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CASES REPORTED.

	Page		Page
Abraham v. Miller (Or.).....	814	Bismark Mountain Gold Min. Co. v. North	
Adams v. Carlton (Kan.).....	390	Sunbeam Gold Co. (Idaho).....	14
Adams, Castro v. (Cal.).....	1027	Blackburn v. Bucksport & E. R. R. Co.	
Adams v. Oklahoma City (Okl.).....	975	(Cal. App.).....	668
Addington v. Kimball (Kan.).....	1134	Blackburn, Muskogee Land Co. v. (Okl.)..	252
Ah Lean, People v. (Cal. App.).....	380	Black Diamond Copper Min. Co., In re	
Ainsa, Richardson v. (Ariz.).....	103	(Ariz.).....	117
Albitre, People v. (Cal.).....	653	Blakeman, Young v. (Cal.).....	888
Aldrich v. Barton (Cal.).....	940	Blaylock, Hussey v. (Okl.).....	773
Allen v. Phoenix Assur. Co. (Idaho).....	829	Bledsoe v. Seaman (Kan.).....	576
Allsman v. Oklahoma City (Okl.).....	468	Bleitz v. Carton (Wash.).....	1099
Altnow, Williams v. (Or.).....	200	Blum, Colorado Trading & Transfer Co.	
American Falls Canal & Power Co., Smith		v. (Colo.).....	541
v. (Idaho).....	1059	Blush, Wallbrecht v. (Colo.).....	927
Anaconda Copper Min. Co., Knipe v.		Board of Com'rs of Cleveland County,	
(Mont.).....	129	Watts v. (Okl.).....	771
Anderson v. Aupperle (Or.).....	330	Board of Com'rs of Cloud County, Ander-	
Anderson v. Board of Com'rs of Cloud		son v. (Kan.).....	583
County (Kan.).....	583	Board of Com'rs of El Paso County v.	
Anderson v. McCarthy Dry Goods Co.		Rhode (Colo.).....	551
(Wash.).....	325	Board of Com'rs of Lake County v. Schrad-	
Andrews, Tulip v. (Kan.).....	1135	sky (Colo.).....	312
Ardmore Loan & Trust Co., McLaughlin v.		Board of Com'rs of Teller County, Frost v.	
(Okl.).....	779	(Colo.).....	289
Arkansas Valley & W. R. Co., Bullen v.		Board of Com'rs of Teller County v. Trow-	
(Okl.).....	476	bridge (Colo.).....	554
Arkansas Valley & W. R. Co., Foster Lum-		Board of Education of City of San Jose,	
ber Co. v. (Okl.).....	224	Barthel v. (Cal.).....	892
Arnold, Chadwick v. (Utah).....	527	Board of Education of Sonoma County,	
Ascough, Edmonston v. (Colo.).....	313	Ferguson v. (Cal. App.).....	165
Atchison, T. & S. F. R. Co. v. Baker (Okl.)	433	Board of Education, Regents of University	
Atchison, T. & S. F. R. Co., Herzog v.		of Oklahoma v. (Okl.).....	429
(Cal.).....	806	Board of Medical Examiners for Southern	
Atchison, T. & S. F. R. Co. v. Stone		Dist. of Indian Territory, Freeman v.	
(Kan.).....	1049	(Okl.).....	229
Atchison, T. & S. F. R. Co. v. Wright		Board of Public Works of City and County	
(Kan.).....	1132	of San Francisco, Coon v. (Cal. App.).....	913
Ater, Foss Investment Co. v. (Wash.).....	1017	Board of Sup'rs of Merced County, Davis	
Atlantic, G. & P. Co., Mugford v. (Cal.		v. (Cal. App.).....	170
App.).....	674	Bocher, Kerker v. (Okl.).....	981
Aupperle, Anderson v. (Or.).....	330	Bonestell, Richardson & Co. v. Curry (Cal.)	887
Auric Min. Co., Ferrara v. (Colo.).....	952	Borrego, People v. (Cal. App.).....	381
Baden Brick Co. v. Chubbuck (Cal. App.)..	905	Brace & Hergert Mill Co. v. State (Wash.)	278
Baehr, Payne v. (Cal.).....	905	Bracken v. Stone (Okl.).....	236
Bailey v. Carlton (Colo.).....	542	Bradbury, National Cash Register Co. v.	
Bain, Hoppe Hardware Co. v. (Okl.).....	765	(Ariz.).....	180
Baker, Atchison, T. & S. F. R. Co. v.		Bradford-Kennedy Co., Zimmerman v.	
(Okl.).....	433	(Idaho).....	825
Barbour, First Nat. Bank v. (Okl.).....	790	Brandon, Chicago, R. I. & P. R. Co. v.	
Barron, Kaiser v. (Cal.).....	799	(Kan.).....	573
Barrow v. B. R. Lewis Lumber Co. (Idaho)	682	Branson v. Industrial Workers of the	
Barthel v. Board of Education of City of		World (Nev.).....	354
San Jose (Cal.).....	892	Brewer v. Rust (Okl.).....	233
Bartlett, Christisen v. (Kan.).....	1130	Brewer, L. Starks Co. v. (Kan.).....	402
Barton, Aldrich v. (Cal.).....	900	Brill, Phillips v. (Wyo.).....	856
Bauer v. Widholm (Wash.).....	277	Bristol v. Hershey (Cal. App.).....	1040
Beaver Hill Coal Co., Ferrari v. (Or.)....	498	B. R. Lewis Lumber Co., Barrow v. (Idaho)	682
Beck v. Lowell (Kan.).....	1131	Bronzo, State v. (Nev.).....	1001
Beck, Wellington v. (Colo.).....	297	Brown, Fritz v. (Okl.).....	437
Bedford, Commercial Nat. Bank v. (Utah)	518	Brown, Logan v. (Okl.).....	441
Bedford's Estate, In re (Utah).....	518	Brown, Shafford v. (Wash.).....	270
Belden, Henderson v. (Kan.).....	1055	Brown & McCabe Co., Fredenthal v. (Or.)..	1114
Bell, Masoner v. (Okl.).....	239	Bruce, Norton v. (Kan.).....	389
Bell v. National Bank of D. O. Mills (Cal.)	378	Bryan v. Menefee (Okl.).....	471
Bell v. Thompson (Cal.).....	372	B. Schade Brewing Co., Russell v. (Wash.)	327
Bell's Estate, In re (Cal.).....	372	Buck, Knight-Campbell Music Co. v. (Colo.)	283
Bell's Estate, In re (Cal.).....	378	Bucksport & E. R. R. Co., Blackburn v.	
Bentley, Kansas Buff Brick & Mfg. Co. v.		(Cal. App.).....	668
(Kan.).....	1134	Budge, Toncray v. (Idaho).....	26
Bergmann v. Koernig (Colo.).....	300	Buhman v. Nickels & Brown Bros. (Cal.	
Berryman v. Gibson (Cal. App.).....	671	App.).....	177
Richel v. Oliver (Kan.).....	396	Bullen v. Arkansas Valley & W. R. Co.	
Bijelich, Phenix v. (Nev.).....	351	(Okl.).....	476
		Burdette, Wyatt v. (Colo.).....	336

	Page		Page
Burgess, Choctaw, O. & G. R. Co. v. (Okl.)	606	Cooper, Grinstead v. (Kan.)	401
Burkhalter v. Smith (Okl.)	241	Cooper-Power v. Hanlon (Cal. App.)	678
Burnham, O'Connor v. (Wash.)	1013	Copple v. Durand (Cal.)	38
Butler v. Hlands (Colo.)	920	Copper Belle Min. Co. v. Costello (Ariz.)	94
Butte, A. & P. R. Co., Harrington v. (Mont.)	8	Copper Belle Min. Co. v. Costello (Ariz.)	805
Butte, Mullen v. (Mont.)	597	Corby, McGilliv v. (Mont.)	1063
Butterfield v. Nogales Copper Co. (Ariz.)	182	Cordray v. Morgan (Okl.)	761
Bybee, Kiesel v. (Idaho)	20	Corra v. Higuera (Cal.)	882
Cache La Poudre Irrigating Ditch Co. v. Hawley (Colo.)	317	Costello, Copper Belle Min. Co. v. (Ariz.)	94
Caldwell Banking & Trust Co. v. Porter (Or.)	1	Costello, Copper Belle Min. Co. v. (Ariz.)	803
California Door Co., Whitaker v. (Cal. App.)	910	Courier Printing & Publishing Co., Russell v. (Colo.)	936
Camp v. Neufelder (Wash.)	640	Crawford v. Lininger & Metcalf Co. (Kan.)	1134
Campbell v. Santa Maria Oil & Gas Co. (Cal.)	39	Crawford v. Parlin, Orendorff & Martin Co. (Kan.)	1134
Campbell v. Sherman (Okl.)	238	Crescent Feather Co. v. United Upholsterers' Union, Local No. 28 (Cal.)	871
Campodonico, Carmichael v. (Cal. App.)	164	Crowley v. Taylor (Wash.)	1016
Canon City v. Manning (Colo.)	537	Cruse, Wright v. (Mont.)	370
Capitol Nat. Bank v. Holmes (Colo.)	314	Culin, Flowing Wells Co. v. (Ariz.)	111
Carey, State v. (Ind. App.)	761	Cummings, Rumble v. (Or.)	1111
Carlton, Adams v. (Kan.)	390	Curlee, Ex parte (Okl.)	414
Carlton, Bailey v. (Colo.)	542	Curry, Bonestell, Richardson & Co. v. (Cal.)	887
Carmichael v. Campodonico (Cal. App.)	164	Curtis v. Hammond (Colo.)	921
Carton, Bleitz v. (Wash.)	1099	Cutler, State v. (Utah)	1071
Castro v. Adams (Cal.)	1027	Dabner, People v. (Cal.)	880
Caulfield, People v. (Cal. App.)	606	Davis v. Board of Sup'rs of Merced County (Cal. App.)	170
Central Savings Bank v. Smith (Colo.)	307	Davis v. Territory (Ariz.)	1133
Chadwick v. Arnold (Utah)	527	De Graffenreid v. Iowa Land & Trust Co. (Okl.)	624
Chamberlain v. Chamberlain (Cal. App.)	659	De Graffenreid, Miller v. (Colo.)	941
Chambers, Great Western Gold Co. v. (Cal.)	151	De Hart, Wilks v. (Kan.)	836
Chicago, R. I. & P. R. Co. v. Brandon (Kan.)	573	Deitz v. Stephenson (Or.)	803
Chillson & Chillson, Plotner v. (Okl.)	775	De Lea, Reade v. (N. M.)	131
Choctaw, O. & G. R. Co. v. Burgess (Okl.)	606	Delehanty's Estate, In re (Ariz.)	109
Choctaw, O. & G. R. Co. v. Hamilton (Okl.)	972	Dempster Mill Mfg. Co. v. Falkenberg (Kan.)	1045
Choctaw, O. & G. R. Co. v. Hendricks (Okl.)	970	Deng v. Lamb (Kan.)	592
Choctaw, O. & W. R. Co., Territory v. (Okl.)	420	Denman, Miller v. (Wash.)	67
Christensen Co., Salt Lake City v. (Utah)	523	Dennis, Western Arizona R. Co. v. (Ariz.)	192
Christisen v. Bartlett (Kan.)	1130	Dent v. Superior Court of Los Angeles County (Cal. App.)	672
Chubbuck, Baden Brick Co. v. (Cal. App.)	905	Denver City Tramway Co., Liutz v. (Colo.)	600
Chute v. Moeser (Kan.)	398	Denver & S. F. R. Co. v. Hannegan (Colo.)	343
Citizens' Bank of Wakita v. Garnett (Okl.)	755	Despain, Pacific Mut. Life Ins. Co. of California v. (Kan.)	580
City of Globe v. Slack (Ariz.)	126	Dever, Mackay v. (Wash.)	860
City of Olympia v. Knox (Wash.)	1090	Diepenbrock v. Superior Court of Sacramento County (Cal.)	1121
City of San Diego v. Potter (Cal.)	146	Diggs, Lines v. (Colo.)	341
City of Seattle, In re (Wash.)	862	District Court of Second Judicial District, State v. (Mont.)	593
City of Spokane v. Griffith (Wash.)	84	District Court of Second Judicial District, State v. (Mont.)	841
Clark, Hill v. (Cal. App.)	382	District Court of Second Judicial District of Silver Bow County, State v. (Mont.)	843
Clark, Swanston v. (Cal.)	1117	Donnellan, Ex parte (Wash.)	1085
Clause v. Columbia Savings & Loan Ass'n (Wyo.)	54	Douglas Oil Fields v. Hamilton (Wyo.)	849
Clawson, Empson Packing Co. v. (Colo.)	546	Doust v. Rocky Mountain Bell Telephone Co. (Idaho)	209
Clements, Lewis v. (Okl.)	769	Doyle, Village of Sandpoint v. (Idaho)	945
Clements, State v. (Mont.)	845	Driggers v. United States (Okl.)	612
Clevenger v. Lewis (Okl.)	230	Duff, Leuschner v. (Cal. App.)	914
Coeur D'Alene & S. R. Co. v. Union Pac. R. Co. (Wash.)	71	Duncan, Janssen v. (Colo.)	922
Coffey, Tracy v. (Cal.)	150	Dunlap, State v. (Wash.)	321
Cole, Harn v. (Okl.)	415	Durand, Copley v. (Cal.)	38
Coleman v. Larson (Wash.)	262	Dyer, Conley v. (Colo.)	304
Coles County, Haynes & Lyons v. (Ill.)	747	Ebel v. Ebel (Kan.)	1134
Collins, Sequeira v. (Cal.)	876	Edmonston v. Ascough (Colo.)	313
Collins v. Seyfang (Wash.)	1088	Edwards, State v. (Utah)	367
Colorado Trading & Transfer Co. v. Blum (Colo.)	541	E. H. Moorehouse & Co. v. Weister Co. (Or.)	497
Colorado Springs Rapid Transit R. Co., Farrier v. (Colo.)	294	Emmons, People v. (Cal.)	1032
Columbia Savings & Loan Ass'n, Clause v. (Wyo.)	54	Empson Packing Co. v. Clawson (Colo.)	546
Colville, Krueger v. (Wash.)	81	Erie Min. & Mill. Co. v. Gearing (Colo.)	300
Colvin, Continental Casualty Co. v. (Kan.)	565	Erskin v. Wood (Kan.)	418
Commercial Nat. Bank v. Bedford (Utah)	518	Falkenberg, Dempster Mill Mfg. Co. v. (Kan.)	1045
Conley v. Dyer (Colo.)	304	Farnsworth v. Wilbur (Wash.)	642
Connell v. Harron, Rickard & McCone (Cal. App.)	916		
Continental Casualty Co. v. Colvin (Kan.)	565		
Continental Timber Co., Stubbs v. (Wash.)	1011		
Coon v. Board of Public Works of City and County of San Francisco (Cal. App.)	913		

Page	Page
Farrier v. Colorado Springs Rapid Transit R. Co. (Colo.)	294
Faurot v. Oklahoma Wholesale Grocery Co. (Okla.)	463
Felber, Jenal v. (Kan.)	403
Ferguson v. Board of Education of Sonoma County (Cal. App.)	165
Ferrara v. Auric Min. Co. (Colo.)	952
Ferrari v. Beaver Hill Coal Co. (Or.)	498
First Nat. Bank v. Barbour (Okla.)	790
First Nat. Bank, Forbes v. (Okla.)	785
First Nat. Bank, Gillespie v. (Okla.)	220
First Nat. Bank, Harris v. (Okla.)	781
First Nat. Bank, Williams v. (Okla.)	457
First State Bank, Wilson v. (Kan.)	404
Fishburne v. Robinson (Wash.)	80
Fisher v. Great Northern R. Co. (Wash.)	77
Fisk v. Tacoma Smelting Co. (Wash.)	1082
Fitzgerald, Langley v. (Colo.)	923
Flowing Wells Co. v. Culin (Ariz.)	111
Floyd, Ex parte (Cal. App.)	175
Forbes v. First Nat. Bank (Okla.)	785
Ft. Collins, La Fitte v. (Colo.)	927
Fossetti, People v. (Cal. App.)	384
Foss Investment Co. v. Ater (Wash.)	1017
Foster Lumber Co. v. Arkansas Valley & W. R. Co. (Okla.)	224
Foulger v. McGrath (Utah)	1004
Fredenthal v. Brown & McCabe (Or.)	1114
Freeman v. Board of Medical Examiners for Southern Dist. of Indian Territory (Okla.)	229
Frith, Howe v. (Colo.)	603
Fritz v. Brown (Okla.)	437
Frost v. Board of Com'rs of Teller County (Colo.)	289
Fry, Makins v. (Kan.)	394
Fry, State v. (Kan.)	392
Gaffney v. Gaffney (Or.)	334
Gale, Ex parte (Idaho)	679
Gamble, Schell v. (Cal.)	870
Gantner & Mattern, Occidental Real Estate Co. v. (Cal. App.)	1042
Garbarino v. Howard (Colo.)	933
Gardner v. Kime (Okla.)	242
Gardner v. State (Kan.)	588
Garnett, Citizens' Bank of Wakita v. (Okla.)	755
Gearing, Erie Min. & Mill. Co. v. (Colo.)	300
Gelvin, McIntyre v. (Kan.)	389
German-American State Bank v. Spokane-Columbia River R. & Nav. Co. (Wash.)	261
Gerth v. Gerth (Cal. App.)	904
Gibson, Berryman v. (Cal. App.)	671
Gibson, Hill Brick & Tile Co. v. (Colo.)	293
Gill v. Manhattan Life Ins. Co. (Ariz.)	89
Gillespie v. First Nat. Bank (Okla.)	220
Glassell v. O'Dea (Cal. App.)	44
Glenwood Lumber Co., Wendling Lumber Co. v. (Cal.)	1029
Globe Nav. Co., Chilcott v. (Wash.)	264
Godfrey v. Iowa Land & Trust Co. (Okla.)	792
Goffinet v. Soper (Kan.)	571
Gold Fissure Gold Min. Co., Steele v. (Colo.)	349
Gold Ridge Min. Co., Ross v. (Idaho)	891
Goldstein v. Webster (Cal. App.)	677
Goodrich v. Kimble (Wash.)	1084
Goodwin, Sherman v. (Ariz.)	121
Gordan v. Graham (Cal.)	145
Gordon, Milwaukee Gold Extraction Co. v. (Mont.)	995
Graden v. Mais (Kan.)	412
Graff & Co., Winer v. (Cal. App.)	167
Graham, Gordan v. (Cal.)	145
Grand Canyon R. Co. v. Treat (Ariz.)	187
Grant v. Milam (Okla.)	424
Graves v. White (Colo.)	347
Gray, Wasem v. (Colo.)	557
Great Northern R. Co., Fisher v. (Wash.)	77
Great Western Gold Co. v. Chambers (Cal.)	151
Greene v. Hereford (Ariz.)	105
Griffin v. Tacoma (Wash.)	1107
Griffith, City of Spokane v. (Wash.)	84
Griffith, O'Sullivan v. (Cal.)	873
Grinstead v. Cooper (Kan.)	401
Groff, Kansas City Elevated R. Co. v. (Kan.)	394
Gumaer, Robison v. (Colo.)	935
Gunnison, Howe v. (Colo.)	283
Hale, Phelps v. (Colo.)	925
Hall v. O'Connell (Or.)	717
Hamilton, Choctaw, O. & G. R. Co. v. (Okla.)	972
Hamilton, Douglas Oil Fields v. (Wyo.)	849
Hamilton, Phillips v. (Wyo.)	846
Hamilton v. Smart (Kan.)	836
Hammerich, Sievers v. (Colo.)	289
Hammond, Curtis v. (Colo.)	921
Hands, Butler v. (Colo.)	920
Hankins v. Helms (Ariz.)	1133
Hanlon, Cooper-Power v. (Cal. App.)	678
Hannegan, Denver & S. F. R. Co. v. (Colo.)	343
Hanson, Howard v. (Wash.)	265
Harn v. Cole (Okla.)	415
Harrington v. Butte, A. & P. R. Co. (Mont.)	8
Harris v. First Nat. Bank (Okla.)	781
Harris v. Washington Portland Cement Co. (Wash.)	81
Harrison v. Scott (Kan.)	1045
Harrod v. Latham Mercantile & Commercial Co. (Kan.)	11
Harron, Rickard & McCone, Connell v. (Cal. App.)	916
Hatch v. Nevills (Cal.)	43
Hawley, Cache La Poudre Irrigating Ditch Co. v. (Colo.)	317
Heberle's Estate, In re (Cal.)	41
Helena Waterworks Co. v. Settles (Mont.)	838
Helms, Hankins v. (Ariz.)	1133
Hemenway v. Washington Water Power Co. (Wash.)	269
Henderson v. Belden (Kan.)	1055
Hendricks, Choctaw, O. & G. R. Co. v. (Okla.)	970
Henry, Pearsall v. (Cal.)	154
Henry, Pearsall v. (Cal.)	159
Hereford, Greene v. (Ariz.)	105
Herndon v. Salt Lake City (Utah)	646
Hershey, Bristol v. (Cal. App.)	1040
Hertzog v. Atchison, T. & S. F. R. Co. (Cal.)	898
Heybrook v. Index Lumber Co. (Wash.)	324
H. Graff & Co., Wiener v. (Cal. App.)	167
Higuera, Corea v. (Cal.)	882
Hill Brick & Tile Co. v. Gibson (Colo.)	293
Hill v. Clark (Cal. App.)	382
Holcomb v. Holcomb (Wash.)	1091
Holmes, Capitol Nat. Bank v. (Colo.)	314
Hopgood, O'Brien v. (Wash.)	489
Hoppe Hardware Co. v. Bain (Okla.)	765
Hough v. Porter (Or.)	732
Howard, Garbarino v. (Colo.)	933
Howard v. Hanson (Wash.)	265
Howard Mills Co. v. Schwartz Lumber & Coal Co. (Kan.)	559
Howe v. Frith (Colo.)	603
Howe v. Gunnison (Colo.)	283
Hubbard v. Territory (Okla.)	217
Hubbell v. Hubbell (Cal. App.)	664
Hume, State v. (Or.)	808
Hunter Realty Co. v. Spencer (Okla.)	757
Hussey v. Blaylock (Okla.)	773
Hutchinson v. Mt. Vernon Water & Power Co. (Wash.)	1023
Index Lumber Co., Heybrook v. (Wash.)	324
Industrial Bldg. & Loan Ass'n v. Meyers-Abel Co. (Ariz.)	115
Industrial Workers of the World, Branson v. (Nev.)	354
Interior Warehouse Co., Smith v. (Or.)	493
Iowa Land & Trust Co., De Graffenreid v. (Okla.)	624
Iowa Land & Trust Co., Godfrey v. (Okla.)	792
Irving v. People (Colo.)	940
Jackman, McCue v. (Cal. App.)	673
Jackson v. McCarron (Kan.)	402
James v. Seattle (Wash.)	273
Jamieson, St. Louis & S. F. R. Co. v. (Okla.)	417

	Page		Page
Janssen v. Duncan (Colo.)	922	McCarthy Dry Goods Co., Anderson v. (Wash.)	325
J. C. Bradbury, National Cash Register Co. v. (Ariz.)	180	McCue v. Jackman (Cal. App.)	673
Jeffreys, Weiser Nat. Bank v. (Idaho)	23	McFarland v. Matthai (Cal. App.)	179
Jenal v. Felber (Kan.)	403	McGeehan v. Reed (Colo.)	348
Jenkins-Boys Co., Loveland v. (Wash.)	490	McGillic v. Corby (Mont.)	1063
Jerrue v. Superior Court of Los Angeles County (Cal. App.)	906	McGrath, Foulger v. (Utah)	1004
J. Noonan Furniture Co., Perry v. (Cal. App.)	1128	McIntyre v. Gelvin (Kan.)	389
Johnson v. Johnson (Idaho)	499	Mackay v. Dever (Wash.)	860
Johnson, Stark v. (Colo.)	930	McKenzie, Tyler v. (Colo.)	943
Johnson v. Williams (Cal.)	655	McLaughlin v. Ardmore Loan & Trust Co. (Okla.)	779
Kaiser v. Barron (Cal.)	879	McLeod v. Pacific States Telephone & Telegraph Co. (Or.)	1009
Kansas Buff Brick & Mfg. Co. v. Bentley (Kan.)	1134	McLeod v. Spencer (Okla.)	754
Kansas Buff Brick & Mfg. Co. v. Stark (Kan.)	1047	Magert v. Keele (Okla.)	406
Kansas City Elevated R. Co. v. Groff (Kan.)	394	Mais, Graden v. (Kan.)	412
Keele, Magert v. (Okla.)	406	Makins v. Fry (Kan.)	394
Keeton, Wheeler County v. (Or.)	819	Manhattan Life Ins. Co., Gill v. (Ariz.)	89
Keeton, Wheeler County v. (Or.)	821	Manning, Canon City v. (Colo.)	537
Kelley, People v. (Cal. App.)	45	Masoner v. Bell (Okla.)	239
Kennedy, Pekin Min. & Mill. Co. v. (Cal.)	161	Matthai, McFarland v. (Cal. App.)	179
Kenney, Territory v. (Ariz.)	93	Mayhew, Pettit v. (Colo.)	929
Kerker v. Bocher (Okla.)	981	Mayhew v. Smith (Colo.)	549
Kiesel v. Bybee (Idaho)	20	Maynes v. Shulskey (Kan.)	1044
Kimball, Addington v. (Kan.)	1134	Meacham, Peabody v. (Wash.)	322
Kimble, Goodrich v. (Wash.)	1084	Mead v. Ph. Zang Brewing Co. (Colo.)	284
Kime, Gardner v. (Okla.)	242	Meads, State v. (Wash.)	1022
King v. Mecklenburg (Colo.)	951	Mecklenburg, King v. (Colo.)	951
Kirkpatrick, Roussin v. (Cal. App.)	1123	Meek v. Southern California R. Co. (Cal. App.)	166
Kitsap County, Stohlton v. (Wash.)	268	Menefee, Bryan v. (Okla.)	471
Klinge, Los Angeles Brewing Co. v. (Cal. App.)	44	Meyers-Abel Co., Industrial Bldg. & Loan Ass'n v. (Ariz.)	115
Knight-Campbell Music Co. v. Buck (Colo.)	283	Michael, Quist v. (Cal.)	658
Knights of Maccabees of the World v. Nelson (Kan.)	1052	Milam, Grant v. (Okla.)	424
Knipe v. Anaconda Copper Min. Co. (Mont.)	129	Millen v. Pacific Bridge Co. (Or.)	196
Knott, Mitchell v. (Colo.)	335	Miller v. Abraham (Or.)	814
Knox, City of Olympia v. (Wash.)	1090	Miller v. De Graffenried (Colo.)	941
Knoernig, Bergmann v. (Colo.)	300	Miller v. Denman (Wash.)	67
Kroeger, Lindsay v. (Mont.)	839	Milwaukee Gold Extraction Co. v. Gordon (Mont.)	995
Krueger v. Colville (Wash.)	81	Minneapolis Threshing Mach. Co., Rogers v. (Wash.)	1014
Lace v. People (Colo.)	302	Minneapolis Threshing Mach. Co., Russell & Co. v. (Wash.)	1014
La Fitte v. Ft. Collins (Colo.)	927	Minneapolis Threshing Mach. Co., Tinkelpaugh-Kimmel Hardware Co. v. (Okla.)	427
La Fitte v. Salisbury (Colo.)	1065	Mintz, Wilmore v. (Colo.)	536
Laguna Canal Co. v. Rocky Ford Ditch Co. (Colo.)	287	Missouri, K. & T. R. Co. v. Shepherd (Okla.)	243
Lamb, Deng v. (Kan.)	592	Mitchell v. Knott (Colo.)	335
Langley v. Fitzgerald (Colo.)	923	Mitchell v. Tulsa Water, Light, Heat & Power Co. (Okla.)	961
Larabee, Turner v. (Kan.)	1135	M. K. & T. Oil Co., Raich v. (Cal. App.)	662
Larson, Coleman v. (Wash.)	262	Moeser, Chute v. (Kan.)	398
Latham Mercantile & Commercial Co., Harrod v. (Kan.)	11	Moffitt's Estate, In re (Cal.)	653
Lawson v. Tripp (Utah)	520	Moffitt's Estate, In re (Cal.)	1625
Leuschner v. Duff (Cal. App.)	914	Molina v. Territory (Ariz.)	102
Lewis v. Clements (Okla.)	769	Moore v. National Accident Soc. (Wash.)	268
Lewis, Clevenger v. (Okla.)	230	Moore, State v. (Kan.)	409
Lewis and Clark County, Rush v. (Mont.)	836	Moorehouse & Co. v. Weister Co. (Or.)	497
Lewis Lumber Co., Barrow v. (Idaho)	682	Moran, Strandell v. (Wash.)	1106
Lewiston-Clarkston Co., Woelflen v. (Wash.)	493	Morgan, Cordray v. (Okla.)	731
Lewiston & S. E. Electric R. Co., Naylor & Nordlin v. (Idaho)	827	Morrell, Saindon v. (Kan.)	1056
Lindsay v. Kroeger (Mont.)	839	Morris, Lunun v. (Cal. App.)	907
Lines v. Digges (Colo.)	341	Morrison, Raiche v. (Mont.)	1061
Lininger & Metcalf, Crawford v. (Kan.)	1134	Morse v. People, two cases (Colo.)	285
Linscott, Streater v. (Cal.)	42	Moss v. Ramey (Idaho)	513
Liutz v. Denver City Tramway Co. (Colo.)	600	Moylan v. Moylan (Wash.)	271
Logan v. Brown (Okla.)	441	Mt. Vernon Water & Power Co., Hutchinson v. (Wash.)	1023
Los Angeles Brewing Co. v. Klinge (Cal. App.)	44	Mugford v. Atlantic, G. & P. Co. (Cal. App.)	674
Loux, Perkins v. (Idaho)	694	Mullen v. Butte (Mont.)	597
Loveland v. Jenkins-Boys Co. (Wash.)	490	Muskogee Land Co. v. Blackburn (Okla.)	252
Low v. Wilson (Kan.)	1135	Mutual Sav. Bank of San Francisco, Robinson v. (Cal. App.)	533
Lowell, Beck v. (Kan.)	1131	National Accident Soc., Moore v. (Wash.)	268
L. Starks Co. v. Brewer (Kan.)	402	National Bank of D. O. Mills, Bell v. (Cal.)	378
Lueders v. Tenino (Wash.)	1089	National Cash Register Co. v. J. C. Bradbury (Ariz.)	180
Lunnun v. Morris (Cal. App.)	907	National Life Ins. Co., Rhone v. (Colo.)	298
Luper, State v. (Or.)	811	Naylor & Norlin v. Lewiston & S. E. Electric R. Co. (Idaho)	827
MacCarron, Jackson v. (Kan.)	402	Nelson, Knights of Maccabees of the World v. (Kan.)	1052

	Page		Page
Neufelder, Camp v. (Wash.).....	640	Phillips v. Smith (Ariz.).....	91
Nevills, Hatch v. (Cal.).....	43	Phoenix Assur. Co., Allen v. (Idaho).....	829
Nickels & Brown Bros., Buhman v. (Cal. App.).....	177	Ph. Zang Brewing Co., Mead v. (Colo.).....	284
Nielson, State v. (Or.).....	720	Pierce, Pyramid Land & Stock Co. v. (Nev.).....	210
Nogales Copper Co., Butterfield v. (Ariz.).....	182	Piper v. Piper (Kan.).....	1051
Noonan Furniture Co., Perry v. (Cal. App.).....	1128	Plotner v. Chillson & Chillson (Okla.).....	775
North Alaska Salmon Co., Ryan v. (Cal.).....	862	Polk County, Riggs v. (Or.).....	5
Northern Pac. R. Co., North Yakima Brewing & Malting Co. v. (Wash.).....	486	Porter, Caldwell Banking & Trust Co. v. (Or.).....	1
North Sunbeam Gold Co., Bismark Mountain Gold Min. Co. v. (Idaho).....	14	Porter, Hough v. (Or.).....	732
North Yakima Brewing & Malting Co. v. Northern Pac. R. Co. (Wash.).....	486	Portland Cordage Co., Oregon Auto-Dispatch v. (Or.).....	498
Norton v. Bruce (Kan.).....	389	Portland General Electric Co., State v. (Or.).....	722
O'Brien v. Hopgood (Wash.).....	489	Potter, City of San Diego v. (Cal.).....	146
Occidental Real Estate Co. v. Gantner & Mattern (Cal. App.).....	1042	Potter, Woods v. (Cal. App.).....	1125
O'Connell, Hall v. (Or.).....	717	Powell, Winchell v. (Colo.).....	957
O'Connor v. Burnham (Wash.).....	1013	Pratt v. Seamans (Colo.).....	929
Ocosta, Soule v. (Wash.).....	1083	Prentice, Steck v. (Colo.).....	552
O'Dea, Glassell v. (Cal. App.).....	44	Preston, State v. (Wash.).....	82
O'Grady v. People (Colo.).....	346	Preston, State v. (Nev.).....	918
Oklahoma City, Adams v. (Okla.).....	975	Purcell, Purse v. (Colo.).....	201
Oklahoma City, Allsman v. (Okla.).....	468	Purse v. Purcell (Colo.).....	201
Oklahoma Wholesale Grocery Co., Faurot v. (Okla.).....	463	Pyramid Land & Stock Co. v. Pierce (Nev.).....	210
Oliver, Richel v. (Kan.).....	336	Quist v. Michael (Cal.).....	658
Oliver, People v. (Cal. App.).....	172	Raiche v. Morrison (Mont.).....	1061
Oregon Auto-Dispatch v. Portland Cordage Co. (Or.).....	498	Raisch v. M. K. & T. Oil Co. (Cal. App.).....	662
Oregon Power Co., Rush v. (Or.).....	193	Ramey, Moss v. (Idaho).....	513
O'Sullivan v. Griffith (Cal.).....	873	Randolph, Sandoval v. (Ariz.).....	119
Pacific Bridge Co., Millen v. (Or.).....	196	Raphael v. Wasatch & J. V. R. Co. (Utah).....	1008
Pacific Mut. Life Ins. Co. of California v. Despain (Kan.).....	580	Ray v. School Dist. No. 9, Caddo County (Okla.).....	480
Pacific States Telephone & Telegraph Co., McLeod v. (Or.).....	1009	Reade v. De Lea (N. M.).....	131
Pajaro Valley Bank v. Scurich (Cal. App.).....	911	Ready v. Smith (Or.).....	817
Parlin, Orendorff & Martin Co., Crawford v. (Kan.).....	1134	Redwood City Salt Co. v. Whitney (Cal.).....	885
Parmeter, State v. (Wash.).....	1012	Reed, McGeehan v. (Colo.).....	348
Parsons, State v. (Kan.).....	391	Reeves, Stough v. (Colo.).....	958
Patman, Ex parte (Okla.).....	622	Regents of University of Oklahoma v. Board of Education (Okla.).....	429
Pauley, Tacoma Gas & Electric Light Co. v. (Wash.).....	1103	Rhode, Board of Com'rs of El Paso County v. (Colo.).....	551
Paul v. Salt Lake City R. Co. (Utah).....	363	Rhone v. National Life Ins. Co. (Colo.).....	298
Payne v. Baehr (Cal.).....	895	Richardson v. Ainsa (Ariz.).....	103
Payne, Petterson v. (Colo.).....	301	Richardson v. Wren (Ariz.).....	124
Peabody v. Meacham (Wash.).....	322	Richter v. State (Wyo.).....	51
Pearsall v. Henry (Cal.).....	154	Riggs v. Polk County (Or.).....	5
Pearsall v. Henry (Cal.).....	159	Riley, Tonapah Lumber Co. v. (Nev.).....	1001
Peck, State v. (Idaho).....	515	Riley, Village of Hailey v. (Idaho).....	686
Pekin Min. & Mill. Co. v. Kennedy (Cal.).....	161	Roark, Wettermark v. (Okla.).....	228
People v. Ah Lean (Cal. App.).....	380	Roberts, Robinson & Co. v. (Okla.).....	246
People v. Albitre (Cal.).....	653	Robinson, Fishburne v. (Wash.).....	80
People v. Borrego (Cal. App.).....	381	Robinson v. Mutual Sav. Bank of San Francisco (Cal. App.).....	533
People v. Caulfield (Cal. App.).....	666	Robinson & Co. v. Roberts (Okla.).....	246
People v. Dabner (Cal.).....	880	Robison v. Gumaer (Colo.).....	935
People v. Emmons (Cal. App.).....	1032	Robison, Saunders v. (Idaho).....	1057
People v. Fossetti (Cal. App.).....	384	Roby v. Shunganunga Drainage Dist. (Kan.).....	399
People, Irving v. (Colo.).....	940	Rocky Ford Ditch Co., Laguna v. (Colo.).....	287
People v. Kelley (Cal. App.).....	45	Rocky Mountain Bell Tel. Co., Doust v. (Idaho).....	209
People, Lace v. (Colo.).....	302	Rogers v. Minneapolis Threshing Mach. Co. (Wash.).....	1014
People, Morse v., two cases (Colo.).....	285	Romero v. Territory (Ariz.).....	101
People, O'Grady v. (Colo.).....	346	Ross v. Gold Ridge Min. Co. (Idaho).....	821
People v. Oliver (Cal. App.).....	172	Roussin v. Kirkpatrick (Cal. App.).....	1123
People v. Scobie (Cal. App.).....	667	Rumble v. Cummings (Or.).....	1111
People v. Siemsen (Cal.).....	863	Runge v. Wilson (Cal. App.).....	178
People v. Simmons (Cal. App.).....	48	Rush v. Lewis and Clark County (Mont.).....	836
People v. Simmons (Cal. App.).....	51	Rush v. Oregon Power Co. (Or.).....	193
People v. Thompson (Cal. App.).....	386	Russell v. B. Schade Brewing Co. (Wash.).....	327
People v. Whitelaw (Cal. App.).....	879	Russell v. Courier Printing & Publishing Co. (Colo.).....	936
People v. Youngs (Colo.).....	1067	Russell, State v. (Okla.).....	463
Perkins v. Loux (Idaho).....	694	Russell & Co. v. Minneapolis Threshing Mach. Co. (Wash.).....	1014
Perry v. J. Noonan Furniture Co. (Cal. App.).....	1128	Rust, Brewer v. (Okla.).....	233
Petterson v. Payne (Colo.).....	301	Rutherford v. United States (Okla.).....	753
Pettit v. Mayhew (Colo.).....	939	Ryan v. North Alaska Salmon Co. (Cal.).....	862
Phelps v. Hale (Colo.).....	925	Ryno v. Snider (Wash.).....	644
Phenix v. Bijelich (Nev.).....	351	Saindon v. Morrell (Kan.).....	1056
Phillips v. Brill (Wyo.).....	856		
Phillips v. Hamilton (Wyo.).....	846		

	Page
St. Louis & S. F. R. Co. v. Jamieson (Okl.)	417
Salisbury, La Fitte v. (Colo.)	1063
Salt Lake City v. Christensen Co. (Utah)	523
Salt Lake City, Herndon v. (Utah)	646
Salt Lake City R. Co., Paul v. (Utah)	363
Sandoval v. Randolph (Ariz.)	119
Santa Maria Oil & Gas Co., Campbell v. (Cal.)	39
Sargent, Woods v. (Colo.)	932
Sauers v. Smits (Wash.)	1097
Saunders v. Robison (Idaho)	1057
Saxon v. White (Okl.)	783
Schade Brewing Co., Russell v. (Wash.)	327
Schell v. Gamble (Cal.)	870
Schley v. Vail (Ariz.)	113
Schmith, Ready v. (Or.)	817
Schnitger, State v. (Wyo.)	698
School Dist. No. 9, Caddo County, Ray v. (Okl.)	480
Schradsky, Board of Com'rs of Lake County v. (Colo.)	312
Schwartz Lumber & Coal Co., Howard Mills Co. v. (Kan.)	559
Scobie, People v. (Cal. App.)	667
Scott, Harrison v. (Kan.)	1045
Scott v. Thrall (Kan.)	563
Scott v. Tubbs (Colo.)	540
Scurich, Pajaro Valley Bank v. (Cal. App.)	911
Seaman, Bledsoe v. (Kan.)	576
Seamans, Pratt v. (Colo.)	929
Sears, Shawnee Light & Power Co. v. (Okl.)	449
Seattle, James v. (Wash.)	273
Sequeira v. Collins (Cal.)	876
Settles, Helena Waterworks Co. v. (Mont.)	838
Seyfang, Collins v. (Wash.)	1088
Shafford v. Brown (Wash.)	270
Shawnee Light & Power Co. v. Sears (Okl.)	449
Shepherd, Missouri, K. & T. R. Co. v. (Okl.)	243
Sherman, Campbell v. (Okl.)	238
Sherman v. Goodwin (Ariz.)	121
Shirk, United States Fidelity & Guaranty Co. v. (Okl.)	218
Shulsekey, Maynes v. (Kan.)	1044
Shunganunga Drainage Dist., Roby v. (Kan.)	309
Siemens, People v. (Cal.)	863
Sievers v. Hammerich (Colo.)	289
Simmons, People v. (Cal. App.)	48
Simmons, People v. (Cal. App.)	51
Simmons, Wiswell v. (Kan.)	407
Sims' Estate, In re (Cal.)	655
Slack, City of Globe v. (Ariz.)	126
Smart, Hamilton v. (Kan.)	836
Smith v. American Falls Canal & Power Co. (Idaho)	1059
Smith, Burkhalter v. (Okl.)	241
Smith, Central Sav. Bank v. (Colo.)	307
Smith v. Interior Warehouse Co. (Or.)	499
Smith, Mayhew v. (Colo.)	549
Smith, Phillips v. (Ariz.)	91
Smits, Sauers v. (Wash.)	1097
Snider, Ryno v. (Wash.)	644
Soper, Goffinet v. (Kan.)	571
Soto Bros. & Renaud, Appeal of (Ariz.)	117
Soule v. Ocosta (Wash.)	1083
Southern California R. Co., Meek v. (Cal. App.)	166
Spencer, Hunter Realty Co. v. (Okl.)	757
Spencer, McLeod v. (Okl.)	754
Spokane-Columbia River R. & Nav. Co., German-American State Bank v. (Wash.)	261
Spokane Falls Gaslight Co., Theis v. (Wash.)	1074
Spokane & B. C. R. Co. v. Washington & G. N. R. Co. (Wash.)	64
Stark v. Johnson (Colo.)	930
Stark, Kansas Buff Brick & Mfg. Co. v. (Kan.)	1047
Starks Co. v. Brewer (Kan.)	402
State, Brace & Hergert Mill Co. v. (Wash.)	278
State v. Bronzo (Nev.)	1001
State v. Clements (Mont.)	845
State v. Cutler (Utah)	1071

	Page
State v. District Court of Second Judicial District (Mont.)	593
State v. District Court of Second Judicial District (Mont.)	841
State v. District Court of Second Judicial District of Silver Bow County (Mont.)	843
State v. Dunlap (Wash.)	321
State v. Edwards (Utah)	367
State v. Fry (Kan.)	392
State, Gardner v. (Kan.)	588
State v. Hume (Or.)	808
State v. Luper (Or.)	811
State v. Meads (Wash.)	1012
State v. Moore (Kan.)	409
State v. Nielsen (Or.)	720
State v. Parmeter (Wash.)	1012
State v. Parsons (Kan.)	391
State v. Peck (Idaho)	515
State v. Portland General Electric Co. (Or.)	722
State v. Preston (Nev.)	918
State v. Preston (Wash.)	82
State, Richter v. (Wyo.)	51
State v. Russell (Okl.)	463
State v. Schnitger (Wyo.)	698
State v. Superior Court for Clarke County (Wash.)	488
State v. Superior Court of Yakima County (Wash.)	490
State v. West (Idaho)	949
Staten v. Territory (Ariz.)	1133
Steck v. Prentice (Colo.)	552
Steele v. Gold Fissure Gold Min. Co. (Colo.)	349
Stephenson, Deitz v. (Or.)	803
Stiles, Valley Tp. v. (Kan.)	572
Stohlton v. Kitsap County (Wash.)	248
Stone, Atchison, T. & S. F. R. Co. v. (Kan.)	1049
Stone, Bracken v. (Okl.)	236
Stough v. Reeves (Colo.)	958
Strandell v. Moran (Wash.)	1106
Straup, Whiting v. (Wyo.)	849
Streator v. Linscott (Cal.)	42
Stubbs v. Continental Timber Co. (Wash.)	1011
Sullivan v. Sullivan (Wash.)	1095
Sullivan's Estate, In re (Wash.)	71
Superior Court for Clarke County, State v. (Wash.)	488
Superior Court of Los Angeles County, Dent v. (Cal. App.)	672
Superior Court of Los Angeles County, Jerue v. (Cal. App.)	906
Superior Court of Sacramento County, Diepenbrock v. (Cal.)	1121
Superior Court of Yakima County, State v. (Wash.)	490
Swanston v. Clark (Cal.)	1117
Tacoma Gas & Electric Light Co. v. Pauley (Wash.)	1103
Tacoma, Griffin v. (Wash.)	1107
Tacoma Smelting Co., Fisk v. (Wash.)	1082
Taylor, Crowley v. (Wash.)	1016
Tenino, Lueders v. (Wash.)	1089
Territory v. Choctaw, O. & W. R. Co. (Okl.)	420
Territory, Davis v. (Ariz.)	1133
Territory, Hubbard v. (Okl.)	217
Territory v. Kenney (Ariz.)	93
Territory, Molina v. (Ariz.)	102
Territory, Staten v. (Ariz.)	1133
Territory, Romero v. (Ariz.)	101
Theis v. Spokane Falls Gaslight Co. (Wash.)	1074
Thompson, Bell v. (Cal.)	372
Thompson, People v. (Cal. App.)	386
Thrall, Scott v. (Kan.)	563
Tinkelpaugh-Kimmel Hardware Co. v. Minneapolis Threshing Mach. Co. (Okl.)	427
Toneray v. Budge (Idaho)	26
Tonopah Lumber Co. v. Riley (Nev.)	1001
Town of Lyons v. Watt (Colo.)	949
Tracy v. Coffey (Cal.)	150
Treat, Grand Canyon R. Co. v. (Ariz.)	187
Tribolet v. United States (Ariz.)	85
Tripp, Lawson v. (Utah)	520

	Page		Page
Trowbridge, Board of Com'rs of Teller County v. (Colo.).....	554	Wendling Lumber Co. v. Glenwood Lumber Co. (Cal.)	1020
Tubbs, Scott v. (Colo.).....	540	West, State v. (Idaho).....	949
Tulip v. Andrews (Kan.).....	1135	Western Arizona R. Co. v. Dennis (Ariz.)	192
Tulsa Water, Light, Heat & Power Co., Mitchell v. (Okl.).....	961	Wettermark v. Roark (Okl.)	278
Turner v. Larabee (Kan.).....	1135	Wheeler County v. Keeton (Or.).....	819
Tyler v. McKenzie (Colo.).....	943	Wheeler County v. Keeton (Or.).....	821
Union Pac. R. Co., Coeur D'Alene & S. R. Co. v. (Wash.).....	71	Whitaker v. California Door Co. (Cal. App.)	910
United States, Driggers v. (Okl.).....	612	White, Graves v. (Colo.).....	347
United States Fidelity & Guaranty Co. v. Shirk (Okl.)	218	White, Saxon v. (Okl.).....	783
United States, Rutherford v. (Okl.).....	753	Whitelaw, People v. (Cal. App.).....	379
United States, Tribolet v. (Ariz.).....	85	Whiting v. Straup (Wyo.).....	849
United Upholsterers' Union, Local No. 28, Crescent Feather Co. v. (Cal.).....	871	Whitney, Redwood City Salt Co. v. (Cal.)	885
Vail, Schley v. (Ariz.).....	113	Widholm, Bauer v. (Wash.).....	277
Valley Tp. v. Stiles (Kan.).....	572	Wiener v. H. Graff & Co. (Cal. App.)	167
Van Arsdale & Osborne v. Young (Okl.)..	778	Wilbur, Farnsworth v. (Wash.).....	642
Veysey v. Bernard (Wash.).....	1096	Wilks v. De Hart (Kan.).....	836
Village of Hailey v. Riley (Idaho).....	686	Williams v. Altnow (Or.)	200
Village of Sandpoint v. Doyle (Idaho).....	945	Williams v. First Nat. Bank (Okl.).....	457
Wagner, Ex parte (Okl.).....	435	Williams, Johnson v. (Cal.).....	655
Wallbrecht v. Blush (Colo.).....	927	Wilmore v. Mintz (Colo.).....	536
Wasem v. Gray (Colo.).....	557	Wilson v. First State Bank (Kan.).....	404
Washington Portland Cement Co., Harris v. (Wash.).....	84	Wilson, Low v. (Kan.).....	1135
Washington Water Power Co., Hemenway v. (Wash.).....	260	Wilson, Runge v. (Cal. App.).....	178
Washington & G. N. R. Co., Spokane & B. C. R. Co. v. (Wash.).....	64	Winchell v. Powell (Colo.).....	957
Wasatch & J. V. R. Co., Raphael v. (Utah)	1008	Winsor v. Winsor (Kan.).....	1135
Watts v. Board of Com'rs of Cleveland County (Okl.)	771	Wiswell v. Simmons (Kan.).....	407
Watt, Town of Lyons v. (Colo.).....	949	Woelffen v. Lewiston-Clarkston Co. (Wash.)	493
Webster, Goldstein v. (Cal. App.).....	677	Wood, Erskin v. (Kan.).....	413
Weiser Nat. Bank v. Jeffreys (Idaho)....	23	Woods v. Potter (Cal. App.).....	1125
Weister Co., E. H. Moorehouse & Co. v. (Or.)	497	Woods v. Sargent (Colo.).....	932
Wellington v. Beck (Colo.)	297	Wren, Richardson v. (Ariz.).....	124
		Wright, Atchison, T. & S. F. R. Co. v. (Kan.)	1132
		Wright v. Cruse (Mont.).....	370
		Wyatt v. Burdette (Colo.).....	336
		Young v. Blakeman (Cal.).....	888
		Young, Van Arsdale & Osborne v. (Okl.)...	778
		Youngs, People v. (Colo.).....	1067
		Zang Brewing Co., Mead v. (Colo.).....	284
		Zihn v. Zihn (Cal.).....	868
		Zimmerman v. Bradford-Kennedy Co. (Idaho)	825
		Ziska v. Ziska (Okl.)	254

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CALDWELL BANKING & TRUST CO. v. PORTER et al.

(Supreme Court of Oregon. April 14, 1908.)

1. GARNISHMENT—PROCEEDINGS—WAIVER OF OBJECTIONS.

The failure of plaintiff to appear at the time and place specified in the order requiring the garnishee to appear for examination is waived by the garnishee subsequently answering and proceeding to trial without objection, and without requesting a ruling on its motion to dismiss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, § 272.]

2. SAME—PROPERTY SUBJECT TO GARNISHMENT—"PROPERTY."

Under B. & C. Comp. § 300, providing that all "property" of defendant not exempt from execution shall be liable to attachment, the balance a firm has to its credit in a bank is liable to seizure under an attachment in an action against the firm, the word "property" including money and credits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, §§ 110, 111.]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

3. SAME—NATURE OF PROCEEDING.

A proceeding against a garnishee on an attachment or execution issued in an action at law is strictly at law, and pleadings are framed and the issues of fact arising thereon are tried as in ordinary actions at law.

4. APPEAL—RULING ON MOTION FOR NON-SUIT—REVIEW.

The grounds stated in a motion for a non-suit are conclusive on the moving party, and he cannot raise for the first time on appeal a ground not stated in the trial court.

5. GARNISHMENT—EFFECT—RIGHTS OF ACTION.

A creditor of a firm who, in an action against the firm, attaches money and credits belonging to the firm in possession of another, succeeds to the rights of the firm against the latter.

6. PARTNERSHIP—DISPOSITION OF FIRM PROPERTY—RIGHTS OF CREDITORS—RIGHTS OF PARTNERS.

Simple contract creditors of a firm have no lien in their own right on firm assets which will prevent the partners from in good faith applying the same to the payment of the individual debts of the partners, but the partners have a lien on the property for the payment of partnership debts, and one partner cannot appropriate the property to the payment of his individual debts without the consent of the copartners, and such a payment without such consent is a misapplication of the assets of the firm, and a fraud on the rights of the copartners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 314, 316.]

7. SAME.

A bank received deposits from a firm. It charged against the firm account the notes of partners, though it knew that the notes were the individual obligations of the partners. *Held*, that the act of the bank was prima facie invalid as against the partnership and its creditors, and the burden of proof was on it to show that it made such charge with the assent, express or implied, of all the partners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 316.]

8. SAME.

Evidence *held* not to show that a bank applied firm deposits to the individual obligations of partners with the assent, express or implied, of all the partners essential to make the transaction valid as against the firm and its creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 316.]

Appeal from Circuit Court, Malheur County; George E. Davis, Judge.

Action by the Caldwell Banking & Trust Company against F. L. Porter and others, copartners under the firm name of Porter, Jones & Test, in which the First National Bank of Ontario was summoned as garnishee. From a judgment for plaintiff, the garnishee appeals. *Affirmed*.

On September 29, 1906, F. L. Porter, Thomas Jones, and E. H. Test, partners in the sheep business in Malheur county, sold their sheep for \$22,594.50, and deposited the money in the First National Bank of Ontario to the credit of the firm, which, together with a previous balance of \$458.26, made an aggregate credit of \$23,052.76. At that time the partnership was indebted to the bank in the sum of \$13,656.04, and it held the individual notes of each member of the firm, which were overdue and of about equal amounts, approximating—principal and interest—\$7,008.85, which the bank charged to the firm account. This left a balance of \$2,035.02 to the credit of the firm. On October 3d plaintiff, Caldwell Banking & Trust Company, commenced an action at law against Porter, Jones & Test to recover on two promissory notes, amounting in the aggregate to \$7,500 and accumulated interest, and caused a writ of attachment to be issued and served upon the bank, attaching any and all money or credits in its possession belonging to the partnership. The bank answered that its books showed a balance to the credit of the

firm of only \$2,035.02. This being unsatisfactory to plaintiff, it obtained an order requiring the bank to appear and answer on oath concerning the same. Written allegations and interrogatories were subsequently served and filed, in which, after alleging the incorporation of plaintiff and garnishee bank, the partnership of Porter, Jones & Test, the commencement of the action by plaintiff against the partnership, the issuance and service of the writ of attachment therein, the return of the garnishee bank, the deposit by Porter, Jones & Test of \$22,594.50 with the garnishee bank on September 29, it is averred that after such deposit, and prior to the service of the writ of attachment on the garnishee bank, it had paid out on order of the partnership the sum of \$14,008.89, and and no more, and that at the date of such service there was due and owing from such bank to the partnership the sum of \$9,043.87. On the day the garnishee bank was requested to appear and answer it filed a motion to dismiss the proceeding for want of an appearance by plaintiff, but before such motion was disposed of it answered the allegations, denying the material averments thereof, and affirmatively set out the several notes due it from the partnership of Porter, Jones & Test, and from the individual members of such partnership, and averred that all such notes were given by the parties thereto and accepted by the bank, and the time of payment thereof extended from time to time, and particularly the notes of the individual members of the firm, upon the express agreement and understanding with the makers, individually and collectively, that the sheep and other partnership property of Porter, Jones & Test would be sold and the money received therefor deposited in the garnishee bank to be applied by the bank in payment thereof; that in accordance with such understanding and agreement, Porter, Jones & Test sold the sheep and deposited the proceeds of the sale with the garnishee bank, whereupon the bank duly applied such portion thereof as was necessary to the payment and discharge of all such notes, partnership and individual; that prior to the commencement of the action by plaintiff against Porter, Jones & Test the partnership and the individual members of such firm duly and fully ratified the action of the garnishee bank in applying the proceeds of the sale to the payment of the partnership and individual debts, and received and accepted their notes as paid and discharged in full. A reply put in issue the new matter alleged in the answer, and upon the issues thus joined the cause came on for trial before a jury. The defendant garnishee objected to the admission of any evidence on the ground that plaintiff's remedy is in equity and not at law. This objection was overruled, whereupon plaintiff, to sustain the issues on its part, offered in evidence severally the complaint, summons and proof of service thereof, a demurrer filed by defendants, the

affidavit and undertaking for writ of attachment, the writ of attachment and notice of garnishment, together with the sheriff's return thereon, the answer of the garnishee, and the judgment in the action brought by plaintiff against Porter, Jones & Test. But all these papers were excluded by the court on objection of defendant, on the ground that they were immaterial, irrelevant, and incompetent. The plaintiff then called Mr. Test, one of the members of the firm of Porter, Jones & Test, who identified the two notes upon which the action was brought by plaintiff; but the court, on objection of defendant, refused to admit either of such notes in evidence, on the ground that they were immaterial, irrelevant, and incompetent, and also refused, for a like reason, to permit Test to testify that at the time of the commencement of such action there was due and owing thereon from the partnership of Porter, Jones and Test to the plaintiff the principal and interest of each of such notes. Plaintiff then proved by Test that the partnership of Porter, Jones & Test had on deposit with the garnishee bank on September 29th \$23,052.76, and that between that date and the service of the garnishee process upon it there had been paid out by the bank on account of the partnership, and by its authority, \$14,008.89, and no more, and then rested. Whereupon the defendant garnishee moved the court for a nonsuit, on the grounds (1) that plaintiff's remedy was in equity, and not at law; (2) that plaintiff had not proved a partnership of Porter, Jones & Test under the firm name of Porter, Jones & Test, but had shown the partnership to be Porter, Test & Jones. This motion was overruled, and defendant garnishee gave evidence which it claims tended to support its defense to the garnishee proceedings, but at the close of the testimony the court, on motion of plaintiff, directed a verdict in favor of plaintiff, from which defendant garnishee appeals.

W. F. Butcher and A. N. Soliss, for appellant. John C. Rice and W. H. Brooke, for respondent.

BEAN, C. J. (after stating the facts as above). The defendant's motion to dismiss the proceeding and discharge the garnishee from liability because of the failure of plaintiff to appear at the time and place mentioned in the order requiring the garnishee to appear and be examined on oath concerning the matters stated in its answer to the garnishee process was waived by defendant. It subsequently answered, and proceeded to trial without objection, and without asking or requesting a ruling on the motion. Nor is there any merit in the objection made at the opening of the case to the admission of any testimony because plaintiff's remedy is in equity and not at law. All the property of a defendant not exempt from execution is liable to attachment (section 300, B. & C. Comp.), and this includes

money and credits. If the garnishee bank was indebted to the partnership of Porter, Jones & Test, or that firm had a balance to its credit on the books of the bank, at the time the garnishee process was served, it was liable to seizure under an attachment in the action brought by plaintiff against the firm, and, if the answer of the bank was not satisfactory to plaintiff, it had a right to proceed in the manner provided by statute. A proceeding against a garnishee on an attachment or execution issued in an action at law is in no sense equitable, but strictly at law, and the pleadings are framed and issues of fact arising thereon tried as in ordinary law actions. *Case v. Noyes*, 16 Or. 329, 19 Pac. 104; *Smith v. Conrad*, 23 Or. 206, 31 Pac. 398.

It is contended that defendant's motion for a nonsuit should have been sustained because plaintiff did not prove the commencement of an action by it against Porter, Jones & Test, or the issuance and service of an attachment therein, or the answer of the garnishee to such attachment, or that a judgment had been rendered in favor of plaintiff in such action. Plaintiff offered in evidence the pleadings and record in the action referred to, which would have furnished the proof suggested, but they were ruled out by the court on an objection of defendant, and it would seem that it ought not be permitted to take advantage of a failure of proof in this respect. The ruling of the court was probably based on the theory that proceedings against a garnishee are auxiliary to the action in which the attachment was issued, and therefore the court will take judicial knowledge of the proceeding in such action without proof, and there are many authorities which support this view. *State v. Bates*, 22 Utah, 65, 61 Pac. 905, 83 Am. St. Rep. 768; *Kenosha Stove Co. v. Shedd*, 82 Iowa, 540, 48 N. W. 933; *Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57; *Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851; *Farrar v. Bates*, 55 Tex. 193; *Farrington v. Sexton*, 43 Mich. 454, 5 N. W. 654; *S. E. Olson Co. v. Brady*, 76 Minn. 8, 78 N. W. 864; *Morrison v. Hilburn & Poole*, 126 Ga. 114, 54 S. E. 938. But whatever the true rule may be in this regard, defendant specified particularly the grounds of its motion for a nonsuit, which do not include the point now made, and it is the law that the grounds stated in such a motion are conclusive upon the moving party, both at trial and in an appellate court, and that he cannot raise for the first time on appeal a ground of nonsuit not stated below. 6 Ency. Pl. & Pr. 879; *Meler v. Northern Pacific R. Co. (Or.)* 93 Pac. 691.

It is also claimed that the court erred in directing a verdict in favor of plaintiff at the close of the testimony. This depends upon whether the garnishee bank had the right, as against the partnership of Porter, Jones & Test, to charge to the firm account the notes held by it against the individual members of the firm. Plaintiff, by virtue of the attach-

ment, was subrogated to the rights of the firm against the bank, and is entitled to recover against it, if the firm could have done so at the time the attachment was served. *Keene v. Smith*, 44 Or. 525, 75 Pac. 1065. Simple contract partnership creditors have no lien in their own right upon partnership assets which will prevent the partners, while the property is under their control, from in good faith applying it to the payment of the individual debts of the members of the firm or otherwise disposing of it. *Stahl v. Osmer*, 31 Or. 199, 49 Pac. 958; *First National Bank of Indianola v. Brubaker*, 128 Iowa, 587, 105 N. W. 116, 2 L. R. A. (N. S.) 256, 111 Am. St. Rep. 209; *Pepper v. Peck*, 17 R. I. 55, 20 Atl. 16; *Carver Gin & Machine Co. v. Bannon*, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. Rep. 803; *Woodmansie v. Holcomb*, 34 Kan. 35, 7 Pac. 603; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 13; *Smith v. Smith*, 43 Am. St. Rep. 359, 364, note. But the partners have a lien on such property for the payment of the partnership debts, or for the surplus due each partner, and therefore one partner cannot appropriate the property to the payment of his individual debts without the consent of all the other partners. Such a payment is regarded in law as a misapplication of the assets of the firm and a fraud upon the rights of copartners, and, if the individual creditor has knowledge of the fact, the property may, according to the weight of authority, although there is some conflict in the decisions, be recovered in an action at law in the name of the firm, or by a creditor succeeding to its rights by attachment or garnishment. *Johnson v. Hersey*, 70 Me. 74, 35 Am. Rep. 303; *Coote & Jones v. Bank of United States*, 3 Cranch, C. C. 95, Fed. Cas. No. 3,204; *Davies v. Atkinson*, 124 Ill. 474, 16 N. E. 809, 7 Am. St. Rep. 373, 377, note; *Cannon v. Lindsey*, 85 Ala. 198, 3 South. 676, 7 Am. St. Rep. 38; *Rogers v. Batchelor*, 12 Pet. (U. S.) 221, 9 L. Ed. 1063; *Johnson & Pitt v. Crichton*, 56 Md. 108; *Cotzhausen v. Judd*, 43 Wis. 213, 28 Am. Rep. 539; *Viles v. Bangs*, 36 Wis. 131; *Howell & Gibson v. Sewing Machine Co.*, 12 Neb. 177, 10 N. W. 700; *Brickett v. Downs*, 163 Mass. 70, 39 N. E. 776; *Locke v. Lewis*, 124 Mass. 1, 26 Am. Rep. 631.

It is undisputed that at the time the garnishee bank charged up to the firm account the notes of the individual members it knew the character of the obligations. Its act was therefore *prima facie* invalid as against the partnership and its creditors, and the burden of proof was on the bank to show that it made such charge with the assent, express or implied, of all the partners. *Coote & Jones v. Bank of United States*, supra; *Willis v. Holmes*, 28 Or. 265, 42 Pac. 989. We have read the entire testimony, and do not find any evidence that all the partners consented or agreed that the individual debts of the members of the firm should be paid from the firm assets. There is testimony that each partner,

when pressed for payment of his individual debt, stated that it would be paid when the sheep belonging to the partnership were sold. But there is no testimony that any of the partners, except perhaps Test, agreed or consented to the payment of the individual notes of his copartners out of such fund. Mr. Alexander, president of the bank, and Mr. Kenyon, cashier, were the two witnesses who testified in regard to the matter. Kenyon says that when the deposit was made by Porter the bank held the partnership notes amounting to about \$14,000 and the individual notes of the members of the firm amounting to \$7,008.85, all of which were charged to the partnership account, leaving a balance of \$2,035.02, and he (witness) charged off the individual notes because they were past due, and it was the understanding with the partners that the bank was to have its money when the sheep were sold; that the question of the payment of the individual notes had often come up for consideration, and Test had at all times assured the bank that as soon as the sheep were sold it would get its money on them as well as those of the firm; that he had a conversation with Test in July, 1906, and told him the directors were dissatisfied with the amount of indebtedness and wanted security by mortgage on the sheep; that Test would not give the mortgage, but said, "We expect to sell this property in a short time, and when this property is sold, you shall have your money"; that the individual notes had always been regarded by the bank as partnership indebtedness, and interest thereon was from time to time charged to the partnership account, and a statement rendered to the firm; that at one time Test paid the interest on Jones' note by a firm check; that at another time Test asked witness to request Porter to pay his note, as he seemed disinclined to sell the sheep, and that a short time afterwards witness saw Porter and inquired when he would be able to pay his note, and he said he could not pay it then, but as soon "as we sell the sheep you shall get your money"; that the next day after the notes had been charged off the president of the bank and witness had a conversation with Test concerning the matter, and Mr. Alexander said to him, "You know that it was the understanding all the time that this indebtedness was to be paid when the sheep were sold," and Test replied, "I have never denied that, but we cannot pay our individual notes until the company's debts are paid," and that he would not consent to paying the individual notes, because it might involve them in a lawsuit; that on the next day after the money had been deposited in the bank by Porter Test came in and told witness he had better charge up the notes for he (Test) was about to be sued and attached, but no particular notes were mentioned at that time; that on the 1st or 2d of October Jones came into the bank and got his note, saying, "I guess it is paid, and I am entitled to it"; that Porter came in and got his note

after the garnishment had been served, and Test's notes were mailed to him, and none of such notes have ever been returned. Mr. Alexander said that on one occasion he had a conversation with Mr. Test about the Porter notes, and Test told him that they were partners in the sheep business, and when the sheep were sold the firm would pay the notes from the proceeds of the sale; that he had other conversations with Test about the individual notes, and it was understood that they would be taken care of by the firm and paid when the sheep were sold; that he had a conversation with Jones in May, 1906, in which he expressed a fear that enough would not be realized from the sheep to pay the partnership and individual notes, and Jones assured him that there would be sufficient for that purpose, and he (witness) told Jones that if he would get a letter from Test to that effect the bank would wait, and the payment of Jones' note was extended with that understanding; that it had been the custom of the bank to charge the interest due on the individual notes to the firm account. This is all the testimony concerning the right of the bank to charge to the firm account the notes of the individual members, and it is clearly insufficient to show that such charge was made with the consent of all the members of the firm. There is no testimony whatever that Porter or Jones agreed or consented that the notes of Test should be paid from the partnership assets, or that either agreed that the note of the other should be so paid. All that can be reasonably claimed from the testimony is that each partner, when pressed for payment of his own note, stated to the bank that it would be paid as soon as the property belonging to the firm could be sold, but this amounts to nothing more than the assurance that each partner would pay his own indebtedness from the surplus due him after the partnership affairs were settled, and not that such assets should be used for the payment of the individual debts of the members of the firm. There is no testimony showing a direct promise by either one or more of the partners that the firm would pay or assume the individual debts. The tenor of the whole testimony is that each partner expected, when the sheep were sold, that there would be money enough to pay all the firm debts and leave a balance coming to the respective partners sufficient to pay their individual debts.

We conclude, therefore, that within the settled rule of law the defendant did not make out such a case as will entitle it to charge to the firm account the individual notes of the members of the firm, and that the court below was right in directing a verdict in favor of the plaintiff. The verdict in this case was returned on the 1st day of May, 1907, but the judgment entry, which was made on the 4th, recites that it is based on a verdict returned on the 2d, but this was manifestly a clearly clerical error which could affect no substantial

right of the defendant, or is no ground for a reversal of the judgment. Finding no error in the record, the judgment is affirmed.

Mr. Commissioner KING, having been of counsel in the court below, took no part in this decision.

RIGGS v. POLK COUNTY et al.

(Supreme Court of Oregon. April 14, 1908.)

1. CORPORATIONS — MEMBERS — MEETINGS — CALLING MEETINGS — PERSONS MAKING CALL.

It is in general essential to the validity of acts done at a special or called meeting of a corporation that the call shall be made by the persons appointed by the governing statute to call such meetings, and notice must be given at the time and in the manner prescribed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 734-743.]

2. SCHOOLS AND SCHOOL DISTRICTS — PUBLIC SCHOOLS — DISTRICT BOARDS — MEETINGS — PERSONS GIVING NOTICE.

B. & C. Comp. § 3385, vesting in school district meetings the power to levy taxes, expressly limits such power to "district meetings, legally called"; section 3389, subd. 1, empowers the district school board to call meetings generally; and subdivision 14 empowers it to call meetings to consider the question of erecting school buildings. Section 3380 provides that all regular and special school meetings must be convened by a call stating the objects of such meeting, signed by the chairman of the board and the district clerk, or a majority of the district school board. *Held*, that section 3380 was intended to designate the persons who should give notice of a called meeting ordered by the board, and not merely to give the officers therein named a discretionary power to call a meeting, and the existence of the same power in some other body was necessarily excluded.

3. STATUTES — CONSTRUCTION — RELATED CLAUSES.

To ascertain the intention of a statute it must be construed in connection with all other provisions of the act of which it forms a part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 259-265, 302-306.]

4. SCHOOLS AND SCHOOL DISTRICTS — PUBLIC SCHOOLS — MEETINGS — PERSONS GIVING NOTICE — "CHAIRMAN OF THE BOARD."

B. & C. Comp. § 3380, provides that all regular and special school meetings must be convened by a written call stating the objects of such meetings, signed by the chairman of the district board and district clerk, or a majority of the school board. Section 3388 provides that the director who has served the longest time shall act as chairman of the board meetings, and, in the absence of the chairman, the other members of the board in the order of their seniority may act as chairman. The statute does not expressly create the office of "chairman of the school board," but such office was impliedly recognized by section 3389, subd. 16, providing that school warrants must be drawn and signed by the chairman of the board, and subdivision 21 permitting the board to authorize the chairman to draw warrants for the payment of salaries, and subdivision 31 providing that all bonds issued shall be signed by the chairman of the board of directors, and section 3409 providing that meetings of the board may be convened by written notice issued on the order of the chairman. *Held*, that the various sections of the statute construed together recognized the permanent and separate existence of the office of "chairman of the board," and by section 3388

the oldest in service of the directors was chairman of the board, and hence a special meeting called under section 3380 signed by the next oldest member of the board was not signed by "the chairman of the board," as required thereby, and bonds issued at such a meeting were invalid.

5. SAME — DISTRICT DEBTS — BONDS — REMEDIES OF TAXPAYER — PARTICIPATION IN MEETING — ESTOPPEL TO OBJECT — PLEADING.

In a suit to enjoin the issue of bonds to build a district school building, on the ground that the meeting of the district board authorizing the issue of the bonds was not legally convened, even if plaintiff had knowledge of the meeting and participated therein, and was thereby estopped to question the validity of the proceedings in equity, such facts would be a matter of defense by way of estoppel.

Moore, J., dissenting.

Appeal from Circuit Court, Polk County; William Galloway, Judge.

Suit by Seth Riggs against the county of Polk and others. From a decree dismissing the complaint and dissolving a temporary injunction, plaintiff appeals. Decree reversed, with instructions to sustain demurrer to the answer, and for further proceedings.

Plaintiff, who is a resident of and owns property in school district No. 45 of Polk county, instituted this suit to enjoin the collection of a school tax attempted to be levied by that district. It is alleged, in substance, that at the time of the issuance of the call for the holding of the meeting at which the tax was levied A. M. Holmes, Finley M. Edgar, and Mason K. Crowley were the duly elected and qualified directors of the district; that of the three Holmes had served the longest time under an election. Edgar was next in seniority of service, and Crowley was the junior director; that on December 3, 1904, Edgar attempted to convene a special school meeting of the district to be held at the schoolhouse at the hour of 10 o'clock in the forenoon of December 17, 1904, by a written notice, which is pleaded *hæc verba*. It is signed by Edgar as chairman pro tem. of the board of directors, and by the clerk of the district, and sets forth the object and purpose of the meeting to be the levying of a tax for building a schoolhouse in said district. It is further alleged that at the time of the issuance of the notice Holmes was chairman of the board of directors, and that said notice was not signed by the chairman of the board of directors, nor by a majority of such board; that in pursuance of such notice a meeting was held at the time and place therein stated, which attempted to levy a tax of seven mills on the dollar upon the real and personal property in the district; that the amount of tax levied upon plaintiff's property was \$82.28, which became delinquent, and, in pursuance of a warrant issued to the defendant by the county court, he is about to sell plaintiff's property for the collection thereof. A general demurrer to the complaint having been overruled, defendants answered, admitting the averments of the complaint, excepting that part which sets

forth the form and manner of the issuance of the notice or call for the meeting, and that the notice was not signed by the chairman of the board. These were denied, and in substance it is affirmatively alleged that on December 3, 1904, a meeting of the board of directors of the district was duly called and held at the schoolhouse for the purpose of authorizing the issuance and directing the posting of a notice for a school meeting of the district for the object above stated; that directors Edgar and Crowley and the clerk were present at the meeting, but that director Holmes did not attend; that at such board meeting it was determined to call a special school meeting to be held at the schoolhouse on December 17, 1904, at 10 o'clock in the forenoon, for the purpose of levying a tax to build a schoolhouse, and the clerk was ordered to post notices to that effect, as required by law; that in pursuance thereof the clerk did post notices, a form of which is set out in full. It is identical with the notice set forth in the complaint, excepting that after the signature thereto of Finley M. Edgar there is added these words, "Chairman pro tem., Chairman Board of Directors," which slightly differs from the alleged signature to the notice set forth in the complaint, but the signature of the clerk is the same. A general demurrer to the answer having been overruled, plaintiff declined to plead further, and thereupon a decree was entered dismissing the complaint and dissolving the temporary injunction theretofore issued, from which decree plaintiff appeals.

Oscar Hayter and W. H. Holmes, for appellants. John H. McNary, for respondents.

SLATER, C. (after stating the facts as above). The validity of the tax is questioned by plaintiff solely upon the ground that the call for the school meeting by which it was attempted to be levied was not signed by the person or persons upon whom that duty is imposed by the statute, which is to the effect that all regular and special school meetings must be convened by a written call stating the objects of the meeting, signed by the chairman of the board and the district clerk, or a majority of the district school board. Section 3380, B. & C. Comp. It is in general essential to the validity of acts done at a special or called meeting of a corporation that the call shall be made by the person or persons appointed by the governing statute to call such meetings, and notice must be given at the time and in the manner so prescribed. 25 A. & E. Ency. (2d Ed.) 40, 41; 10 Cyc. 3245. The power vested by the statute in district school meetings to levy a tax is expressly limited to "district meetings, legally called" (section 3385, B. & C. Comp.), and the power to call a meeting to consider the question of the erection of a schoolhouse is conferred upon the district board, which power it may or shall exercise whenever, in

the judgment of the board, it is desirable or necessary to the welfare of the schools in the district or to provide for the children therein proper school privileges, or whenever petitioned so to do by one-third of the voters in the district (section 3380, subd. 14, B. & C. Comp.). The power to call a meeting for the particular purpose for which this one was called being thus expressly conferred by statute upon the board, the implied existence of the same power in some other body or person is necessarily excluded. But section 3380, B. & C. Comp., also provides that "all regular and special school meetings must be convened by a written call stating the objects of such meeting, signed by the chairman of the board, and the district clerk, or a majority of the district school board; and the directors shall cause the clerk to post such written notices in three public places in the district at least ten days before the day appointed for said meeting." The validity of the call put forth in this case depends upon what construction is to be placed upon this section of the statute in two particulars: (1) Whether a discretionary power to call a meeting is thereby conferred upon the persons designated, or whether it is intended by this section merely to designate the persons who should give, and to prescribe the form and manner of giving, a notice of a call ordered by the board in the exercise of an authority conferred exclusively upon it; and (2) who is meant by the expression "chairman of the board."

1. The answer to the first inquiry has already been suggested. Looking at the words of the section when standing alone, it appears that the only intention was to prescribe the form and manner of giving notice of a call ordered by some other person or body in whom the power had been vested; for it could not reasonably have been intended to confer a discretionary power upon the chairman of the board and the district clerk or upon a majority of the board to convene a "regular" school meeting, the time for the holding of which is expressly named in the act of 1901 of which this section is a part. Moreover, to ascertain the intention of a legislative declaration, it must be construed in connection with all other provisions of the act of which it forms a part. The power to call meetings generally is conferred upon the board by section 3380, subd. 1, and specifically, for the particular purpose for which this meeting was held, by subdivision 14, of the same section. We conclude, therefore, that it was intended by section 3380 to designate the person or persons who should give, and to prescribe the form and manner of giving, notice of a call ordered to be made by the board, and not to grant to the officials therein named a discretionary power to call a meeting.

2. The answer alleges that a special meeting of the board of directors was convened and held in accordance with the requirements

of section 3388, which meeting directors Edgar and Crowley and the district clerk attended, but that director Holmes did not attend; that Edgar acted as chairman; and that at this meeting the board determined to call a special school meeting to be held at the time and for the purpose named in the notice, and instructed the clerk to post written notices thereof, which, it is further alleged, was done. Thus far the proceedings for the call of the meeting appear to be in compliance with the statute and to that extent the answer is sufficient to support the validity of the tax. But it is contended by the plaintiff that the notices so posted were not signed by "the chairman of the board," nor by "a majority of the district school board," as required by section 3380, while the defendant asserts that Edgar, being next to Holmes in seniority of service, was designated by section 3388 as the proper person to preside at a district board meeting. It reads as follows: "The director who has served the longest time as such under an election shall act as chairman of district school board meetings; in the absence of the chairman the other members of the board in the order of their election may act as chairman," etc.—and by section 3381 similar provision is made for chairmen of district school meetings. That Edgar, having presided as chairman of the board meeting which ordered the call to be issued, was "chairman of the board," within the meaning of section 3380, for the purpose of signing this notice, and, as he did sign it as "chairman of the board," it is sufficient. That as to the powers, duties, and official acts there is no distinction in the act of 1901 between the officer therein designated on the one hand as "chairman of the board," and, on the other hand, as "chairman of district school board meetings," or "chairman of district school meetings." But we have not been able to so harmonize or reconcile the different expressions of the act under consideration. There are several different, important, and essential duties other than to preside at board or district school meetings required to be performed by some person designated in the act as "chairman of the board." The statute nowhere expressly provides that there shall be such an office, nor who shall perform the duties assigned to that office, but throughout the act there are several legislative expressions similar to that used in section 3380 which necessarily imply the legislative existence of such an office, because of the important and essential duties that are imposed upon and required to be performed by an officer designated as "chairman of the board," such as: That school warrants must be drawn and signed "by the chairman of the board." Section 3389, subd. 16. That "the board may authorize the chairman and clerk to draw warrants for the payment of teachers' salaries at the end of each school month," etc. Id., subd. 21. That "all bonds so issued shall be signed by the chairman of the board of di-

rectors." Id., subd. 31. And that meetings of the board of directors "may be convened upon written or printed notices issued by the school clerk by order of the chairman." Section 3400. Some of these duties are not dependent upon the order of a board meeting, particularly the signing of bonds issued by the district, which is done by order of a district school meeting, and the convening of a board meeting by order of the chairman. Hence it cannot be said that by the expression "the chairman of the board" is meant the person who presided at the board meeting which authorized the thing to be done. There is also a difference in the terms used, from which a difference of intent may be inferred. In section 3388 the authorization is that the director who has served the longest time under an election shall act "as chairman of district school board meetings." The official authority thus conferred is necessarily temporary and limited to the existence of that meeting; and the same may be said of the expression used in section 3381 as to who shall act as chairman of district school meetings. Moreover the language of that section in itself recognizes the permanent and separate existence of the office of "chairman of the board," as distinguished from the temporary position of acting as "chairman of school board meetings," where, after providing who shall act as chairman of such meetings, the language used is, "In the absence of the chairman, the other members of the board * * * may act." Had it not been so intended, the natural legislative expression would have been, "In the absence of the director who has served the longest time, the other members of the board * * * may act." The imperative declaration of this act, however, is that all bonds issued by the district shall be signed "by the chairman of the board," and, if not so signed, the unavoidable conclusion is that they are not legal or valid obligations; and it is just as emphatically declared by the statute that the same officer must also sign the notice that calls or convenes the meeting of the taxpayers of the district by whom a tax is to be levied. The legality of every bond issued and every tax levied depends upon the due performance of these official duties by some one denominated in the statute as "chairman of the board." But, by defendants' contention, each of these very important and essential acts need not be performed by the same person, but may be performed by either of two different directors, and the question arises, can there be two different persons to perform these respective duties? We think not. A large amount of bonds has been issued under this act by the several school districts of this state, and doubtless, in an endeavor to comply strictly with the law, the director who has served the longest time as such under an election has uniformly been considered to be "the chairman of the board" mentioned in the statute, and such seems to be within the intentment of

section 3388, and such officer has signed and executed, on behalf of the district, all of the bonds heretofore issued. Necessity, therefore, as well as the inferences to be drawn from the terms of the act, it seems to use, enforces that construction. From this conclusion it necessarily follows that the call for the district school meeting was not signed by the "chairman of the board," and therefore the acts done at the meeting were invalid. The answer falls to state a defense to the complaint, and the demurrer should have been sustained.

It is further contended by defendants that the complaint fails to state facts sufficient to constitute a cause of suit, in that it fails to aver want of knowledge by plaintiff that a school meeting was to be held at the time and place and for the purpose it was held. For, it is argued, if he had knowledge of these facts, or was present, he will not be permitted to complain in a court of equity of the actions of the meeting; but the authorities cited by counsel are to the effect that one who was present and participated in corporate meetings of quite a different character from this one could not complain, although he had not been formally notified of the calling of the meeting as required by the law. Such facts, if they existed here and had the effect claimed, would be matter of defense only by way of estoppel.

From these considerations it follows that the decree should be reversed, and the cause remanded, with instructions to the lower court to sustain plaintiff's demurrer to the answer, and for such other proceedings as may be proper.

MOORE, J. (dissenting). The permanent office of chairman of a school district board is not created by express legislative enactment. The statute does not provide that the school director who has served the longest time as such under an election is the chairman, but only that he shall act as such at the board meetings, and in his absence the member of the school board next to him in point of service under an election is authorized so to act. B. & C. Comp. § 3388. It would appear from the use of the word "act," as indicated, that the office of chairman of the district school board is only temporary, being called into existence when the school board is legally assembled, and continued until the business considered at such meeting has been fully discharged, altered, or countermanded at a subsequent meeting. All school meetings must be convened by a written call, signed by the chairman of the board or by a majority thereof, and attested by the district clerk. B. & C. Comp. § 3380. If the school director who has served the longest time as such under an election were to preside as chairman at a district school board meeting, and it was determined to convene a district meeting to levy a tax, it is possible he might so oppose the measure as to decline to sign the call.

His refusal, however, would not necessitate mandatory proceedings to compel the performance of a mere ministerial duty, for a majority of the members of the school board, who must have inaugurated the proceedings, could subscribe their names to the notice, which would be adequate. Except in the case supposed, it would appear unnecessary for a majority of the school board to sign a call for a district meeting, for the director who legally acted as chairman at the board meeting is, in my opinion, the only person authorized to issue the required notice. Believing the call in the case at bar to have been signed by the proper officer, I cannot agree with my associates in holding that an error was committed in overruling the demurrer to the answer.

HARRINGTON v. BUTTE, A. & P. RY. CO.
(Supreme Court of Montana. April 18, 1908.)

1. RAILROADS—INJURY TO CHILD ON TRACK—QUESTION FOR JURY—UNAVOIDABLE ACCIDENT.

In an action against a railway company for injury to a child run over by cars, *h'ld.*, under the evidence, a question for the jury whether the accident was unavoidable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1163, 1191.]

2. APPEAL—REVIEW—FINDING.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In a personal injury action, the burden of proving contributory negligence is on defendant in the first instance, under Code Civ. Proc. § 3266, subd. 4, creating a presumption that one takes ordinary care of his own concern.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 229-234.]

4. SAME—PRIMA FACIE CASE.

When, in a personal injury action, plaintiff's own case presents evidence which, if unexplained, would make out prima facie contributory negligence on his part, there must be further evidence exculpating him, or he cannot recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 274-276.]

5. PARENT AND CHILD—CARE OF CHILD—PARENTS' DUTY.

Parents have no right to expect others to care for children so young and immature that they cannot care for themselves, and are bound to exercise such degree of care and prudence to promote their safety as in all the circumstances is reasonable, considering the age and intelligence of such children, and known dangers or dangers which might be known by exercising due care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parent and Child, § 94; Negligence, §§ 157-160.]

6. SAME—INJURY TO CHILD—EVIDENCE.

In an action by a parent for the loss of services of a young child negligently injured, etc., its unexplained presence in a place of known danger is prima facie evidence of its parents' negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parent and Child, § 97.]

7. NEGLIGENCE—DEFINITION.

Broadly speaking, negligence is a breach of duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 1, 2.

For other definitions, see Words and Phrases, vol. 5, pp. 4743, 4763; vol. 8, pp. 7729, 7731.]

8. PARENT AND CHILD—INJURY TO CHILD—PARENTS' CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence, in an action by a parent against a railway company for loss of services of a child negligently run over by cars, *held* insufficient to show that the parents exercised ordinary care to keep the child out of a place of known danger, thus defeating recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parent and Child, § 97.]

Smith, J., dissenting.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Personal injury action by Jeremiah P. Harrington against the Butte, Anaconda & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

See 93 Pac. 640.

A. J. Shores, Forbis & Evans, C. F. Kelley, and D. Gay Stivers, for appellant. Peter Breen, Jesse B. Roote, and John J. McHatton, for respondent.

HOLLOWAY, J. Bernard Harrington was about 5 years and 8 months old on July 5, 1906, when he was injured by being run down by cars operated by the defendant railway company over its tracks in the northern part of the city of Butte. This action is brought by the father of the child for damages by way of compensation for the loss of the child's services from the time of the injury until he should have reached the age of 21 years. The injury occurred at a point where a roadway of general travel crosses the defendant railway company's tracks. As to whether it is a public street is left somewhat in doubt. The complaint is drawn upon the theory that the injury was occasioned by the negligence of the defendant company. The answer denies any negligence, and pleads contributory negligence on the part of the child, and also contributory negligence on the part of this plaintiff in permitting the child to be in a place of danger unattended. The case was tried to the court sitting with a jury. A verdict was returned in favor of the plaintiff, and a judgment rendered and entered thereon, from which judgment and an order denying it a new trial the defendant appeals.

The appellant's specifications of error relate to the insufficiency of the evidence to sustain the verdict, and to instructions given, modified, and refused. Respondent objects to any consideration of the questions arising upon the instructions, for the reason that the instructions are not presented to this court in the judgment roll; but the application of the rule heretofore announced is of little or no consequence in this particular case, since the principal contention made by the appel-

lant is presented under its specification of the insufficiency of the evidence to justify the verdict. Appellant contends that the injury was the result of an unavoidable accident; and while there is some testimony to the effect that the child ran upon the track and in front of the moving cars so soon before his injury as to render the injury unavoidable, there is likewise testimony that the child stood upon the track for from two to four or five minutes before he was struck. This conflict in the evidence was properly submitted to the jury for consideration, and with the finding thereon in plaintiff's favor we cannot interfere. Appellant's other contention upon the evidence presents a most difficult question. We think the evidence is ample, if believed, to show the negligence of the defendant railway company. The injury is admitted in the pleadings. In making out plaintiff's case it was made to appear that this child of tender years, non sui juris, was in a known place of danger, unattended by any one whose duty it was to care for him. In this jurisdiction the rule is firmly established that in an action of this character the burden of alleging and proving contributory negligence is upon the defendant in the first instance; and this must be correct, since there is a presumption of law that the plaintiff exercised ordinary care. Subdivision 4, § 3266, Code Civ. Proc. In *Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905, this court, after stating this rule, said: "There is a corollary, rather than an exception to this rule; the corollary being to the effect that, whenever the plaintiff's own case raises a presumption of negligence, the burden of proof is immediately upon him. In such a case it devolves upon the plaintiff, as of course, to clear himself of the suspicion of negligence that he has himself created. He must make out his case in full, and, where the circumstances attending the injury were such as to raise a presumption against him in respect to the exercise of due care, the law requires him to establish affirmatively his freedom from contributory fault." We think it would be more accurate to say that, whenever the plaintiff's own case presents evidence which, if unexplained, would make out prima facie contributory negligence on his part, there must be further evidence exculpating him, or he cannot recover. However, this is evidently what the court meant, and this doctrine has the support of practically all of the authorities.

On the part of plaintiff it is alleged that this crossing was a dangerous place, and that, by reason of his tender years, the injured child was incapable of understanding or appreciating the danger. In view of these allegations appellant contends that the unexplained presence of this five-year old child in a known place of danger, unattended by any one whose duty it was to care for him, was of itself prima facie evidence of contributory negligence on the part of his parents. It may

be said to be a general rule, of universal application, that parents have no right to expect others to care for their children who are so young and immature that they cannot care for themselves, and that they (the parents) owe the duty to care for such children, and in caring for them are bound to exercise such degree of care and prudence to promote their safety as under all the circumstances is reasonable, and this degree of care is proportionate to the age and intelligence of such children and to the known dangers, or dangers which might be known by the exercise of due care (1 Thompson's Commentaries on the Law of Negligence, § 321); and in support of this rule it may be said that the authorities are harmonious. When, however, it comes to the application of the rule to particular cases, the courts have not been able to agree. While there are some courts which hold that the mere unexplained presence of a child, non sui juris, unattended, in a place of known danger, is not evidence of the parents' contributory negligence (Hagan's Petition, 5 Dill. [U. S.] 96, Fed. Cas. No. 9,802; Corbett v. O. S. L. R. Co., 25 Utah, 449, 71 Pac. 1065), the decided weight of authority, and we think the better rule, is that such unexplained presence is some evidence, not conclusive, but prima facie, evidence, of contributory negligence on the parents' part. 1 Thompson's Commentaries on the Law of Negligence, § 324; Wright v. M. & M. R. Co., 4 Allen (Mass.) 283; Hartfield v. Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273; Jeffersonville, etc., R. R. Co. v. Bowen, 49 Ind. 154; Westerberg v. Railroad Co., 142 Pa. 471, 21 Atl. 878, 24 Am. St. Rep. 510; Gibbons v. Williams, 135 Mass. 333; Finkelstein v. American Ice Co. (Sup.) 88 N. Y. Supp. 942; Albert v. Albany Ry. Co., 5 App. Div. 544, 39 N. Y. Supp. 430. We do not see any reason for the first of these rules, while for the last there appears to be some reason, even if not entirely satisfactory. Broadly speaking, negligence may be said to be a breach of duty. Primarily, and in a general way, the parents of a child of tender years owe the duty to protect such child from harm by keeping it out of danger. This duty is owed to the child for the child's sake, and it is likewise owed to the community in general in order that ordinary business pursuits may be carried on; for, if railroad tracks are to be made common playgrounds for irresponsible children, it does not require much foresight to see that but one result will inevitably follow, viz., the suspension of the railway business. Since the father of this child, who is the plaintiff in this action, owed the duty to exercise ordinary care to keep the child out of danger, a breach of that duty was negligence on his part; and the fact that he did not keep the child out of this danger, which the child could not appreciate, must be held to be prima facie evidence of the father's negligence. We are impelled to adopt this rule for the further reason that it appears to us

to be the more righteous one. The parents are the natural custodians of such a child, and they knew better than any one else what means they have employed to safeguard it. It would be a small matter for them to show what, in fact, they did respecting the care of the child, while in a majority of cases it would be practically impossible for the defendant to do so. We desire, however, to add emphasis to our statement that such unexplained presence is only prima facie evidence of contributory negligence, and the courts holding this view have quite generally said that comparatively slight evidence that the child was in the place of danger, despite the fact that the parents exercised due care, will warrant a submission of the question of contributory negligence to the jury. Fox v. Oakland Con. St. Ry. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216.

Up to this point we have considered the child's presence in the known place of danger as entirely unexplained, and in this assumption we think we are correct. Counsel for respondent do not even suggest that any explanation can be found in the evidence, but rest upon the theory that the burden was upon the defendant to make an explanation which would show negligence, if any, on the part of the plaintiff. However, this much does appear from the record. The mother testified that: "At the time the boy was injured I thought he was in the yard at home. He was in the yard a little while before. I certainly always exercised care in looking after and seeing where he was. I always kept him right around because I was afraid of the track, and not only him, but the rest of them." The father testified: "When I am around home I exercise care in looking after the children. I try to keep them around home. I did not know that the little boy was down at the railroad at the time he was hurt. As to what I was doing at the time he was brought home or just before, it was a little after supper, and I went out into the yard to milk a cow, and the little boy was with me at the time I started to milk her, and when I got through I went in with the pail and put it on the kitchen table, and it was not but a short time that I heard the child was killed, and I went down there and I brought him home in my arms." But the father, who is this plaintiff, also testified that they lived no more than 200 feet from the railroad track, and in view of this fact the testimony given above cannot be said to consist of any facts from which the jury could form a conclusion as to whether they did exercise ordinary care. The statement by each of these witnesses that care was exercised is the barest kind of a conclusion, while the statement that they tried to keep or did keep the child around, or around home, is susceptible of almost any conclusion.

We think we are fully justified in treating this as a case of unexplained presence of a child of tender years in a known place of

danger, unaccompanied by any one whose duty it was to care for him. These facts appearing in the record, we hold that there was prima facie evidence of plaintiff's contributory negligence; and because of the fact that the child's presence was not explained or some evidence offered tending to show that he was there, despite the exercise of ordinary care on the part of his parents, we think the plaintiff has failed to make out his case.

For the reason that the evidence is insufficient to sustain the verdict, the judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., concurs.

SMITH, J. (dissenting). While I agree with what is said in the foregoing opinion as to the law, I think there was sufficient evidence on the part of the plaintiff to warrant the court in submitting to the jury the question whether plaintiff was guilty of contributory negligence, and I am therefore of opinion that the judgment and order should be affirmed.

(77 Kan. 466)

HARROD et al. v. LATHAM MERCANTILE & COMMERCIAL CO.

(Supreme Court of Kansas. March 7, 1908.
Rehearing Denied April 17, 1908.)

1. STATUTES—TITLE OF ACT—REGULATION OF INSURANCE COMPANIES.

The title of chapter 93, p. 214, Laws 1871, is sufficient to embrace the provisions contained in sections 18 and 23 (pages 223 and 224) of the act, including the penalties prescribed therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 141-144.]

2. INSURANCE—REGULATION OF INSURANCE COMPANIES—FINES—PENALTIES—CONSTITUTIONAL LAW.

The provision of section 22 of the act referred to (Laws 1871, p. 224, c. 93) that one half of such penalty, when collected, shall be paid in to the treasury for the use of the county, and the other half to the informer, is invalid, being in violation of section 6, art. 6, of the Constitution.

3. STATUTES—PARTIAL INVALIDITY.

This invalid provision is not such an integral portion of the whole law as to be inseparable. The act provides proper means for collecting such penalties, which will be disposed of as the Constitution directs, and this does not violate the legislative intent or impair the efficacy of the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 58-60.]

4. SAME.

The penalties above referred to are not so far exclusive as to preclude a party, suffering loss from a violation of the statute, from recovering damages from the wrongdoer. The decision of this court upon the former hearing is adhered to.

5. TRIAL—QUESTIONS FOR JURY—WEIGHT OF EVIDENCE.

When the burden of proving the material averments of a petition is upon the plaintiff, it cannot be determined, as a matter of law, that the jury are bound to accept the evidence as true, although not contradicted. The weight

and sufficiency of testimony to prove a fact thus in issue is for the jury in the first instance, subject to the supervisory powers of the court, to be exercised afterwards if found necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 342, 343.]

(Syllabus by the Court.)

Error from District Court, Cowley County; D. M. Dale, Judge pro tem.

Action by the Latham Mercantile & Commercial Company against T. H. Harrod and John W. Hanlen. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Hackney & Lafferty, for plaintiffs in error.
Jackson & Noble, for defendant in error.

BENSON, J. In reviewing this case at a former hearing a judgment in favor of the plaintiff for nominal damages was reversed. Latham Co. v. Harrod, 71 Kan. 565, 81 Pac. 214. The second trial resulted in a judgment for the plaintiff for \$2,000. The defendants now bring the case here, insisting that the statute relied upon for recovery is unconstitutional, and that, in any event, the facts do not warrant a recovery.

The validity of the statute was not challenged at the first hearing. It is claimed that the title of the act is not sufficient under section 16, art. 2, of the Constitution, which provides that: "No bill shall contain more than one subject, which shall be clearly expressed in the title." The title of this act is "An act to establish an insurance department in the state of Kansas, and to regulate the companies doing business therein." Laws 1871, p. 214, c. 93. The contention is that the provision for penalties is not indicated in the title, and State v. Bankers' & Merchants' Mut. Ben. Ass'n, 23 Kan. 499, is cited in support of that claim. In that case the act was entitled "An act to amend" certain sections expressly named in the title, while the body of the statute contained a provision purporting to amend a different section, separate and independent from the subject specified. The title was restrictive, and could not be enlarged by interpretation. The distinction between broad and comprehensive titles and limited and restricted ones was carefully indicated—citing Bowman v. Cockrill, 6 Kan. 311, as illustrative of the rule applicable where the title is a comprehensive one. The title of the act under review in that case was "An act to provide for the assessment and collection of taxes," and was held to be broad enough to include a provision fixing a period of limitations for actions to recover land sold for taxes. In Woodruff v. Baldwin, 23 Kan. 491, the article of the Code of Criminal Procedure making provisions for the appointment of trustees for the estates of convicts was held to be embraced in the title "An act to establish a Code of Criminal Procedure." Mr. Justice Brewer said: "Evidently the Legislature intended by this title one whose scope was broad enough to include the

article; and, while there is a sense in which the article does not treat of criminal procedure, yet we must impute to the Legislature an intent to use the title in a broader sense. * * * And while the constitutional provision is mandatory, yet it is to be liberally construed, and so as not to prevent or embarrass ordinary legislation." *Woodruff v. Baldwin*, 23 Kan. 491.

It is not necessary that the title should be an abstract of the entire act, but it will be deemed sufficient if it fairly indicates, although in general terms, its scope and purpose. *Lynch v. Chase*, 55 Kan. 367, 40 Pac. 666. The provision of the Constitution, while mandatory, must be applied in a fair and reasonable way, otherwise it would become the source of more injury than the ills it was designed to remedy. *City of Eureka v. Davis*, 21 Kan. 578. An examination of many of our general laws will show that the incorporation of penalties in acts having only a general and comprehensive title has been common practice in our legislation. The executor's act has such a general title, and yet it embraces an instance of embezzlement, and provides punishment therefor. "An act in relation to marriage" is another example of this practice. "Roads and Highways" includes penalties for obstructing roads, defacing milestones, and the like. Whenever the penalty is fairly incidental to the regulation of the subject expressed, it may properly be included in the act, without special mention in the title. The act in question is to regulate insurance companies, and this suggests means to make the regulation effective. To regulate is to direct by rule or restriction; to govern. *Otto Gas-Engine Works v. Hare*, 64 Kan. 78, 67 Pac. 444. Penalties are plainly incidental to such regulation. The following cases are illustrative of the scope of such a general title: *In re Pinkney, Petitioner*, 47 Kan. 89, 27 Pac. 179; *La Harpe v. Gas Co.*, 69 Kan. 97, 76 Pac. 448; *State v. Thomas*, 74 Kan. 360, 86 Pac. 499.

It is also insisted that the act is void because it allows the penalties to be diverted from the school fund, contrary to section 6, art. 6, of the Constitution. This provision, although unconstitutional, does not make the law void. The obnoxious provision alone falls. It can be easily separated, and the law enforced without it. It was held in *Hardy v. Kingman County*, 65 Kan. 111, 68 Pac. 1078, that a similar provision was not such an integral portion of the whole law as to be inseparable from it, and might fall without destroying the remainder of the law. The general rule is that only the invalid parts of a statute are without legal efficacy. When, however, the void and valid parts are so connected in the general scheme of the act that they cannot be separated without violence to the evident intent of the Legislature, the whole will fail. *State v. Smiley*, 65 Kan. 240, 69 Pac. 199, 67 L. R. A. 903. This statute provides proper means for collecting the pen-

alties. It then provides for a disposition of such penalties, contrary to the constitutional mandate. This provision being invalid, the fund will be disposed of as the Constitution directs. This disposition in no manner violates the legislative intent, nor does it impair the efficacy of the law. The decision in *Atchison, T. & S. F. R. Co. v. State*, 22 Kan. 1, is easily distinguished. That action was brought by the informer to recover the penalties for his own use, and he necessarily failed. It was a direct attempt to enforce the void provision. So far as his interests were concerned, and so far as that provision was involved, the act was void, and it was so declared. The general language used must be interpreted to apply to the particular claim presented and the matters under consideration.

We conclude that the statute in question is not void for either of the reasons suggested. It is argued, however, that the construction put upon this law at the former hearing is erroneous in this: That the penalties prescribed for its violation are exclusive; that an individual suffering loss from any violation of its terms cannot recover damages therefor, and *Jones v. Horn*, 104 Mo. App. 705, 78 S. W. 638, is cited sustaining that view. Some other authorities are also referred to, holding that penalties imposed under various statutes are to be deemed exclusive of any other remedy. *Utley v. Hill*, 155 Mo. 232, 55 S. W. 1091, 49 L. R. A. 323, 78 Am. St. Rep. 569; *Mack v. Wright*, 180 Pa. 472, 36 Atl. 913; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Commonwealth v. Howes*, 32 Mass. 231. This court, however, adopted the contrary view, sustained by decisions in other states, and, as it was considered, by the better reasoning. The authorities do not appear to be in entire harmony on this subject. "Two apparently inconsistent rules have been enunciated by the courts in deciding whether damage, caused to an individual by the violation of a penal statute creating a new right or duty, constitutes a civil cause of action in his favor, or whether the penal cause of action is exclusive. On the one hand, it has been held that, as a general rule, the wrongdoer is liable in damages to a party injured by the violation of the statutory duty, notwithstanding he may be subject to the penalty for the public wrong; on the other, that the offense against the state is the only cause of action, and the penal suit in expiation thereof an exclusive remedy. By the better authority, the true test for determining whether or not such penal statutes confer a cause of action for private injuries resulting from the breach seems to be whether the intention of the law is to confer a right upon individuals in addition to creating a new public offense." 1 Cyc. 679.

The intention of this law is obvious. It is to protect our citizens who may become policy holders. *Morton v. Hart Bros.* 88 Tenn. 427, 12 S. W. 1026. The benefits

sought are not altogether to vindicate the sovereignty of the state, but to secure safe insurance for our citizens. When the protection is for the benefit of a class, or individuals of a class, it is held that an individual right of action accrues to the party injured. *Taylor v. Lake Shore & Mich. S. Ry.*, 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457. This distinction has not always been kept in view, and is sometimes shadowy, but in a general way it may serve to explain the divergence in the decisions. The Supreme Court of Iowa, in an action against an insurance agent to recover for loss under a policy issued in a company not licensed to do business in the state, said: "The statutes regulating the transaction of the insurance business in this state were enacted for the protection of policy holders, and especially to guard those seeking indemnity against loss from deception by companies incapable of performing their contracts and agents not authorized to bind them." *Hartman v. Hollowell*, 126 Iowa, 643, 102 N. W. 524. The Iowa statute was similar to our own, and the court in the same opinion said: "Plaintiffs, in the absence of knowledge to the contrary, had the right to assume that both the companies and the defendant had complied with the law. That neither had so done must have been known to the defendant, as he had no certificate from the State Auditor as their agent. * * * In seeking patronage he must be held to have been cognizant of the law with reference to foreign companies doing business in the state, and the necessity of his being authorized to act by the Auditor of State." Page 648 of 126 Iowa, and page 525 of 102 N. W. In the same opinion *Jones v. Horn*, supra, is referred to, and distinguished.

The opinion of the court in *Landusky v. Beirne*, 80 App. Div. 272, 80 N. Y. Supp. 238, sustains the plaintiff's contention. That was an action against an insurance agent; the policy having been taken out in an unauthorized foreign company. The court said: "The plaintiff made out a violation of the defendant's contract when he showed that the policy procured for him was not enforceable in New York or Pennsylvania, and that the company by which it was issued refused to pay the amount specified in the policy after receipt of due proofs of loss." In *Burges v. Jackson*, 18 App. Div. 296, 46 N. Y. Supp. 326, it was held that an agent who procured a policy to be issued by a company not authorized to do business in the state was liable for the resulting loss, on the ground of negligence in taking out such a policy which was held to be void. It is true that in this state such a policy would not be void, for the company is estopped from pleading its own disobedience to law (*Germania Fire Ins. Co. v. Curran*, 8 Kan. 9); but, where it is shown that a loss has resulted from such violation of law, notwithstanding the validity of the policy, the same rule ought to apply. It can

make no difference to the policy holder whether he loses because the policy is void or because it is valueless on account of the insolvency of the company. The wrongful act of the agent, in either case, causes the loss.

The contention of the defendants that the plaintiff was bound, equally with the defendants, to know that the company had not been authorized to do business in this state is without merit, for reasons fully stated in the former opinion. The parties were not in *pari delicto*.

An important question remains for consideration. The verdict was returned upon an instruction to find for the plaintiff. The claim of the plaintiff was based upon the alleged wrongful act of the defendants, agents of the insurance company, in causing the policy to be issued by a company not licensed to do business in this state, and which it was alleged was insolvent. A loss by fire was alleged, and the failure of the company to pay after due proofs of such loss had been made. The defendants admitted the issuance and delivery of the policy, and that they were agents of the company and partners as alleged, and denied the other averments of the petition. Upon this issue the plaintiff was required to prove the loss and its extent, that they made proofs thereof, the fact that the company was not authorized to do business in the state, and its insolvency. The fact that it was not so licensed to transact business in this state was shown by the deposition of the commissioner of insurance, and by the testimony of one of the defendants. Evidence of the destruction of the goods by fire, and of the amount of the resulting loss after applying other insurance, and of the delivery of proper proofs of loss, was given. Evidence was also offered that a judgment against the company for the amount of plaintiff's claim had been duly rendered in a local court in Chicago, Ill., where the home office of the company was located, and of the due return upon the execution that no property could be found to satisfy the same. The resident agent of the company at Chicago testified that, when the policy was issued, there was not enough money on hand to pay a loss of \$2,000, that the company had some securities, but whether of sufficient value to make good the loss he was unable to state, that after the loss occurred the company suffered other severe losses, and that its financial condition was not as good as it had been previous to such losses. This evidence was uncontradicted. The facts, however, which the plaintiff sought to prove by such evidence, were in issue.

The weight and sufficiency of testimony to prove a fact in issue is for the jury. It does not necessarily follow that a fact is established because testimony, fairly tending to prove it, is uncontradicted by opposing testimony. The burden of proving the material averments of the petition, not admitted, was

upon the plaintiff; and it cannot be said, as matter of law, that the jury were bound to accept the evidence as true, although not contradicted. *Jevons v. Railroad Co.*, 70 Kan. 491, 78 Pac. 817; *Railroad Co. v. Geiser*, 68 Kan. 281, 75 Pac. 68. Where there is evidence tending to show the constitutive facts advanced by the party sustaining the burden of proof, it is for the jury to say whether the evidence is sufficient for that purpose. 2 Thompson on Trials, § 2243. The jury determine the sufficiency of the evidence to prove the facts, and the court determines the sufficiency of the facts when proven. *Davis v. Miller*, 14 Grat. (Va.) 1. When, therefore, there is no dispute as to the ultimate facts upon which the right of recovery depends, the court may direct a verdict. The rule and its limitations have been stated by this court as follows: "There are cases where the court may and should instruct the jury in absolute form and direct a verdict in favor of one of the parties. This may be done where a party fails to show something essential to the maintenance of the action or defense, and also where there are no disputed facts for the jury to pass upon. Some of the courts have gone to the extent contended for by the defendant, and held that the court might direct a verdict in any case where a contrary verdict would be set aside as against the weight of the evidence. To this we cannot agree. Neither is it in accord with the decisions of this court, where it has been held, in effect, that if the evidence fairly tends to establish the plaintiff's cause of action or the defense of the defendant, the court cannot withdraw the case from the jury or direct a verdict, but must leave the weight and credit of the testimony with the jury." *Sullivan v. Phenix Ins. Co.*, 34 Kan. 170, 177, 8 Pac. 112, 117. Whenever the testimony must be weighed, and conclusions deduced therefrom, the jury alone must make the deductions in the first instance. *Avery v. Railroad Co.*, 73 Kan. 563, 85 Pac. 600; *Railroad Co. v. Watkins Merchandise Co.* (Kan.) 92 Pac. 1102. We do not wish to be understood as doubting the sufficiency of the testimony to show the plaintiff's loss, or the insolvency of the company, but it was the province of the jury, and not the court, to weigh the evidence and find these facts in the first instance, subject to the supervisory powers of the court, to be exercised afterwards if found necessary.

Because of the error in directing a verdict, the judgment is reversed, and the cause remanded for a new trial.

BISMARCK MOUNTAIN GOLD MINING CO. v. NORTH SUNBEAM GOLD CO.

(Supreme Court of Idaho. March 14, 1908.)

1. MINES AND MINING—NOTICE OF CLAIMS.

Under the provisions of section 3102, Rev. St. Idaho 1887, and of section 2324, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1426), requiring notices of location to contain such a de-

scription of the locality of the claim by reference to natural landmarks or permanent objects as to render the situation of the same reasonably certain from the letter of the notice itself, *held*, that the description of the Jesse James and Little Giant mining claims, as stated in said notices, is sufficient under the provisions of said statutes and the facts of this case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 46.]

2. SAME—LOCATION—NATURAL OBJECTS.

The object of the law, in requiring the location of mining claims to be made with reference to some natural object or permanent monument, is for the purpose of directing attention, in a general way, to the vicinity or locality in which the mining claim was to be found.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 46.]

3. SAME—CONSTRUCTION OF NOTICE.

Where it appears that the location of a mining claim is made in good faith, the court will not hold the locator to a very strict compliance with the law in respect to his location notice; and, if by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 46.]

4. SAME—NATURAL OBJECTS.

The natural objects or permanent monuments referred to in said statutes may be on the ground located, or off, as the case may be.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 46.]

5. SAME—LOCATION NOTICE.

It is the settled doctrine in this state that location notices should receive a liberal construction, to the end of upholding locations made in good faith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 46.]

6. SAME.

The object and purpose of a location notice is to give notice to subsequent locators; and, if there be a defect in the notice, and the subsequent locator has actual notice of the prior location, he will be bound thereby, at least so far as defects are concerned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 45.]

7. SAME—AMENDED LOCATIONS.

Section 5 of an act concerning mines and mining claims, approved February 14, 1890 (Laws 1890, p. 238), provides that amended locations may be made. Such amended locations, where they do not interfere with existing rights, relate back to the date of the original locations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 49.]

8. SAME.

It is the policy of the law, in allowing such amended locations, not to avoid a location for defects in the notice, but rather to give the locator an opportunity to correct his certificate or notice whenever defects are found in it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 49.]

9. SAME—RECORDING NOTICE—EFFECT—PRIMA FACIE NOTICE.

The location notice or certificate, when recorded, is prima facie evidence of all the facts the statute requires it to contain, and which are therein sufficiently set forth; and the affidavit of the locator attached to the notice, setting forth the fact that the ground was unoccupied mineral land of the United States at the time of his location, when introduced in evidence in an adverse suit, makes a prima facie case of such fact. Such notices are prima facie evi-

dence of all the facts required by the statute to be stated therein which are, in fact, sufficiently stated therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 50.]

10. SAME—POSTING NOTICE.

Held, that the evidence in this case is sufficient to make a prima facie case as to the fact of posting the location notices on said claims.

11. SAME—ANNUAL ASSESSMENT WORK.

Held, that the affidavits of labor, introduced in evidence, showing that the annual assessment work was done on said claims in the years 1904 and 1905, make a prima facie case on that question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 106.]

12. SAME—MISTAKE IN NOTICE.

If a mistake is made in such notice, it may be corrected by oral evidence. The fact as to whether the work was done is the main question, and not its method of proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 106.]

13. CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—PLEADING.

Where it is alleged in the complaint that the plaintiff is a foreign corporation, and that it has complied with the requirements of the Constitution and laws of this state relative to foreign corporations doing business in this state, a denial of its compliance on information and belief is not a sufficient denial to raise an issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2646.]

14. SAME—DEEDS TO FOREIGN CORPORATIONS.

Prior to the passage of the act of 1903, in regard to foreign corporations, neither the Constitution nor the statute rendered a conveyance of real estate to a noncomplying corporation void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2578-2586.]

15. MINES AND MINING—ADVERSE ACTION.

This is an adverse action to protect the title to real estate alleged to have been acquired before said act of 1903 went into effect, and not an action to enforce any contract made with the defendant corporation.

16. EVIDENCE—DECLARATIONS OF GRANTOR.

The declarations of a grantor of real estate, in regard thereto and to mining claims adjoining, may be admitted in evidence, in an action concerning the title to such claims, provided the declarations were made prior to the time such declarant sold his interest in such real estate, but not after.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1111-1116.]

(Syllabus by the Court.)

Appeal from District Court, Custer County; James M. Stevens, Judge.

Action by the Bismark Mountain Gold Mining Company against the North Sunbeam Gold Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Nathan A. Clark, for appellant. M. A. Brown, for respondent.

SULLIVAN, J. This is an action, brought in support of an adverse claim, to quiet plaintiff's title to two certain mining claims, located and known as the "Jesse James" and "Little Giant," situated on Bismark Mountain, in Yankee Fork mining district, Custer

county, Idaho. From the location notice it appears that the Jesse James claim was located on the 1st day of January, 1898, by E. L. Ayers and Louis Roy, and the Little Giant on the 16th day of April, 1898, by E. L. Ayers. On the 18th of November, 1899, said Ayers and Roy conveyed to George P. Mulcahy the said mining claims. Thereafter, on the 6th day of March, 1900, said Mulcahy conveyed said mining claims to one F. E. Langford, and thereafter, on the 29th day of December, 1900, said Langford conveyed said mining claims to the appellant, the Bismark Gold Mining Company, which is a corporation organized and existing under the laws of the state of Washington. The respondent, the North Sunbeam Gold Mining Company, is a corporation organized under the laws of the state of Idaho. It appears that Fred Kenenbly and E. E. Stettler located the Exchequer lode mining claim on the 11th day of June, 1903, which claim is located on said Bismark Mountain, and is tied, by notice of location, to the said Jesse James mining claim "on the west," when, as a matter of fact, it is on the east. This would indicate that the locators of the Exchequer recognized the Jesse James mining claim, although they made a mistake as to the point of compass. Thereafter, said Exchequer mining claim was transferred to the respondent corporation. It further appears that one W. J. Oster on the 27th day of April, 1906, located the Matilda, the North Sunbeam, and Squaw Hitch lode mining claims, all of which were located on said Bismark Mountain. Thereafter said Oster conveyed said three mining claims to the respondent corporation. It appears from the plat contained in the record that the Matilda, North Sunbeam, and Squaw Hitch claims overlap, and include all of said Little Giant claim in connection with other land; that the North Sunbeam and Squaw Hitch also lap over and onto a portion of the Jesse James claim. It also appears that the Exchequer laps over and onto the Jesse James. After obtaining title to the said Exchequer, Matilda, North Sunbeam, and Squaw Hitch, the North Sunbeam Company made application for a patent to those four claims, and this suit was brought by the appellant for the purpose of protecting whatever interests the appellant, the Bismark Company, had in and to said Little Giant, and Jesse James mining claims.

It appears that, during the years 1900, 1901, and 1902, the Bismark Company expended nearly \$30,000 in improving and developing the said Little Giant and Jesse James claims; most of the work being done on the latter. It ran over 1,400 feet of tunnels, and erected dwellings and buildings of various kinds on said premises; that, after said development work was stopped, it appears that the Bismark Company performed the annual assessment on each of said claims up to the time of the commencement of this

suit. It appears from the record that mineral-bearing rock was discovered in place on said claims, and that said claims were properly staked, as required by law, and that the ground included within their boundaries was an unappropriated part of public domain at the date of their location. During the trial, among other evidence was introduced the original location notices of said claims, also amended location notice thereof. When the appellant had finished putting in its evidence and rested, the defendant made a motion to strike out the original and all amended certificates of location of the Jesse James and Little Giant mining claims, based on a number of different grounds, the main one being that said notices or certificates of location did not contain any reference to any natural object or permanent monument, so as to render the situation and location of said claims reasonably certain from the letter of the notice itself, as required by the provisions of section 3102, Rev. St. Idaho 1887, and section 2324, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1426). Said location notices are as follows:

"Notice is hereby given that we, the undersigned citizens of the United States, conforming to mining laws thereof and the state of Idaho and the local rules, regulations, and customs, have this day located and do claim 1,500 linear feet in length by 600 feet in width, the same being 300 feet on each side of location stake together with all dips, spurs and angles and all other veins or lodes, the top or apex of which lies within said boundaries; this claim shall be known as the 'Jesse James Quartz Mining Claim' and is situated on Bismark Mountain, Yankee Fork mining district, county of Custer, state of Idaho, and is bounded and described as follows: Commencing at this stake and notice and running S. E. 300 feet to S. E. side line, thence N. E. 600 feet to N. E. corner stake, thence N. W. 600 feet to N. W. corner stake, thence S. W. 600 feet to N. W. side-line stake, thence S. W. 900 feet to S. W. corner stake, thence S. E. 600 feet to S. E. corner stake, thence N. E. 900 feet to place of beginning. Located this 1st day of January, 1898. E. L. Ayers, Louis Roy, Locators."

"Notice is hereby given that I, the undersigned, having complied with the requirements of chapter 6, tit. 32, §§ 2318-2352, Rev. St. U. S. (U. S. Comp. St. 1901, pp. 1423-1441), and of the laws of Idaho state, relating to the location of mining claims and all local customs, laws, and regulations, have located and do claim 1,500 linear feet along this lode or vein of quartz, by three hundred (300) feet in width on each side of the middle of the lode or vein, making 600 feet in width. The claim so located is hereby named the Little Giant Quartz Claim and is situated in the Yankee Fork mining district, Custer county, Idaho state, and is described as follows: Commencing at this stake and notice, which

is situated about center of claim and running N. E. 750 ft. to center and stake, thence 300 ft. N. W. to N. W. corner stake, thence 1,500 ft. S. W. to S. W. corner stake, thence S. E. 600 ft. to S. E. corner stake, thence N. E. 1,500 ft. to N. E. corner stake, thence N. W. 300 ft. to place of beginning, situated on Bismark Mountain. E. L. Ayers, Locator. Located this 16th day of April, 1898."

It will be observed from the location certificate of the Jesse James that the locators claimed 1,500 feet in length by 600 feet in width. It is also stated in said notice that said claim shall be known as the "Jesse James Quartz Mining Claim," and is situated on Bismark Mountain, Yankee Fork mining district, Custer county, state of Idaho, and "is bounded and described as follows." Here follows an accurate tracing of the boundaries of the several lines and corner and side-line stakes, as will be observed from the location notice above set forth. The location notice of the Little Giant claim, after reciting the facts usually recited in such a notice, states that the locator claims 1,500 feet along that lode or vein by 300 feet in width on each side of the middle thereof, and that said claim was named the Little Giant quartz claim, and is situated in Yankee Fork mining district, Custer county, state of Idaho, and is described as follows: "Commencing at this stake and notice, which is situated about center of claim and running N. E. 750 ft. to center end stake, thence 300 ft. N. W. to N. W. corner stake, thence 1,500 ft. S. W. to S. W. corner stake, thence S. E. 600 ft. to S. E. corner stake, thence N. E. 1,500 ft. to N. E. corner stake, thence N. W. 300 ft. to place of beginning, situated on Bismark Mountain." And to each of such notices is attached the affidavit of E. L. Ayers, one of the locators, which affidavits substantially conform to the affidavit required by section 3104 of the Revised Statutes, as amended by Laws 1895, p. 29. The provisions of section 3102, Rev. St. Idaho, and of section 2324, Rev. St. U. S., so far as requiring the notice of location to contain the date of the location, the name of the locators, and the description of the claim located by reference to some natural object or permanent monument as to render the situation of such claim reasonably certain from the letter of the notice, are substantially the same.

While there has been some diversity of opinion in some of the states as to the definiteness and certainty required by the provisions of said section, the more recent decisions are more liberal in the construction of said provisions; and we think the correct rule is stated in *Farmington Gold Mining Co. v. Rhymney Gold & Copper Co.*, 20 Utah, 363, 58 Pac. 832, 77 Am. St. Rep. 913, where it is said: "If by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient." That case was cited with approval

by this court in *Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 955. Whether the notice and description of the claim were sufficient to apprise other prospectors of its precise location is a question of fact and not of law. *Ellers v. Boatman*, 111 U. S. 356, 4 Sup. Ct. 432, 28 L. Ed. 454. In *Dillon v. Bayliss*, 11 Mont. 171, 27 Pac. 725, it was held that, when the court cannot say from the inspection of the notice that the description is an impossible or uncertain one, it may be admitted in evidence; but it is not conclusive, and may be subjected to the attacks of its adversary. In each of said notices it is recited as follows: "Commencing at this stake and notice," etc., thus referring to a stake, and it is also stated in the notice of the Little Giant claim that said stake is situated about the center of the claim. The notices describe each of said claims as being situated on Bismark Mountain, in Yankee Fork mining district. A deputy mineral surveyor of that region testified that said Bismark Mountain is a small mountain; that it could be covered by 10 or 12 mining claims. Another witness testified that said mountain is small; that it is a well-known object around there in the Yankee Fork district; that it is known among prospectors there everywhere. Another that he had been acquainted with it since 1898; that it was well known. Another witness testified that Bismark Mountain is well known to every prospector from Challis through; that it is a small mountain, and on the east side of the slope from the apex to the base is about 2,100 to 2,200 feet. Another testified that Bismark Mountain has been known for years; that it is from 2,000 to 2,500 feet on one side, and from 500 to 1,200 on the other; that it is very precipitous for 500 feet, and then slopes gently; that it was on the apex of this mountain that the Jesse James was located. Another testified "that Bismark Mountain is a well-known mountain in that country to all prospectors." Another that Bismark Mountain was a well-known object; that there was quite a long rock on top; "that it is rather sharp, and that the Jesse James is situated right on top."

Thus it is clearly shown that said Bismark Mountain was a small mountain, and well known to prospectors in the Yankee Fork mining district. It is well recognized that the ties of mining claims to some natural object or permanent monument are not and were not intended to be as accurate and correct as they would be if tied by a competent surveyor. If that were true, very few, if any, of many hundreds of mining claims, located in good faith by prospectors and miners, would be held valid. It was held in *Flavin v. Mattingly*, 8 Mont. 242, 19 Pac. 384, as follows: "The object of the law, in requiring the location to be made in reference to some natural object or permanent monument, is not very apparent, unless it was for the main purpose of directing attention in a general way, to the vicinity or locality in which the location was

to be found." And in *Farmington Gold M. Co. v. Rhymney G. & C. Co.*, supra, the court said: "With just how much accuracy the description of a mining claim, in reference to natural objects or permanent monuments, must be stated in the notice of location is not set forth in the statute; and where, as in this case, the location was evidently made in good faith, we are not disposed to hold the locator to a very strict compliance with the law in respect to his location notice. If by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient."

Said provisions of the statute were designed to secure a description, so that the mining claim could be readily ascertained. See *Hammer v. Garfield Mining Co.*, 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; *Bennett v. Harkrader*, 158 U. S. 144, 15 Sup. Ct. 863, 39 L. Ed. 1046. The natural objects or permanent monuments referred to are not required to be on the ground located, although they may be; and the natural object may be any fixed natural object, and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. *North Noonday Min. Co. v. Orient Min. Co. (C. C.)* 1 Fed. 533; *Jackson v. Dines*, 13 Colo. 90, 21 Pac. 918. And it was held in *Hansen v. Fletcher*, 10 Utah, 271, 37 Pac. 480, that a prospect hole, rock monument, or stakes are, within the meaning of the law, permanent monuments. It is the well-settled doctrine of all of the later decisions that location notices and records should receive a liberal construction, to the end of upholding a location made in good faith. In *Londonderry M. Co. v. United G. M. Co.*, 38 Colo. 480, 88 Pac. 455, where the court was considering the sufficiency of a location notice, it is said: "Every case where this question is raised must therefore depend upon its own circumstances. As previously stated, the purpose of such location certificate is to give notice to subsequent locators; and, if by reasonable construction the language descriptive of the situs of a claim, aided or unaided by testimony, allunde, will do so, it is sufficient in this respect. In other words, the object of requiring a reference to a natural object or permanent monument is to furnish means by which to identify the claim, and whatever reference will accomplish this object satisfies the law."

It appears from the evidence that said Jesse James and Little Giant mining claims were located very prominently on said Bismark Mountain, the former on the very top, and that the appellant company had expended large sums of money during the years 1900, 1901, and 1902 in developing them, and had erected dwelling houses, bunkhouses, and other buildings in connection therewith; that the most of the work had been done on the Jesse James claim. Something over 1,400 feet of tunnel had been run. With that condition ex-

isting W. J. Oster, who located said Matilda, North Sunbeam, and Squaw Hitch mining claims on the 27th day of April, 1906, testified that he had been in the mining business since 1883, and that he had been on Bismark Mountain since 1903, and was acquainted with those premises. It does not seem possible that a man could have been on that little mountain for three years without knowing of said Jesse James and Little Giant mining claims, the former of which is located on the very top of said mountain, and on which claims nearly \$30,000 had been expended in developing them. He testified as follows: "I knew at time [1903] of the existence of two stakes that were reputed to be the easterly end stakes of the Jesse James; one of them was at the southwest corner of the Exchequer as staked." Those facts appearing, every reasonable presumption that can be drawn therefrom should be in favor of his knowing of said locations; and his grantees should not be permitted to take advantage of any minor defects in the location notices of said mining claims. If Oster had actual notice of the location and boundaries of said claims, he nor his grantees will be permitted to take advantage of some technical defect in the location notice, where it appears that said claims were located in good faith. Of course, if it be shown that the appellant company failed to do its annual assessment work upon said claims, then the knowledge of a subsequent locator of the fact of the former location of said claims would not affect the subsequent locator's right or privilege to locate the same or part of the same ground. We think the court erred in striking out said location notice. In the case at bar the statement in the location notices that said mining claims were located on Bismark Mountain, and the proof aliunde showing that said mountain was a small, well-known mountain in Custer county, and the fact of the large expenditure of money thereon prior to the location of the other mining claims referred to in this case, and the fact that the other locators knew of said mining claims prior to making their locations, taking into consideration all of those facts, we conclude that said notices of location sufficiently identify said claims by reference to permanent monument or fixed object, within the requirements of the provisions of said statute. The sufficiency of each notice of location depends upon the facts and circumstances surrounding it, and will be liberally construed in the light of such facts and circumstances, when it appears that the locations have been made in good faith.

The next question raised is in regard to the court striking out the amended certificates of location. The evidence shows that, after the respondent's grantors had attempted to locate the ground in question and had applied for patent therefor, and prior to the time of the commencement of this action, the appellant corporation made and recorded amended certificates of location on said Jesse James and

Little Giant claims, in which amended certificates descriptions were made from plats of actual surveys of said claims, and said claims were tied to United States mineral monument No. 1, by course, distance, and magnetic variation. Said amended certificates were received in evidence with the original certificates, and were later stricken out on motion. That action of the court is assigned as error.

This court had under consideration in *Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 955, the provisions of section 5 of an act entitled "An act to define the manner of locating lodes, quartz and placer claims. * * * Sess. Laws, 1899, p. 238. That section provides, in effect, that if at any time the locator of a mining claim, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, etc., he may file an additional certificate, subject to the conditions of said act, provided that such amended location does not interfere with the existing rights of others at such time as the amendment is made. It was held in that case that such amended location notice related back to the date of the original location. Since we have held that the court erred in striking out the location notice, it follows that it erred in striking out said amended certificates of location. Of course, if said amended certificates of amended location took in ground not formerly covered by the original notice and location, which ground had been located prior to the filing of such amended location notices, such ground could not be included in such amended location certificates. In the case of *McEvoy v. Hyman* (C. C.) 25 Fed. 596, the court had under consideration an amended location certificate, and held that the first record of a mining claim is usually, if not always, imperfect, and that it is the policy of the law to give the locator an opportunity to correct his record when defects are found therein; and, when it is so corrected, the amendment takes effect, with the original certificate of location as of the date of such original certificate. It would appear from that decision that the location certificate therein considered stated that said mining claim was situated on "Aspen Mountain." This was held a sufficient reference. The original location certificates involved in this suit are similar in that respect; for they state that said Jesse James and Little Giant claims are situated on "Bismark Mountain." In the decision of that case, Judge Hallett said: "Under the law as it is at present, a full, complete, and unimpeachable certificate cannot be made without the aid of a surveyor and the best instruments; and, with such aids, the surveyors often disagree, and time and labor are required to decide between them. Of course, it is often, and perhaps generally, impracticable to obtain the services of a surveyor in making a location; and the miner must depend upon his own skill and judgment. In

such effort he usually fails. Indeed, it may be said as to the course of his lines he is always in error; and the natural object and permanent monument, required by section 2324 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1426), are entirely beyond his grasp. He does not know what they are, or how to refer to them. Every one who is at all familiar with mining locations knows that, in practice, the first record must usually, if not always, be imperfect. Recognizing these difficulties, it has never been the policy of the law to avoid a location for defects in the record, but rather to give the locator an opportunity to correct his record whenever defects may be found in it." See, also, *Frisholm v. Fitzgerald*, 25 Colo. 290, 53 Pac. 1109; *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111. The last above cited decisions are from the state of Colorado. In *Morrison v. Regan*, supra, referring to the last-cited decisions from Colorado, the court said: "This court is in accord with the rule laid down in those decisions upon the question under consideration here. If in making the amended certificate of location it included land not included in the original location, and interfered with existing rights as to such land, the amended location would not relate back to the date of the original location, so far as the recently included land is concerned." *Butte C. M. Co. v. Barker*, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177.

Said motion for nonsuit was also based on the ground that the plaintiff's evidence did not show that the premises located as the Jesse James and Little Giant was unappropriated public domain of the United States at the time the grantors of the appellant made said locations. It appears that both of said grantors were dead, and could not be produced as witnesses on the trial. One of the locators swore to and signed the affidavits required by law to be attached to such location notices. Said affidavits were introduced with said notice, and said locator stated under oath therein as follows: "That the ground and claim therein described or any part thereof has not, to the best of my knowledge and belief, been heretofore located, according to the laws of the United States or the state of Idaho, and if so located, the same has been abandoned or forfeited. * * *" The law requires that one of the locators named in the notice of location must make and subscribe an affidavit "in writing on or attached to the notice," containing the facts above enumerated, among others; and we think such affidavit is prima facie evidence in this class of cases of the facts therein stated. If this were not the correct rule, in many cases where the locators have disappeared or died no proof could be made whatever, and valuable rights would be lost without any fault of the locators or their assigns. In *Strepey v. Stark*, supra, in considering a similar question, the court said: "The location certificate, when recorded, is prima facie

evidence of all the statute requires it to contain, and which are therein sufficiently set forth." *O'Reilly v. Campbell*, 116 U. S. 418, 6 Sup. Ct. 421, 29 L. Ed. 669; *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153; *Id.*, 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964. In *Goldberg v. Bruschi*, 140 Cal. 708, 81 Pac. 23, the court said: "In a suit to quiet title to mining land, when plaintiff made his proof of citizenship and of discovery of gold-bearing quartz, and had shown a location according to the requirements of the law, he established his case prima facie; and it was not necessary for him to make further proof that the land was unoccupied mineral land of the United States." Location certificates or notices are prima facie evidence of all the facts required to be stated therein by the statute, in so far as it contains those facts. It is contended that the proof of posting the location notices at the discovery of each of said claims is not sufficient. After an examination of the evidence we think it is sufficient to make a prima facie case of the fact of such posting, and also that it sufficiently appears that the notices posted were like those recorded and introduced in evidence.

It is also contended that the evidence does not show that the assessment work was done for the years 1904 and 1905. Affidavits of labor were filed in the proper office and introduced in evidence, showing that the annual assessment work on each of said claims was done in said years. The affidavit for the assessment work done in 1904 was made by one Cross, and he, in effect, swears that \$200 worth of work was done on said Jesse James and Little Giant claims, at the expense of the Bismarck Mining Company. The affidavit of proof of labor for 1905 was made by one Casto, and he therein swears that \$100 worth of work was done upon each of said claims in the year 1905, at the expense of H. E. Foster, "owner of said claims." There was a mistake in said notice as to the name of the owner of said claims. It appears from the record that H. E. Forester was president of the Bismarck Company, and it appears that a mistake was made in said proof of labor in stating that said work was done at the expense of "H. E. Foster," instead of "Forester." Forester evidently paid for the assessment work, for the year 1905, for the appellant company; he being its president. The main question on this point is, was the work done at the expense of the appellant? If, in fact, it was, that may be shown by any competent evidence.

Under the provisions of section 2332, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1433). It is provided that, where locators or their grantors have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims, in the state or territory where the same may exist, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto, in

the absence of any adverse claim. In considering the provisions of that section the Supreme Court of Colorado, in *Cleary v. Skiffich*, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207, held that said statute was not available in an action brought in support of an adverse claim, except that it might be in such action that proof of such possession would be sufficient upon which to presume that all steps necessary to effect a location of the claim adversely had been taken; and it has been held that, where possession of a mining claim was continued for the period covered by the state statute of limitations before the adverse right exists, it is equivalent to a location under the laws of Congress. *Altoona Q. M. Co. v. Integral Q. M. Co.*, 114 Cal. 105, 45 Pac. 1047. See, also, *Belk v. Meagher*, 104 U. S. 279, 420, 26 L. Ed. 735; *M. Co. v. Bullion M. Co.*, 3 Sawy. 634, Fed. Cas. No. 4,089. It will be observed that both Congress and the courts have endeavored to protect the rights of locators and their assigns where locations have been made and held in good faith, and courts have given a liberal construction to the mining laws and locations made under them with a view of doing justice to the prospector and miner who have acted in good faith.

It is next contended that the appellant has failed to show that it, being a foreign corporation, had complied with the laws of this state so as to entitle it to do business in the state. It is alleged in the complaint that the appellant corporation was duly organized under the laws of the state of Washington, and, as such corporation, had complied with the requirements of the Constitution and laws of this state relative to foreign corporations doing business in the state. This allegation was denied, on information and belief, by the answer. In *Valley Lumber & Mfg. Co. v. John Driessel* (Idaho) 93 Pac. 765, this court held that the fact as to whether a foreign corporation had complied with the Constitution and law in that regard was a matter of record, and a denial thereof on information and belief was not a sufficient denial. There being no sufficient denial of the allegation as to whether the appellant corporation had complied with the Constitution and law so as to enable it to transact business in this state, there was no issue raised by such denial.

It appears that the appellant corporation procured whatever title it had to the mining claims in question in 1900, and prior to the amendment of section 2653, Rev. St. 1887, by the act of 1903 (Laws 1903, p. 49), there was nothing in the Constitution of this state or the statutes rendering a conveyance of real estate to a noncomplying corporation void. Therefore the conveyance of said mining claims to the appellant corporation was valid at the date of said conveyance, and was not made void by the amendment of said section 2653 in 1903. This is an action in support of an adverse claim, and not an action to enforce a contract against the respondent corporation; but it is an action to protect the

title to real estate acquired before said act of 1903 went into effect. The appellant corporation in this adverse suit is attempting to protect its own title against the assault on it by the respondent corporation, each claiming to have obtained title through different and adverse locators. *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; *Reynolds v. Crawfordsville Bk.*, 112 U. S. 412, 5 Sup. Ct. 213, 28 L. Ed. 736.

It is next contended that the court erred in not allowing the witness Winwood to state the conversation which he had with Kenenbly, one of the locators of the Exchequer mine, as to the Little Giant stakes. Kenenbly thereafter conveyed said Exchequer claim to the respondent corporation, and it is contended that, he being a grantor of the respondent, his declaration as to the stakes of an adjoining claim, to wit, the Little Giant, was admissible in evidence in this suit. That would depend altogether upon the fact whether those declarations were made prior to the time that Kenenbly conveyed said Exchequer claim to the respondent corporation. If such conversation was had before Kenenbly conveyed said claim to the respondent, the conversation should have been admitted in evidence; otherwise, not.

There are other errors assigned, but none that will arise on a retrial of this case, and it will therefore not be necessary for us to pass upon them. It is suggested by counsel for appellant that, on the record as presented, in case of a reversal of the judgment, this court would be fully justified in directing judgment to be entered for the appellant. There are several cogent reasons why this cannot be done. While we hold that the plaintiff made a prima facie case and was improperly nonsuited, the respondent had not put in any evidence on its behalf, which it would have had a right to do had the court not granted a nonsuit.

The judgment is reversed, a new trial granted, and the cause remanded for further proceedings, with costs in favor of the appellant.

AILSHIE, C. J., and ST. J. WART, J., concur.

KIESEL v. BYBEE et al.

(Supreme Court of Idaho. March 27, 1908.)

1. EVIDENCE—BURDEN OF PROOF—DEFENSES.

Where a complaint is open to demurrer, on the ground that the contract sued on was entered into by a foreign corporation, and that the complaint fails to state that the corporation had complied with the Constitution and statutes of this state so as to entitle it to do business within the state, and the defendant fails to raise the objection by demurrer, but elects to plead it as an affirmative defense to the plaintiff's right of recovery, the burden of proving such allegation rests upon the defendant. If the defendant would have the burden of proving compliance with the statute rested where it properly belongs, namely, on the plaintiff, he must raise the objection by demurrer, and

thereby compel the plaintiff to allege and prove such compliance.

2. TRIAL—FINDINGS—SUFFICIENCY.

Where the complaint contains no allegation as to the compliance by a foreign corporation with the Constitution and statutes of this state, and the defendant pleads affirmatively in his answer that such corporation had not complied with the law, the burden of proof is on the defendant to show noncompliance, and the finding by the court that the defendant introduced no evidence in the case to show noncompliance on the part of the corporation is sufficient on that issue to support a judgment in favor of plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 945.]

3. SAME—FILING COPIES OF INCORPORATION—DESIGNATION OF AGENT.

Under the act of March 10, 1903 (Laws 1903, p. 49), requiring a foreign corporation doing business in this state to file certified copies of its articles of incorporation and also a designation of an agent upon whom service of process can be had, a foreign corporation that had complied with the law prior to its amendment will be held to have substantially complied with the amended law if, subsequent to the passage of the act of 1903, it performs all the additional acts and things required by the latter statute that were not required by section 2653 of the Revised Statutes of 1887 prior to the amendment.

4. MORTGAGES—FORECLOSURE—EVIDENCE.

Findings in this case examined and considered, and held sufficient to support the judgment.

(Syllabus by the Court.)

Appeal from District Court, Bingham County; J. M. Stevens, Judge.

Action by Fred J. Kiesel against David Bybee and Emily Bybee. Judgment for plaintiff, and defendants appeal. Affirmed.

Merriman & Wilkins, for appellants. F. L. Bradley and Hasbrouck & St. Clair, for respondent.

AILSHIE, C. J. A motion has been made in this case to dismiss the appeals, on the ground that no sufficient undertaking was filed. The appeal was taken from both the judgment and an order denying a motion for a new trial. A new and additional undertaking was filed in this court, and approved January 31st of this year. This undertaking, however, is given only upon the appeal from the judgment. As to that appeal it is specific and sufficient. There being no undertaking, however, on the appeal from the order denying a motion for a new trial, that appeal must be dismissed, and it is so ordered.

This leaves the case here on an appeal from the judgment alone. On this appeal we cannot examine the evidence for the purpose of determining its sufficiency to support the findings. It is urged by appellants that the findings are not sufficient to support the judgment. The principal point argued is as to the compliance by plaintiff's assignor, the Western Loan & Savings Company, a foreign corporation, with the foreign corporation laws of this state. The plaintiff alleged in his complaint that he purchased the note and mortgage sued on from the Western Loan &

Savings Company, the payee named therein, and that his assignor was at all the times mentioned in the complaint a foreign corporation, organized and existing under the laws of the state of Utah and doing business in the state of Idaho in its corporate name. The complaint, on the other hand, contained no allegation whatever as to the compliance, by this foreign corporation, with the laws of this state, in order to entitle it to do business within the state. The defendants filed a general demurrer to the complaint, but there does not seem to have been any ruling by the court on that demurrer; and it was apparently waived by defendants, who answered the complaint. By the answer the defendants admitted that the Western Loan & Savings Company was a foreign corporation, organized and existing under the laws of the state of Utah and doing business in Idaho. Defendants then alleged that the Western Loan & Savings Company, a foreign corporation, had failed and neglected to comply with the Constitution and statutes of this state, and that it failed and neglected to file certified copies of its articles of incorporation and designate a statutory agent on whom service of process could be made, as provided by Act March 10, 1903 (Sess. Laws 1903, p. 49). After the evidence was all in and the case was finally submitted, the court made his findings of fact and conclusions of law, and entered judgment in favor of the plaintiff.

By paragraph 1 of the findings the court finds "that the allegations set forth in said plaintiff's complaint are true and correct, and that the allegations set forth in the answer and cross-complaint of the defendants are true." By paragraphs 2 and 3 thereof the court finds the facts relative to the execution of the note and mortgage and the amount due thereon. In paragraph 4: "The court further finds that the defendants have offered no evidence in this action to show that the Western Loan & Savings Company, a Utah corporation, has not filed designation of agent and copies of its articles of incorporation, as required by section 2653 of the Revised Statutes of 1887 of the state of Idaho, as amended by Act March 10, 1903 (Laws 1903, p. 49)." In that paragraph the court proceeds to specifically find that the corporation at all times had a principal place of business within this state and an agent upon whom process could be served, and that it had complied with the requirements of section 10 of article 11 of the Constitution, and that on the 10th day of October, 1896, it filed in the office of the clerk of the district court of Ada county, and also with the Secretary of State of the state of Idaho, a designation, in writing, of Ada county as its principal place of business, and a written designation of a resident citizen of Ada county as agent of the corporation on whom process might be served. The court also finds that on the 10th day of October, 1896, said corporation filed, in the office of the Secretary of State of the state of Idaho, a certificate

of its incorporation, duly certified by the Secretary of State of the territory of Utah, and that afterward, and on the 6th day of December, 1904, the corporation filed in the office of the recorder of Ada county, and also in the office of the Secretary of State, a duly certified copy of its articles of incorporation, and that on the same date the Secretary of State issued to the corporation a certificate, to the effect that it had fully complied with section 10 of article 11 of the Constitution, and with section 2653, Rev. St. 1887, as amended by Act March 10, 1903 (Laws 1903, p. 49).

In paragraph 1 of the conclusions of law the court concludes as follows: "That the plaintiff's assignor, the Western Loan & Savings Company, a Utah corporation, had, at the time of the execution and delivery of the note and mortgage set forth and described in plaintiff's complaint, fully complied with the Constitution and laws of the state of Idaho relating to foreign corporations, and was then and is now entitled to do business in this state."

The foregoing cover all the findings and conclusions concerning the compliance with the Constitution and laws of this state by plaintiff's assignor, the Western Loan & Savings Company. The first proposition advanced by appellants on this point is that, under the decisions of this court with reference to foreign corporations, and particularly in the case of Valley Lumber & Mfg. Co. v. Driesel, 93 Pac. 771, the burden of proving compliance with the laws of this state rested upon the plaintiff. That contention requires some consideration. In the Driesel Case this court held that a complaint by a foreign corporation that failed to allege that the corporation had complied with the Constitution and laws of this state was open to demurrer, and that, if the question was not raised by demurrer, the defendant might raise it by answer; but that, if it was not raised by demurrer or answer, it was waived. If the defendant had raised the question of the capacity of plaintiff's assignor, the Western Loan & Savings Company, to transact the business out of which this contract arose, and to enforce which this action was brought, then it would have been incumbent on the plaintiff to have alleged such fact, and consequently the burden of proving that fact would have also rested upon the plaintiff. Defendants did not see fit to raise the question in that way. They rather elected to raise the question of compliance by an affirmative allegation in their separate defense. By pursuing this method of raising the question of the corporation's compliance with the statute the defendants necessarily assumed the burden of proving that fact. It is true that ordinarily a litigant does not assume the burden of proving a negative; but here the defendants did not see fit to raise the question so as to throw the burden, where it properly rested, upon the plaintiff, but rather assumed to

plead the negative of those facts as an affirmative defense. They therefore assumed the burden and responsibility of proving the allegations of their complaint. In this view of the case and condition of the pleadings the question now arises as to whether the findings made by the court, as hereinbefore recited, are sufficient to support a judgment in favor of plaintiff.

We think it is clear that the findings in this respect support the judgment. The court finds that the defendants "offered no evidence in this case to show that the Western Loan & Savings Company has not filed designation of agent," etc., as required by the Constitution and statute. In addition to this finding the court further finds that the corporation had complied with the statute, although that finding is among the conclusions of law. The court might have rested with the finding that defendants had offered no evidence to show that the corporation had not complied with the law. It is urged by appellants that a filing of articles of designation of an agent made by the corporation prior to the act of March 10, 1903, would not answer for the discharge of a duty of the same nature required by the latter act. We do not think this position is well founded. The statute of 1903 requires a series of acts to be performed by a foreign corporation in order to entitle it to do business in this state. Some of the specific acts in that series of acts are substantially the same as certain acts required by section 2653, Rev. St. 1887, before the amendment. Now we can see no necessity for a corporation, that is attempting to comply with the statute of 1903, performing any of the specific acts that it had already performed prior to the passage of the act. It would only be necessary for such a corporation to comply with the additional requirements imposed upon it by the act of 1903, so that all the acts required by the latter statute would be complied with and performed, either by the things done prior to the passage of the act, or those done subsequent to the passage of the act, or by both taken together. What the statute is most particular about is that all these acts shall be performed, and duties complied with, by a foreign corporation before it does business within this state. This view of a similar statute was taken by the Court of Chancery Appeals of Tennessee in United States Sav. & Loan Co. v. Miller, 47 S. W. 17, wherein the Tennessee court said: "Acts 1895, p. 123, c. 81, requiring a foreign corporation to file a copy of its charter with the Secretary of State, are complied with where such charter has been on file with the Secretary of State for some years prior to the passage of the act."

The question as to the compliance of this foreign corporation with the laws of this state so as to entitle it to do business in the state seems to be the only point raised that can be considered on this appeal from the judgment. Having determined that question ad-

versely to the contention of appellants, it follows that the judgment must be affirmed; and it is so ordered, with costs in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

WEISER NAT. BANK v. JEFFREYS et al.
(Supreme Court of Idaho. March 27, 1908.)

1. TAXATION—NATIONAL BANKS—POWER TO TAX.

The only power the state has to levy any taxation, either direct or indirect, upon national banks, their property, assets, or franchises, is that granted by the laws of the United States.

2. SAME—EXTENT OF POWER.

Section 5219, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3502), is the measure of the power of a state to tax national banks, their property or their franchises.

3. SAME.

Any tax on the property of a national bank that is in excess of and not in conformity to the provisions of said section of the Revised Statutes of the United States is void.

4. SAME—"CAPITAL STOCK"—"SHARES OF CAPITAL STOCK."

The term "capital stock" does not mean "shares of capital stock," as used in our revenue law, but means the actual money or property paid in and possessed by the corporation.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 959, 967; vol. 8, p. 7595.]

5. SAME.

There is no authority, under the statutes of the United States nor under the revenue laws of this state, which authorizes the taxation of the capital stock of national banks.

6. SAME—SHARES OF STOCK.

The county assessor has no authority to assess the "capital stock" of a national bank, but is given authority to assess the shares of stock of such bank to the owners thereof.

7. SAME—BOARDS OF EQUALIZATION.

Under the provisions of section 12, art. 7, of the state Constitution the county commissioners for the several counties of the state constitute the boards of equalization for their respective counties, whose duty it is to equalize the valuation of the taxable property in their respective counties, under such rules and regulations as may be prescribed by law.

8. SAME—METHOD OF EQUALIZATION.

Under the provisions of sections 54 and 55 of the revenue act of this state, approved March 12, 1901 (Sess. Laws 1901, p. 251), the method and manner of equalizing the valuation of the taxable property in the several counties of the state is provided for, and applies to the taxable property in the county, and not to property over which the taxing power has no jurisdiction.

9. SAME—PROPERTY SUBJECT.

Under the provisions of said revenue act the assessor is authorized to assess the shares of stock of national banks to the individual owners thereof, and is prohibited from assessing the capital stock of such bank.

10. SAME—NATIONAL BANKS—LISTING—PROPERTY.

The cashier of such bank may act as the agent of the bank in listing its property for taxation, but he has no authority to list the capital stock of such bank for assessment against the bank, and the mistake of the cashier in listing the capital stock of the bank for taxation will not estop the bank from recovering the taxes paid under protest on such void assessment.

11. SAME.

Inland Lumber & Timber Co. v. Thompson, 11 Idaho, 508, 83 Pac. 933, 114 Am. St. Rep. 274, cited and distinguished.

(Syllabus by the Court.)

Appeal from District Court, Washington County; Ed. L. Bryan, Judge.

Action by the Weiser National Bank against Woodson Jeffreys and others to recover taxes paid under protest. Judgment for defendants, and plaintiff appeals. Reversed.

Ed. R. Coulter, for appellant. Frank Harris, for respondents.

SULLIVAN, J. This action was brought by the Weiser National Bank, a corporation, as plaintiff, against Woodson Jeffreys, treasurer of Washington county, and Washington county, as defendants, to recover a tax of \$636 paid under protest. The case was submitted to the trial court on an agreed statement of facts, and judgment was entered against the plaintiff, who is appellant here, dismissing the action. The facts stipulated were in effect as follows: That the Weiser National Bank is a banking corporation, organized under the laws of the United States of America relating to national banks; that its principal office and place of business is at the city of Weiser, in Washington county, and that it began doing business on the 15th day of March, 1906; that said bank was organized with a paid-up capital of \$50,000, consisting of 500 shares of capital stock of the par value of \$100 each; that a list of the stockholders and owners of the shares of capital stock of said corporation is attached to the stipulated facts as an "Exhibit"; that said list contains a true statement of the names of the stockholders and their residences at the time of the organization of said bank, as well as at the date of the attempted assessment of the capital stock of said bank by the county assessor and tax collector of said Washington county for the year 1906; that all of the money with which said shares of stock were purchased, except the sum of \$4,000—with which \$4,000 were purchased 2 shares of Rebecca K. Troy, of Cincinnati, Ohio, 2 shares of Samuel R. Meyer, of Cincinnati, Ohio, 6 shares of Sig Wise, of Cincinnati, Ohio, and 30 shares of M. McGregor of Portland, Or.—was in the state of Idaho on the 2d Monday of January, 1906; that from the 2d Monday of January, 1905, until the 2d Monday in January, 1907, Francis M. Potter was the duly qualified and acting assessor and ex officio tax collector of said county; that from the 2d Monday in January, 1905, until the 2d Monday in January, 1907, J. M. Canary was the duly elected, qualified, and acting treasurer of said county; that since the 2d Monday of January, 1907, defendant Woodson Jeffreys has been and now is the duly qualified and acting treasurer of said county, being the successor of said Canary; that on or about the month of May, 1906,

said Potter, in his official capacity of assessor of said Washington county, did attempt to assess all the property of plaintiff corporation it then owned for taxation for the year 1906, regardless of the fact that the plaintiff corporation was not in existence on the 2d Monday of January, 1906, and, in pursuance of said assessment, said assessor did, on tax list numbered 313, for said year, attempt to assess the following described property for purpose of taxation for the year 1906, to wit: [Here follows a description of certain real estate belonging to said plaintiff corporation with improvements thereon, about which there is no question in this action.] Then follows "personal property, capital stock $\frac{2}{3}$ of year, \$12,000"; that said tax list was sworn to by the cashier of said bank; at the same time there was furnished to said assessor by said cashier a list of all stockholders of said bank, their post office addresses, and the number of shares of the stock of said bank owned by each, which list was attached to said tax list No. 313; that the taxes upon all of said shares of stock of said bank were attempted to be assessed as shown by said tax list, and not otherwise, and none of said shares were assessed against the holders of the same in the individual assessment list of the personal property of said stockholders; that upon the tax roll for 1906, none of said owners and holders of said shares of stock were charged with or taxed for the same, but the said plaintiff bank is charged with the whole thereof; that the amount of taxes levied upon said shares of stock, as equalized by the State Board of Equalization, was the sum of \$636; that on the 5th day of January, 1907, the plaintiff bank, under protest, paid said taxes on said capital stock, and at the same time filed with the tax collector its protest in writing, which is attached to said agreed statement of the case as an "Exhibit"; that at the time of filing said written protest, the attorney of the plaintiff bank entered into a stipulation with the county attorney of said county relative to the paying in of said taxes under protest, a copy of which stipulation is contained in the record; that, at the time of paying said taxes to said ex officio tax collector under protest, the plaintiff also filed with said tax collector, and also with the county treasurer of Washington county, a copy of said written protest and also of the stipulations heretofore referred to; that the \$636 so paid under protest is the amount of taxes assessed against said capital stock alone, the same being listed for two-thirds of a year at \$12,000, but that the plaintiff paid all taxes levied against its real estate voluntarily and without protest, and in no wise wishes to recover back the same; that the taxes so paid under protest were turned over by the tax collector to the county treasurer, and that the county treasurer deposited same in a special deposit, separate and apart from all other moneys, and that said treas-

urer surrendered and turned over said special deposit to his successor in office, the defendant herein, Jeffreys, and that said sum is now in his hands as such county treasurer, and that the same is by him kept separate and apart from all other moneys which have come into his hands as public money; that at the April, 1907, meeting of the board of county commissioners of said Washington county, the plaintiff bank applied to said board to refund said \$636 on the facts aforesaid, but that said board of county commissioners were undecided as to their powers, and it was there agreed by and between the plaintiff bank and the defendants that the agreed facts set forth should be presented to the judge of the district court of said county for his decision thereon. On that statement of facts the district court entered judgment in favor of the defendants, and dismissed the action. This appeal is from the judgment.

The two principal questions presented for decision are: (1) Was the assessment and levy of the \$636 taxes on the capital stock of appellant bank for 1906 merely irregular, or was it void? (2) If void, is appellant estopped from recovering from respondents the amount of said tax, by reason of appellant's failure to make application to the board of equalization of Washington county for a correction of said assessment and relief therefrom?

Was the assessment and levy absolutely void or only irregular? If the state or county has no authority to assess the capital stock of a national bank, the assessment then is void. The states would be wholly without power to levy any tax, either direct or indirect, upon national banks, their property, assets, or franchises, were it not for the permissive legislation of Congress. See notes to section 5219, Rev. St. U. S., and authorities there cited; 5 Fed. St. Ann. p. 157 (U. S. Comp. St. 1901, p. 3502). That section of the United States Revised Statutes is as follows: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares. In assessing taxes imposed by authority of the state within which the association is located; but the Legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed." In *Owensboro Nat. Bank v. Owens-*

boro, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850, it is held that the provisions of said section of the Revised Statutes of the United States are the measure of the power of a state to tax national banks, their property or their franchisees. The court held: "This section, then, of the Revised Statutes is the measure of the power of a state to tax national banks, their property, or their franchisees. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank. Any tax, therefore, which is in excess of, and not in conformity to, these requirements, is void." It will be observed from the provisions of that section that all shares of stock of the stockholders may be included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by the authority of the state in which the bank is located; and, under the provisions of said section, the state or county may tax the real estate belonging to such bank.

It will be observed from the stipulated facts that the "capital stock" was assessed, and not the shares of capital stock. The term "capital stock" does not mean "shares of capital stock," but means the actual money or property paid in and possessed by the corporation. *State Bank of Va. v. City of Richmond*, 79 Va. 113. Neither under said statute of the United States nor under the revenue law of the state of Idaho is there any authority to tax the capital stock of national banks. The assessor is given no authority or jurisdiction to assess the capital stock of the appellant bank. He is given authority to assess the real estate belonging to the bank and to assess the shares of stock to the owners thereof. The taxes so assessed must be paid by the bank. Section 43 of the revenue law, approved March 22, 1901 (Sess. Laws 1901, p. 249), is as follows: "The stockholders of every banking association located in this state, and organized under the laws of the United States or of this state, must be assessed and taxed on the value of their shares of stock therein in the county, city, town, village and independent school district, authorized by law to collect revenue as in this act provided, where such bank is located, whether the stockholders there reside or not; such shares must be listed and assessed with regard to the value of such shares by reason of any net individual profits or surplus of such corporation, and with regard to the ownership thereof, subject, however, to all deductions allowed in the assessment of other moneyed capital and subject to the restriction that taxation of such shares must not be at a greater rate than is assessed on any other moneyed capital in the hands of individual citizens of the state in the place where such bank is located. Every such banking association must furnish to the assessor a full and correct list of the names and resi-

dence of its stockholders and the number of shares held by each. The taxes upon such shares must be assessed against the holder of the same in the list of personal property and must be paid by the bank. The real estate of such banking association is subject to state, county, municipal and district taxation as other real estate." It will be observed from the provisions of said section that the stockholders of a national bank may be assessed and taxed on the value of their shares of stock; but there is no provision in said section authorizing the assessment of the "capital stock" of the bank, and the provisions of said section 43 are in conformity with the provisions of said section 5219 of the Revised Statutes of the United States. We conclude, therefore, that the assessor had no jurisdiction or authority to assess the capital stock of said bank to the bank, or at all.

The next question presented for consideration is as to whether the appellant is estopped, under the facts of this case, from recovering from the respondents the amount of said tax, and whether it is estopped therefrom by reason of its failure to make application to the board of equalization of Washington county for relief from said void assessment. It is contended by counsel for respondents that the exclusive remedy for the appellant to be relieved of this tax was before the county board of equalization, and cites, among other authorities, 25 Am. & Eng. Ency. of Law (1st Ed.) p. 242, where it is said: "When provisions are made for an application to the board of equalization or review for the correction of errors in an assessment, such remedy is exclusive; and the taxpayer, failing to avail himself thereof within the time prescribed, cannot prevent the collection of a tax for any cause for which he might have had an abatement."

We will now refer to the provisions of our Constitution and the statute law prescribing the powers and duties of the board of equalization. Under the provisions of section 12, art. 7, of the Constitution of this state, it is provided, among other things, that: "The board of county commissioners for the several counties of the state, shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county under such rules and regulations as may be prescribed by law." It will be observed from those provisions that the boards of equalization have authority "to equalize the valuation of the taxable property in the county." Sections 54 and 55 of the revenue act, approved March 12, 1901 (Sess. Laws 1901, p. 251), provide the method and manner of equalizing the valuation of such property. Those provisions of the Constitution and the statute apply to "taxable property in the county." Property over which the taxing authority has no jurisdiction does not come within the jurisdiction of the board of equalization, under the provisions of said statute; and hence the

bank was not required to make application to said board for relief, and is not estopped from recovering the amount of the tax paid under protest. As the capital stock of the appellant bank was not taxable property within the county, it does not come within the provisions of said equalization law. By the provisions of said revenue act the assessor was commanded to assess the shares of stock of such banks as the appellant to the individual owners thereof, and was impliedly prohibited from assessing the capital stock of the bank to the bank, or at all. While it is true the cashier of the bank swore to the tax list in which the capital stock of said bank was attempted to be assessed, he was without any authority or right to do so, and could not bind the bank by his illegal act. It is not claimed that there was any fraud in this matter, but that it was ignorance of the law as to the rights of the bank in the premises. It is not claimed that there were any false representations upon which the assessor relied in making said assessment. In *City of Wilmington v. Ricand*, 90 Fed. 214, 32 C. C. A. 580, which is a case quite similar to the one at bar, it was held "that the mistake of the cashier should not estop the bank. He was the agent of the bank, to list its property for taxation. He had no authority or semblance of authority to list as its property the shares of the stockholders, nor to assume for the bank the payment of their tax out of the bank's funds." Under our law the bank is liable for the payment of the tax assessed against the shares of stock to the owners thereof, but in the last-cited case it is held that the mistake of the cashier would not estop the bank. The court in that case also said: "The general principle is stated in the case of *City of Charlestown v. County Com'rs of Middlesex*, 109 Mass. 270: 'One who, by mistake of his rights, returns to the assessor as liable for taxation a list of property which by law is exempt is not thereby estopped to claim an abatement of the tax.'" And in the same case the court said: "The taxpayer is not estopped by his return when the assessment is void." In *Inland Lumber & Timber Co. v. Thompson*, 11 Idaho, 508, 83 Pac. 933, 114 Am. St. Rep. 274, is not in point in this case. In that case the property involved was property subject to taxation, and the appellant returned it as its property, and it was held to be estopped from denying its ownership; while in the case at bar the capital stock of said bank was not subject to taxation, and the list furnished by the cashier on its face shows that it was not subject to taxation. We therefore conclude that the appellant is not estopped from recovering back said taxes.

The judgment of the trial court must be reversed, and it is so ordered, and the cause remanded for further proceedings in accordance with the views herein expressed. Costs of this appeal are awarded to the appellant.

AILSHIE, C. J., and STEWART, J., concur.

TONCRAY v. BUDGE.

(Supreme Court of Idaho. March 24, 1908.)

1. ELECTIONS—CONTESTS—REPEAL OF STATUTES.

By Act Feb. 2, 1899 (Sess. Laws 1899, p. 33), providing for the holding of elections and for election contests, all territorial statutes in relation to elections and election contests were repealed, and the same are no longer in force or effect.

2. SAME—SPECIAL PROCEEDINGS.

At the time of the adoption of the state Constitution, the remedy provided for the contesting of elections in certain cases was classed and distinguished as "a special proceeding of a civil nature," and was not classed among "cases or actions either at law or in equity."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 245, 246.]

3. SAME—CONTESTS.

At common law an election contest, as such, was unknown, and all the provisions or authority existing within this state for contesting an election are dependent upon statute alone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 245, 246.]

4. SAME—JURISDICTION.

At the time of the adoption of the Constitution of this state, an election contest, as such, was neither recognized by the common law nor the statute law as a "case either at law or in equity," and such a proceeding is therefore not necessarily included within the original jurisdiction of district courts, as that jurisdiction is conferred by section 20 of article 5 of the Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 253-256.]

5. CONSTITUTIONAL LAW—POWERS OF GOVERNMENT—DISTRIBUTION.

An election contest is of purely statutory origin, and is within the direction, control, and management of the political power of the state, and the manner of conducting such a contest and of determining the questions arising thereunder is within the authority and control of the political power of the state government, as distinguished from the judicial power and authority thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 144, 145.]

6. ELECTIONS—COURTS—SUPREME COURTS—ORIGINAL JURISDICTION.

Under section 124, Act Feb. 2, 1899 (Acts 1899, p. 61), in reference to elections and the contest of elections, the Supreme Court has original jurisdiction in the matter of a contest of the election of a district judge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 253-256.]

7. CONSTITUTIONAL LAW—POWER OF GOVERNMENT—DISTRIBUTION.

Under the Constitution of this state, it is competent for the Legislature to authorize the contesting of elections, and to prescribe the manner and method of conducting the same, and to establish or designate the court, body, board, or tribunal before which such contests shall take place.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 144, 145.]

8. SAME.

It would not be competent for the Legislature, under the name or guise of an election contest, to authorize a board or body other than the duly and regularly constituted constitutional, judicial tribunals to inquire into and pass upon a constitutional question or a constitution-

al ineligibility to hold office and make such inquiry and investigation final and conclusive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 144, 145.]

9. QUO WARRANTO—TITLE TO OFFICE—"CASES BOTH AT LAW AND IN EQUITY."

The writ of quo warranto was a common-law remedy, and is covered by and included in sections 4612 to 4619 of the Revised Statutes of 1887 of this state, which provide for an information in the nature of quo warranto, to inquire into the authority by which a person holds or exercises an office or franchise, and those provisions of the statute are still in force in this state, and the jurisdiction to be exercised under these provisions of law falls within the category of "cases both at law and in equity," as used in section 20 of article 5 of the Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 29.]

10. SAME—JURISDICTION.

In proceedings by information in the nature of quo warranto, under sections 4612 to 4619, Rev. St. 1887, the district courts of this state have original jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 29.]

11. SAME—PROCEDURE—PARTIES—ATTORNEY GENERAL AS RELATOR.

In proceedings on information, under sections 4612 to 4619, Rev. St. 1887, the action must be prosecuted in the name of the people of the state, against the usurper or intruder, and must be brought by or on the relation of the district attorney of the proper county or of the Attorney General of the state, except in the single instance where a person claims himself to be originally entitled to the office, in which case he may prosecute the action in his own name.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, §§ 38-41.]

12. SAME.

Where an action in the nature of quo warranto is sought to be prosecuted under sections 4612 to 4619, Rev. St. 1887, and the same is not prosecuted by or on relation of the Attorney General or the proper county attorney, it is necessary for the plaintiff to show some good cause why the same is not so prosecuted, and obtain the permission and consent of the court to act as the relator himself, and prosecute the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 34.]

13. SAME.

It is contrary to the spirit and purpose of the ancient writ of quo warranto, and its modern form of information in the nature of quo warranto, to allow the action to be prosecuted promiscuously by any and every elector.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, §§ 38-41.]

14. SAME.

The remedy provided for by sections 4612 to 4619, Rev. St. 1887, for an information in the nature of quo warranto, is for the protection of the public in its governmental and sovereign capacity, and for the benefit of the community or state at large, rather than for the gratification, satisfaction, or protection of any particular individual, except it be one who is himself entitled to the office.

15. CONSTITUTIONAL LAW—SELF-ACTING PROVISIONS—ELIGIBILITY TO OFFICE.

Section, 3 of article 6 of the Constitution is self-operative and self-acting, and needs no legislation to carry its provisions into effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 32-34.]

16. ELECTIONS—VOTERS—DISQUALIFICATION.

No one can exercise the elective franchise, serve on a jury, or hold any civil office within this state who comes within the inhibitions of section 3 of the "Suffrage and Elections" article of the state Constitution.

17. CONSTITUTIONAL LAW—CONSTRUCTION OF PROVISIONS.

The only safe and reasonable way in which to interpret and construe language used in a constitutional provision is to read it in the light of the known condition of affairs and circumstances existing at the time of its adoption, and against which its provisions were directed, and in doing so the court will look to the public history of such time as the same can be gathered from the press, public writings, and the current literature of that time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 12.]

18. SAME—OBJECT OF PROVISIONS.

The principal and primary object of the people and their representatives, in the constitutional convention, in adopting section 3 of article 6, was to suppress and forever prohibit and discountenance bigamy and polygamy in the state of Idaho, under whatever name or distinction it might be given, and under whatever doctrine or creed it might be recognized, taught, or practiced by any person or organization.

19. SAME—RELIGIOUS LIBERTY.

At the time of the holding of the constitutional convention, the Church of Jesus Christ of Latter-Day Saints, commonly called the "Mormon Church," recognized two kinds of marriages, one for time only, or for this life only, and the other for both time and eternity, or for this life and the life hereafter, and it was the intention of the framers of the Constitution, and the people in its adoption, to prohibit plural marriages of either kind; but the prohibition only extends to the natural life of the parties and to this civil and temporal government.

20. SAME.

Constitutions and statutes are drafted and adopted for the government of men and the regulation of their conduct, in a civil and temporal government of human beings in this life. Constitutions and statutes care nothing about what men believe with reference to a future existence. Indeed, they are intended, in this American Union, to protect a man in anything he wants to believe in reference to the future life. They do not deal with beliefs, but with acts and practices and teachings. They protect a man in his religious beliefs, but they prohibit him from acting or practicing or teaching anything in any manner contrary to good morals and the public weal as prescribed by the laws of the land.

21. SAME—CRIMES—CELESTIAL MARRIAGES.

Celestial and patriarchal marriages, to be participated in in the next world or the future life, cannot be crimes here and in this life, under a civil and man-made government; but, whenever under such names or designation or any other name a man takes unto himself more than one wife during any given period of time, such marriages become bigamous or polygamous, and are prohibited by the organic law of the state.

22. SAME.

There was no objection at the time of the adoption of the Constitution, and can be no constitutional one now, to a man believing that the wife to whom he is married in this life will continue to be his wife throughout eternity, and there can be no objection to his marrying her for both "time and eternity"; but what the Constitution objects to and forbids is a man having more than one wife at any one and the same time, whether he be married to her for "time only" or for "all time and eternity."

23. ELECTIONS—ELECTORS—QUALIFICATIONS.

The fact that a man belongs to a church or organization that teaches that marriage cere-

monies, celebrated by its duly authorized officers or ecclesiastics, remain in force and effect during both this life and all eternity does not disqualify him for an elector, so long as such church or organization does not teach or countenance more than one of such marriages, for the same person, during the same period of time, so as to make such marriage bigamous or polygamous.

24. BIGAMY—POLYGAMOUS MARRIAGES.

The framers of the Constitution, and the people in its adoption, in employing the words "bigamous," "polygamous," "plural," "celestial," and "patriarchal" marriages, meant and intended to prohibit and forbid a man having more than one wife at any one time, under whatever name or designation he might choose to style his marriage; and the use of each of those words was directed against bigamous and polygamous marriages.

25. SAME.

A celestial or patriarchal marriage, in order to come within the prohibition of the provisions of the Constitution, must also be bigamous or polygamous.

26. CONSTITUTIONAL LAW—RELIGIOUS LIBERTY.

It was not intended by the Constitution to in any manner interfere with the religious beliefs and opinions of any one. The Constitution was directed against acts, practices, and teachings with reference to this life, and not against beliefs and opinions in regard to a future life.

(Syllabus by the Court.)

Appeal from District Court, Bannock County; J. M. Stevens, Judge.

Action by Dudley D. Toncray against Alfred Budge to contest election as judge. Judgment for defendant, and plaintiff appeals. Affirmed.

Richards & Haga, for appellant. Clark & Budge and Hawley, Puckett & Hawley, for respondent.

AILSHIE, C. J. This proceeding was instituted on the 15th day of December, 1906, in the district court of the Fifth judicial district in and for the county of Bannock. It is a proceeding to contest the election of the defendant and respondent as judge of the Fifth judicial district of this state. The complainant alleged that he was an elector of the state and of the county of Bannock on the 6th day of November, 1906, and that as such elector he prosecutes this proceeding to contest the election of the Honorable Alfred Budge as district judge. He alleges that on the 6th day of November, 1906, the defendant was elected judge of the Fifth judicial district, and that thereafter and on the 26th day of November, 1906, the State Board of Canvassers canvassed the election returns, and declared the defendant duly elected to the office of district judge in and for the Fifth district. The sole and only grounds of contest alleged by the complainant, on account of the existence of which he alleges that the defendant had not been duly and regularly elected to such office, and for which he prayed that the office be declared vacant, are those found in section 3 of article 6 of the state Constitution. That section is as follows: "No person is permitted to vote, serve as a juror,

or hold any civil office who is under guardianship, idiotic or insane, or who has at any place been convicted of treason, felony, embezzlement of public funds, bartering or selling or offering to barter or sell his vote, or purchasing or offering to purchase the vote of another, or other infamous crime, and who has not been restored to the rights of citizenship, or who at the time of such election is confined in prison on conviction of a criminal offense, or who is a bigamist or polygamist, or is living in what is known as 'patriarchal or celestial marriage,' or in violation of any law of this state, or of the United States, forbidding any such crime; or who in any manner, teaches, advises, counsels, aids or encourages any person to enter into bigamy, polygamy, or such patriarchal, plural or celestial marriage, or to live in violation of any such law or to commit any such crime; or who is a member of, or contributes to the support, aid, or encouragement of, any order, organization, association, corporation, or society, which teaches, advises, counsels, encourages or aids any person to enter into bigamy, polygamy or such patriarchal or plural marriage, or which teaches or advises that the law of this state prescribing rules of civil conduct, are not the supreme law of the state; nor shall Chinese or persons of Mongolian descent not born in the United States, nor Indians not taxed, who have not severed their tribal relations and adopted the habits of civilization, either vote or serve as jurors, or hold any civil office."

It is alleged that the defendant judge is one of the persons named, in the foregoing provision of the Constitution, as prohibited from holding any civil office within this state. The principal grounds charged as constituting the inhibition against this defendant are: That the defendant was on the 6th day of November, 1906, and for a long time prior thereto, and ever since said date has been, a member of an organization known as the "Church of Jesus Christ of Latter-Day Saints," commonly called the "Mormon Church," and that he did at all the times mentioned, and still does, contribute to the support, aid, and encouragement of such organization and church; "that said church teaches, advises, counsels, encourages, and aids persons to enter into polygamous marriages," and "plural marriages," and "patriarchal marriages," and "celestial marriages." The complaint, consisting of 33 paragraphs, charges the organization, commonly known as the "Mormon Church," with teaching each and every of the separate acts inhibited by section 3 of article 6 of the Constitution, and charges the defendant with being a member thereof, and contributing to the support and aid of the organization. It does not, however, charge the defendant himself with bigamy or polygamy, unless charging celestial and patriarchal marriages amounts to charging bigamy and polygamy. It does charge him, though, with "living in what is known as 'celestial marriage,'"

and with "teaching, advising, counseling, and encouraging persons to enter into what is known as 'celestial marriage.'" The complaint prays for a judgment decreeing that the defendant was at the time of his election ineligible to hold the office of district judge, and that the office be declared vacant. The defendant demurred to the complaint (1) on the ground that the court in which the complaint was filed had no jurisdiction of the subject-matter; (2) that the complaint did not state facts sufficient to constitute a cause of action; (3) that it was uncertain and ambiguous, in that it did not allege what complainant meant by charging that the defendant was living "in what is known as 'celestial marriage,'" and also in charging that defendant was living "in what is known as 'patriarchal marriage.'" The demurrer came on for hearing before the Honorable James M. Stevens, judge of the Sixth judicial district, presiding; and after argument was sustained, and, the complainant declining to amend, the cause was dismissed. This appeal is from the judgment.

The first question presented on this appeal is as to the jurisdiction of the district court to hear and determine a contest of election of a district judge. Respondent contends that the only authority to be found in the laws of this state for contesting the election of a district judge is that contained in Act Feb. 2, 1899 (Sess. Laws 1899, p. 33), and that by section 124 (page 61) thereof, the Supreme Court is vested with original jurisdiction in such cases. That section provides as follows: "The Supreme Court shall hear and determine contests of the election of judges of the Supreme Court, judges of the district courts, and district attorneys; and in case they shall disagree, the Governor shall act with them in determining, but no judge of the Supreme Court shall sit upon the hearing of any case in which he is a party." The appellant, on the contrary, contends that in the first place the foregoing section is unconstitutional; in the second place, that if it is constitutional, it is only a concurrent jurisdiction with the district courts; that under the provisions of section 20 of article 5 of the Constitution "the district courts have original jurisdiction in all cases both at law and in equity," and that it would consequently be beyond the power of the Legislature to deprive that court of its original jurisdiction in an election contest. In the light of these different contentions we turn our attention to an examination of the legislative enactments on the subject, and also of the constitutional provisions applicable to the controversy.

At the time of the adoption of the Constitution we had on the statute books of the then territory sections 5026 to 5042, Rev. St. 1887, providing for contesting certain elections. At the time of the adoption of the Constitution an election contest was designated by the statute as a "special proceeding of

a civil nature," and was made a title of part 3 of the Code of Civil Procedure of 1887. Under the provisions of the statute as it then existed the district courts were given jurisdiction in such cases as the one at bar. After the adoption of the Constitution the first Legislature enacted an election law, of which Act Feb. 2, 1899 (Sess. Laws 1899, p. 33), is a re-enactment. By section 162 (page 66) of the latter act it is provided that: "All acts and parts of acts enacted by any territorial Legislature relating to elections be and the same are hereby repealed." That act contained a complete election law, as well as specific enactments for contesting each and every office to which a candidate might be elected. It also provided the board, body, or forum in which each contest should take place. Act Feb. 2, 1899 (Sess. Laws 1899, p. 33), was clearly intended to provide a full and complete scheme and procedure for holding elections and the contests thereof, and repealed all territorial election laws, and with it such territorial statutes as provided for the contesting of elections. A statute providing for contesting an election is clearly legislation "relating to elections," and was within the repealing provisions of section 162 of the act. We conclude that the only legislation we now have in this state that refers to the contest of elections is that found in the legislative enactments subsequent to the adoption of the Constitution. This determination leads to the conclusion that, if section 124 of the act of February 2, 1899, is constitutional, then the Supreme Court has original jurisdiction over such a contest. It remains, then, to determine whether or not the foregoing section is constitutional, and, if constitutional, whether the jurisdiction there conferred is exclusive or is merely concurrent with the district courts. These two questions are so intimately related that the consideration of the one will necessarily involve the other, and we will therefore consider them both together.

It seems to be conceded by the authorities that at common law there was no such a proceeding or remedy as an election contest, and that the only way known to the common law to contest the right of a person to an office was by the writ of quo warranto, and that remedy was invoked in the name of the crown by the public prosecutor, or, as we term him, the Attorney General. *Carter v. Superior Court*, 138 Cal. 150, 70 Pac. 1067; *Budd v. Holden*, 28 Cal. 124; *Snowball v. People*, 147 Ill. 260, 35 N. E. 538; *Paine on Elections*, §§ 793, 794; 7 Ency. Pl. & Pr. 377; 15 Cyc. 393. The territorial Legislature, at the session of 1887, enacted sections 4612 to 4619, inclusive, which are practically a codification of the common-law quo warranto, with some additions and enlargement, both as to subject-matter and authority and jurisdiction of the courts. Those provisions of the statute are still in force. They at once be-

came a part of the power and jurisdiction of the district courts, as was quo warranto at common law, and they remain such to this day. The present proceeding is not prosecuted under the provisions of the foregoing sections, and was evidently not instituted on that theory. It was brought purely as an election contest, and in the name of an elector as contestant. Of this, however, we will deal later. For the purposes of our present consideration we treat the proceeding as a straight election contest. The question then arises: Is an election contest a case either at law or in equity, within the meaning of section 20, art. 5, of the Constitution? That section reads: "The district court shall have original jurisdiction in all cases both at law and in equity, and such appellate jurisdiction as may be conferred by law." At first blush it would seem that the framers of the Constitution had by the words "in all cases both at law and in equity" intended to cover all matters, subjects, and controversies involving judicial determination, or requiring a judicial investigation for their determination. A reading, however, of section 21 of the same article, which confers original jurisdiction, "in all matters of probate, settlement of estates of deceased persons and appointment of guardians," on probate courts, discloses at once that it was not the intention of the framers of the Constitution to cover the whole field of litigation or judicial inquiry or investigation by the words "at law and in equity." Indeed, this court so held in *Re Estate of David McVey*, 93 Pac. 28. It would seem, however, that aside from the jurisdiction conferred by section 21, it must have been the intention of the framers of the Constitution, in drafting section 20, to cover all other subjects of judicial investigation, inquiry, and determination that might arise under the Constitution or laws of the state. In considering the same language used in the federal Constitution, the Supreme Court of the United States, in *Nashville v. Cooper*, 6 Wall. (U. S.) 247, 18 L. Ed. 851, said: "The power here under consideration is given in general terms. No limitation is imposed. The broadest language is used. 'All cases' so arising are embraced. None are excluded. How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed. The Constitution is silent upon those subjects. They are remitted, without check or limitation, to the wisdom of the Legislature. * * * A case in law or equity consists of the right of the one party as well as the other, and may be truly said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the right construction of either."

Aside, however, from these considerations

and legal conclusions the inquiry still remains: Is an election contest necessarily or innately a judicial inquiry? It must be conceded, we think, that a contest, as distinguished from a quo warranto or inquiry on information, is of purely statutory origin. *Paine on Elections*, § 793. In the absence of legislation providing for and authorizing an election contest, no such right would exist, and consequently there would be no remedy therefor, cognizable in either a court of law or equity. In *Douglas v. Hutchinson*, 183 Ill. 323, 55 N. E. 628, the Supreme Court of Illinois in 1890, in considering this identical question under the Constitution of that state, said: "The provision of the Constitution conferring original jurisdiction upon circuit courts includes the prosecution of every claim or demand, in a court of justice, which was known, at the adoption of the Constitution, as an action at law or a suit in chancery. It also includes all actions, since provided for, in which personal or private rights are involved, which belong to the same class, or are of the same nature, as previously existing actions at law or in equity. Such are cases where the Legislature creates a new statutory remedy for the recovery of property, or for damages occasioned by the infringement of a right. There are many special statutory proceedings which involve rights, but which are not within the terms of the Constitution, because they are not causes at law or in equity. This proceeding has never been regarded, under common law or equity practice, as a cause at law or in equity, and is not of the same nature as such a cause." In 1905 that case was affirmed in *Quartier v. Dowlat*, 219 Ill. 326, 76 N. E. 371. In *Williamson v. Lane*, 52 Tex. 335, the Supreme Court of Texas held that: "The determination of the result of an election is not a matter pertaining to the ordinary jurisdiction of the law in courts of justice. It is in the nature of a political question, to be regulated, under the Constitution, by the political authority of the state." It has also been held, by very respectable authority, that the holding and conducting of elections is exclusively under the control, direction, and management of the political power of the state, and that the manner of conducting them, and questions arising in declaring the results thereof, and the determination as to who has been duly elected to office, are all within the control of the political power of the state, and are entirely separate and independent from and outside of those powers known as the "judicial power and authority of the state." This principle was announced in *Dickey v. Reed*, 78 Ill. 261, wherein the court said: "Elections belong to the political branch of the government, and are beyond the control of the judicial power. It was not designed, when the fundamental law of the state was framed, that either department of government should interfere with or control the

other, and it is for the political power of the state, within the limits of the Constitution, to provide the manner in which elections shall be held, and the manner in which officers thus elected shall be qualified and their elections contested." The foregoing was approved and reaffirmed in *Douglas v. Hutchinson*, supra.

McCrary on Elections seems to recognize the fact that the matters involved in an election contest are not necessarily judicial in character. In other words, that they are at most merely quasi judicial, as he recognizes the power of the Legislature to deprive the courts entirely of jurisdiction in such matters, or rather withhold jurisdiction from them. At section 344 he says: "Where the statute creates a board for the purpose of determining election contests, and confers upon such board exclusive jurisdiction, in such cases the courts are deprived of jurisdiction to pass upon the results of any such contests." Such a conclusion could not be arrived at if the determination of those controversies were recognized as of purely a judicial character and inherently belonging to the courts. The same principle has been recognized in a great number of authorities. *Hipp v. Supervisors*, 62 Mich. 456, 29 N. W. 77; *Moulton v. Reid*, 54 Ala. 320; *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 587, 757; *Clarke v. Rogers*, 81 Ky. 43; *State v. Judge of Second Judicial District*, 35 La. Ann. 89; *State v. Police Jury*, 41 La. Ann. 850, 6 South. 777; *Skrine v. Jackson*, 73 Ga. 377; *Reynolds et al. v. Police Jury*, 44 La. Ann. 863, 11 South. 236; 15 Cyc. 394; *Caldwell v. Barrett*, 73 Ga. 604. We conclude that the right of an elector to contest an election is of purely statutory origin, and that the determination of a contest is not of itself necessarily of such a judicial character as to inherently fall to the courts upon its creation, and that the legislative authority which grants the right may also designate or establish a board, body, or tribunal that shall hear and pass upon that right. At the time of the adoption of the Constitution it was not recognized in this territory as a common-law right. Neither was it recognized by the territorial statutes as a right or remedy either "at law or in equity." On the contrary, by the territorial statutes it was designated as a "special proceeding"; the jurisdiction of which was conferred upon the district courts by special legislative enactment. We conclude, therefore, that the framers of the Constitution, in the adoption of section 20, art. 5, supra, did not by that provision necessarily include election contests within the jurisdiction of "cases at law and in equity." If such remedy was contemplated by that provision of the Constitution, the right of election contests would have been inherited to every elector in the state upon the adoption of the Constitution, irrespective of legislation on the subject. That assumption would not be warranted. In this view of the Constitution and the statutes it necessarily fol-

lows that section 124 of the act of February 2, 1899, is constitutional and valid. If election contests are purely within the legislative control and discretion, and belong to the political power of the state, then the Legislature may confer the jurisdiction to hear and pass upon such contests upon any court it sees fit, or upon a board or body specially created for the purpose, or withhold the right entirely.

Incidental to this question arises another contention, made by appellant, to this effect: That under section 119, Act Feb. 2, 1899 (Sess. Laws 1899, p. 60), "the election of any person to any public office * * * may be contested * * * (2) when the incumbent was not eligible to the office at the time of the election," and that he is therefore only pursuing the remedy there prescribed in raising the ineligibility of respondent to hold the office to which he was elected. Now, it must be conceded, we think, that we have on the statute books two remedies for reaching the ineligibility of a person to hold office; one by contest under the provisions of the foregoing act, the other by information in the nature of quo warranto, under sections 4612 to 4619, Rev. St. 1887. Proceeding under information, the jurisdiction is clearly in the district courts. Proceeding under the statute for contests, the jurisdiction to contest the election of a district judge is clearly in the Supreme Court. Under the contest law no one may be a contestant or plaintiff who is not at the time an elector of the state, county, or district in which the officer was elected. On the other hand, proceeding under information, the action must be prosecuted in the name of the people, and on relation of the Attorney General or county attorney, as the case may be. These statutes, authorizing proceedings against usurpers and intruders into office, are in the interest of and for the protection of the people at large, and no person, except one who is himself entitled to the office, is supposed to have any more interest in such a proceeding than any other citizen. The remedy is therefore only available to the people, except in the one single instance, under section 4612, where a person originally entitled to the office may bring an action in his own name against a usurper. Another distinction to be noted between these two provisions is that a contest is directed towards facts and conditions that exist at the time of the election of the incumbent or that transpired at the election itself. On the other hand, the statutes providing for information against usurpers and intruders into office have reference to conditions that exist at the time the action is brought. A person might be eligible to hold an office at the time he was elected, and therefore not be subject to a contest on the ground of ineligibility. Subsequent to his election he might become one of the inhibited class enumerated in section 3 of article 6 of the Constitution, and would immediately become ineligible to continue to hold the office, and consequently liable to a proceeding under sections

4612 to 4619 for unlawfully holding the position. Under section 23 of article 5 of the Constitution no one is eligible to the office of district judge who is not "at the time of his election an elector in the judicial district for which he is elected." Now, if at the time of his election he falls within the inhibition of section 3 of article 6, he is not an elector, and is therefore ineligible to hold the office of district judge. It will therefore be seen that the Legislature of this state, in providing the grounds upon which an election contest may be had, have, in effect, authorized an inquiry, upon contests, into the question as to whether or not the incumbent was an elector, at the time of the election, within the contemplation of section 3, art. 6.

Counsel for appellant argue with great earnestness and much force that it is without and beyond the power of the Legislature to take, from the duly organized, constitutional, judicial tribunal, the power and jurisdiction of determining a constitutional question; in other words, of determining a constitutional eligibility or ineligibility to hold an office. We would hesitate very much before disagreeing with counsel as to that proposition. Primarily, an election contest signifies a controversy between two contending candidates for the same office. The unsuccessful candidate is contesting against the candidate to whom the election board have issued a certificate. It is an adversary proceeding. *Burke v. Perry*, 26 Neb. 420, 42 N. W. 401; *State v. Francis*, 88 Mo. 561. There can be no constitutional question or right involved, as to the citizen himself, as distinguished from the commonwealth, in the mere holding of an election, counting the votes, making returns, and declaring the result. But in this state the Legislature has seen fit to go further than is ordinarily contemplated by the expression "election contest," and have authorized the court or board hearing the contest to inquire into the eligibility of the incumbent, in the event the contestant charges that as one of the grounds of his contest. We can see no legal or valid objection to the Legislature granting the right to a contestant to have the question of the eligibility of the candidate inquired into upon a contest, when we keep in mind the fact that there is guaranteed to the people, and likewise to the candidate elected, as well as the one claiming the office, the right to have the eligibility of the incumbent judicially determined in the properly constituted courts, under information, as provided in sections 4612 to 4619.

As to the finality or conclusiveness of the determination of a constitutional ineligibility to hold office on a contest proceeding, we express no opinion. A somewhat kindred question arose in Kentucky in the case of *Commonwealth v. Jones*, 10 Bush (Ky.) 725. The court in that case had under consideration the question of a legal disqualification to hold an office, and the power of a contesting board to finally determine such question. The court

said: "To admit that a contesting board may determine finally as to what constitutes a legal disqualification for office would be to decide that the Legislature, instead of confining these tribunals to the discharge of executive duties, and to the determination primarily of mere questions of fact, had, in disregard of the distribution of the powers of government, existing by virtue of the first article of the Constitution, created a high judicial tribunal—a court with power and authority to determine finally and conclusively questions of individual rights arising under the Constitution—and provided that it should be composed exclusively of high executive officers. It is a matter of great difficulty to draw the exact line of demarkation between executive and judicial powers, and of still more difficulty to define with accuracy how far executive officers, in the discharge of executive or ministerial duties, may bind the other departments of government by the exercise of quasi judicial functions. But we regard it as an indisputable proposition that, where the inquiry to be made involves questions of law as well as fact, where it affects a legal right, and where the decision may result in terminating or destroying that right, the powers to be exercised, and the duties to be discharged, are essentially judicial, and are such as cannot constitutionally be delegated to or imposed upon executive officers." That court concluded by holding that an ascertainment and determination of the legal disqualification of a person to hold office "is essentially judicial," and that, while the board might in the first instance pass upon it, it would still be open to the courts for final consideration, in case it became necessary to resort to the courts in order to carry out the order, determination, or decision of the election board. *Dillon's Munic. Corp.* (4th Ed.) § 201. As touching the principle involved, see, also, *Cummings v. State*, 4 Wall. (U. S.) 277, 18 L. Ed. 356; *In re Garland*, 4 Wall. (U. S.) 333, 18 L. Ed. 366.

Counsel for appellant argued that, since the complaint in this proceeding presents all the facts necessary to be pleaded in an action in the nature of quo warranto, under sections 4612 to 4619, he is entitled to maintain the proceeding, although it was not brought in the name of the state or by the Attorney General. Counsel's argument appears reasonable and sound, but is successfully met by the statute itself. Section 4612, Rev. St. 1887, provides as follows: "An action may be brought in the name of the people of the state against any person who usurps, intrudes into, holds or exercises any office or franchise, real or pretended, within this state, without authority of law. Such action shall be brought by the district attorney of the proper county, when the office or franchise relates to a county, precinct, or city, and when such office or franchise relates to the state, by the Attorney General; and it shall be the duty of the proper officer, upon proper showing, to bring such

action whenever he has reason to believe that any such office or franchise has been usurped, intruded into, held or exercised without authority of law. Any person rightfully entitled to an office or franchise may bring an action in his own name against the person who has usurped, intruded into, or who holds or exercises the same." It will be noticed that the action must be brought in the name of the people of the state against the person who is usurping, intruding into, or holding the office without authority of law, and must be prosecuted either by the district attorney or Attorney General, as the case may be. The last sentence of the foregoing section provides the only instance in which the action may be prosecuted in the name of an elector, and that is a case where the person, claiming to be rightfully entitled to the office, himself may bring the action, in his own name, against the intruder or usurper. The latter provision was evidently added to the section for the purpose of enabling one who was appointed to an office, or for any cause was not in position to contest the election, to maintain his action directly against the person who is unlawfully holding the office and exercising the functions thereof. In the present case the action is not prosecuted in the name of or on behalf of the people of the state, nor is it prosecuted by any person claiming himself to be entitled to the office, nor does he make any showing that he has at any time applied to or requested the Attorney General to bring the action against respondent, nor does he show any refusal on the part of the district attorney or Attorney General to take the necessary action, nor has he ever applied to the court for leave to prosecute the action on behalf of the people. He has therefore failed to bring himself within the purview of the statute. It is true that in certain cases, where the public prosecutor or Attorney General refused to bring the action on proper application being made to him, an elector or private party has been granted leave, in the discretion of the court, to maintain the action as relator on behalf of the people. Such an application, however, is addressed to the sound discretion of the court. Such permission was clearly never applied for or obtained in this case. In considering the right of a private relator to maintain an action in the nature of quo warranto, such as is authorized by section 4612 of our statute, *High on Extraordinary Legal Remedies* (2d Ed.) p. 472, says: "The principle is now firmly established that the granting or withholding leave to file an information, at the instance of a private relator, to test the right to an office or franchise, rests in the sound discretion of the court to which the application is made, even though there is a substantial defect in the title by which the office or franchise is held. In the exercise of this discretion, upon the application of a private relator, it is proper for the court to take into

consideration the necessity and policy of allowing the proceeding, as well as the position and motives of the relator in proposing it, since this extraordinary remedy will not be allowed merely to gratify a relator who has no interest in the subject of inquiry. The court will also weigh the considerations of public convenience involved, and will compare them with the injury complained of, in determining whether to grant or refuse the application." *Paine on Elections*, §§ 877-880. For an exhaustive consideration of the authority and control of the Attorney General over proceedings in quo warranto, see *State v. Gleason*, 12 Fla. 210.

The soundness of the principles above announced is clearly apparent upon a moment's reflection. To allow any and every citizen to commence an action against any public official, to oust him from office at any time he may see fit, whether for private and personal revenge or the public weal, would be most disastrous, dangerous, and prejudicial to the public service. In some communities, and under certain conditions, they might keep a public officer engaged most of the time defending his right to the office, instead of discharging the public business. This remedy was created for the benefit and protection of the public in its governmental and sovereign capacity, and for the benefit of the community at large, rather than for the gratification, satisfaction, or protection of any particular individual other than one himself entitled to the office. The law-making power, in recognizing the right and prescribing the remedy to inquire into the conditions and circumstances under which one claims to hold an office, had the clear and unquestionable authority to also designate the party or parties who might invoke this remedy, and the conditions under which it might be applied. It might be argued in reply to this position that the Legislature saw fit to allow any elector to contest the election of an officer, and that such right or privilege, on the part of every elector, has not proven disastrous or detrimental to the public good. The answer to that, however, is that a contest must be instituted within 20 days after the canvass of the election returns. While the privilege is extended to all electors, the time within which it must be exercised is limited to a very short period, and that period has generally expired before the case of any contestant has been heard, so that ordinarily only one contest is filed against any candidate. On the other hand, the right to proceed by information is open throughout an official's entire term of office. In the light of the foregoing investigation and determination we conclude that the proceeding, being an election contest, was brought in a court that had no jurisdiction of the subject, and that the demurrer was properly sustained. We are also of the opinion that it could not be properly recognized or maintained as an informa-

tion under section 4612, Rev. St. 1887, for the reasons hereinbefore stated.

We have been urged by the eminent and distinguished counsel on both sides in this controversy that, whatever view we may take of the jurisdictional question just considered, we also pass upon and define the terms "celestial" and "patriarchal" marriage as they are used in the above-quoted section of the Constitution. We appreciate the fact that this case might be determined and disposed of by us on the jurisdictional question alone. On the other hand, the demurrer raised the sufficiency of the complaint, and particularly in respect to its charging defendant with celestial and patriarchal marriage, and the demurrer was sustained generally by the trial court without specifying upon which ground. Both the jurisdictional question and the sufficiency of the complaint have been fully and exhaustively argued, both orally and by briefs, and the questions are directly raised, and have been fully presented to the court. Under that condition of the proceeding we are inclined to the belief that we should pass upon this latter question, and that our decision thereon would be a judicial expression, as distinguished from obiter dictum (*Buckner v. Chicago, M. & N. W. Ry. Co.*, 60 Wis. 264, 19 N. W. 56; *Florida Cent. Ry. Co. v. Schutte*, 103 U. S. 118, 6 L. Ed. 327; *Kane v. McCown*, 55 Mo. 181), and would be binding upon the court, in any future litigation involving the construction of these terms as employed in the Constitution. In view of these considerations, and of the high attainments and professional standing of the respective attorneys in this case, and their request and stipulation, made in open court, for a decision on this branch of the case, and in the light of the further contention made by them that the question involved is of such general public importance that the views of the court of last resort ought to be speedily given thereon, the court has consequently examined the matter with more than usual care and diligence, and we briefly express the conclusion reached by our research and investigation.

In the first place, it is urged by appellant and admitted by respondent that section 3 of article 6 of the Constitution is self-operative and self-acting, and needs no legislation to carry its provisions into effect. Indeed, this court has, on several occasions, held other and similar negative and prohibitory provisions of the Constitution as self-executing. *Katz v. Herrick*, 12 Idaho, 1, 86 Pac. 873; *Day v. Day*, 12 Idaho, 556, 86 Pac. 531; *Cunningham v. Moody*, 3 Idaho, 125, 28 Pac. 395.

It requires no argument nor citation of authority to establish the proposition, as a well-founded legal conclusion, that no one can exercise the elective franchise, serve on a jury, or hold office who comes within the inhibitions of section 3 of the "Suffrage and Elections" article of the Constitution. In

such case the only inquiry to be made is: Does the defendant come within the constitutional enumeration of prohibited persons or classes as charged in the complaint?

On February 3, 1885, the territorial Legislature passed an act regulating elections within the territory, and prescribing the qualifications of electors, and section 16 of the act contained what has been popularly known ever since as the "Test Oath" (Sess. Laws 1885, p. 110). At that time it was generally conceded, we believe, even by the Mormon authorities and ecclesiastics themselves, that bigamy, polygamy, and plural and celestial marriages was a tenet of the Church of Jesus Christ of Latter-Day Saints, and was taught by it and practiced by some of its members. In support of this assumption, see *Extracts from Church History and Church Doctrines*, quoted in *Hilton v. Roylance*, 25 Utah, 129, 69 Pac. 660, 58 L. R. A. 723, 91 Am. St. Rep. 821. See, also, *Davis v. Beason*, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637; *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *Late Corporation of Latter-Day Saints v. United States*, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 481. It was at that time a burning issue in this territory as to whether any one who taught such a doctrine or creed, or practiced the principles thus taught, should be allowed the elective franchise or to hold any office of profit or trust. The test oath provision was incorporated into section 504 of the Revised Statutes of 1887, and its substance was also embodied into section 501 of the same Code. In 1889 the case of *Davis v. Beason* was taken to the Supreme Court of the United States, where it was argued in December of that year. In that case it was contended that the statute of Idaho was in contravention of the first amendment of the Constitution of the United States, and was an unlawful and unwarranted interference with religious toleration. The Supreme Court denied that contention, and sustained the acts of the territorial Legislature, and that decision would equally apply at this time to the validity of the constitutional provision now under consideration. Section 3 of article 6 of the Constitution prescribes substantially the same qualifications for electors as was required by the foregoing territorial statutes. We must now determine the meaning of the language used in this section in the light of conditions as they existed, at the time the constitutional convention was in session, in July, 1889. As said by the Supreme Court of the United States in *Maxwell v. Dow*, 176 U. S. 601, 20 Sup. Ct. 456, 44 L. Ed. 605: "The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment

[constitutional] was adopted." See 8 Cyc. 730, and cases cited.

It would be useless to go to dictionaries and lexicons for definitions of such words and terms as "celestial marriage" and "patriarchal marriage" as here used in the organic law of the state. We are now removed nearly 19 years from the time about which we must inquire, as to the social, civil, and political conditions that confronted the constitutional convention and the people of this territory, and for that information we must turn to the public history of the day as it can be gathered from the press, public writings, and current literature of that time, aided by whatever memory we may have left as to the occurrences of those days. The principal and primary object of the people and their representatives in the constitutional convention was to suppress and forever outlaw and discountenance bigamy and polygamy within the state of Idaho, under whatever name or designation it might be given, or under whatever doctrine or creed it might be recognized, taught, or practiced by any person or organization. Now, when the convention came to writing section 3 of the article on "Suffrage and Elections," they were confronted by the fact that, while in the language of Legislatures, courts, and law-writers anything which looked like having more than one wife at one and the same time was defined as bigamy or polygamy, nevertheless this organization of Latter-Day Saints, commonly called the "Mormons," was employing and using other terms and expressions concerning the marital relation, and which terms might also signify bigamy and polygamy; so the convention included those other terms also in section 3, as herein set out. No more importance seems to have been attached, by the convention, to the words "celestial" and "patriarchal" than to the words "bigamy" and "polygamy," and, indeed, we have been unable to learn where any member of the convention ever offered to define either of those terms as meaning anything other than bigamy or polygamy. No stress seems to have been laid upon them. So far as we are able to ascertain, section 3 appears to have been adopted by the convention without debate, and whatever discussion or debate took place in the convention on this subject must have occurred over the adoption of section 4 of article 6, or concerning the Declaration of Rights, or both. The consensus of opinion seems to have been that the convention would strike down bigamy and polygamy, and that, since the Mormon Church taught those practices, the incidental result would be to strike at that organization and deprive its members and adherents of the elective franchise. The convention seems to have thought that, since the church taught a specific and peculiar doctrine with reference to "celestial and patriarchal marriage," in the event of a prosecution they might disclaim the doctrine of bigamy and polygamy,

and yet justify substantially the same teaching and practices under the church names of "celestial" and "patriarchal."

In this connection it is interesting and important to know just what the Church of Latter-Day Saints taught and believed in 1889, and prior thereto, with reference to the marital relation, and particularly as to "celestial and patriarchal marriage." For this latter purpose we have consulted the opinion in *Hilton v. Roylance* very freely, for the reason that it gives more information and references on this specific subject than anything else we have found. We presume the Supreme Court of Utah, from which that opinion comes, is and has been in a better position to know the tenets and doctrines of the Mormon Church, and the meaning of these terms as then used by that organization, than any other court or judicial body in the land. Turning to this phase of the inquiry, we find that President Wilford Woodruff, of the Mormon Church, is reported as having said, in the course of a speech delivered in 1883, in discussing the marriage relation: "So I will say to our friends here—the strangers within our gates—that any man that marries a wife by any authority other than the authority of the holy priesthood is simply married for time, 'or until death do you part.' When you go into the spirit world you have no claim on your wife and children. The ordinance of having them sealed to you by one having authority of the holy priesthood must be attended to in this world. Father Abraham obeyed the law of the patriarchal order of marriage. His wives were sealed to him for time and all eternity, and so were the wives of all the patriarchs and prophets that obeyed the law." 25 Utah, 153, 69 Pac. 668.

Prior to the foregoing utterances by President Woodruff, Orson Pratt, an elder of the church, who appears to have attained a high standing as an expounder of the church doctrine, said: "It seems, then, that if we wish to fulfill the object of our creation, and if we are truly in the Lord, we must go into the eternal world as married, not for time, not by some justice of the peace that is an infidel, not by a man that has no right to join us together under the revelation and authority of the Most High, but we must be married for eternity by a man who has the right to speak, being commanded of the Lord, holding the keys of authority and power, who can say to the man and woman: 'I pronounce you husband and wife for time and all eternity.' Then you will be married according to the pattern given. Then you will have a claim upon each other after death. But have married people in the nations a claim upon each other after death? (I mean those who have not been married after the pattern and authority of heaven.) By no means. Their contracts are made only for a little space—some 20, 30, 50, or 70 years, as the case may be. Then death comes along,

and the contract runs out, and when you come in the resurrection, who are you? Have you any wife there? Oh, no. Why not? Because you were not sealed or married to each other by Divine authority. That is the reason. * * * The word of the Lord told you to gather up here. What for? That you might, among other things, be married according to the law of God. I am endeavoring to tell you some of our peculiarities. We do believe that every man who gathers up with the saints, whether married by the Gentile law or not, should be married by one holding Divine authority to officiate, and thus have the ordinance, the ministration, sealed on earth, that it may be sealed in the heavens." 25 Utah, 153, 69 Pac. 668.

In the Articles of Faith (page 457), written by Dr. James E. Talmage, acting under appointment and by authority of the church, the author wrote: "Marriage, as regarded by the Latter-Day Saints, is ordained of God, and designed to be an eternal relationship of the sexes. With this people it is not merely a temporal contract, to be of effect on earth during the mortal existence of the parties, but a solemn agreement, which is to extend beyond the grave. In the complete ceremony of marriage, as prescribed by the church, the man and the woman are placed under covenant of mutual fidelity, not 'until death do you part,' but 'for time and for all eternity.' A contract as far-reaching as this, extending not only throughout time, but into the domain of the hereafter, requires for its validation an authority superior to that of earth; and such an authority is found in the holy priesthood, which, given of God, is eternal."

In the Key to Theology, by Parley P. Pratt, as reported in *Hilton v. Roylance*, with reference to the binding effect and continuance of the marital relation, it is stated as follows: "All vows, covenants, contracts, marriages, or unions not formed by revelation and sealed for time and all eternity and recorded in the holy archives of earth and heaven, by the ministration of the holy and eternal priesthood, will be dissolved by death, and will not be recognized by the eternal authority after the parties have entered through the veil into the eternal world. This is heaven's eternal law, as revealed to the ancients of all ages, who held the keys of eternal priesthood, after the order of the Son of God, and as restored with the priesthood of the saints of this age."

President Brigham Young, of the Mormon Church, is reported in *Hilton v. Roylance* to have stated in a public discourse, as late as May 8, 1870, as follows: "I will say a few words on a subject which has been mentioned here; that is, celestial marriage. God has given a revelation to seal for time and for eternity, just as he did in the days of old. In our own days he has commanded his people to receive the new and everlasting covenant, and he has said: 'If ye abide not

that covenant, then are ye damned.' We have received it." And to similar effect is the discussion of President Taylor of the church in speaking on the subject of celestial marriage, wherein he said: "God has revealed through his servant, Joseph Smith, something more. * * * He has revealed unto us the law of celestial marriage, associated with which is the principle of plural marriage."

In the *Hilton-Roylance* Case, in considering and discussing when a celestial marriage begins and ends, the court says: "In 1 Whitney, Hist. Utah, p. 212, speaking of the doctrine of celestial marriage, the author said: 'It was, to the Latter-Day Saints, the key to the celestial kingdom, where, according to their faith, family relationships formed on earth according to Divine law will be perpetuated. Hence the revelation enjoining celestial marriages was entitled "Revelation on the Eternity of the Marriage Covenant, Including Plurality of Wives." How can "family relationships" be formed on earth, and "perpetuated" in the celestial kingdom, if they are not to begin until both parties are dead? Evidently the historian meant that a marriage, by authority of the church, was for both time and eternity. The revelation referred to relates to the eternity of the "marriage covenant," and doubtless refers to all marriages solemnized by authority of the church, whether monogamous or plural.'"

From the foregoing it seems clear that the church looked upon and regarded marriages celebrated and solemnized by mere civil authority, and with only the sanction of law, as marriages for "time only," while a marriage solemnized by a duly constituted church authority, or, as they put it, "by the holy and eternal priesthood of the saints," was termed and designated by them as a "celestial" or "patriarchal" marriage, binding not only during this life, but throughout the life to come. It will also be seen at once, from these quotations and citations, that at the time of the constitutional convention the church recognized the two kinds of marriages—one for time only, or in other words, for this life only; and the other for both time and eternity, or for this life and the life hereafter. The latter were termed "celestial" or "patriarchal" marriages. Now, it was evidently the intention of the convention to prohibit more than one celestial or "time and eternity" marriage, as well as to prohibit more than one terrestrial or "time only" marriage. But the prohibition on the celestial or patriarchal marriage was only intended to extend to the same period of time and to the same extent as the prohibition on the time marriage; namely, to this life. Constitutions and statutes are drafted and adopted for the government of men, and the regulation of their conduct in a civil and temporal government of human beings in this life. Constitutions and statutes care nothing about what men believe with reference to a future existence. Indeed, they are intended, in this American Union, to

protect a man in believing anything he wants to believe with reference to the future. They do not deal with beliefs, but with acts and practices. They protect any man in believing anything he wants to believe with reference to the future, but they prohibit him from acting or practicing anything in any manner contrary to good morals or the public weal as prescribed by the laws of the land. As said by Chief Justice Waite, in *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244: "Laws are made for the government of actions; and, while they cannot interfere with mere religious belief and opinions, they may with practices."

This conclusion is clearly borne out and supported by the provisions of section 4 of article 1 of the Constitution, known as the "Declaration of Rights." There the framers of the Constitution specifically recognized the right of every one to the "enjoyment of religious faith and worship," and asserted that no one should ever "be denied any civil or political right, privilege, or capacity on account of his religious opinions." It also provided that "liberty of conscience" should not be construed to either justify or "excuse acts of licentiousness or justify polygamous or other pernicious practices, * * * nor to permit any person, organization or association to directly or indirectly aid or abet, counsel or advise, any person to commit the crime of bigamy or polygamy, or any other crime." The section referred to is as follows: "Sec. 4. The exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or excuse acts of licentiousness or justify polygamous or other pernicious practices. Inconsistent with morality or the peace or safety of the state; nor to permit any person, organization or association to directly or indirectly aid or abet, counsel or advise, any person to commit the crime of bigamy or polygamy, or any other crime. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship. Bigamy and polygamy are forever prohibited in the state, and the Legislature shall provide by law for the punishment of such crimes."

Now, celestial and patriarchal marriages, to be participated in in the next world, or a future life, cannot be crimes here and in this life under a civil and man-made government; but, whenever they are practiced, in this present life, to the extent of more than one at a time, they become bigamous or polygamous, and are prohibited by the organic law of the state. It therefore clearly appears that the convention itself was guarding

against acts and practices and teachings, and not against beliefs. There was no objection at that time, and can be no constitutional one now, to a man believing that the wife to whom he is married in this life will be his wife in the hereafter, and there can be no objection to his marrying her for both "time and eternity"; but what the Constitution objects to and forbids is a man having more than one wife at any one time, whether he be united, joined, or married to her by a celestial marriage ceremony for "all time and eternity" or by a purely civil marriage ceremony by a justice of the peace, or other civil officer, "for time only." Nor does the fact that a man belongs to a church that teaches that marriage ceremonies, celebrated by its duly authorized officers and ecclesiastics, remain in force and effect during both this life and all eternity disqualify him for an elector, so long as it does not teach or countenance more than one of such marriages for the same person, during the same period of time, so as to make such marriages bigamous or polygamous.

Following close upon the adoption of the Constitution by popular vote, the Supreme Court of the United States, in *Davis v. Beason*, sustained and affirmed the power of a territory or state to place such restrictions and limitations on the right of franchise as contained in this Constitution. Soon thereafter, and in the autumn of 1890, the president of the church, Wilford Woodruff, issued what has been popularly known as the "Manifesto," whereby the church authorities renounced the doctrine of bigamy and polygamy, and declared that it should no longer be a tenet of the church or of their religious faith or doctrine, and should not be taught or practiced by it or any of its members or adherents. This declaration by the church authorities was accepted by the United States government, and President Harrison accordingly, on January 4, 1893, issued a proclamation, extending general amnesty and pardon to all those who were liable to punishment under the law prior to November 1, 1890, and who had subsequently obeyed the law. 9 Messages and Papers of the Presidents, p. 368. The state of Idaho also accepted their declaration, and from 1894 to the present time, so far as we are informed, the members and adherents of the Mormon Church have quite generally exercised the right of franchise as fully as any other class or body of our citizens. In their exercise of this right all our citizens seem to have assented, until within the last few years. The inhibitions of section 3 of article 6 of the Constitution, however, are just as positive to-day as ever against any person who may fall within its prohibitions. Whether they do or not is, in every case, purely a question of fact.

In the light of the foregoing inquiry and investigations we conclude that the framers of the Constitution, and the people in its

adoption, in employing the words "bigamous," "polygamous," "plural," "celestial" and "patriarchal" marriages, meant and intended to prohibit and forbid a man having more than one wife at any one time, under whatever name or designation he might choose to style his marriage; and that the use of each of those words was directed against bigamous and polygamous marriages. A celestial or patriarchal marriage, therefore, in order to come within the prohibition of the provision of the Constitution must be bigamous or polygamous. One who teaches or practices having more than one wife at any one time, or belongs to an organization that teaches such a doctrine, is disqualified for the duties of an elector, and consequently for holding any civil office under the laws of this state. On the other hand, it was never intended by the Constitution to in any manner interfere with the religious beliefs and opinions of any one. The Constitution was directed against acts, practices, and teachings with reference to this life, and not against beliefs and opinions in regard to the hereafter.

The judgment must be affirmed; and it is so ordered, with costs in favor of respondent.

SULLIVAN and STEWART, JJ., concur both in the conclusions reached and in the statements made and reasoning employed in the opinion.

COPLEW v. DURAND et al. (L. A. 1,999.) (Supreme Court of California. March 24, 1908.)

1. CONTRACTS — PERFORMANCE — APPROVAL OF ARCHITECT.

Where work is to be done to the satisfaction of a person evidenced by a certificate, the production of such a certificate is a condition precedent to a right of action on the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1308-1317.]

2. SAME—WITHHOLDING CERTIFICATE.

Where from the nature of work to be paid for on certificate of approval by an architect there might be latent defects, not discoverable at the time of completion, but becoming patent after lapse of time, or the defects were apparent and the architect frequently called the contractor's attention to them and paid the progress payments under repeated promises of the contractor to repair the defects before the work was finally turned over for acceptance, there was reserved to the architect the right of final approval or rejection at the time of final payment.

3. SAME—FRAUD.

Where work to be paid for on certificate of approval by an architect has been completed to the satisfaction of the owner and the architect, and the architect without warrant refuses to issue his certificate, the refusal under such circumstances being unreasonable, the necessity for production thereof as a condition precedent to an action on the contract is dispensed with.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1310, 1311.]

Department 2. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by D. Coplew against A. W. Durand and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Anderson & Anderson, for appellants. J. Wiseman Macdonald, for respondent.

HENSHAW, J. Plaintiff had entered into a contract with defendants to do the painting, polishing, enameling—in short the "finishing"—of the woodwork and floors of defendants' house. By the terms of the contract progress payments were to be made, 75 per cent. of the contract price to be paid on completion, and 25 per cent. 36 days after final completion. The progress payments were made as in the contract provided, and this action is brought to recover the 25 per cent. final payment, which defendants refused to make.

The contract provided that the work was to be "strictly first-class and to be done to the entire satisfaction of the owner and the architect"; as to the payments, "that in each of said cases a certificate be obtained and signed by the said architect." Defendants' refusal to pay was based upon the declaration of the architect that the work was not first-class and was not done to his satisfaction. Where work is to be done to the satisfaction of a person, evidenced by a certificate to that effect, the production of such a certificate is a condition precedent to a right of action upon the contract. This proposition is too well established to be questioned, and, indeed, is not questioned in this case. *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Loup v. California, etc., Co.*, 63 Cal. 97; *Cox v. McLaughlin*, 63 Cal. 196; *Tally v. Parsons*, 131 Cal. 516, 63 Pac. 833; *Kihlberg v. U. S.*, 97 U. S. 398, 24 L. Ed. 1106; *Wangler v. Swift*, 90 N. Y. 38; 9 Cyc. 618.

To make his case, in the absence of such certificate, the contractor pleaded and the court found that the work was done to the entire satisfaction of the owner and the architect, and that the refusal to issue the completion certificate was wrongful and was due to plaintiff's refusal to do certain repair work which was not required of him by the contract. The evidence, while conflicting, established to the satisfaction of the trial court the following facts: Under the terms of the contract plaintiff was to be paid \$2,165. The work consisted of the finishing of the woodwork of the doors and walls and the finishing of the hardwood floors. The hardwood floors were naturally the last woodwork to be put in place and the last to be finished by the contractor. The contractor proceeded with his work upon the doors and walls, receiving partial payments. In the early part of August he had completed all this work, and nothing remained for him to do under his contract but to finish the floors, which were not as yet ready for him. The architect asked the plaintiff what would be the value of the work which he had yet to do upon the

floors, and plaintiff replied, "About \$200." The architect then stated that he would allow him the full 75 per cent. of the contract price, deducting the value of the separate work yet to be done upon the floors, and did so; the architect himself testifying that he knew that he had paid precisely 75 per cent. of the entire contract price, excepting \$200, the cost or the value of the work upon the floors. It is in evidence on behalf of the plaintiff that at the time of the completion of all this woodwork, excepting the floors, the architect and owner both expressed themselves satisfied with it. This condition of affairs obtained from August 8, 1904, when the last payment, amounting to 75 per cent. was made, until January 22, 1905, when plaintiff finally completed the work upon the floors. The delay was through no fault of his. Meantime decorators had been called in, and in doing their work they had injured the work done by plaintiff. This is not disputed, and a separate contract was entered into by defendants with plaintiff to repair the damage so occasioned by the decorators. This work, in turn, he did to the apparent satisfaction of the defendants. At least he was paid in full therefor. It is not satisfactorily explained why at this time he should have been employed at a special price to do this repair work, if, as defendants' architect contends, he was at that time insisting that the original work was incomplete, unsatisfactory, and poor. The floors were done by plaintiff, as the court finds, in a satisfactory and workmanlike manner. Then, when in due course plaintiff demanded his final payment, the architect refused to give him a final certificate, stating that the woodwork had been damaged by water, panels and joists were cracked and would have to be replaced, and that he looked to the plaintiff to finish these damaged panels and joists, to which plaintiff replied that he could not be expected to do the work twice, when he was paid but once for it. In fact it was necessary to replace panels to the number of about 60, and those panels in turn had to be "finished."

Appellants, however, contend that, notwithstanding these progress payments which had been made, and notwithstanding the fact that the woodwork had been completed to the satisfaction of the architect and owners, and evidence of that completion given by the payment of the 75 per cent., still the owners and architect retained a right under the contract to exercise a later judgment, and were not legally required to pass final judgment until the contractor was ready to turn over to them his work as complete. *Haynes v. Second Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413. In this connection it is pointed out that the very finding of the court, while to the effect that the work had been performed to the satisfaction of the architect and owner, declared also that it was not performed in a good and workmanlike manner, so that,

whatever payments the owners and architect might choose to make during the progress, they still had the right to refuse the certificate for the final payment if at that time the work had not been performed to their satisfaction under the terms of the contract. This undoubtedly is true. Where, from the nature of the work, there might be latent defects, not discoverable at the time of completion, but becoming patent after the lapse of time, it might be important that the architect should not exercise final judgment until after the lapse of the 36 days; or where, as the architect contends in this case, the defects were apparent, and he frequently called the contractor's attention to them, and paid the 75 per cent. under repeated promises of the contractor to repair the defects before the work was finally turned over for acceptance. Under such circumstances it would unhesitatingly be held that there was reserved to the architect the right of final approval or rejection at the expiration of the time named. This was the position of the defendants in this case, and that position was supported by the testimony of the architect. But the difficulty which confronts appellants lies in the fact that the court did not accept their version. Its direct finding that the work was done to the satisfaction of the architect impliedly, but positively, negatives the contention that he was, during all of that time, insisting that the work was imperfect and incomplete.

The case which is thus presented is one where the work has been completed to the satisfaction of the owner and architect, and the latter thereafter and without warrant refuses to issue his certificate for the final payment. The refusal under these circumstances being unreasonable, the necessity for the production of the certificate is dispensed with. *Katz v. Bedford*, 77 Cal. 322, 19 Pac. 523, 1 L. R. A. 826; *Nolan v. Whitney*, 88 N. Y. 649; *Phillips, etc., Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341.

For these reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

153 Cal. 282

CAMPBELL v. SANTA MARIA OIL & GAS CO. (L. A. 1,961.)

(Supreme Court of California. March 24, 1908.
Rehearing Denied April 23, 1908.)

1. CORPORATIONS — CONTRACTS FOR ISSUE OF STOCK—LIABILITY TO ASSESSMENT.

Plaintiff, a lessee of oil property, who was also director and secretary in a corporation, proposed at a director's meeting that the corporation acquire the leasehold to be paid for in stock of the company issued as fully paid and non-assessable. At a subsequent stockholders' meeting the directors were requested to purchase for \$300,000, "payable in the fully paid stock" of the company, without specifying that the stock should be nonassessable. The offer in this form was made by the board of directors, and was accepted, and the conveyance made. Plaintiff

himself as secretary prepared the certificates of stock, and caused to be printed across the face of each the word "nonassessable." *Held*, that it was not the mere offer of plaintiff to sell for nonassessable stock, but the offer which the corporation made in return to buy for "fully paid" stock and its acceptance which constituted the contract, and the fact that plaintiff caused the word "nonassessable" to be printed on the certificates without authority had no weight in determining the rights of the original parties, whatever effect the word might have had if the stock had passed into the hands of an innocent purchaser without notice.

2. SAME—OFFICERS—ESTOPPEL TO QUESTION REGULARITY OF CORPORATE ACTS.

A director of a corporation, who voted as such for the levying of an assessment on the capital stock, is estopped to object to defects and irregularities in the assessment, and the estoppel binds the assignee of his interests.

3. SAME—RECOVERY OF STOCK—ACTION—TENDER—SUFFICIENCY.

A tender to a corporation by the owner of stock which was sold for a delinquent assessment of the amount of the delinquent assessment and costs is insufficient to sustain an action under Civ. Code, § 347, providing that no action must be sustained to recover stock sold for delinquent assessments upon the ground of irregularity in the assessment, unless the party first tenders to the corporation or the party holding the stock sold, the sum for which it was sold, with subsequent assessments "and interest on such sums from the time they were paid."

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen and Charles Monroe, Judges.

Action by John B. Campbell against the Santa Maria Oil & Gas Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. F. Conroy, for appellant. Wright, Bell & Ward, for respondent.

HENSHAW, J. This is an action brought by the assignee of one Kloeckner to recover certain stock sold for delinquent assessment under section 347 of the Civil Code. Defendant is a California corporation, having a capital stock of \$500,000 divided into 500,000 shares of the par value of \$1 each. Plaintiff's right to relief is based upon his allegations of certain irregularities in the assessment, and upon his claim that there was an agreement that the stock in question should be nonassessable. The court found against plaintiff's contentions. Judgment passed for the defendant, and plaintiff appeals.

As plaintiff is but the assignee of Kloeckner, with whom all of the transactions of the corporation were had, his name may be dropped from consideration. Kloeckner and others were the lessees of certain oil land in Santa Barbara county. The owners of the leasehold concluded to incorporate for convenience in operating their property. To that end certain of them, including Kloeckner, subscribed to articles of incorporation and for five shares of the capital stock of the defendant company. The incorporation was duly had. At the first directors' meeting after the officers of the corporation had been chosen Kloeckner, being one of the directors and sec-

retary of the corporation, proposed that the corporation acquire the leasehold, if possible, from himself and his associates, "and to use in payment of the purchase capital stock of the company to any amount not to exceed \$300,000; the stock to be issued as fully paid and nonassessable by the company." At the stockholders' meeting next held the stockholders requested the board of directors "to purchase said leasehold interest for the price of \$300,000, payable in the fully paid stock of this company." After this action at the stockholders' meeting another directors' meeting was held at which the proposition was fully discussed, and it was resolved to acquire the leasehold estate "for 300,000 shares of the fully paid stock of this company." The offer thus formulated the court finds was accepted, and the leasehold conveyed to the corporation for \$300,000 of the fully paid capital stock of the company. The conveyance was actually made to the corporation, the stock ordered issued to Kloeckner and his associates in such proportion as Kloeckner himself directed upon payment by the purchasers of the United States revenue tax. Kloeckner, in fact, prepared these certificates for issuance. The stock certificates, which he himself, as secretary, procured to be printed, bore upon the face of each, without authority from the board of directors, the word "nonassessable." The contention that the contract between Kloeckner and the company was for nonassessable stock is based upon these circumstances. But it was not the mere offer of Kloeckner to sell the leasehold interest for \$300,000 of nonassessable stock which fixed the liability of the corporation. It was the offer which the corporation in turn made to Kloeckner, and which he accepted, which determines the rights of the parties. By that offer, and in the acceptance of that offer, it nowhere appears that nonassessability of the stock was a condition of the contract. In terms, the leasehold was to be conveyed to the corporation for 300,000 shares of the fully paid capital stock of the company, and this in fact was done, and the circumstance that Kloeckner himself caused to be printed on the stock certificates of the company the word "nonassessable" can have no weight in determining the rights of the original parties to the contract, whatever effect the words might have if the stock had passed into the hands of an innocent purchaser, without notice.

It was pleaded by the defendant that Kloeckner was estopped from denying the validity of the assessment, in that he was a director of the defendant corporation, and voted affirmatively for the adoption of the resolution levying the assessment. The court so found upon abundant evidence. That having participated in all of these matters, and having voted as a director for the levying of this assessment, an estoppel is raised against Kloeckner's objections to the defects and ir-

regularities in the assessment, is too well settled to require discussion. It is sufficient to refer to the cases of *Marten v. Burns Wine Co.*, 99 Cal. 357, 33 Pac. 1107; *Macon & Augusta R. R. Co. v. Vason*, 57 Ga. 314; *Kansas City Hotel Co. v. Harris*, 51 Mo. 404; *Willamette Freighting Co. v. Stannus*, 4 Or. 263; *Stone v. Great Western Oil Co.*, 41 Ill. 86. As an estoppel, of course, binds the parties and their privies, the estoppel is equally effective against Kloeckner's assignee, plaintiff in this action. *Kessler v. Ensley Co. (C. C.)* 123 Fed. 559; *Union Dime Savings Bank v. Willmot*, 94 N. Y. 228, 46 Am. Rep. 137.

The final contention of plaintiff is that he elected under section 347 of the Civil Code to pay, and tendered to the corporation, the amount of the assessment, with costs; but, as the court holds, his averment was simply that he offered to pay the costs and assessment on the last day of the six months immediately preceding the sale. This offer was insufficient to entitle Kloeckner to redeem or to entitle him to bring the action under the section above cited, inasmuch as no tender or payment was made of the amount of interest.

For these reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

133 Cal. 275

In re HEBERLE'S ESTATE. (L. A. 2,079.)
(Supreme Court of California. March 24, 1908.
Rehearing Denied April 23, 1908.)

1. WORDS AND PHRASES—"DISTRIBUTED."

The word "distributed" is not a technical word in conveyancing; but, if it has any technical meaning, it is with reference to decrees of distribution in probate courts.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2133.]

2. WILLS—CONSTRUCTION IN FAVOR OF TESTACY—VOID TRUSTS.

A testator directed real property to be held in trust for certain beneficiaries. The trust was void. The will further provided that, in case testator should dispose of the trust property, the trustees should pay to the same beneficiaries the amount received for the property, "it being my will that" they "receive from my estate the said real estate or its value." The trustees were empowered to sell real property, except the property subject to the trust, "which is not to be sold but is to be kept and distributed" to the beneficiaries. Held, that the paramount intention of the testator was not that the property should descend to his beneficiaries through a trust, but that with or without a trust they should with certainty receive property to that value, and, since a construction which favors testacy is always preferred to one resulting in intestacy, the fact that the trust was void should not operate to defeat testator's intention, and render him intestate as to the estate attempted to be devised in trust.

Department 2. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Petition by Jacob Heberle and another for partial distribution to them as heirs at law, of a portion of the estate of George Heberle.

From an order sustaining, without leave to amend, demurrers to the petition, petitioners appeal. Affirmed.

Milton K. Young, F. E. Lacy, and Dennis & Loewenthal, for appellant. Lee, Scott & Chase, for respondent Jacob Swigart. Murphy & Schmidt, for other respondents.

PER CURIAM. This is an appeal from an order sustaining, without leave to amend, demurrers to the petition of Jacob Heberle and Eva Dickhof for partial distribution to them, as heirs at law, of a portion of the estate of George Heberle, deceased; it being the contention of petitioners that as to this portion he died intestate. The petitioners' status as heirs at law is not in question. The only question is whether or not from a construction of the will of deceased intestacy resulted as to the property in controversy.

The deceased by his will, after directing the payment of his debts and funeral expenses, devised and bequeathed to trustees all the rest and residue of his estate upon specified trusts. By the seventh paragraph of his will he directed certain real property upon Spring street, in the city of Los Angeles, called for convenience the "Spring street property," of the estimated value of \$65,000, to be held by the trustees for the term of five years, "and then the same by said trustees to be conveyed to the children of my deceased brother Martin Heberle, late of Miamisburg, Montgomery county, state of Ohio, share and share alike." It is conceded by all parties to this litigation that this trust is void. Estate of Walkerly, 108 Cal. 628, 41 Pac. 772, 49 Am. St. Rep. 97; Estate of Cavarly, 119 Cal. 408, 51 Pac. 629; Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; Estate of Dixon, 143 Cal. 511, 77 Pac. 412; Estate of Sanford, 136 Cal. 97, 68 Pac. 494. At the time of his death the testator still owned the Spring street property. The question to be answered is what disposition is to be made of it. Admittedly, if intestacy results as to this property, the petitioners are entitled to share in it.

Reading the whole will, we find next this clause: "In case I should dispose of said property, then it is my will that my trustees pay over to the said children or grandchildren of my said deceased brother the amount received by me for said property. It being my will that the said children and grandchildren of my deceased brother shall receive from my estate the said real estate or its value." By the fourteenth paragraph the testator empowers the trustees to convert real estate into money by sale. The seventeenth paragraph, however, is a limitation of this general power, and reads as follows: "That the power to sell my real estate, as set forth in the fourteenth subdivision shall not affect my said Spring street property, which is not to be sold, but is to be kept and distributed to the children of my said deceased

brother Martin." The trust created by paragraph 7 being void in its creation, no estate as to the Spring street property passed to the trustees. If in the will there are no other apt words disposing of the property upon the failure of this trust, intestacy as to it must be the result. The trial court found those words in the seventeenth subdivision of the will above quoted, and, in view of the fact that a construction which favors testacy is always preferred to one resulting in intestacy (*Dunphy's Estate*, 147 Cal. 96, 81 Pac. 315), it may not be said that the interpretation is not a permissible one. The seventeenth paragraph contains a direction for the "distribution" of the Spring street property to the children and grandchildren. While it may be argued that the word has reference to distribution by the trustees under the trust, yet it is not a word aptly used for such purpose, while it is apt in its application to a direct devise. It is equally open to the construction, therefore, that the distribution to the children is to be at the hands of the court. As is said in *Estate of Dunphy*, supra, the word "distributed" is not a technical word in conveyancing, and is not usually found in deeds. "If it have any legal technical meaning, it has such meaning with reference to decrees of distribution in probate courts." It appears that while the testator designed in case he died possessed of the Spring street property that that property should be held for five years, yet that, if the Spring street property had been sold, they were to receive in money the amount obtained from such sale directly, and not through the medium of trustees. The paramount idea in the testator's mind, therefore, was not that the property should descend to his beneficiaries through a trust, but that, with or without a trust, they should with certainty receive property to that value from his estate. Under the wording of this instrument, therefore, the trial court was correct in holding that its conclusion that the trust was void did not, in contemplation of the other language employed in the will, so defeat the testator's intent as to render imperative a finding of intestacy.

For which reason the decree appealed from is affirmed.

153 Cal. 285

STREATOR v. LINSKOTT et al. (S. F. 4,976.)

(Supreme Court of California. March 26, 1908.)

1. PLEADING—SUFFICIENCY OF ALLEGATIONS—CONCLUSION OR FACTS.

An allegation in an action to enjoin the issuance of bonds that plaintiff has no speedy or adequate remedy at law is a mere conclusion of law without value, in the absence of allegation of facts supporting it.

2. INJUNCTION—GROUNDS OF RELIEF—INJURY THREATENED.

Where, if a taxpayer is right in his contention that Pol. Code, §§ 1880-1886, authorizing the issuance of school district bonds, have,

as to school districts composed in whole or in part of municipal corporations of the fifth class, been superseded by Act March 23, 1893, Laws 1893, p. 292, c. 210, and an amendment thereof, approved March 11, 1897, Laws 1897, p. 103, c. 99, the alleged invalidity of the issue of bonds sought to be enjoined will appear on the face of the bonds, the taxpayer can suffer no damage if the bonds are put in circulation, they being void even in the hands of bona fide holders, and has no cause of action.

3. APPEAL—REVIEW—SCOPE—THEORY AND GROUNDS OF DECISION OF LOWER COURT.

Where, in an action by a taxpayer to enjoin the issue of school district bonds on the ground that Pol. Code, §§ 1880-1886, authorizing the issuance of school district bonds as to school districts composed in whole or in part of municipal corporations of the fifth class, have been superseded by act approved March 23, 1893, Laws 1893, p. 292, c. 210; and an amendment thereof, approved March 11, 1897, Laws 1897, p. 103, c. 99, and that the provisions of that act as amended were violated in various particulars by the bonds proposed to be issued and the proceedings purporting to authorize their issuance, the court below declined to pass on the question raised by defendants that the act of 1893 and its amendment, if applicable to the school district in question, was unconstitutional, and sustained a demurrer on the ground that the complaint did not show that the taxpayer would suffer any injury by issue of the bonds, the Supreme Court will not decide the question of the validity of the bonds "independent of the ground upon which the superior court based its decision," since, if on examination it should agree with the contention that the district in issuing the bonds must proceed under the act of 1893, it could not afford the taxpayer any relief without reversing a judgment rightly made on a ground fairly presented by the record.

4. SAME—REVIEW—ABSTRACT QUESTIONS.

The Supreme Court will not undertake to decide abstract questions of law at the request of a party who shows no substantial right that can be affected by a decision either way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3122, 3331-3341.]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Clark P. Streator against James A. Linscott and others, chairman of the board of supervisors and other officers of the county of Santa Cruz. Judgment for defendants, and plaintiff appeals. Affirmed.

Hugh R. Osborn, City Atty., for appellant. Benj. K. Knight, Dist. Atty., for respondents.

SLOSS, J. This is an action brought by a resident and taxpayer of the city of Santa Cruz against the chairman of the board of supervisors and other officers of the county of Santa Cruz to enjoin them from signing or issuing certain bonds authorized by a vote of the electors of a school district embracing the city of Santa Cruz and certain outlying territory. A demurrer to the complaint was sustained, and the plaintiff appeals from the ensuing judgment of dismissal.

The complaint sets forth the proceedings had for the purpose of authorizing the issuance of the bonds. It is not disputed that these proceedings were in strict accordance with sections 1880 to 1886 of the Political Code. The position of the appellant is, however, that these sections have, as to school

districts composed in whole or in part of municipal corporations of the fifth class, to which it is claimed the city of Santa Cruz belongs, been superseded by an act entitled "An act to enable school districts in cities of the fifth class, and school districts which embrace territory, a portion of which is within and a portion of which is without such cities of the fifth class, to issue bonds, etc.," approved March 23, 1893 (St. 1893, p. 292, c. 210), and an amendment to said act approved March 11, 1897 (St. 1897, p. 103, c. 99). It is pointed out that the provisions of this act as amended are violated in various particulars by the bonds proposed to be issued, and the proceedings purporting to authorize their issuance. The contention of the respondents in the lower court apparently was that the act of 1893 and its amendment, if applicable to the school district in question, are unconstitutional. The judgment contains a statement showing that the court below declined to pass upon the constitutional question involved, and that the demurrer was sustained upon the ground that the complaint did not show that the plaintiff would suffer any injury by reason of the issuance of the bonds. In this the court was clearly right. All that the complaint contains connecting the plaintiff with the subject-matter of the suit is to be found in the allegations that he is a resident and taxpayer of the city of Santa Cruz, and that he "has no speedy or adequate remedy at law." The latter is, of course, a mere conclusion of law, valueless in the absence of averment of facts supporting it.

The complaint sets forth at length an order of the board of supervisors prescribing the form of the proposed bonds. From this it appears that the bonds themselves, if issued, will contain at least two provisions which, according to the contention of the appellant, conflict with the requirements of the act of 1893 as amended: (1) The bonds provide that interest shall be payable annually, while the only authority given by the act of 1893 is to issue bonds bearing interest "to be payable semiannually"; (2) the bonds declare that they are issued and sold "for the purpose of raising money for purchasing school lots, for building one or more schoolhouses, or insuring the same," etc. The act of 1893 does not authorize the issuance of bonds for the purpose of insuring schoolhouses or other property. The respondents suggest no doubt of the sufficiency of either of these objections to invalidate the bonds, if the act of 1893 is the only law authorizing the issuance of such bonds. If the appellant is right in his contention that this act is the one that governs, the alleged invalidity of the issue will appear on the face of the bonds, and they will be void even in the hands of bona fide holders for value. "It results that the plaintiff as a taxpayer can suffer no damage if the bonds are put in circulation, and has no cause of action." *McCoy v. Briant*, 53 Cal. 247; *Hop-*

kins v. Lovell, 47 Mo. 102; *Polly v. Hopkins*, 74 Tex. 145, 11 S. W. 1084.

We are informed by the appellant's brief that this is "a friendly proceeding to determine the validity of the legal method adopted," and are asked to decide the question of such validity "independent of the ground upon which the superior court based its decision." This we cannot do. If we should, upon examination, agree with the contention that this district, in issuing bonds, must proceed under the act of 1893, we could not afford the appellant any relief without reversing a judgment which was rightly made upon a ground fairly presented by the record. Furthermore, regardless of the fact that the trial court based its decision upon this particular ground, this court will not undertake to decide abstract questions of law at the request of a party who shows no substantial right that can be affected by a decision either way. It may be advantageous for municipalities desiring to issue bonds to obtain from this court, in advance, a "certificate of title" attesting the validity of the proposed issue, but such relief can be obtained only in a proper proceeding, that is, one in which the decision of the question sought to be presented will be necessary to the disposition of a real controversy between parties having an actual interest in the matter in litigation.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.

7 Cal. Unrep. 241

HATCH v. NEVILLS et al. (L. A. 1,756.) (Supreme Court of California. Oct. 22, 1907.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—CONTRACT—VALIDITY.

A contract for street improvements providing that all loss or damage arising from the nature of the work to be done under the agreement, or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the work, etc., shall be sustained by the contractor, is void as tending to increase the cost of the work, and is therefore insufficient to support an assessment for work done thereunder.

Shaw and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by P. E. Hatch against William A. Nevills and others. Judgment for defendants, and plaintiff appeals. Affirmed.

E. C. Denio and A. B. McCutchen, for appellant. R. W. Kemp, for respondents. O. B. Carter, amicus curiæ.

SLOSS, J. The plaintiff appeals from a judgment entered in favor of defendants in an action to foreclose a street assessment lien for work done in the city of San Pedro.

The various proceedings of the city board of trustees leading up to the contract itself provided that the work should be done in accordance with certain specifications on file in the office of the city clerk. These speci-

fications included the following clause: "All loss or damage arising from the nature of the work to be done under this agreement, or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from encumbrances on the lines of the work, or from any act or omission on the part of the contractor, or any person or agent employed by him, not authorized by this agreement, shall be sustained by the contractor." In the case of *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213, this court held that there could be no valid assessment for street work done under a contract which referred to and included specifications containing the following language: "All loss or damage arising from the nature of the work to be done under these specifications shall be sustained by the contractor." The italicized portion of the provision which we have quoted from the specifications in the present case is substantially the same as the clause considered in *Blochman v. Spreckels*, and, on the authority of that case, the contract and assessment here sued upon must be held to be invalid. It is unnecessary to consider any other point made by the respondents.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; HENSHAW, J.; McFARLAND, J.

We dissent, for the reasons given in the dissenting opinion in *Woollacott v. Meekins*, 91 Pac. 615: SHAW, J.; LORIGAN, J.

7 Cal. App. 473

GLASSELL et al. v. O'DEA et al. (Civ. 418.)
(Court of Appeal, Second District, California.
Jan. 28, 1908. Rehearing Denied by
Supreme Court March 26, 1908.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—CONTRACT—VALIDITY.

A contract for street improvements subject to specifications, one of which required that all loss or damage arising from the nature of the work to be done under the agreement should be sustained by the contractor, was void and insufficient to sustain an assessment for the work done.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Hugh Glassell and another, as executors of the estate of Andrew J. Glassell, deceased, against M. F. O'Dea and others. Judgment for plaintiffs, and defendant Tryon-Brain Company appeal. Affirmed.

Leslie R. Hewitt, for appellant. Lucius M. Fall, for respondents.

TAGGART, J. This is an action to quiet plaintiffs' title to a lot in block 1, town of Garvanza, in the city of Los Angeles, against the lien of a street improvement bond issued upon an assessment for the cost of street work done under the "Vrooman Act." From a judgment in favor of plaintiffs declaring such bond void the defendant Tryon-Brain

Company, the holder of the bond, appeals. From the resolution of intention to the contract for the street work upon which the bond is based, reference is made in all steps of the proceedings to certain specifications on file in the office of the city clerk. These specifications are the same as those considered by the Supreme Court in the opinion rendered in *Woollacott v. Meekin*, 91 Pac. 612, being general specifications Nos. 68, 54, 52, 55, and 51 used by the engineer's office of the city of Los Angeles. The provision therein that "all loss or damage arising from the nature of the work to be done under this agreement, * * * shall be sustained by the contractor," was held to render void an assessment resting upon such specifications. A careful consideration of appellant's brief and the record here, and of the opinion filed in the *Woollacott v. Meekin* Case, leads to the conclusion that there is no question of law left for the decision of this court.

On the authority of that case, the cases therein cited, and *Hatch v. Nevills*, 95 Pac. 43, the judgment appealed from is affirmed.

We concur: SHAW, J.; JAMES, J., pro tem.

7 Cal. App. 550

LOS ANGELES BREWING CO. v. KLINGE et al. (Civ. 407.)

(Court of Appeal, Second District, California.
Feb. 15, 1908.)

JUDGMENT—FINDINGS TO SUPPORT.

Where the only issue raised by the findings of the parties in question was as to the amount of sales to defendant K. during a certain period beginning February 20, 1906, and the amount of payments by K. during the same time, and it appeared from the findings of the court that K. bought goods of plaintiff to the amount \$2,179.20 prior to February 20th and \$2,020 subsequently, and that K. paid \$1,145.89 prior to February 20th and \$2,147.77 subsequently, a judgment for plaintiff for \$903.54 could not be sustained, since the findings as to the transactions prior to February 20th, being made outside the issue, would not support a judgment.

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by the Los Angeles Brewing Company against William Klinge and others on a bond. From a judgment for plaintiff, defendant George G. Garrettsen appeals. Reversed.

Wright, Schoonover & Winnek, for appellant. W. T. Craig, Carroll Allen and Fred O'Farrell (Lawler, Allen, Van Dyke & Jutten, of counsel), for respondent.

SHAW, J. Action against sureties on bond to recover payment of the value of goods sold to principal. The appeal is from a judgment in favor of plaintiff.

On February 20, 1906, William Klinge, as principal, and George G. Garrettsen and one Walger, as sureties, executed a certain bond to the Los Angeles Brewing Company in the sum of \$1,500. By the terms of this instrument, copy of which is made a part of a

verified complaint, it was provided that the brewing company should sell to said Klinge, as principal, such amount of beer as he might demand, and should open and establish an account with him, and, as it might deem advisable, extend to him a line of credit for such purchases as he might make, not exceeding \$1,500. To secure the payment of any indebtedness incurred by said Klinge for beer sold him by said brewing company, appellant and Walger, as sureties, undertook and agreed to pay the same on demand. Plaintiff alleges that between February 20, 1906, and July 18, 1906, under and in accordance with the terms of said instrument, it sold and delivered to Klinge certain beer, for which he agreed to pay plaintiff the sum of \$930.54, which sum, although demanded, he had failed to pay. By his separate answer appellant admits all the allegations of the complaint, except that he alleges the aggregate amount of beer sold by plaintiff to Klinge between said dates to have been \$2,045, instead of \$930.54, as stated in the complaint, and alleges, further, that between said dates Klinge paid to plaintiff on account of said purchase the sum of \$2,047.77, and avers that plaintiff was paid in full for all beer so sold to Klinge under the provisions of said contract. It thus appears that the only issue joined by the pleadings related to the transactions had between the parties subsequent to February 20, 1906; plaintiff charging that the amount sold was of the value of \$930.54, no part of which had been paid, and defendant alleging that the value of the beer sold was \$2,045, all of which had been paid. This constituted the sole issue before the court.

The court made the following finding: "That previous to the 20th day of February, 1906, the plaintiff did sell and deliver beer to the defendant Klinge, for which the agreed price was \$2,179.20; that subsequent to the 20th day of February, 1906, and in pursuance of the instrument in writing hereinbefore set forth, the plaintiff did sell and deliver certain quantities of beer to the defendant William Klinge for the agreed price of \$2,020; that all the goods hereinbefore mentioned were charged to the defendant Klinge on the books of the plaintiff in the form of a running account; that prior to the 20th day of February, 1906, the defendant Klinge did pay to the plaintiff the sum of \$1,145.89 on said running account; that subsequent to the 20th day of February, 1906, the defendant Klinge did pay to the plaintiff the sum of \$2,147.77 on the said running account; that all of said payments, both subsequent and prior to the 20th day of February, 1906, when received by the plaintiff, were immediately placed upon the books of the plaintiff to the credit of the defendant Klinge on said running account; that prior to and at the time of the filing of the complaint herein, for the said goods sold and delivered, the agreed price unpaid was the sum of \$905.54." If we disre-

gard that part of the finding as to the dealings between the parties prior to February 20, 1906, no reference to which appears in the complaint, and consider only that portion applicable to the issues raised by the pleadings, it would appear that during the period specified in the complaint Klinge bought beer of plaintiff to the value of \$2,020 and paid on account thereof, and for other goods purchased, the sum of \$2,147.77. The court so finds. It cannot be claimed that such finding supports the judgment rendered. In order to sustain the judgment we must invoke the support of a finding not within the issues, namely, that relating to transactions had between Klinge, the principal, and respondent, prior to February 20, 1906, and in no wise mentioned or referred to in the complaint. The law will not permit this to be done. A finding made outside the issues will not warrant a judgment. *Moynihan v. Drobaz*, 124 Cal. 212, 56 Pac. 1026, 71 Am. St. Rep. 46; *Green v. Chandler*, 54 Cal. 626; *Gamache v. South School District*, 133 Cal. 145, 65 Pac. 301. It follows, from what has been said, that the court erred in its conclusion of law that plaintiff was entitled to recover of defendant Garrettson the sum of \$905.54.

The transcript contains a bill of exceptions purporting to embody certain evidence had upon the trial. This, however, is not a subject for consideration upon this appeal, for the reason that the appeal was not taken within 60 days after the entry of judgment. Code Civ. Proc. § 939. The evidence given on behalf of defendant seems to bear upon the question of unfairness claimed to have been exerted in procuring appellant's signature to the bond, but no such issue was tendered.

The judgment is reversed.

We concur: ALLEN, P. J.; TAGGART, J.

7 Cal. App. 534

PEOPLE v. KELLEY. (Cr. 58.)

(Court of Appeal, Third District, California. Feb. 15, 1908. Rehearing Denied by Supreme Court April 16, 1908.)

1. CRIMINAL LAW — RESPONSIBILITY FOR CRIME—INSANITY.

A person who was at the time of the commission of an offense insane, and incapable of knowing and understanding that the act was wrong, is entitled to an absolute acquittal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 53-58.]

2. HOMICIDE—EVIDENCE—INSANITY—INSTRUCTIONS.

Where accused did not deny the killing of decedent, and interposed the defense of insanity, and the evidence on the issue was conflicting, an instruction that, if accused was at the time of the killing insane, the jury should not find him guilty of murder in the first degree, for, if insane he could not form the willful, deliberate, and malice aforethought intent which the law requires to constitute murder in the first degree, was, standing alone, erroneous as leading the jury to believe that, if accused was insane, he would be entitled to an acquittal of murder in the first degree, but as to the other

degree of murder, or manslaughter, insanity would not excuse him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 605.]

Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Frank Kelley was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Pardee & Pardee, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, for the People.

HART, J. The defendant, under an information charging him with the crime of murder, was convicted at the trial of murder of the second degree. From the judgment and the order denying him a new trial, he takes this appeal.

The homicide occurred on the 22d day of January, 1907, in the county jail at Susanville, the defendant having been arrested and confined in said jail on that day upon suspicion that he was insane. The sheriff, who made the arrest, employed the deceased, Perry Stout, to remain with and guard the defendant during the night of the day of the arrest. At about the hour of 12 o'clock that night one Packard, a night watchman and deputy sheriff, went to the jail with food or "supper" for Stout and the prisoner. On reaching the inside of the jail he found Stout lying dead on the floor. Death, it was learned upon investigation by the sheriff, who had been summoned to the jail immediately upon the discovery of Stout's death, and by the autopsy physician, who later examined the body, was caused by knife wounds. The defendant, as stated, had been arrested on the supposition that he was insane. He had been engaged as a laborer on tunnel work for the Western Pacific Railway, and was placed under arrest by the sheriff at a point on the line of said railway known as "Camp No. 1." The evidence discloses that the defendant had been on a protracted "spree," or under a state of alcoholic intoxication for a number of days previous to his arrest, and that his actions prior to and at the time of his said arrest were so unusual and queer that it was generally believed by his acquaintances that he had lost his reason. The sheriff was notified of the conduct of the defendant, and was requested to place him in custody, and, in obedience to said request, arrested and confined him in the county jail, as already related. The defendant did not deny killing Stout, but interposed the defense that, at the time of the commission of the homicide, he was insane.

On the 4th day of February the district attorney was about to proceed with the arraignment of the defendant upon the information filed against him, when, upon a suggestion by counsel representing the accused, the court, by the authority of section 1368 of the Penal Code, made an order,

reciting that a doubt existed as to the sanity of the prisoner, and that the question of his sanity be submitted to a jury. Thereupon a jury was summoned and impaneled to try the question of defendant's mental condition. The jury, after hearing evidence, returned a verdict "that said alleged insane person is at the present time insane." Upon this verdict the judge of the superior court made an order committing the accused to the Napa state hospital for the insane. The effect of this verdict and order of commitment to the state hospital was only, of course, to suspend, until such time as the prisoner might recover, further proceedings involving his arraignment and trial. On the 18th day of March, 1907, the medical superintendent of the state hospital officially declared the recovery of the defendant, and accordingly made an order, in compliance with section 2189 of the Political Code, discharging him from said hospital. The defendant was subsequently returned to the custody of the sheriff of Lassen county, and on the 18th day of July put upon his trial for the crime of murder, as charged against him in the information.

The defendant, on this appeal, makes the complaint that the trial court erred to his prejudice in a number of its rulings upon questions of evidence, and likewise erred in giving and refusing certain instructions. It is also urged that certain jurors impaneled to try the case received evidence bearing upon the issues of the case out of court. But it will not be necessary to notice all the assignments of error; for we are in no doubt that a reversal of the cause is imperatively demanded because of prejudicial error involved in the charge of the court to the jury. The only defense interposed to the charge was, as we have seen, that the defendant was, at the time he killed the deceased, insane to the extent that he was without volition or responsibility; that is, that he was so unbalanced mentally that he was powerless to know and appreciate the wrongfulness or criminality of his act. The circumstances attending the homicide, according to the description given by the witnesses of the wounds inflicted upon the body of the deceased, were of unusual atrocity and wickedness, if the act was committed by the defendant in a state of sanity. There were found upon the body of the deceased by the autopsy physician something like 30 wounds, all of which, with the exception of 1, were produced by a knife. A few of the wounds were inflicted, in the opinion of the physician, after the deceased had expired. One of the wounds—that on the right side of the neck—extended over an inch to the left of the median line to 2½ inches beyond the right ear, severing the jugular vein and carotid artery.

There is evidence tending to show that the defendant for some days prior to the homicide had been indulging in alcoholic drinks

to such an extent that he became a victim of delirium tremens; that, as before suggested, his actions were so far from his ordinary and apparently normal manner of conducting himself that those who had some personal acquaintance with him became convinced that his mind was affected to the extent at least of temporary dethronement of reason. Expert testimony was offered by both sides as to the mental sanity of the defendant at the time of the commission of the act of killing. As is usual in almost all cases in which insanity is relied upon as a defense to crime, the testimony of the alienists was conflicting—those for the defense claiming that the defendant was certainly insane at the time, and those testifying for the prosecution declaring with equal positiveness that, while he was laboring under certain hallucinations, superinduced by long continued alcoholic intoxication, he nevertheless had intelligence enough to know that his act was not only wrongful but criminal. The defendant and the deceased had never met before the evening preceding the morning on which Stout was found to have been slain, and no motive or reason for the homicide is shown by the record. The defendant made no effort to escape, and there was some evidence to the effect that the opportunity was readily available to him to do so had such a thought been in his mind. In short, the evidence was such that the jury would have been warranted in returning a verdict either for or against the accused.

If the defendant was, at the time he killed Stout, insane to a degree that he was incapable of knowing and understanding that he was thus doing wrong, then he was entitled, under the law, to an absolute acquittal. Logically, under the evidence as presented in the case at bar, either one of two verdicts only could properly have been returned—the one that the defendant was guilty of murder of the first degree; the other an acquittal altogether of any offense embraced in the charge in the information. By this we are not to be understood as saying that a verdict of guilty of murder of the second degree or of manslaughter could or should not be sustained, if the instructions and rulings of the court did not involve prejudicial error. We only make the suggestion for the purpose of illustrating the proposition that the defendant was entitled to a full and accurate statement by the court to the jury of the law applicable to the sole defense interposed by him against the charge alleged in the information. The court signally failed to so instruct the jury, as must be readily obvious from an examination of its full charge, and particularly from the following instruction read and submitted to the jury as the law upon the question of insanity as a defense to the charge of murder: "If you believe and find from the evidence that the defendant was, at the

time of the alleged killing, insane from any cause, either of a temporary or settled nature, then you should not find the defendant guilty of murder in the first degree, for, if insane, he could not form that willful, deliberate, premeditated, and malice aforethought intent which the law absolutely requires to constitute murder in the first degree." The objection made to the quoted instruction is that the court thereby in effect declared to the jury that they could find the defendant guilty of any crime included within that charged in the information other than murder of the first degree, even though they believed the defendant was insane to the extent of irresponsibility at the time he killed the deceased. The instruction, while stating the law correctly as far as it goes, is, we think it will not be disputed, open to the criticism involved in the complaint urged against it. If the court had elsewhere in its charge stated the law fully and correctly upon this subject to the jury, then there might be room for the application of the argument advanced that the charge, considered in its entirety, or as a whole, fairly presented the law relating to the defendant's only defense, and although, even under the mentioned circumstances, the instruction would be none the less vulnerable to the criticism made against it, there would perhaps be some ground for holding that it did not operate prejudicially to the accused. But we have searched the record in vain for a single line in any of the court's instructions bearing upon the issue of insanity in which the jury were told that, if the defendant was shown by sufficient proof to have been insane at the time of the commission of the act, he was thereby under our law absolved from responsibility for the same, and consequently entitled to an absolute acquittal, or a verdict of not guilty of any offense comprehended in the charge preferred against him. The criticised instruction, standing alone, and without any other or further or more correct amplification of the law applicable to insanity as a defense to the crime of murder, cannot reasonably be construed to mean anything less than that, if the defendant were shown to have been insane when he killed Stout, he would thereby be entitled to an acquittal of murder of the first degree, because his mentality was such that he could not conceive and form the malice aforethought essential to a consummation of the crime of murder of that degree, but that as to the other degree of murder or manslaughter insanity would not excuse him. This is not the law as it should have been declared to the jury, and the instruction was highly prejudicial.

The judgment and order are reversed, and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

7 Cal. App. 559

PEOPLE v. SIMMONS. (Cr. 60.)

(Court of Appeal, Third District, California.
Feb. 17, 1908. Rehearing Denied by Supreme Court April 16, 1908.)

1. CRIMINAL LAW—APPEAL—RECORD—BILL OF EXCEPTIONS—EXTENSION OF TIME FOR PRESENTING.

Under the express provisions of Pen. Code, § 1174, as amended in 1905, the time specified therein and in section 1171 within which the draft of a bill of exceptions must be presented to the judge or delivered to the clerk may be extended for a reasonable period by the judge, but only for good cause, and upon affidavit showing the necessity therefor, presented upon written notice to the adverse party, who may file counter affidavits, and in no case may the time be extended by the stipulation of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2857-2860.]

2. SAME—BILL OF EXCEPTIONS PRESENTED TOO LATE—PRESUMPTIONS.

Attorneys will be presumed to know the procedure necessary to secure an extension of time in which to prepare a bill of exceptions, and where they fail to observe it their misunderstanding or misconstruction of the statute cannot excuse their default.

3. SAME—SUFFICIENCY OF AFFIDAVIT FOR RELIEF.

Affidavits in support of a motion to be relieved from the objection that a proposed bill of exceptions was not presented in time are not aided by the recital in the motion that it would be made "on the ground of mistake, inadvertence, surprise, and excusable neglect," where they do not present the grounds constituting the mistake, etc.

4. SAME—QUESTION PRESENTED FOR REVIEW—APPEAL FROM JUDGMENT.

An appeal from the judgment alone without a bill of exceptions presents for review only the action of the trial court in giving and refusing instructions.

5. SAME—TRIAL—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

In a murder case an instruction that the prosecution is not required to establish accused's guilt beyond any possible doubt, but all that is required is moral certainty, that is, that degree of proof which produces conviction in an unprejudiced mind, and, if the jury are satisfied beyond a reasonable doubt of accused's guilt, they should convict, was not erroneous, because failing to state that the jury should be satisfied "to a moral certainty and beyond a reasonable doubt," especially where the instructions as a whole required that degree of proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1877-1882.]

6. SAME—CONSIDERATION OF CASE BY JURY.

In a murder case it was not error to refuse a requested instruction that if, after consideration of the case, a juror should entertain a reasonable doubt of accused's guilt, it would be his duty not to vote for a verdict of guilty, and not to be influenced in so voting for the single reason that a majority of the jury should be in favor of such a verdict, where the court repeatedly charged that they must be convinced of accused's guilt beyond a reasonable doubt or else acquit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

7. SAME—TRIAL—DUTY TO GIVE INSTRUCTIONS—PRESUMPTION.

It will be presumed that refused instructions were not pertinent to any fact shown by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3032.]

8. HOMICIDE—MURDER—TRIAL—INSTRUCTIONS—THREATS.

In a murder case a requested instruction that a threat of accused could not be considered unless the jury believed that the act upon which it was conditioned was done by deceased was properly rejected, since the character of the threat may have been such, and the condition upon which it was to be executed of such trivial importance, as to show malice, even without evidence that the act upon which the threat was conditioned was performed by deceased, especially as an attempted performance by deceased of the condition would make the threat admissible.

9. CRIMINAL LAW—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

In a murder trial a statement in an instruction that "there is nothing in the nature of circumstantial evidence that renders it any less reliable than any other class of evidence," was not violative of the constitutional provision prohibiting judges from charging with respect to matters of fact, and was not erroneous where, when considered with other instructions, it could only be understood as meaning that circumstantial evidence is just as reliable as any other kind, if it convinces the jury of accused's guilt to a moral certainty, and beyond a reasonable doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1883-1888.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

H. C. Simmons was convicted of murder, and appeals from an order refusing to settle a bill of exceptions and from the judgment. Affirmed.

Weldon & Held, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, for the People.

BURNETT, J. There are two appeals in the case upon separate records—one from an order refusing to settle a bill of exceptions, and denying and refusing to grant the motion of defendant to be relieved from the objection of plaintiff that defendant's proposed bill of exceptions was not presented in time, and the other from the judgment of life imprisonment upon conviction of murder in the first degree, with that penalty fixed by the jury. In this opinion we shall consider the questions arising in both appeals.

1. Judgment was entered against defendant on October 2, 1906. The court on the same day made an order granting defendant 30 days in addition to the time allowed by law in which to prepare, serve, file, and present his bill of exceptions. On November 10th, and before the expiration of the time theretofore allowed, the district attorney entered into a stipulation with the attorney for defendant that the latter should have to and including December 11th to present his bill of exceptions. On December 8th defendant gave notice that on December 10th he would present his bill to the judge. On December 10th said bill was duly presented, and thereupon the district attorney objected to the settlement upon the ground that the said proposed bill of exceptions was not presented "within the time required by law, as express-

ed in sections 1171 and 1174 of the Penal Code, nor was the same delivered to the clerk for the judge within said time, nor was the time expressed in said sections extended by any order of any court or any judge." The defendant then made application on affidavits to be relieved from said objection of the district attorney. These affidavits were made by the attorneys for defendant, and they set out the facts above stated, and that the order of the judge extending time was made in open court in presence of the district attorney, who made no objection, and that affiants "solely and implicitly relied upon the said extension of time so given by said stipulation and the order of the court, and did believe that by compliance therewith the presentation of said proposed bill of exceptions would be made in due time, and did believe that said order and stipulation waived the necessity of securing such extension by the presentation of affidavits, and that the securing of such affidavits and other steps prescribed by said sections 1171 and 1174 were not necessary where the attorney for plaintiff consented to such extension of time." The district attorney filed a counter affidavit presenting the additional fact that the said order of the court was made without any showing by affidavit or otherwise of any good cause therefor, and without any notice being served upon the district attorney, and that he neither assented to nor objected to the granting of said time to said defendant, and that no other order was ever made by any court or judge extending said time. The court denied defendant's application, and refused to settle any bill of exceptions.

Said section 1174, as amended in 1905, provides that: "The time specified in this section and section 1171 within which the draft of a bill of exceptions must be presented to the judge or delivered to the clerk, may be extended for a reasonable period by the trial judge, * * * but only for good cause and upon affidavit showing the necessity therefor, presented upon written notice of at least two days to the adverse party, who shall have the right to file counter affidavits. In no case can the time be extended by the stipulation of the parties." Here the order extending the time was made, as we have seen, by the judge without any affidavit having been filed, and without any notice having been given to the adverse party. Again the proposed bill was presented, not within the period covered by the order, but some time thereafter, upon the theory that there was an extension by virtue of the stipulation. To uphold appellant's contention that the bill should have been settled would be to disregard the plain provision of the statute. The significance of said provision was considered and determined by this court in the case of *People v. Bliss*, 84 Pac. 676. In that case it was said: "The present statute introduces additional requirements, which we cannot hold to be merely directory. * * * But it is claimed that it

was nevertheless within the discretion of the court, 'after hearing the whole matter, to make the order setting down the bill for settlement, and giving the district attorney time in which to file his amendments to the bill.' We cannot concur in this view of sections 1171 and 1174, and must hold that, when a defendant in a criminal action seeks to obtain an extension of time within which to have his bill of exceptions settled, he must proceed substantially as directed by the statute. Doing this, the judge is then clothed with discretion, and his action would be disturbed only where its abuse is made to appear." There is no pretense that appellant complied with the requirement of said statute. Hence the court below had no authority to consider the proposed bill of exceptions.

But if it were a matter of discretion, and the court had jurisdiction to relieve the appellant of his default, it could not be said that there was any abuse of said discretion. There is nothing in the affidavits of the attorneys for appellant to show that they were not familiar with the requirements of the law. It must be presumed that they had knowledge of the procedure to be taken in order to secure an extension of time in which to prepare their proposed bill. Knowing the law, they departed from its plain provisions at their peril. We might surmise that the amendment to said section 1174 had escaped the attention of counsel, but we must base our decision upon the record as we find it. No effect can be given to the statement in one of the affidavits that counsel, in view of the said order and stipulation, believed that they were acting within the purview of the law, as a misunderstanding or misconstruction of the statute cannot excuse default. *Chase v. Swain*, 9 Cal. 130; *Thompson v. Harlow*, 150 Ind. 455, 50 N. E. 474. Neither can the affidavits be aided by the recital in the motion that it would be made "on the ground of mistake, inadvertence, surprise, and excusable neglect of defendant and his counsel herein." Facts must be presented from which the court reaches the conclusion that the relief should be granted. The court is not concerned with the opinion of affiant that his neglect is excusable. *Shearman v. Jorgensen*, 106 Cal. 485, 39 Pac. 863.

2. The action of the trial court in giving and refusing instructions is the only question to be considered on the appeal from the judgment. The action of the court must be viewed in the light of any conceivable evidence against defendant, as the evidence actually received is not in the record. *People v. Clark*, 121 Cal. 634, 54 Pac. 147.

Complaint is made that the court erred in giving the following instruction: "The prosecution is not required to establish the guilt of the defendant beyond any possible doubt. All that is required is moral certainty, that is, that degree of proof which produces conviction in an unprejudiced mind; and if, from the evidence in this case, the jury are satis-

fied beyond a reasonable doubt of the guilt of the defendant, then your verdict should be one of conviction." The criticism of appellant is as follows: "Our contention is that not only must the jury be satisfied beyond a reasonable doubt, but to a moral certainty before they can convict." It is hard to understand how a juror can be satisfied beyond a "reasonable doubt" and not to a "moral certainty" of the guilt of defendant; but, conceding a difference, it is without significance, as the jury must have understood from the instructions as a whole that they must be satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant in order to convict him.

There was no error committed by the court in its refusal to give the following instruction: "If after consideration of the whole case any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so voting for the single reason that a majority of the jury should be in favor of a verdict of guilty." It was fully covered by other instructions given by the court. In fact, the court fully and repeatedly charged the jurors that they must be convinced of defendant's guilt beyond a reasonable doubt, or else it was their duty to acquit. For instance: "I charge you, gentlemen of the jury, that there must be in your minds an abiding conviction to a moral certainty of the truth of the charge derived from a comparison and consideration of all the evidence, and you must be satisfied of the truth of the accusation against the defendant to a moral certainty and beyond a reasonable doubt, or your verdict must be not guilty." This instruction was addressed to all the jurors, and any one would be very obtuse indeed who did not understand from it that each individual juror could not vote for conviction under any circumstance unless he was satisfied of the guilt of the defendant to a moral certainty and beyond all reasonable doubt. The law does not require such tautology as is advocated by appellant.

As to the refusal of the court to give a proposed instruction upon circumstantial evidence, it is sufficient to say that it is substantially covered by other instructions, and besides the general suggestion is applicable to this as to all the instructions refused that it must be presumed that they were not pertinent to any fact shown by the evidence.

The instruction as to threats given as modified was as favorable to defendant as he was entitled to. The latter portion, that the threat could not be considered unless the jury believed that the act upon which the same was conditioned was done by the deceased, was properly rejected. The character of the threat may have been such, and the condition upon which it was to be executed of such trivial importance, as to show malice, even

without any evidence whatever that the act upon which the threat was conditioned was performed by deceased. And besides, as suggested by respondent, an attempted performance by deceased of the condition would make the threat admissible while the proposed instruction required a complete performance.

Appellant complains of the following statement in one of the instructions given by the court: "There is nothing in the nature of circumstantial evidence that renders it any less reliable than any other class of evidence." It is contended that this is in violation of the provision of the Constitution which prohibits judges from charging juries with respect to matters of fact, and in support of the position *People v. Vereneseneckhoff*, 129 Cal. 511, 58 Pac. 156, 62 Pac. 111, *People v. O'Brien*, 130 Cal. 8, 62 Pac. 297, and *Estate of Blake*, 136 Cal. 311, 68 Pac. 827, 89 Am. St. Rep. 135, are cited. The *Vereneseneckhoff* Case, however, goes much beyond the case at bar, as will be seen from the following quotation: "The court enlarged upon the necessity of a resort to such circumstantial evidence in order to punish crime and protect the community, and said: 'Providence, the laws of nature, and the relation of things are so linked and combined together that a medium of proof is often furnished leading to conclusions as strong as those arising from direct testimony.' And again: 'Circumstantial evidence has this great advantage—that various circumstances from various sources are not likely to be fabricated.'" It will be readily seen also upon examination that the instructions condemned in the other two cases are materially different from what we have here. On the contrary, in reference to an instruction containing the same statement, the Supreme Court, in *People v. Wilder*, 134 Cal. 184, 66 Pac. 229, declares: "It may be said that as to this instruction containing a declaration of law there may be grave doubt, but as to the statements there contained not being prejudicially erroneous there is no doubt. *People v. Vereneseneckhoff* does not go to the length of holding such an instruction reversible error." The ruling was the same in the case of *People v. Howard*, 135 Cal. 266, 67 Pac. 148. But, assuming that the prosecution relied partly or wholly upon circumstantial evidence for a conviction, we think it was proper for the court to tell the jury that they might base their verdict upon circumstantial evidence as well as upon direct evidence. In other words, that there is nothing in its nature that renders it any less reliable than any other class of evidence. Considered with other instructions, it could only be understood as meaning that circumstantial evidence is just as reliable as any other kind, if it convinces the jury of defendant's guilt to a moral certainty and beyond a reasonable doubt.

We have examined the record carefully,

and find no error. The order refusing to settle the bill of exceptions and to relieve appellant of his default is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

PEOPLE v. SIMMONS. (Cr. 61.)

(Court of Appeal, Third District, California.
Feb. 17, 1908. Rehearing Denied by
Supreme Court April 16, 1908.)

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

H. C. Simmons was convicted of murder, and appeals. Affirmed.

Weldon & Held, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, for the People.

BURNETT, J. For the reasons stated in the opinion in the above-entitled case, No. 60 (this day filed) 95 Pac. 48, the judgment of conviction is hereby affirmed.

We concur: CHIPMAN, P. J.; HART, J.

RICHTER v. STATE.

(Supreme Court of Wyoming. April 21, 1908.)

1. ANIMALS — CONTAGIOUS AND INFECTIOUS DISEASES—QUARANTINE.

The power conferred by statute on sheep inspectors to quarantine sheep infected with or which have been exposed to infectious diseases is not inhibited by the Constitution, since it is practically the only method by which the state can enforce its police regulations.

2. SAME—STATUTORY REGULATIONS.

Rev. St. 1899, § 2077, as amended by Sess. Laws 1905, p. 148, c. 98, authorizes the board of sheep commissioners to divide the state into inspection districts, to appoint inspectors, to do all things practicable to protect sheep from disease, and to make regulations for the quarantining of sheep with infectious or contagious diseases, or that have been exposed to such disease, etc. Section 2087, as amended by said chapter, authorizes any inspector to inspect and quarantine sheep affected with disease, or suspected of being so affected, or that have been exposed to any such disease; and provides that, where an inspection made on request of a sheep grower results in finding the sheep free from disease, the expense of the inspection shall be paid by the party requesting it, but that, if the inspector finds that the sheep are infected or have been exposed to disease, the expense of inspection shall be paid by the owner of the sheep, and that the inspector shall take the steps provided in the succeeding section. Section 2088, as amended by said chapter, provides that the inspector, on finding that the sheep are infected or have been exposed to disease, may require that they be kept within certain fixed limits, and that any owner of sheep who breaks quarantine shall be guilty of a misdemeanor. Section 2100, as amended by said chapter, provides that all misdemeanors under section 2088 et seq., shall be punishable by a fine, etc. Held, that section 2087 was meant to define the duties of the inspector which are preliminary in their nature, and that such section and section 2088, considered in connection with sections 2077 and 2100 as amended, do not contemplate the quarantining of sheep because suspected of infection, and that, though the inspector had power to in-

spect such sheep, the authority to quarantine exists only when the sheep are found to be infected or to have been exposed to disease.

3. SAME.

Rev. St. 1899, § 2088, as amended by Sess. Laws 1905, p. 149, c. 98, provides that any sheep inspector on finding on examination that sheep are infected with or have been exposed to infectious disease may require that they be kept within certain fixed limits, and that any owner of sheep who breaks quarantine shall be guilty of a misdemeanor. Held, that the statute does not in terms make the decision of the inspector final on the question whether sheep have been exposed to disease; and hence, in a prosecution under such section for removing sheep from quarantine, the action of the inspector did not preclude defendant from showing that the necessity therefor did not exist; the question being one for the jury.

Error to District Court, Big Horn County; C. H. Parmelee, Judge.

Paul Richter was convicted of a misdemeanor, and brings error. Reversed and remanded for new trial.

Ridgely & West, for plaintiff in error. W. E. Mullen, Atty. Gen., for the State.

SCOTT, J. The plaintiff in error was convicted of a misdemeanor, and brings error.

It appears from the record that Richter was and had been for many months prior to June 28, 1906, the owner of a band of sheep which was kept and grazed upon the open range in Big Horn county. On said date a sheep inspector inspected the sheep, and found that they were not infected with any disease, but, acting on information to the effect that the sheep had been exposed to "scab," placed them in quarantine within certain limits fixed by him. The herder who was in charge of the sheep was duly notified, and such notice was communicated to Richter, who disregarded the notice, and without permission of any inspector removed the sheep from the quarantine limits, and herded them back upon the open range.

The court, over the objection of the defendant, gave to the jury instructions 1, 5, and 7, respectively, as follows:

"(1) You are instructed that under the law of this state whoever, being the owner of sheep, removes the same beyond the quarantine limits that may have been prescribed by any lawful inspector, is guilty of a misdemeanor."

"(5) You are instructed that under the law of this state an inspector, either federal or state, has authority to inspect and quarantine sheep affected with infectious or contagious diseases, or suspected of being so infected, or that have been exposed to any such disease."

"(7) You are instructed that the jury are not the judges of the question as to whether or not the sheep in controversy had been exposed, but that the inspector is the sole judge of whether or not there has been an exposure."

It is urged that these instructions did not correctly present the law of the case to the

jury, and that the defendant was thereby prejudiced. The determination of this question involves a discussion of what powers are conferred upon a sheep inspector. The board of sheep commissioners consists of three members appointed by the Governor (section 2074, Rev. St. 1899), who, after qualifying, choose their president from its members, and who are authorized to appoint a secretary (section 2076, Id.). The board is authorized (section 2077, Rev. St. 1899, as amended; chapter 98, p. 148, Sess. Laws 1905) to divide the state into districts for inspection, and appoint such inspectors as it may deem necessary in the manner as the board may provide by its rules and regulations; and to do and cause to be done all things practicable to protect the sheep of the state from disease, "and it shall prepare and promulgate such rules and regulations as it may deem necessary for the quarantining and dipping of sheep infected with scab, or any other infectious or contagious disease, or that have in any manner been exposed to any such disease and for the speedy and effective supervision among sheep as are not in conflict with the provisions of this chapter and also of chapter 7 of the Revised Statutes of Wyoming 1899." Section 2087, as amended and re-enacted (chapter 98, p. 149, Sess. Laws 1905), is as follows: "Any inspector, either federal or state, shall have authority to inspect and quarantine and treat sheep affected with contagious or infectious diseases, or suspected of being so affected, or that have been so exposed to any such disease, and such sheep inspector may be called upon, in writing, at any time, by one or more sheep growers owning sheep and paying taxes in such county, to inspect any band of sheep in his county. Upon such request being received by such inspector, he shall forthwith proceed to inspect the sheep mentioned in such request. If he shall find them free from scab or other infectious or contagious disease, the expense of such inspection shall be paid by the party making such request. If he shall find upon such inspection that any of such sheep are infected with scab or any other infectious or contagious disease, or have been exposed in any manner to any such disease, the expense of inspection shall be paid by the owner of such sheep, and such inspector shall take the steps in relation to said sheep provided in the next succeeding section of this chapter." The next section, being section 2088 of the Revised Statutes of 1899 as amended and re-enacted, provides, in part, that: "Whenever, upon examination by such inspector any flock of sheep kept or herded in the state of Wyoming shall be found infected with scab or any other infectious or contagious disease or that have been exposed in any manner to any such disease, such inspector shall forthwith notify the owner or person in charge of such sheep in writing," and in such case may require that such sheep be kept within certain limits, to be by him fixed and specified, and that other sheep owners shall not enter upon such

quarantined ground with their flocks of sheep until further notice or their sheep will also be quarantined. It is also provided that the owner or owners, person or persons, in control of sheep so quarantined who shall fail to keep them within the quarantine limits until properly released, shall be guilty of a misdemeanor. It will be observed that the inspector's authority to quarantine sheep is expressly conferred by statute; and in the matter of quarantining sheep because infected with, or because they have been exposed to, infectious diseases, he is the agent of the state. A conferred power of this nature is not inhibited by the Constitution, because it is the method, and practically the only method, by which the state can enforce its police regulations. The law is essentially of that nature, and the protection sought and the object to be attained must be by a summary method, and the state must act and act quickly through its agents, who are clothed with certain powers in the performance of the duty. The power cannot be used arbitrarily nor oppressively, but only in such case and in the manner prescribed by the statute, which, being penal in its nature, must be strictly construed. We doubt if the Legislature has the power to lodge in one man or set of men the authority to deprive a man of his right to the control and custody of his sheep because the inspector or any one else suspects that they are infected with scab. The inspector has not only the right, but it is his duty, to inspect the sheep, and, if competent to do so, it is an easy matter for him to determine whether they are infected or not. Section 2087, supra, as amended, says in the first part that the inspector shall have authority to inspect and quarantine and treat sheep "affected with contagious or infectious diseases or suspected of being so affected, or that have been so exposed to any such disease." We think the section should be considered as a whole and in connection with the other provisions of the act. The latter part of the section expressly provides that if he shall find upon such inspection "that any of such sheep are infected with scab or any other infectious or contagious disease, or have been exposed in any manner to such disease, * * * such inspector shall take the steps in relation to said sheep provided in the next succeeding section of this chapter." The next section, being 2088 of the Revised Statutes as amended, provides only for the quarantine of sheep found upon such inspection to be infected with scab or any other infectious disease, or that have been exposed in any manner to any such disease. Section 2100, as amended, reads as follows: "All misdemeanors under section two thousand and eighty-eight, two thousand and ninety-three, two thousand and ninety-four and two thousand and ninety-five shall be punishable by a fine of not less than twenty-five dollars nor more than five hundred dollars, and all misdemeanors under sections two thousand and eighty-nine and two thousand

and ninety-one shall be punishable by a fine of not less than five hundred nor more than two thousand dollars, and all such fines when collected shall be paid into the treasury of the county." Under section 2088 there is no authority to quarantine sheep except for the causes therein stated. The causes for which sheep may be placed in quarantine limits are expressly enumerated, and the misdemeanor therein defined consists in the removal of the sheep from such limits without a permit from the inspector after they have been duly quarantined. As no penalty is provided by the act for the removal of sheep from quarantine limits except when quarantined for specific causes, we think the failure to provide such penalty excludes the idea that it was the legislative intent that the inspector had authority to establish a quarantine for any other cause. That a mere suspicion of infection was not intended to authorize a quarantine, but merely an inspection to determine the fact of infection, is further evident from the provision of section 2087 that, if upon such inspection the inspector "shall find them free from scab or other infectious or contagious diseases, the expense of such inspection shall be paid by the party" requesting the inspection. We are of the opinion that section 2087 was meant to define the duties of the inspector which are preliminary in their nature, and that the two sections considered together in connection with sections 2077 and 2100 as amended do not contemplate the quarantining of sheep because suspected of being infected, but that the inspector has the power to inspect when so suspected, and the authority to quarantine depends upon the result of such inspection, and exists only when the sheep are found to be infected, or to have been exposed to such infectious or contagious diseases. Any other construction would place an arbitrary power in the hands of the inspector which the law does not permit, and the exercise of which might in many instances result in oppression and injustice. The jurisdiction of the inspector to declare and establish a quarantine for sheep rests upon the fact that they are either infected or have been exposed to such diseases as are enumerated by the statute; and this power should not be confounded with his authority to inspect, in order to determine whether the conditions exist upon which a legal quarantine may be established.

Instruction No. 5 was therefore erroneous, for by it the jury were told that the inspector had power to quarantine sheep which were suspected of being infected with infectious or contagious diseases when no such power is conferred by the statute. We have no doubt that instruction No. 1 either standing alone or unaltered by other proper instructions is erroneous. When considered in connection with instruction No. 7, the error by a construction of the two is quite apparent. It is not always true that the owner of sheep who removes them beyond

quarantine limits that may have been prescribed by a lawful inspector is guilty of crime. The inspector may be a lawful inspector, and yet, if he acts beyond and outside of the authority reposed in him by statute, his acts are void; for in such case he has no jurisdiction to act. He is clothed with quasi judicial power. He acts summarily, and is authorized to act only when certain causes exist. He should inform himself of the existence of one or the other of these causes. It is true that the statute is silent as to the manner and method of obtaining the information. The inspector is neither empowered to take testimony nor to administer an oath. In *People v. Board of Health*, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 431, 37 Am. St. Rep. 523, certiorari was brought to review the proceedings of the board of health declaring that certain dams across a river were a nuisance, and ordering their removal. There was no provision for a hearing before the board on the part of any person who was charged with maintaining a nuisance upon his premises. The court say: "Boards of health, and other like boards, act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they exercise their jurisdiction for the public welfare. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a determination." The action of the inspector in quarantining the sheep did not conclude the defendant from showing that the necessity therefor did not exist, nor was the defendant required to go into that question until the state had made out a prima facie case. The inspector was not the sole judge, nor could he pass judgment in this proceeding upon the question as to whether or not there had been an exposure. The issue was as to whether the defendant had violated the quarantine, and, if there had been no exposure, it being conceded that the sheep were not infected, there was no quarantine to violate, for the act of the inspector in attempting to establish such quarantine would be illegal and unauthorized. The statute does not in terms make the decision of the inspector final upon this question. We are not obliged to hold that it does. If it did, its application to this case would be an invasion of the constitutional rights of the defendant. Without due process of law neither his property, personal rights, or liberty can be interfered with. Section 6, art. 1, Const.; *People v. Board of Health*, supra. In the last-named case it is said: "Boards of health under the acts referred to cannot as to any existing state of facts by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order or ordinance abating an alleged nuisance, unless there be in fact a nuisance. It is the actual existence of a nuisance which gives them juris-

diction to act. Their acts declaring nuisances may be presumptively valid until questioned or assailed for the same reasons which give presumptive legality to the acts of official persons under the maxim, 'Omnia præsumuntur legitime facta donec probetur contrarium.' In the case before us the act of the inspector may have been presumptively valid until the plea of not guilty was interposed. Such plea questioned the validity of the quarantine, and thenceforth such presumption ceased to exist. The burden of proof was not shifted to the defendant, but, as in all criminal cases, rested upon the state to prove every essential element constituting the crime charged. One of the elements was that a valid quarantine had been established; that is to say, a quarantine which is authorized by the statute.

In *Troy v. State*, 10 Tex. App. 319, an act provided for the appointment of inspectors of sheep in certain counties, and defined their duties. One of the sections provided that whenever an inspection of a flock or herd of sheep under the provisions of the act disclosed the presence of "scab" or other infectious or contagious disease, it should become the duty of the inspector to notify at once the owner or person in charge, and prescribe certain limits within which the flock should be herded until cured. Another section provided that any owner or person in charge who shall willfully or knowingly fail to comply with or violate any of the provisions of the act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, etc. The similarity of the above provisions with those of our statute is apparent. *Troy* was convicted of a violation of the provisions of the statute in failing to keep his sheep within the limits prescribed by the inspector. He assigned as error the refusal of the court to instruct the jury as follows: "If the jury believe from the evidence that the sheep of the said C. W. Troy did not have the scab, they will find him not guilty. If the jury believe from the evidence that the defendant did not willfully violate the law in keeping the sheep within the limits prescribed by the inspector, you will find him not guilty." The court say: "If * * * the sheep of the defendant were infected with the disease called 'scab,' and he had been properly notified of that fact, and limits had been prescribed within which the sheep should be kept until cured, and the defendant had willfully and knowingly violated the provisions of the act as charged, then he would be guilty of a misdemeanor, but, if not, then he would not be guilty. Hence in our opinion it was a material inquiry whether the defendant's flock of sheep had scab or not, and whether, this being the case, he had willfully or knowingly failed of his duty in the premises; and the jury should have been so instructed in substance, as requested by the defendant's counsel." The judgment was reversed upon

the ground of error in refusing to give the instruction so requested. In the case before us the sheep were not quarantined on the ground that they were infected with scab or any other contagious disease, but upon the ground that they had been exposed thereto, and, as held in a former part of this opinion, they could be inspected if suspected of being so infected, or if they had been exposed. Whether or not they were infected with scab or had been exposed to such infection so as to authorize the inspector to place them within quarantine limits is, we think, upon principle and authority, a material inquiry for the jury in a prosecution of this kind, and that the court by instruction No. 7 took this question from the jury, and that in so doing it committed error prejudicial to the defendant.

There are other questions presented by the record as to the admissibility of hearsay evidence upon which the inspector acted. We do not deem it necessary to here discuss those questions in view of a new trial further than to say that this kind of testimony was evidently deemed competent upon the erroneous theory upon which the case was tried. To establish the fact that the sheep were either infected or exposed to the infection of diseases enumerated in the statute calls for competent evidence, the same as it does to establish any other fact in the case. The existence of one or the other of these causes is necessary to the establishment of a valid quarantine, and, in the absence of both, the defendant would not be guilty of the charge contained in the information even though the inspector acted in good faith and upon evidence which seemed to him satisfactory. His judgment could not in this action be substituted for that of the jury.

For error in giving instructions 1, 5, and 7 to the jury, the judgment will be reversed, and the case remanded for a new trial.

Reversed.

POTTER, C. J., and BEARD, J., concur.

CLAUSE v. COLUMBIA SAVINGS & LOAN ASS'N.

(Supreme Court of Wyoming. April 21, 1908.)

1. BUILDING AND LOAN ASSOCIATIONS—BY-LAWS—MATURITY OF SHARES.

The by-laws and prospectus of a building association which state that the shares are estimated to mature in six years, that when the amount in the loan fund to the credit of any share from monthly payments and profits is equal to the par value of the share, it shall be fully paid and matured, that loans and calculations are made on the estimate of the specified period required to mature the shares, etc., do not stipulate that the shares shall mature in six years, and the controlling provision as to maturity is that the stock will mature when the amount to its credit shall equal its par value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Building and Loan Associations, § 14.]

2. SAME—LOANS—PAYMENT.

The by-laws of a building association stipulated for monthly payments by the borrowing member, and that such payments should continue until the stock borrowed on should mature, and required shareholders to pay each month a specified sum on each share unless a loan had been obtained, and provided for the maturing of the stock by apportioning thereto the monthly payments and profits. *Held*, to require monthly payments until the stock borrowed on should mature.

3. PROCESS—DEFECTS—JURISDICTION.

The irregularity or imperfection of a summons, or the service thereof, which will deprive the court of jurisdiction, must render the summons or the service thereof so defective that a collateral impeachment of the judgment rendered thereon is available, and a service of process by the coroner authorized to serve process under specified circumstances is not void, though the service is improper, and the court has jurisdiction.

4. LIMITATION OF ACTIONS—COMMENCEMENT OF ACTION—NEW ACTION AFTER FAILURE OF FORMER SUIT—QUASHING SERVICE OF PROCESS.

The quashing of the service of summons because made by the coroner, authorized by Rev. St. 1899, § 1172, to serve process only where the sheriff is a party, based on the fact that the sheriff was improperly joined as a party, results in failure by plaintiff otherwise than on the merits, within section 3465 providing that, where plaintiff in an action commenced in time fails otherwise than on the merits, he may commence a new action within one year thereafter, in which case the bar of limitations is not applicable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 562.]

5. SAME.

Where the service of process in an action begun in time is quashed because the service was made by the coroner in a case in which service could not be made by him, plaintiff may cause the issuance and service of another summons in the same action on the petition previously filed, or an amended petition, thereby commencing the action anew, within Rev. St. 1899, § 3461, providing that an action shall be deemed commenced at the date of the summons served on defendant, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 562.]

6. SAME—PERIOD OF LIMITATIONS—MATURITY OF DEBT—INSTALLMENTS.

Where a debt is payable in installments, the statute of limitations runs on the whole debt from the date of the first default only when such default has the effect by the terms of the contract or otherwise of maturing the whole debt, and where the default does not mature the whole debt, the statute will run from the date of the default, if at all, only on the installment as to which default has occurred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 281.]

7. SAME.

A debt payable in installments was secured by a deed of trust stipulating that on the default in any of the payments the whole debt might at the option of the creditor become due at once. *Held* that, unless the creditor exercised the option, the statute of limitations ran on the debt only from the time of its maturity as originally fixed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 281.]

8. BUILDING AND LOAN ASSOCIATIONS—BY-LAWS—MATURITY OF DEBT—LIMITATION OF ACTIONS.

The by-laws of a building association declared that, where any shareholder neglected to

pay the interest or dues on his loan or the monthly installments for six months, the association might compel payment of principal, interest, etc., by proceedings on his note, and foreclosing the security, which should at once become due and payable. A borrowing member secured the debt by a deed of trust, which stipulated that in default in any of the payments of principal or interest the association might at its option declare the whole debt due. *Held*, that the by-laws, if construed to mature the debt absolutely, without an option, did not mature it until after a failure for six months to make the required payments.

9. SAME.

A building association suing on a note executed by a borrowing member, which stipulates that monthly installments must be paid until the stock borrowed on shall mature in accordance with the by-laws of the association, and thereby repay the loan, must allege and prove that the stock has not matured to establish a default on the part of the member.

10. SAME.

The note given to a building association by a borrowing member stipulated for the payment of monthly installments until the stock borrowed on should mature and the loan be thereby repaid. Continuous payments were made by the member previous to any default for the period originally estimated by the association to be sufficient to mature the stock. The association in an action on the note alleged its willingness to credit the value of the stock on the amount found to be due. The answer did not object to such credit, and alleged that the stock had matured, or ought to have matured, and that by reason of its maturity there was no indebtedness. *Held*, that the borrowing member was entitled to credit for the value of the stock, with interest, in reduction of any amount found due on the note.

Error to District Court, Carbon County; David H. Craig, Judge.

Action by the Columbia Savings & Loan Association against James H. Clause, administrator of Robert O'Malia, deceased. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

McMicken & Blydenburgh, for plaintiff in error. Jabez Norman, for defendant in error.

POTTER, C. J. The defendant in error, who was the plaintiff below, is a Colorado corporation, and belongs to that class of private corporations commonly known as building associations. Its original corporate name was the Columbia Building & Loan Association. In 1899 the name was changed to the Columbia Savings & Loan Association. This suit was brought by the association to recover an amount alleged to be due upon the note or contract of a borrowing shareholder. Robert O'Malia, then a resident of the city of Rawlins in this state, became a member of said association June 4, 1890, and received a certificate of that date entitling him to 10 shares of the capital stock, subject to the conditions, rules, regulations, and by-laws of the association. The by-laws required of each shareholder a monthly payment on the last Saturday of each month of 70 cents on each share, where no loan had been obtained on the stock, but in the event of such loan the payments were regulated by au-

other provision presently to be referred to. It was also stated in the by-laws that each shareholder should be entitled to receive for each share named in his certificate \$100 when the monthly payments and the profits apportioned thereto should equal that sum; also that a shareholder was entitled to a loan from the association of an amount equal to the value of his shares at maturity, upon making a proper application therefor, and giving the required security. While holding said 10 shares, and having regularly made the monthly payments thereon, O'Malla applied for, and on May 26, 1893, received, a loan of \$1,000, which sum equaled the amount to which he would be entitled, in the absence of a loan, upon the maturity of his shares. With his wife he executed a note or contract for the repayment of the loan and a trust deed covering real estate in Carbon county, this state, to secure it, and as collateral security he assigned to the association his shares of stock. Omitting the signatures the note or contract reads as follows: "No. 500. \$1,000. Rawlins, Wyoming, May 26, 1893. In consideration of one thousand (\$1,000) dollars loaned to me by the Columbia Building & Loan Association, we or either of us hereby promise to pay said association at its office in Denver, Colorado, sixteen & $\frac{25}{100}$ dollars per month, payable on the last Saturday of each and every month until the stock borrowed upon shall have matured in accordance with the by-laws and rules of said association and this loan is thereby repaid. The shares of stock in the Columbia Building & Loan Association held by the maker of this note as shown by certificate of stock No. 1,753 are hereby transferred and pledged to the said association as collateral security for the performance of the conditions of this obligation and of the trust deed securing same." The trust deed provided that in case of default in any of the payments of principal or interest according to the tenor and effect of "said promissory note" the whole of said principal sum secured and the interest thereon to the time of sale may at once, "at the option of the legal holder thereof, become due and payable," and the premises sold as if the indebtedness had matured. Payments by borrowing shareholders were to be governed by the following provision of the by-laws: "Shareholders having obtained loans shall, on or before the last Saturday of each and every month until the stock borrowed upon shall have matured and the loan is thereby repaid, make or cause to be made payments as follows: One seventy-second of the sum borrowed (less the membership fee), also interest at the rate of 3 per cent. per annum upon the original amount of the loan." During the period intervening between the date of his membership and the time when he received the loan O'Malla regularly paid the required monthly payment of \$7 dues on his

stock, and after receiving the loan he regularly paid the monthly installment required by the note or contract until and including the month of May, 1896, making in the aggregate 72 monthly payments. There is some dispute as to whether his last payment was for the month of May or June, 1896, but we think it reasonably clear from the evidence that it was the payment due the last Saturday in May. It was entered in his pass book as paid May 30th, though it was not credited on the association's books until some time in June. No further payments were made. O'Malla died September 2, 1900, and shortly thereafter James H. Clause was appointed administrator of his estate. The association presented to the administrator its claim here sued upon, and the same was rejected April 13, 1901. The trust deed given to secure the loan aforesaid was made to Clyde J. Eastman, as trustee, and provided that in case of the latter's death, resignation, removal, or absence, or failure or inability to act, the sheriff of Carbon county should become his successor in trust. On July 2, 1901, the association, as plaintiff, filed a petition for the commencement of a cause in the district court of Carbon county, naming James H. Clause, as administrator of the O'Malla estate, and Creed McDaniel, the sheriff of Carbon county, as defendants. The facts deemed necessary to a recovery upon the claim of the association were set out, and it was also alleged that the trustee named in the trust deed had resigned, and that the sheriff therein appointed as his successor in trust had declined to accept the trust. The prayer of the petition was for judgment against the administrator for the amount alleged to be due, viz., \$680.70, with legal interest from May 27, 1901, and for a sale of the property covered by the trust deed. On the same date (July 2, 1901) a summons was issued on the petition against the defendants therein named by the clerk of the court, under the seal thereof, directed to the coroner of the county. The coroner's return showed service upon Clause, the administrator, July 3, 1901. The latter, appearing specially for that purpose, filed a motion to quash the service and summons on the ground that, though the sheriff was named as a defendant, it appeared from the allegations of the petition that he was neither a proper party nor interested in the action, and that the process had been improperly directed to and served by the coroner. Upon that motion the district court, by an order entered November 8, 1901, quashed the service, and continued the cause for service. An alias summons was issued on the date last mentioned, directed to the sheriff, naming the administrator as the only party to be served. That summons appears to have been duly served upon the defendant administrator on the day it was issued. On December 7, 1901, the answer day under the summons of No-

vember 8th, an amended petition was filed, and a summons issued thereon. The amended petition omitted the sheriff as a party and the prayer for a sale of the property, and demanded judgment for the allowance of the plaintiff's claim to be paid by the administrator out of the proceeds of the estate. On behalf of the administrator a demurrer was filed to that petition, which does not appear to have been acted on. A second amended petition was filed June 26, 1902, and a summons was issued thereon June 27, 1902. The summons was duly served, and the defendant administrator filed a demurrer, which was sustained, and judgment was rendered thereon against the association. That judgment was reversed by this court on error, and the cause remanded, with directions to overrule the demurrer, and for further proceedings. 13 Wyo. 166, 78 Pac. 708. Upon the return of the cause to the district court an answer was filed to the second amended petition, and the plaintiff filed a reply. Upon the issues thus joined a trial was had to the court without a jury, resulting in a judgment for the plaintiff association for the sum of \$2,053.10, made up as follows: Principal, \$1,000; interest to the date of judgment, November 27, 1905, \$1,053.10. The judgment ordered this amount to be paid by the administrator in due course of administration. A motion for new trial was filed and overruled, and the administrator brings the case here on error.

The original and each amended petition allege that the shares of stock held by the decedent had not matured, and that their value June 27, 1901, a few days prior to filing the first petition, was \$887.85. Each petition alleged a total indebtedness due May 27, 1901, of \$1,568.55, consisting of \$1,000 principal, \$553.15 interest from June 3, 1896, to May 27, 1901, and \$15.40 insurance charges paid by the association with interest. The original as well as the first amended petition credited the alleged value of the stock, and asked judgment for the balance, \$680.70, with interest thereon from May 27, 1901. The second amended petition alleged a readiness to credit the stock value, but, without deducting it, claimed judgment for the total indebtedness aforesaid, with interest from the date mentioned. The insurance charges were not allowed, and need not therefore be considered. It appears that the interest included in the alleged indebtedness was computed at the rate of \$9.25 per month, and that the interest embraced in the judgment was computed at the same monthly rate to the date of judgment. This was upon the theory that the agreed monthly installment of \$16.25 included the monthly stock dues of \$7, leaving the balance as interest. The evidence shows that the installments paid were each so credited upon the books of the association, \$7 to dues, and \$9.25 to interest, and the first two payments made by the decedent under the loan contract were entered in his pass book in two separate items of \$9.25 and \$7, and in enter-

ing therein the three succeeding payments the figures 9.25 were entered in the column headed "Interest and dues," and 16.25 in the column headed "Totals." There was no showing upon the trial by either party as to whether or not the stock borrowed upon had matured, or what its value was at the time of trial or at any other time.

1. The defendant by his answer alleged, and it is here contended that upon the by-laws of the association and the representations of its agents and printed circulars the obligation of the decedent as a shareholder was to pay 70 cents monthly on each share for a period of 72 months, and that the contract for the repayment of the loan obligated him only to make the agreed monthly payments the remainder of the period of 72 months, and thereby cancel the indebtedness. This position cannot be sustained. It is true that a printed circular or prospectus distributed by the association explaining its methods and purposes stated that "shares are estimated to mature in six years, and the member may then withdraw such shares and receive \$100 therefor." But that was immediately preceded by the statement: "Whenever the amount in the loan fund to the credit of any share (from monthly payments and profits) is equal to \$100, such share shall be fully paid in, and be considered to have fully matured, and no more monthly payments shall be required." And it was followed by a statement that the six-year estimate as to maturity of stock is a conservative one, based upon the experience and calculations of the larger English associations of a similar character. It is also true that the by-laws contained a like estimate of the period required to mature the shares, and stated that all loans and calculations are made upon that estimate; and the illustrations furnished by the association as to the cost to shareholders, both borrowing and nonborrowing, were based upon 72 monthly payments. The by-laws, however, plainly provided that each shareholder would be entitled to receive \$100 for each share when the monthly payments and profits apportioned thereto should equal that sum. There is testimony also to the effect that at a meeting of prospective shareholders at Rawlins, where the decedent resided, an agent of the association stated that monthly payments for 72 months would mature the stock. The construction contended for is claimed also to be the effect of that provision of the by-laws regulating the payments by borrowing shareholders, which fixes the monthly installment at one seventy-second of the amount of the loan (less the membership fee) with 3 per cent. interest per annum added. The printed circular and the by-laws stated that the association was purely mutual and co-operative, and that each member was interested in all the assets in proportion to the stock held by him.

It is apparent that the controlling provision as to the maturity of the stock, both in

the circular and by-laws, is that which states that the stock will mature whenever the amount to its credit shall equal its par value. Upon that basis it would be manifestly impossible to arbitrarily determine in advance the date of maturity. Though the period required to mature the stock might be estimated, it could not be definitely fixed without ignoring the essential features of the association and the plan adopted for maturing its stock. Six years was not stated as an arbitrary or fixed period for the stock to run, or for limiting payments, but it was expressly stated to be an estimate. It is clear that the impossibility of stating a definite time otherwise than as an estimate or opinion was recognized by the officers of the association, since they did nothing more in that respect than to state an estimated period. Such an estimate, plainly stated to be such, is not to be distorted into a contract or promise to mature the shares within the estimated period. Where a mutual building and loan association provides for maturing its stock by the equal application to all of it, or all of a series, of the monthly dues and profits, as in the case of the association here, the argument that the association is bound by an estimate as to time of maturity, so as to limit the period for payment of dues, has not usually, if ever, been regarded with favor by the courts. That the circulars and by-laws of the association here did not require or provide for the maturing of the stock in the estimated period has been uniformly held where they have been considered. *Columbia, etc., Ass'n v. Junquist* (C. C.) 111 Fed. 645; *Kinney v. Columbia, etc., Ass'n* (C. C.) 113 Fed. 359; *Columbia, etc., Ass'n v. Lytle*, 16 Colo. App. 423, 66 Pac. 247. Indeed it was held in Colorado, where the association is incorporated, that it had no power to contract that stock would mature at a fixed time. *Columbia, etc., Ass'n v. Lytle*, *supra*. In that case it was said with reference to the question here presented: "From this circular it appears that the shareholders of appellant united in a business venture for their mutual benefit, all shareholders to profit or lose in proportion to their respective shares of stock; their respective interests at any time in the association being in proportion to their stock; the value of their stock depending upon the financial success of the corporation; the further value of the stock being uncertain, because dependent upon unknown factors that might enter into the future operations of the corporation. This circular stated facts from which it appeared that no one could state when the stock would mature. An effort to do so could not be other than an estimate." The rule laid down in the by-laws for determining the monthly payments required of borrowing members seems to be unnecessarily complicated. It is difficult to understand why the stated method was employed, except upon the theory that it was not desired to designate as interest

the amount to be paid for the use of the money advanced. The section is not, however, open to the construction that it provides for liquidating the indebtedness with 72 monthly payments, nor that it provides for interest upon the loan merely at the rate of 3 per cent. per annum. The section itself states that the monthly payments thereby provided for shall be continued until the stock borrowed upon shall have matured, and it must moreover be construed with the other provisions, particularly that one which requires shareholders to pay each month 70 cents on each share, unless a loan has been obtained, and the one providing for maturing the stock by apportioning thereto the monthly payments and profits. However confusing in the abstract the provision for the monthly payments of borrowing shareholders may be, it does not seem possible that a shareholder could understand that his liability for stock dues would cease upon receiving a loan, and that thereafter he would be engaged in merely repaying the principal of the loan in monthly installments, with 3 per cent. interest. There is clearly no foundation for such a belief upon any reasonable or proper construction of the by-laws, or the contract here in suit. The shareholder continues such after as well as before receiving a loan, and thereafter he sustains the dual relation to the association of shareholder and borrower, with the rights and obligations of each. The monthly payment required of the borrowing shareholder necessarily includes the monthly stock dues, for the shares remain in existence, and are to be matured by the application of monthly payments and profits the same as shares not borrowed upon, and upon their maturity the loan is to be canceled. The balance of the required monthly payment in excess of the dues can only represent the amount paid for the use of the money advanced prior to the maturity of the stock, and therefore constitutes the interest to be paid. In this case such interest amounted to \$9.25 per month. It would seem that this must have been understood by the shareholder in this case, since the earlier payments under the loan contract were entered in his pass book in separate items of \$7 and \$9.25; the former sum being the amount that he had previously paid monthly as dues upon his shares. We perceive no ground, therefore, for holding that the contract entered into was different from that expressed upon its face, viz., to pay the required monthly installment "until the stock borrowed upon shall have matured in accordance with the by-laws and rules of said association."

2. The defendant pleaded in separate defenses both the general statute of limitations as to an action upon a contract in writing and the special statute as to an action upon a claim against the estate of a decedent rejected by the executor or administrator. An action upon a contract or promise in writing is limited generally to five years after the

cause of action has accrued. Rev. St. 1899, §§ 3453, 3454. Suit upon a claim against the estate of a deceased person, which has been rejected by the executor or administrator, is required to be brought within three months after the date of its rejection, if then due, or within two months after it becomes due. Id. § 4753. It is here contended that the evidence shows the action to have been barred under each statute, and that the judgment should be reversed on that ground. The theory of the contention as to the general statute is, first, that the cause of action accrued upon the occurring of the first default, the last Saturday of June, 1896; and, second, that if, as the plaintiff claimed, the first default occurred in the payment due the last Saturday of July, 1896, then the action was not commenced within five years thereafter, for the reason that, the service of the summons issued upon the petition filed July 2, 1901, having been quashed, because improperly directed to and served by the coroner instead of the sheriff, the summons and service thereof was not sufficient for the commencement of the action, within the meaning of the statute as applied to the limitation of actions. Upon the ground that the summons aforesaid was void and its service quashed, it is contended that the action cannot be deemed to have been commenced with its issuance, and therefore that it was not commenced within three months after the rejection of the claim by the administrator, which occurred April 13, 1901, and that under the special statute the suit was barred before a valid summons was issued. With reference to the point made as to the summons and the quashing of the service thereof, the defendant in error relies to save the bar of the statute upon the provisions of section 3465, Rev. St. 1899, which reads as follows: "If in an action commenced in due time, a judgment for the plaintiff be reversed, or if the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has at the date of such reversal or failure expired, the plaintiff, or if he die and the cause of action survive, his representatives may commence a new action within one year after such date, and this provision shall apply to any claim asserted in any pleading by a defendant."

The question raised upon the defective service will be first considered. The first summons was ordered quashed November 8, 1901, and an alias issued on that date and duly served. Another summons was issued upon the amended petition December 7, 1901, and duly served; and summons was again issued June 27, 1902, upon the second amended petition, and it was duly served. Each new summons was issued within the year after the date of quashing the first. The question, therefore, is in this connection whether the filing of the petition and issuance of the summons of July 2, 1901, which was afterwards quashed, operated to commence the action,

so as to render applicable the statutory provision above quoted, assuming that the general statute had not barred the action at the date last aforesaid. Within the meaning of the limitation statutes it is declared that "an action shall be deemed commenced * * * as to each defendant, at the date of the summons which is served upon him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him; and when service by publication is proper, the action shall be deemed commenced at the date of the first publication, if the publication be regularly made." Rev. St. 1899, § 3461. And that "an attempt to commence an action shall be deemed equivalent to the commencement thereof * * * when the party diligently endeavors to procure a service; but such attempt must be followed by service within sixty days." Id. § 3462. A civil action is commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon. Id. § 3507. The summons is required generally to be directed to and served by the sheriff. Id. §§ 3509, 3513. When, however, the sheriff is a party to the case, the duty of serving and executing process devolves upon the coroner. Id. § 1172. Though the sheriff was named in the petition as a party defendant, the court, in quashing service upon the motion therefor, must have decided that he was not a party within the meaning of the statute authorizing service of process by the coroner, and that the service by the coroner was improper. The correctness of that decision must be here assumed. Was there, then, within the meaning of section 3465, a failure by the plaintiff otherwise than upon the merits, in an action commenced in due time, so as to authorize bringing a new action within one year after the date of such failure? In our opinion this question must be answered in the affirmative, assuming as to this point that the general statute had not run at the time the petition was filed and the summons issued, and that the time limited for the action expired between its commencement, July 2, 1901, and the quashing of service. The question is not affected, in our opinion, by section 3462, making an attempt to commence an action followed by service within 60 days equivalent to the commencement thereof; for here service was obtained upon the summons issued, and if the action was not commenced by the issuance and service of that summons, section 3465 would not apply, and there would be no extension of the statutory period. But if the action was commenced, then section 3465 applies if there was a failure by the plaintiff otherwise than upon the merits. The court had unquestioned jurisdiction of the subject-matter of the action, so that, if the service of the summons by the coroner conferred jurisdiction over the person of the defendant, the action must be held to have been commenced. The mere fact that the service was quashed does not determine the question,

for it is not every irregularity or imperfection in a summons or the service thereof which will deprive the court of jurisdiction, though it may justify or require the setting aside of service upon motion, or the reversal of a judgment upon a proper application. To have the effect of failing to give jurisdiction the summons or service must be so radically defective that it would authorize a collateral impeachment of a judgment rendered thereon; that is to say, it must be void, and not merely voidable. 23 Cyc. 1075, 1076.

The decisions are not harmonious as to the particular defects in a summons which will render it void, and permit on that ground a collateral attack upon the judgment. Various defects have been considered in that respect, and as to most of them a conflict of authority exists. There is some conflict, but not much where the process has been misdirected. Alderson on Judicial Wr. & Proc. c. 6. Where there has been actual personal service, and therefore notice of the action, the weight of authority and the better reasoning favors the theory that a mistake in the direction or address renders the process voidable, but not void. In the work above cited Mr. Alderson says, in summing up the matter: "The progressive and equitable idea is that in the administration of justice substance is to be held in higher regard than form, and technical defects should never be permitted to work injustice or deny substantial right. Process that is in every other particular valid should not, for any omission or defect in the direction, be considered more than voidable." Id. § 25. A practice had grown up in Massachusetts of having the writ directed to and served by a coroner whenever the sheriff was a member of a corporation, which was either plaintiff or defendant. Finally that practice was held to be and to have been improper, but it was also held that the defect would not invalidate the judgments in cases wherein the incorrect practice had been followed. The court said: "It is not too late to go back to the true construction, and for the practice, if wrong, to be corrected. No decided cases can be disturbed, for it is only at the threshold that a wrong service by a sheriff or a coroner can be taken advantage of against the action." *Merchants' Bank v. Cook*, 4 Pick. (Mass.) 405. In *Shaw v. Baldwin*, 33 Vt. 447, it was held that, though the service of process upon a sheriff by his deputy was irregular, if advantage of the defect was not taken by proper objection, the service was so far sufficient that a judgment could not be impeached if recovered on the process thus served. See, also, *Simcoke v. Frederick*, 1 Ind. 54; *Burke v. Interstate*, etc., Ass'n, 25 Mont. 315, 64 Pac. 879, 87 Am. St. Rep. 416. It is to be remembered that, when the sheriff is a party to the case, the coroner is required to serve process, and perform all other duties of the sheriff. In this case as originally brought the sheriff was named as a party defendant. Had no ques-

tion been raised as to parties, his name might have been retained as a party to the case. To determine the insufficiency of the summons and service it was necessary that the court look into the petition and the allegations thereof to ascertain and adjudge whether or not he had been properly named as a defendant. Had the plaintiff in error here, who had been joined with the sheriff as a defendant, not objected, we do not think that upon collateral attack the judgment could have been held void on the ground of defective process because the sheriff had been improperly made a party. The coroner being an officer, authorized under certain circumstances to serve process, we are satisfied that service by him, though improper, and furnishing a reason for quashing service upon objection, or for reversal of the judgment, in case of the erroneous overruling of such an objection, does not have the effect of rendering the judgment absolutely void, or throwing it open to collateral impeachment, where, at least, the sheriff appears to have been named as a party to the cause.

The summons and service not having been void, but voidable only, the action was commenced within the meaning of section 3465. Upon the quashing of the service there was a failure otherwise than upon the merits, thus rendering section 3465 applicable. *Meisse v. McCoy's Adm'r*, 17 Ohio St. 225; *Ketterman v. Railroad Co.*, 48 W. Va. 606, 37 S. E. 683; *Isaacs et al. v. Price*, 2 Dill. (U. S.) 347, Fed. Cas. No. 7,097; *Eaton v. Chapin*, 7 R. I. 408; *Bank of Topeka v. Clark*, 69 Kan. 834, 77 Pac. 92; *Harris v. Davenport*, 132 N. C. 697, 44 S. E. 406. The case cited in 4 Dillon construed a similar statute of Kansas. There had been a defective service, and a judgment had been set aside on that ground. Judge Dillon held that the judgment upon the first service was not void, but regular upon the record; that there had not been a failure on the merits, but the plaintiffs were within the equitable and just provision of the legislation made for such cases, referring to a section of the statute identical almost with our section 3465. In the West Virginia case above cited the failure because of defective summons was said to be within the very reason of a similar statute extending the time after a dismissal for any cause which could not be plead in bar of the action. Statutes of this character are usually construed very liberally. Indeed there are a number of cases holding that a dismissal for want of jurisdiction is such a failure otherwise than on the merits as is contemplated by the statute extending the period of limitation for a new action. If, notwithstanding that the time limited had expired at the time of the failure through the quashing of service, a new action might have been brought within one year thereafter, there seems no good reason for doubting the right of the plaintiff to cause the issuance and service of another summons in the same action, upon the petition previously filed, or an

amended petition, thereby commencing the action anew. It is equivalent to commencing a new action within the meaning of the statute authorizing it. Such action is indeed, then, to be deemed commenced under section 3461 at the date of the summons served upon the defendant, but the limitation period will have been extended one year from the date of the previous failure by the operation of section 3465.

This brings us to a consideration of the question whether under the general statute of five years the commencement of the action July 2, 1901, was in due time. The contention that it was not is based on the theory that the cause of action accrued upon the first default—the last Saturday of June, 1896. Conceding that to have been the date of the first default, the contention cannot be sustained. Where a debt is payable in installments, the statute of limitations runs upon the whole debt from the date of the first default only when such default has the effect, by the terms of the contract or otherwise, of maturing the whole debt. If the default does not mature the whole debt, then the statute will run from the date thereof, if at all, only upon the installment as to which default has occurred. If this contract is to be construed as one providing for the payment of the debt by monthly installments, then the statute would have run merely upon the installment due in June, 1896, at the time the action was commenced, unless that default matured the entire debt. As the interest part only of the agreed installment is sought to be recovered, there may be some question whether it would come under the rule as to debts payable in installments. But we think it clear that the default in the June, 1896, installment did not mature the whole debt at the date of such default, or at a date five years prior to the commencement of the action. The provision of the trust deed as to maturing the debt upon default in making the agreed monthly payments is that, in case of such default, "the whole of said principal sum hereby secured, and the interest thereon to the time of sale, may at once, at the option of the legal holder thereof (the note), become due and payable, and the said premises be sold in the manner and with the same effect as if the said indebtedness had matured." It does not appear that the option thus permitted of making the whole debt due and payable was exercised until the bringing of the suit. The contract did not declare that any default would at all events render the principal debt due at once, but only that it might become due at the creditor's option. There is a conflict of authority upon the question whether, to set the statute of limitations in motion, a debtor can take advantage of a provision in the contract providing, without leaving it to the option of either party, that upon a failure to pay an installment the entire principal and interest shall become due and payable. 25 Cyc. 1103, 1104. And there may be a few cases holding,

where the provision is that the creditor may at his option hasten the maturity of the debt upon a default in the payment of interest or an installment, that the debtor may require the period of limitations to be computed from the default, which would authorize the creditor to act. The better doctrine, however, is said to be, and we think correctly, that the option is solely for the creditor's benefit, and unless he exercises it the statute runs on the debt only from the time of its maturity as originally fixed. 19 Am. & Eng. Ency. L. (2d Ed.) 205; *Watts v. Creighton*, 85 Iowa, 154, 52 N. W. 12; *Moline Plow Co. v. Webb*, 141 U. S. 616, 12 Sup. Ct. 100, 35 L. Ed. 879.

There is another provision entering into the contract here which seems to contemplate that a default in a single installment shall not immediately mature the debt. It is found in the by-laws of the association, and declares that, "if any shareholder or other person shall neglect to pay the interest or dues on his loan, or the regular monthly installments, or other fees, for six months, the association may compel payment of principal, interest, fees, or dues, by proceedings on his note, and foreclosing the mortgage or other security, which shall at once become due and payable." Whether or not this provision matures the debt absolutely without an option at the time it takes effect, it is not to be construed as doing so until after a failure for six months to make the required payments. Our attention has not been called to any other stipulation or provision affecting this question. The note or contract states no definite time for the payment of the principal of the loan, except that it requires the monthly payments to be made until the stock shall have matured, whereupon the debt will become paid. If the whole debt became due and payable by virtue of the above-mentioned provision of the by-laws upon default for six months in making the agreed payments, that time did not expire until the last Saturday of December, 1896, and within five years thereafter, viz., December 7, 1901, the amended petition was filed, and a summons issued thereon of the same date, which was served upon the defendant. We perceive no reasonable ground, therefore, for holding that the statute had run when the action was commenced.

3. Notwithstanding that there was no showing by the plaintiff, or indeed by either party, as to the value of the shares borrowed upon, or whether or not they had at any time matured, the plaintiff was permitted to recover the principal amount loaned, and the agreed monthly interest thereon to the date of judgment. This we think was erroneous. The note or contract sued upon stipulates that, in consideration of the loan, the stated monthly installments shall be paid "until the stock borrowed upon shall have matured in accordance with the by-laws and rules of said association, and this loan is thereby repaid." The agreement is

not to pay the amount of the principal within a certain period, subject to a proviso or condition that the debt shall be deemed satisfied or canceled whenever the stock shall mature, as in most of the reported building association cases which have come to our notice. The note here sued on had not become due upon its face because of the expiration of a definite time for which it had been given, but it became due and enforceable, if at all, because the monthly payments had not been continued as agreed until the maturity of the stock. The petition alleges that the value of the stock in June 1901, had reached the sum of \$887.85, only \$112.15 less than its value at maturity. The cause was not tried until more than four years later. Continuous payments had been made previous to default for six years, a period originally estimated by the association to be sufficient to mature the stock. There is no room, therefore, for the presumption in support of plaintiff's case that the debt had not been paid by the maturing of the stock in June, 1896, at the time of the alleged first default, or that, when suit was brought or trial had, the stock had not matured so as to pay the principal and stop interest at some intervening period. Nor upon the circumstances, considering the length of the period between the making of the loan and the alleged default, and especially the time of bringing suit and the date of trial, can it be said that the production of the note or contract presented a prima facie case. It is true that an officer of the association, testifying as a witness, was allowed to state that there was due upon the note the principal sum of \$1,000, and \$1,053.10 interest, computed at \$9.25 per month from June 3, 1896, to December 3, 1905. The amount of interest was a mere matter of computation, and the amount of the principal is expressed in the contract. Whether anything was or was not due or had become due depended upon the fact as to the maturity of the stock. Had the note provided for a payment of the sum borrowed within a stated period, which had expired, that it had become due would then have been evident, and generally it would then have devolved upon the defendant to show payment or other facts relied upon to defeat a recovery. But upon the terms of the contract here the case presents an exception to the general rule, and the plaintiff to maintain its right to recover was bound to prove a negative upon which its claim depended, viz., that the stock had not matured, for there could have been no default unless the negative was true, and hence no breach of the contract. Certainly the association would have no right to recover the principal if at any time it became paid by the maturing of the stock, nor interest after such payment occurred.

A similar question has been considered in two cases, though under different contracts

and circumstances, but they illustrate the proposition. In *Tyrrell L. & B. Ass'n v. Haley*, 139 Pa. 476, 20 Atl. 1063, 23 Am. St. Rep. 199, a bond had been given to a building and loan association by a borrowing shareholder, conditioned for the payment of a loan within nine years from date, with interest, fines, etc., and a monthly contribution on the obligor's shares. In a suit upon the bond the defendant offered to show by a witness that the stock had matured upon the making of his last payment. The offer was refused on the ground that the matter could not be determined upon the judgment of a witness, but only by the division of the profits made by the officers of the association. It will be observed that the bond in that case fixed a definite period for the repayment of the loan, and in the decision of the case it seems to have been assumed that the burden of showing the maturity of the stock as a ground for discontinuing payments was upon the defendant, though the point really decided by the appellate court was that he had a right to prove the maturity of the stock in the manner proposed, in support of his equitable defense of payment. The court said: "If the defendant is right in his contention, he certainly ought to have an opportunity of showing it, under his equitable plea of payment. As the case stands, he has a judgment at law against him for the full amount of the mortgage, which carries with it the costs of suit, while I see no relief from the effect of this judgment, except by a proceeding in equity, which involves additional expense and trouble. It would be unjust to subject him to all this if, in point of fact, his series has matured. It is a well-settled rule that, when such stock has matured, the debt is paid, and the borrower is entitled to a return of his securities. There may be circumstances which prevent or delay the maturity of the stock in a given instance. This may result from fraud or mismanagement on the part of the officers of the association, or from loss on investments. But, when the stock has fairly matured, I am unable to see what right the association has to recover a judgment against one of its stockholders for the amount of its loan." In *Concordia Sav. & Aid Ass'n v. Read*, 93 N. Y. 474, the action was to foreclose a mortgage given to secure a bond conditioned to pay a certain sum in monthly installments, together with fines, dues, etc., during the existence of the association. It seems that the association would cease whenever it had received money enough to redeem all its outstanding shares. It was contended that it was incumbent on the plaintiff to show that there were outstanding shares and the amount required to redeem them. The principle so contended for was not denied, but it was held that the proof was prima facie sufficient, for the reason that the defendant had made pay-

ments less than a year after he obtained the money, and the suit was begun within two years after the loan was made, within which period enough money to redeem the shares could not by any possibility have been received by the association.

The facts here differ materially from those in the New York case. Here the member had continued to pay throughout the entire period originally estimated to be sufficient, and, though the association was not bound to mature the stock within the estimated period, it is not unreasonable to suppose that it made and published the estimate in good faith, believing it to be conservative, and expecting the stock to reach maturity within the time so stated. The plaintiff alleged in each petition that the stock had not matured. That allegation must have been regarded as material. We think it was material. It is not apparent to us how a default could be established except by showing that the stock had not matured, for it is only until maturity that the payments were agreed to be made. We are not now considering whether the value of the stock should be credited to defendant. The proposition goes to the foundation of plaintiff's case. In our opinion it was necessary for the plaintiff, not only to allege, but to prove, that the stock had not matured, in order to establish a default under the contract sued on, especially so as the facts are peculiarly within the knowledge of the officers of the association. Not only does the petition allege a value of the shares approaching close to maturity, but it is stated in the brief of the association filed in this court April 22, 1907, that the value had reached \$1,258.58, a considerable sum in excess of the required value to mature the same. The same fact as to value was stated by counsel upon the argument of the case. It seems possible, if not indeed probable, from this statement, that interest may have been recovered at the monthly contract rate after maturity of the shares, and during a period when there would be no right to such interest. We are clearly of the opinion that whenever the stock reached maturity the principal was paid and interest thereafter ceased, though we assume that the unpaid interest for the period intervening between the time of default and maturity would be recoverable, if a default should be established.

As the case must be remanded for new trial, we think it proper to refer to the failure of the court to credit the value of the shares. While it is argued on behalf of the association that the application of the value of the stock in reduction of the indebtedness was not required in this action upon the note, it is, however, conceded that no court would enforce payment of the association's claim without compelling it to account for the value of the stock. It is not suggested how that accounting would be compelled. The judgment heretofore entered requires the administrator to pay the full amount of the claim,

principal and interest, and necessarily leaves the stock or its value with the association. To get away from the necessity of paying the amount of the judgment, if allowed to stand in its present form, would seem to require, unless the association should voluntarily and satisfactorily account for the stock, an action of some sort by the administrator. In this connection the remark of the court in the Pennsylvania case above cited is pertinent. It would be unjust to require the defendant to pursue another remedy, perhaps expensive and troublesome, when the whole matter is capable of settlement in the one suit. While the stock is technically held as collateral security, and the rules governing such securities are to a great extent applicable, it is to be observed that it differs in important particulars from ordinary commercial paper or stock in other corporations held as collateral. The stock here forms the basis of the loan, and upon its value depends the termination of the liability. The dues thereon were included in the monthly payment required by the loan contract. The expectation of the parties in such cases is to mature the stock whereupon the relation both of shareholder and debtor will cease, so far as it is represented or affected by the stock borrowed upon. Although the payment of dues and interest will not ipso facto operate as payment upon the debt, the effect thereof, by assisting in the increase of the value of the stock, is to hasten the time of the satisfaction of the debt, and furnish the shareholder with an increasing fund to his credit, which he may, under the rules of the association and the law governing it, have applied toward the reduction of his debt when called upon to pay it. We are aware that it is held that, if neither party makes or asks for such an application, the law will not do so in the first instance, except perhaps upon final decree on foreclosure. Where, however, the member has been so long in default in the payment of dues as to show no disposition to continue the relation of shareholder, there seems to be no substantial reason against crediting the value of the stock and rendering judgment for the balance, if any. Such a course will close the litigation, and we see no injustice in it. It appears especially proper in this case against an administrator, the shareholder having died long after the alleged default. Moreover, in the case at bar, the plaintiff alleges the value of the stock at a specified time, and a willingness to credit the value upon the amount found to be due. The answer does not object to such credit. It denies that the value is only the amount stated in the petition, and alleges that the stock had matured, or ought to have matured, and that by reason of its maturity there was no indebtedness. Upon the pleadings, therefore, there is an admitted item of credit, and without further proof the value of the stock was at least as great as admitted in the petition. We think it proper under the circumstances,

if not indeed necessary, to allow the defendant administrator the value of the stock, with interest, in reduction of any amount found due upon the debt, if a debt should be established. A credit having been admitted by the plaintiff in its petition, proof thereof on the part of defendant was not required, except to establish a credit for a greater amount.

For the insufficiency of the evidence to show that the stock borrowed upon had not matured at the time of the alleged default, and when, if ever, it did mature, the judgment will be reversed, and the cause remanded for new trial.

BEARD and SCOTT, JJ., concur.

SPOKANE & B. C. RY. CO. v. WASHINGTON & G. N. RY. CO. et al.

(Supreme Court of Washington. April 13, 1908.)

1. COURTS—DECISIONS OF FEDERAL SUPREME COURT—CONCLUSIVENESS.

The determination in a state court of a federal question must be made in the light of the decisions of the federal Supreme Court in so far as they apply.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 329-333.]

2. PUBLIC LANDS—GRANTS—FORFEITURE.

The claiming of a forfeiture provided for in a federal land grant can only be made under authority of Congress, such as an act of Congress declaring a forfeiture, or authorizing a forfeiture to be made, or by a judicial proceeding by the government, and individuals claiming under other statutes cannot urge a breach of conditions subsequent by the grantee in such grant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 266.]

3. SAME.

Act Cong. June 4, 1898, c. 377, 30 Stat. 430, grants to a company a right of way for a railroad through an Indian reservation, provides for the filing of maps of definite location and the approval thereof by the Secretary of the Interior, and declares that the grant shall be forfeited unless a specified number of miles shall be constructed within a specified time. Maps of definite location were filed and approved, but the company did not construct any part of its road within the specified time. *Held*, that the grant on the filing and approval of the maps vested in the company the strip indicated by the maps, and on a failure to comply with the conditions the federal government, by a judicial proceeding or an act of Congress, could declare a forfeiture, but an individual claiming under another act of Congress could not demand a forfeiture.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 266.]

Appeal from Superior Court, Ferry County; D. C. Carey, Judge.

Action by the Spokane & British Columbia Railway Company against the Washington & Great Northern Railway Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

M. J. Gordon, Charles A. Murray, G. V. Alexander, and Thomas R. Benton, for appellants. W. T. Beck and Alfred M. Craven, for respondent.

ROOT, J. This was an action by plaintiff to enjoin defendants from interfering with the use of a right of way for railway purposes through the Colville Indian reservation in this state. From a judgment and decree in favor of plaintiff, the defendants appeal.

By an act of Congress approved June 4, 1898 (30 Stat. 430) there was granted to the appellant Washington Improvement & Development Company and to its assigns a right of way for its railway, telegraph, and telephone lines through the Colville Indian reservation, beginning on the Columbia river near the mouth of the Sans Poil river, running thence northerly through said reservation toward the international line. There was also granted grounds adjacent for the purposes of stations, other buildings, side tracks, and switch tracks. The act provided for the filing of maps showing the route when determined upon, said maps of definite location to be approved by the Secretary of the Interior. These maps were subsequently filed, and were approved by the honorable Secretary prior to November 27, 1899. Before the commencement of this action the Washington Improvement & Development Company transferred all of its rights, privileges, and immunities acquired under this act of Congress to the appellant Washington & Great Northern Railway Company. Since the filing and approval of the maps of definite location as aforesaid, this respondent, acting under authority of Act Cong. March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), and Act Cong. March 2, 1899, c. 374, 30 Stat. 990 (U. S. Comp. St. 1901, p. 1581), located a route for its railway over practically the same line indicated by the maps filed by the Washington Improvement & Development Company as aforesaid, and filed its maps with the Secretary of the Interior, who approved the same on October 17, 1905. The act of June 4, 1898, under which appellants claim, contained the following provision: "Provided, that when a map showing any portion of said railway company's located line is filed herein as provided for, said company shall commence grading said located line within six months thereafter, or such location shall be void, and said location shall be approved by the Secretary of the Interior in sections of twenty-five miles before the construction of any such section shall be begun." Section 5 of the statute reads as follows: "That the right herein granted shall be forfeited by said company unless at least twenty-five miles of said railroad shall be constructed through the said reservation within two years after the passage of this act." Neither the Washington Improvement & Development Company nor its successor, the Washington & Great Northern Railway Company, commenced grading within six months after the approval of its maps of definite location, nor did it construct 25 miles of railroad, nor any,

within two years after the passage of the act. For these reasons the respondent claims that appellants' location of the strip indicated by its maps became void and forfeited, and that respondent had a right to go upon the same strip of land and survey and locate its line of railway; that, having surveyed and marked out its proposed line of railway upon substantially this same strip of ground after the expiration of the two years, and its said maps of location having been approved by the Secretary of the Interior, respondent claims that its location thereupon is legal, and that appellants have no rights whatever in the premises, and should be enjoined from in any manner interfering (which appellants were doing) with the respondent's use and occupancy thereof.

Appellants maintain that the provisions of the statute requiring the commencement of work within six months from the approval of the maps of definite location and the construction of 25 miles of railroad within two years after the passage of the act were conditions subsequent, and that any breach or alleged breach of said conditions can be brought in question only by the government; that the respondent is not in a position to urge these matters, and cannot avail itself of any forfeiture on account of any such breach. It will be seen that the matters in issue are federal questions, and the determination thereof by this court must be made in the light of the decisions of the Supreme Court of the United States in so far as the latter apply thereto, and an examination convinces us that every question here raised is controlled by decisions heretofore made by that high court. In the light of those decisions we are led to the following conclusions: The statute under which the Washington Improvement & Development Company located its line through this Indian reservation constituted a grant in present. It was a "floating" grant until the company filed its map of definite location, and the same was approved by the Secretary of the Interior. The grant then became definite and fixed. It attached to the particular strip of land indicated by the map thus filed and approved, and the title to said premises became thereupon vested in the railway company. The provisions requiring the commencement of grading within six months and the construction of at least 25 miles of railroad within two years were conditions subsequent. Upon the failure of the railway company to comply with either of these conditions, the United States government, by a judicial proceeding or an act of Congress, or possibly by other appropriate proceeding equivalent to "office found," as known in the common law, could have declared a forfeiture and made a re-entry. Until this should be done, the title remained in the railway company, and could not be disturbed by respondent or any other third party. It was a matter between the appellants and

the government. Had Congress theretofore authorized the Secretary of the Interior or land department to declare forfeiture in cases of this kind, it is possible that the action of the Secretary of the Interior in approving the map of location filed by the respondent after the expiration of the two years, during which appellant should have commenced grading, and should have constructed 25 miles of railroad, but did not, might be deemed to be a declaration of forfeiture and a re-entry on the part of the government. But no statute or authority of this character is called to our attention, and we are aware of none.

It has been many times held by the United States Supreme Court that the claiming of a forfeiture provided for in a land grant can only be made under authority of the legislative department, such as an act of Congress declaring or directing a forfeiture, or authorizing such to be made, or by a judicial proceeding by the government, and that persons claiming under other provisions of the statute, such as the homestead or exemption laws, cannot urge a breach of conditions subsequent by the grantees. Among the many decisions of the United States Supreme Court bearing upon the matters herein discussed, we may call attention to the following: In the case of *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, 62, 63, 64, 22 L. Ed. 551, that court, speaking by Mr. Justice Field, among other things said: "The provision in the act of Congress of 1856 that all lands remaining unsold after 10 years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed. * * * And it is settled law that no one can take advantage of the nonperformance of a condition subsequent annexed to an estate in fee but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and, if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point with hardly an exception are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government. No individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed. * * * In the present case no action has been taken either by legislation or judicial proceedings to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the state as completely as it existed on the day when the title by location of the route of the railroad acquired precision, and became attached to the adjoining alternate sections." In the case of *Noble v. Union River Logging Railroad Company*, 147 U. S. 165, 176, 13 Sup. Ct. 271, 274, 37

L. Ed. 123, the court, speaking by Mr. Justice Brown, said: "The lands over which the right of way was granted were public lands, subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and his approval was noted upon the plats, the first section of the act vested the right of way in the railroad company. The language of that section is: 'That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an act was a grant in present of lands to be thereafter identified. *Railway Company v. Alling*, 99 U. S. 463, 25 L. Ed. 438. The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. *Moffat v. United States*, 112 U. S. 24, 5 Sup. Ct. 10, 28 L. Ed. 623; *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110. A revocation of the approval of the Secretary of the Interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was therefore void. As was said by Mr. Justice Grier, in *Stone v. United States*, 2 Wall. 525, 535, 17 L. Ed. 765: 'One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.' *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848." In *Van Wyck v. Knevals*, 106 U. S. 360, 366, 367, 1 Sup. Ct. 336, 27 L. Ed. 201, this language was employed: "The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established. It is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route." In *Bybee v. Oregon & California R. Co.*, 139 U. S. 663, 675, 676, 11 Sup. Ct. 641, 643, 35 L. Ed. 305, the court spoke as follows: "An effort is made to distinguish this case from *Schulenberg v. Harriman*, in

the fact that the act not only declares that the lands 'shall revert to the United States,' but that the act itself 'shall be null and void,' from which it is argued that it was the intention of Congress that the failure to complete the road should operate ipso facto as a termination of all right to acquire any further interest in any lands not then patented. It is true that the language of this statute differs somewhat from that ordinarily employed by Congress in connection with similar grants; but the declaration that the lands 'shall revert to the United States' is practically equivalent to a declaration that the act granting such lands shall cease to be operative if the company fail to complete its road within a specified time. * * * In *Grinnell v. Railroad Company*, 103 U. S. 739, 744, 26 L. Ed. 456, the court, speaking through Mr. Justice Miller, used this language: "Another point equally fatal to the plaintiffs in error is that the assertion of a right by the United States to the lands in controversy was wholly a matter between the government and the railroad company, or its grantors. The legal title remains where it was placed before the act of 1864. If the government desires to be reinvested with it, it must be done by some judicial proceeding, or by some act of the government asserting its right. It does not lie in the mouth of every one who chooses to settle on these lands to set up a title which the government itself can only assert by some direct proceeding. These plaintiffs had no right to stir up a litigation which the parties interested did not desire to be started. It might be otherwise if the legal title was in the government." In *St. Louis, etc., Ry. Co. v. McGee*, 115 U. S. 469, 473, 474, 6 Sup. Ct. 123, 125, 29 L. Ed. 446, the court, speaking through Mr. Chief Justice Waite, spoke as follows: "It has often been decided that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law. *United States v. Repentigny*, 5 Wall. 211, 267, 268, 18 L. Ed. 627; *Schulenberg v. Harriman*, 21 Wall. 44, 63, 22 L. Ed. 551; *Farnsworth v. Minnesota & Pacific Railroad Co.*, 92 U. S. 40, 66, 23 L. Ed. 530; *M'Micken v. United States*, 97 U. S. 217, 218, 24 L. Ed. 947; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. Ed. 201. Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and a judgment therein establishing the right, it should be direct, positive, and free from all doubt or ambiguity." In the case of *United States v. Repentigny*, 5 Wall. (U. S.) 211, 267, 268,

18 L. Ed. 627, Mr. Justice Nelson, speaking for the court, said this: " * * * We agree that before a forfeiture or reunion with the public domain could take place a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act directing the possession and appropriation of the land is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government." We think it will be readily seen that the foregoing decisions leave us no discretion in the matter, but conclusively determine the issues in this case adversely to respondent's contention and to the conclusions reached by the honorable trial court.

The judgment and decree appealed from will therefore be reversed, and the cause remanded, with instructions to enter a judgment and decree in favor of appellants.

HADLEY, C. J., and FULLERTON, CROW, RUDKIN, and MOUNT, JJ., concur.

MILLER v. DENMAN et al.

(Supreme Court of Washington. April 4, 1908.)

1. CORPORATIONS—TRUST COMPANIES—SUBSCRIPTIONS TO STOCK—DUTY OF INCORPORATORS.

Laws 1903, p. 367, c. 176, provides for the organization of trust companies. Section 2 provides for the execution of a certificate of organization by not less than seven persons mentioned in section 1; and such persons, under section 3, constitute the first board of directors. Under sections 1 and 3, before the corporation may do business, the capital stock must be fully paid, and the Secretary of State must issue a certificate of authority. *Held* that, while the original incorporators of such a company were authorized to receive money on subscriptions, they were bound to preserve the same as a trust fund to be used in perfecting the organization or to be returned to the subscribers if the enterprise proved abortive; and if they collected less than the original subscriptions on capital stock and failed to return the same when the enterprise proved unsuccessful for want of sufficient funds, they violated their trust and became liable to the subscribers whether such failure resulted from their conspiracy, fraud, or negligence; and if they permitted a portion of their number to divert the funds to an unauthorized purpose, they were guilty of such negligence and breach of trust as would compel them to respond to subscribers thereby suffering loss.

2. SAME—ACTION FOR REPAYMENT—SUBSCRIPTION—QUESTION FOR JURY.

In an action to recover money paid on a subscription for capital stock in a trust company, evidence *held* to sufficiently show defendants' negligence, breach of trust, and failure of duty to require the question of their liability to be submitted to the jury.

3. SAME—RATIFICATION OF INVESTMENT—QUESTION FOR JURY.

In an action to recover money paid on a subscription for capital stock in a trust company, *held*, under the evidence, a question for the jury whether there was any ratification by plaintiff of an investment of the money in bank stock sufficient to relieve defendants from liability.

4. SAME—EVIDENCE—ADMISSIBILITY.

In an action to recover money paid on a subscription for capital stock in a trust company, defended on the ground plaintiff ratified an investment of the money in bank stock, plaintiff could show that such stock was an over-issue, and that part of the money was used to start another bank.

5. WITNESSES—EXAMINATION—ADVERSE PARTIES.

Where plaintiff was compelled to call defendants to testify in his behalf, he should have been allowed much latitude in examining them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 815, 976-978.]

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by J. C. Miller against C. Denman and others. From a judgment dismissing the action, plaintiff appeals. Reversed and remanded for new trial.

Belt & Powell, for appellant. Samuel R. Stern, for respondent Denman. A. G. Gray, for respondents Clure and Foskett. S. P. Domer, for respondents Foster and Kunz. Allen & Allen, for respondent Parry.

CROW, J. This action was commenced by J. C. Miller to recover \$2,000 paid on a subscription for 20 shares of capital stock in the German-American Trust Company of Spokane. On January 27, 1906, the defendants C. Denman, W. W. Parry, C. E. Clure, E. W. Swanson, J. L. Foskett, W. S. Foster, J. F. Kunz, and one Abram E. Sever executed and acknowledged an organization certificate for the German-American Trust Company of Spokane, with \$100,000 capital stock, under Sess. Laws 1903, c. 176, p. 367, known as the "trust company act." On the same date the incorporators as a first board of directors organized, adopted by-laws, elected officers, and authorized the defendants E. W. Swanson and C. E. Clure, respectively elected secretary and assistant secretary, to solicit and collect the required subscriptions of capital stock. In the performance of this duty Clure procured from the plaintiff Miller two subscriptions of \$500 and \$1,500, which the plaintiff paid. The incorporators were unable to obtain full subscriptions, and the organization of the trust company was never perfected. The plaintiff sued all of the incorporators except Abram E. Sever, and also joined as defendant one James McCann, who was not served and did not appear, but who seems to have been interested in the organization although not an incorporator. The plaintiff's contention was that the defendants, instead of returning his subscription money, had without authority appropriated and diverted it to another purpose. On a jury trial a nonsuit was granted, and a judgment was entered dismissing the action. The plaintiff has appealed.

The appellant in his complaint made allegations of fraud and conspiracy. He also alleged facts sufficient to sustain an action for conversion. The respondents, separately

answering, denied all allegations of fraud and conspiracy, but affirmatively alleged that the respondents Clure, Fosskett, and Swanson had invested appellant's money in capital stock of the State Bank of Washington; that he was promptly notified of such investment, and that, by his failure to object thereto, he ratified and approved the same. The appellant in substance contends that the respondents are each and all of them personally liable for the amount of his subscription, even though it be conceded that he has failed to show conspiracy or fraud; that the trial court erred in rejecting evidence offered; and that it also erred in granting the nonsuit and dismissing the action. There was evidence that the respondent C. E. Clure solicited stock subscriptions for the German-American Trust Company, and that on February 14, 1906, the appellant first subscribed and paid \$500 for five shares, at which time Clure delivered to him the following receipt: "German-American Trust Company, Spokane, Wash., Feby. 14, 1906. Received of J. C. Miller five hundred dollars in payment of five shares of the capital stock of the German-American Trust Company. Certificate for same to be issued as soon as received—not later than 90 days from date hereof. German-American Trust Company, C. E. Clure, Assistant Secy." As no business could be transacted by the proposed corporation until the \$100,000 of capital had been fully subscribed and paid, this receipt indicated that the organization was to be sufficiently perfected within 90 days to require an issue of all the capital stock. There was further evidence: That, before the appellant made any additional subscription, the respondents elected him director and vice president of the proposed German-American Trust Company, although he was then ineligible, not being entitled to stock to the amount of \$1,000 par value. That he declined to act as such vice president or director, claiming he was incompetent, being a German farmer, unfamiliar with business transactions, and unable to write the English language. That he never did act or qualify as director or vice president. That the defendants without his authority printed his name as vice president on letter heads of the proposed trust company. That afterwards, on March 3, 1906, the appellant subscribed for 15 additional shares of stock, and paid Clure \$1,500, for which Clure delivered another receipt. That Clure told appellant he could sell all the stock in the city of Spokane, but that the organizers wanted some farmers to be interested in the trust company. That the respondents were unable to obtain subscriptions for more than \$12,000 of the capital stock. That they collected on such subscription \$6,000 in cash and \$6,000 in good notes. That on or about March 10, 1906, the respondents Clure, Fosskett, and Swanson, without any authority from the other respondents or from appellant, invested the \$12,000 cash and

notes in a corporation known as the "State Bank of Washington." That the following letter was mailed to, and received by, the appellant Miller: "Spokane, Wash., March 10, 1906. Mr. J. C. Miller—Dear Sir: Owing to delay in securing the full \$100,000.00 capital stock required by the German-American Trust Company, we have decided to commence business as a State Bank. And for that purpose have taken over the State Bank of Washington and herewith hand you a certificate of stock for twenty shares, being the amount of your subscription in the German-American Trust Company. We do this to enable us to use the capital so that we can pay you a dividend at the close of the year. We will continue to solicit stock in the G. A. T. Co. and when the full amount is secured will open for business under that name, and will take over the business acquired through the operation of the State Bank of Washington. Assuring you that we are working for the best interests of all concerned and with the idea that in the future we will be able to launch the 'German American Trust Company' under the most favorable conditions we desire your most hearty co-operation. Trusting this will meet with your approval, we are, very truly yours, C. E. Clure, Cashier." That like letters were mailed to all the other subscribers, including some of the respondents. That in fact the cash and notes were not turned over to the State Bank of Washington for several days after March 10, 1906. That the appellant made no answer to the letter; neither did he return the bank stock. That the State Bank of Washington was organized in May, 1905. That it did business as such for about two months. That its business was transferred to and conducted by the People's Bank, which was managed by the respondent Swanson and his brother. That while the People's Bank was in business, the State Bank of Washington received no deposits. That about March 15, 1906, the State Bank of Washington, being reorganized, again commenced business. That the appellant's money was then turned over to it. That about one month later it suspended and passed into the hands of a receiver, and that shortly thereafter the appellant demanded his money from the respondents, and commenced this action.

Chapter 176, p. 367, Laws 1903, is an act relating to trust companies. Section 2 provides for the execution of a certificate of organization by not less than seven persons mentioned in section 1. These persons, under section 5, constitute the first board of directors. Sections 1 and 3 provide that before the corporation shall be authorized to transact business the capital stock shall be fully paid, and the Secretary of State shall issue to the company a certificate of authority. From these and other provisions it is evident that the organization would not be complete until all conditions precedent in the act required had been performed and the

certificate of the Secretary of State had been issued. Necessarily subscriptions and payments of capital stock could only be solicited and received by the original incorporators, who constituted the first board of directors, or by their duly authorized agents. They were authorized to receive money on subscriptions, but it was their duty to preserve the same as a trust fund to be used in perfecting the organization, or returned to the subscribers if the enterprise proved abortive. They stood in a position similar to that of the promoters of an ordinary corporation, and incurred at least as much liability. It was not necessary for the appellant to plead or prove that the respondents had been guilty of conspiracy or fraud, although he might properly do so. The respondents assumed certain trusts, duties, and liabilities by becoming the original incorporators and directors of the proposed company, the organization of which they intended to perfect in compliance with the trust company act. If they collected less than the original subscriptions on capital stock, and failed to return the same when the enterprise proved unsuccessful for want of sufficient funds, they violated their trust, and became liable to the subscribers whether such failure resulted from their conspiracy, fraud, or negligence. If they permitted a portion of their number to divert the funds to an unauthorized purpose, they were guilty of such negligence and breach of trust as would compel them to respond to subscribers who might thereby suffer loss. It, therefore, is unnecessary to discuss the evidence for the purpose of ascertaining whether the appellant made a case of conspiracy or fraud.

In England a charter is not granted to a corporation until all stock is subscribed and the proposed corporation is ready to proceed with its business. Hence provision for money paid on stock subscriptions is ordinarily made by the appointment of a conditional committee of directors. Formerly this was done by promoters, and in the preliminary business transactions the promoters now ordinarily constitute the conditional committee. The English courts have repeatedly held that, when money has been paid on stock subscriptions, and the enterprise fails for want of a complete subscription, the individual promoters or provisional committee jointly and severally become liable to the subscribers for the return of their money advanced on stock subscriptions, which must be refunded without any portion being deducted for expenses incurred. Note on liability to subscribers, 25 L. R. A. 95; *Johnson v. Goslett*, 3 C. B. (N. S.) 569; *Nockles v. Crosby*, 3 Barne & Cress, 814; *Chaplin v. Clarke*, 4 Ex. 403; *Walstab v. Spottiswoode*, 15 Mees & W. 501; *Green v. Barrett*, 1 Sin. 45.

In *Johnson v. Goslett*, supra, the court said: "The question then arises, on what contract did the depositors or subscribers

for shares in fact pay their money? Was it not that the receivers should hold it to be applied to the purposes of the projected company if, and when, it should be fairly established, and, if it should not be established, to be returned to them? In other words, that, in the event of the nonestablishment, and in the absence of authority to employ it in the meantime otherwise, it should be held to the use of the parties paying it in. * * * Here a great proportion of the shares were not taken, and the concern was in fact abandoned. There would therefore have been ample evidence in an ordinary case to warrant the jury in finding that the state of facts had arisen on which the deposits ought to be returned." In the case last mentioned it was also held that each and all of seven original directors were liable to the plaintiff, although his payments on stock subscribed by him had been deposited in a bank in the names of only five of them.

The case of *Hudson v. West*, 189 Pa. 491, 42 Atl. 190, is especially applicable to the facts before us, not only on the question of the liability of the original promoters or directors, but also as to the effect of an investment of subscription money claimed to have been made, with the alleged ratification and consent of subscribers. In that case the court said: "This question seems to be of the simplest character. There was no pretense of any compliance on the part of the defendants with the terms of the contract. They received the plaintiff's money in consideration that they would form a company and give him stock therein to the amount of \$10,000, and they did nothing of the kind. They certainly cannot keep the plaintiff's money in those circumstances. Their want of success in the formation of the company is no concern of the plaintiff, and it is no defense in this action."

In *Alger on the Law of Promoters and the Promotion of Corporations*, section 162 reads as follows: "When a subscriber for shares in a projected corporation has paid money thereon in advance to the promoters, and the scheme proves abortive, he may recover back his money. This right rests on the failure of the consideration on which the money was paid. But the scheme is not to be deemed abortive until the formation of the corporation has been abandoned, or has become impracticable, or a reasonable time for the formation has elapsed. It is reasonable, in the absence of agreement to the contrary, that the expense of exploiting the proposed undertaking should, in case it collapses, fall upon the original projectors, and not on those who advanced their money on the faith of the ability of the projectors to do that which they undertook to do." 10 Cyc. 265; 1 Cook on Corporations (5th Ed.) § 63.

We think the principles announced in the above authorities apply with especial force

to the facts of this case, and that the defendants, as original directors, occupying a position kindred to that of promoters, would be liable to the plaintiff for the return of his subscriptions, even though they have been guilty of neither fraud nor conspiracy. There was sufficient evidence of their negligence, breach of trust, and failure of duty to require the question of their liability to be submitted to the jury.

The respondents contend that the appellant ratified the investment of his money in the State Bank of Washington by the defendants Clure, Foskett, and Swanson, and that he is now estopped from claiming its return. He was not familiar with the business methods of bank or trust companies. He was a plain German farmer, living in Idaho, some distance from Spokane. He subscribed and paid for the stock, relying upon assurances of Clure that the investment would prove profitable. His failure to promptly return the bank stock should be viewed more liberally than the failure of a business man shown to be well versed in such matters. The evidence does not show that the appellant fully understood the investment. The letter from Clure inclosing the bank stock gave him no information as to the solvency, business standing, or capital stock of the State Bank of Washington. He was never advised as to its true condition or situation. Mr. Clure stated that the trust company had already determined to take over the State Bank of Washington, and that the certificate for its stock which he inclosed had already been issued. Clure afterwards testified on the trial of this action that nothing of the kind had been done. Mr. Clure's letter further stated that the action had already been taken to enable the payment of a dividend to the appellant, that further subscriptions of stock would be thereafter solicited by the German-American Trust Company, and that, when the full amount was obtained, the trust company itself would take over the business of the State Bank. To the ordinary farmer this would indicate that the trust company enterprise had not been abandoned, but that it was to be fully perfected, and that he would ultimately obtain the stock for which he had subscribed and made payment. The evidence, however, shows that no further subscriptions were solicited or obtained. "Knowledge of all material facts and circumstances is an essential element to an effective ratification. Without such knowledge the adoption of the acts of an unauthorized agent, or one who has exceeded his authority, will not bind the principal; but, on the contrary, if he has given his assent while in ignorance of the facts of the case, he may, on being informed, disavow the unauthorized transaction." 1 Am. & Eng. Enc. of Law (2d Ed.) 1189. Mr. Clure's letter did not advise appellant of all the facts and circumstances pertaining to the disposition of his money.

The appellant is in no manner compromised by the fact that the respondents, against his protest, pretended to elect him director and vice president of the German-American Trust Company. It appears that some one without his knowledge or consent also attempted to elect him to some office in the State Bank of Washington. He never qualified, nor did he act in any official capacity in either corporation. We cannot hold as a matter of law that the appellant ratified the unauthorized acts of Clure, Foskett, and Swanson, thereby relieving them and the other respondents from personal liability. In all probability he would not have approved their acts had he been fully advised of all the facts and circumstances pertaining to the investment of his money. It was within the exclusive province of the jury to determine from all the evidence whether there was any ratification by him sufficient to relieve the respondents from liability. "Although it is said that the conduct of the principal will be liberally construed in favor of a ratification or adoption of the acts of the agent, yet a ratification is not to be presumed from a doubtful state of facts, but the question should be left to the jury." 1 Am. & Eng. Enc. of Law (2d Ed.) 1195.

The trial court refused to permit the appellant to show that the stock in the State Bank of Washington which had been delivered to him was an overissue. We think this was prejudicial error. If the stock was an overissue, there was no investment of appellant's money which he could afterwards ratify. The court also refused evidence offered by appellant tending to show that a portion of the subscription money paid by himself and others had been used to start a bank in a small town some distance from Spokane. This evidence should have been admitted as tending to show a breach of trust and lack of good faith on the part of the respondents. We will not pass on all of the contentions made by appellant in the matter of the rejection of evidence. He pleaded conspiracy and fraud, which he was entitled to prove if he could do so. He was compelled to call the respondents to testify in his behalf. They were not only unwilling witnesses, but their interests were adverse to his. Under such circumstances much liberality should have been allowed him in conducting their examination. Without regard to evidence erroneously excluded, enough was actually admitted to entitle the appellant to have the issue of the liability of each and all of the respondents, and also the issue of ratification, submitted to the jury for their determination.

The judgment is reversed, and the cause remanded for a new trial.

HADLEY, C. J., and ROOT, MOUNT, and FULLERTON, JJ., concur. DUNBAR and RUDKIN, JJ., not sitting.

In re SULLIVAN'S ESTATE.

(Supreme Court of Washington. April 17, 1908.)

On rehearing. Petitions denied.

For former opinion, see 94 Pac. 483.

PER CURIAM. The appellants, state and county, and also Cornelius Sullivan, have filed petitions for rehearing herein. In the petition of the state and county vigorous complaint is made of the following statement in the opinion: "The claimants, the state of Washington and county of King, do not deny the identity of the parentage of the deceased as asserted by the respondents." We concede that the statement quoted, when considered alone, is inaccurate, and we do not desire that counsel's contention shall be misunderstood by reason thereof. The entire sentence from which the above is taken reads as follows: "The claimants, the state of Washington and county of King, do not deny the identity of the parentage of the deceased as asserted by the respondents, and in their brief they admit that, if any fact is established by the evidence, it is established that John Sullivan was the brother of Eliza Sullivan and Ellen de Silva; but they assert that Sullivan died without surviving heirs." The above statement in the opinion was based upon the following, which we here quote from the opening brief of appellants state and county, at pages 180 and 181: "Cornelius Sullivan claims as a brother to the deceased through wholly different parentage, and necessarily repudiates Bessie Sullivan and Ellen Silva as sisters of the deceased. Like respondents, however, the evidence to establish Cornelius Sullivan's relationship depends largely and principally upon memory testimony of witnesses; and, regardless of how strong this testimony may be, the fact that John Sullivan has made sworn statements that Bessie Sullivan and Ellen Silva were his sisters, and the correspondence between Mrs. Lyons and John Sullivan, extending over a period of more than 20 years, with reference to the sister Bessie, and the character of that correspondence, unquestionably establishes that Bessie Sullivan and Ellen Silva were his sisters. If any fact is established by the evidence, it is the relationship of the deceased with these two sisters." From the above concession that Eliza or Bessie Sullivan and Ellen de Silva were the sisters of John Sullivan, and with the fact established as our previous discussion in the opinion had stated, that the parents of the three were Peter Sullivan and Abigail McAuliffe Sullivan, we saw no room for dispute as to the identity of the parentage. The statement that the said appellants "do not deny the identity of the parentage" is, however, probably misleading to the reader not conversant with the case. While the appellants concede that the relationship of brother and sister existed between the three, yet they did and do still

contend that the mother of the three was not Abigail McAuliffe Sullivan, but that her name was Eliza or Bessie. From this contention they deduce the conclusion that the mother was not the aunt of Johanna Callaghan and Edward Corcoran. As stated in the main opinion, we think the evidence established that Abigail McAuliffe was the mother, and that she was the aunt of Callaghan and Corcoran. No fact seemed to us to be more fully established than that Peter and Abigail McAuliffe Sullivan were the parents of Eliza or Bessie Sullivan and Ellen de Silva, and, with these appellants conceding that John Sullivan was their brother, there seemed to be virtually no ground for dispute as to the identity of the parentage. Counsel complain that the statement as made in the opinion puts them in the position of conceding a fact which they had never admitted. The explanatory correction herein made in no way affects the result in our minds, and we have made the statement for the reason that the writer of this and the former opinion, and also the members of the court desire that no apparent injustice may be done to counsel, who have certainly been untiring and vigilant in their efforts to secure what they in their petition for rehearing call "a splendid heritage to the school children of the state." The petition of Cornelius Sullivan is practically a reargument of the evidence as it was submitted at the hearing.

We see no reason for changing our views of the evidence, and both petitions are denied.

COEUR D'ALENE & S. RY. CO., Limited, v. UNION PAC. R. CO. et al.

(Supreme Court of Washington. April 10, 1908.)

1. CARRIERS—RATES—JOINT RATE—THROUGH LINE.

Defendants' connecting carriers operated a through line from Kansas City to Spokane, and had filed a through rate on empty freight cars traveling on their own wheels of \$90 per car in addition to freight earned by the use thereof in transit. Defendants and the Missouri Pacific Railroad Company operating a line from St. Louis to Kansas City had never published a joint free rate on such cars from St. Louis to Spokane, nor was the Missouri Pacific a party to any contract to transport plaintiff's cars from St. Louis to Spokane without charge other than the freight earned by such cars. Defendants had no line between St. Louis and Kansas City, but contracted to transport the cars from Kansas City to Spokane for a free rate. The fact that this rate was contrary to the rates filed with the interstate commerce commission having been discovered, the shippers were notified that the rate would not be adhered to before the cars were shipped, and defendants refused to deliver the cars without payment of the schedule rate. *Held*, that there was no authority for any rate on such shipment less than the joint rate from Kansas City to Spokane plus the rate from St. Louis to Kansas City.

2. SAME—APPLICATION OF STATUTE.

Where the facts are such that it is not clear that the conditions are so dissimilar as to render the interstate commerce act or a rate published thereunder inapplicable, such rate will be held to control in a civil proceeding.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by the Coeur D'Alene & Spokane Railway Company, Limited, against the Union Pacific Railroad Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

W. W. Cotton, Samuel R. Stern, and James G. Wilson, for appellants. Graves, Kizer & Graves, for respondent.

ROOT, J. In the early spring of 1904 the American Car & Foundry Company at its plant in St. Louis was building 20 box cars for the respondent. The respondent desired to have these cars when completed shipped to Spokane. They were, after negotiations between the respondent and the appellants, finally carried from Kansas City to the city of Spokane over the lines of the appellants. The respondent claims that the appellants agreed to carry these cars free of charge to the respondent, in consideration of the use of the same for the carriage of freight for account of the appellants, and the appellants claim that they were prevented, under the interstate commerce law and a schedule of joint rates of charges established and filed with the interstate commerce commission in accordance with said act, from carrying said cars at any rate less than \$90 per car. Upon the arrival of these cars at Spokane the appellant the Oregon Railroad & Navigation Company refused to deliver the same to the respondent except upon the payment of the rate of \$90 per car, or \$1,800 in the aggregate. This sum of \$1,800 was finally paid under protest by the respondent, who, in November, 1904, commenced action against the appellants to recover the sum so paid. The appellants in their answer, after a denial of a portion of the respondent's complaint, set up that the Union Pacific Railroad Company owned a line of railroad from Kansas City to Granger, the Oregon Short Line Railroad a line of railroad from Granger to Huntington, and the Oregon Railroad & Navigation Company a line from Huntington to Spokane; that these lines formed a continuous line from Kansas City to Spokane, but that each of said roads was separate and distinct, and that neither of appellants had any interest in the earnings or operation of either of the other roads; that appellants had established a joint tariff of rates of charges governing the transportation of railroad cars over said continuous line from Kansas City to Spokane, and had filed the same, in accordance with the act of Congress known as the "interstate commerce act"; that the schedule of joint rates established a rate of \$150.40 per car from Kansas City to Spokane when carried empty, and a rate of \$90 per car between said points when used by appellants for the carriage of freight for their own account; that this schedule of tariffs was in force, and governed the carriage of the cars in question;

that by the interstate commerce law the defendants were prevented from charging or participating in any rate between these points, less than that provided in said schedule; that on the 4th of March, 1904, the 20 cars were delivered to the Missouri Pacific Railway at St. Louis for carriage over its line to Kansas City, and to be there delivered to the Union Pacific Railroad Company for further carriage over the line of the Union Pacific and that of the other appellants to Spokane; that prior to the delivery of the cars to the Missouri Pacific at St. Louis the American Car & Foundry Company, the agent of the respondent, applied to the agent of the appellants at St. Louis for the quotation of a rate for the transportation of the cars over appellants' lines, and that, contrary to the tariff in force, the agent of appellants quoted to the American Car & Foundry Company a free rate from Kansas City to Spokane; that prior to the time the cars had left St. Louis the appellants discovered the erroneous quotation of a free rate and notified the said American Car & Foundry Company, the respondent's agent, that appellants could not transport said cars for less than \$90 per car and the use of the cars en route; that neither the American Car & Foundry Company nor the respondent withdrew the shipment; that upon the arrival of the cars at Spokane the Oregon Railroad & Navigation Company refused to deliver the same except upon the payment of \$90 per car, or \$1,800 in the aggregate; and that the same was so paid by the respondent. The reply put in issue the material allegations in the answer. The parties hereto, prior to the trial in the lower court, entered into a stipulation of facts. This stipulation, which is attached to the statement of facts as an exhibit, was the only evidence offered by the plaintiff on the trial. The defendants offered some additional evidence, from which the following facts are established: That the appellants are the owners of and operating lines of railroad between the points, as alleged in their answer, which form a continuous line from Kansas City to Spokane, but neither of said roads owns or is interested in the line of the Missouri Pacific or any road east of Kansas City; that the Missouri Pacific owns a line from St. Louis to Kansas City which, at said last-named place, has a physical connection with the line of the Union Pacific; that the said route from Kansas City to Spokane is on the most direct and regular route of any lines of railroad owned by defendants or any of them for shipments originating at Missouri river points and St. Louis and destined to Spokane; that the plaintiff at all times knew that neither of the appellants had any line nor was interested in any line running to St. Louis, or to any point east of Kansas City; that the appellants, together with other roads operating to the Pacific Coast, and the Missouri Pacific and other

roads operating between the Mississippi river and Missouri river, and with other roads further east, forming a continuous line or route from the Mississippi river points and other points further east to the Pacific Coast points, had established joint rates or charges passing over continuous lines or routes from all Mississippi river points to Pacific Coast points, on practically every line of commodity or freight. These schedules of rates had been duly filed with the interstate commerce commission, as provided by the said interstate commerce act, and the rates, as shown in said schedules, were in force during all of the times covered by the transactions in controversy in this case. Page 21 of this schedule it is stipulated is the only part thereof which provides a rate for the transportation of cars. Said page 21 is as follows:

west of Helena, Mont., and Ogden, Utah; that the Missouri Pacific is a line from St. Louis to Kansas City; that Kansas City is on the continuous line from St. Louis to Spokane via the lines of the Missouri Pacific, Union Pacific, and the other appellants; that the respondent is not a member of the transcontinental freight bureau; that full tariff rates referred to in said schedule with reference to cars moving on their own wheels is 10 cents per car per mile. It further appears from the stipulation that, while the cars in question were being built, some negotiations were had between the respondent and appellants concerning the shipment of the cars from St. Louis to Spokane, which correspondence is set out at length in the stipulation of facts. It appears from the correspondence that the rate contracted for was quoted as a result of

Intermediate Commodity Rates.

To "North Pacific Coast Terminals" and "Intermediate Points," as Designated on Pages 1, 2, 3 and 4. Articles.	In Cents per 100 Pounds from		
	Chicago and Com. Points. C. L.	Mississippi River Com. Points. C. L.	Missouri River Com. Points. C. L.
Minimum weight, carloads, 30,000 pounds, except as otherwise provided.			
Railway Equipment.			
Cars, narrow gauge, or parts thereof, K. D., loaded on standard gauge cars; also ballast cars for street and interurban railways, in cents per 100 lbs.	150	145	135
Equipment, machinery and supplies for standard gauge steam or electric railroads, not owned and operated by lines members of the Transcontinental Freight Bureau, will be subject to full tariff rates, except as provided below.			
Empty freight cars on their own wheels will be charged from Missouri river terminals and Port Arthur, Ont., full tariff rates, based on short line mileage by an authorized route to point of actual destination.			
When loaded with freight (which includes freight consigned to owners of equipment), and destined to points west of Helena, Mont., and Ogden, Utah, \$90.00 per car from Missouri river terminals and Port Arthur, Ont.			
Full tariff rates will be charged on freight loaded in the cars.			
No mileage or per diem allowance will be made on freight or passenger equipment, loaded or empty.			
Freight and passenger cars must be equipped with automatic air brakes, and be subject to inspection in accordance with Master Car Builders' Rules.			
Staves and heading, rough or finished, hoops and bolts (will not apply on tank or vat stuff), min. C. L. wt. 40,000 lbs.	82½	80	80

For "Terminal" commodity rates see pages 23 to 88, inclusive.

The entire controversy in this case arises over the question as to whether the provision of the schedule as set out has any application to a shipment of the nature of the one involved in this action. The contention of the appellants is that it does apply, and the respondent's contention is that it does not. It further appears from the facts established by the stipulation that St. Louis is a Mississippi river point within the meaning of the schedule, and Kansas City a Missouri river point, and Spokane a North Pacific Coast point,

a misinterpretation of certain telegrams passing between the assistant general freight agent of the Union Pacific Company at Omaha and a general agent of appellants at St. Louis. The former official, upon hearing of the rate agreed upon, peremptorily ordered it canceled, but the cars at this time had been delivered to the Missouri Pacific Railway for shipment to Kansas City. The cars were loaded at St. Louis with freight for Kansas City, and transported to the latter city over the Missouri Pacific line. They went in lots

of 10 cars each, the shipping receipt in each instance being as follows:

Form 131.

Wagon No. ——— St. Louis, Dorcas St., 3-3, 1904.

St. L. I. M. Ry. received in good order from American Car and Foundry Company the following articles marked as below:

Directions.	Description.	Weight.
C. D'A. & S. Ry.,	10 new box cars.	
Spokane,	C. D'A. & S.	
Wash.	400, 401, 402, 403, 404,	
c/o W. C. Watrous,	405, 406, 407, 408, 409	
Supt. Transportation,	A. C. & F. Co. pays	
Mo. Pac. Ry., City.	I. M. switching only.	
To be loaded to Kansas	Corrected Ticket.	
City, for delivery to U.		
Pac. when empty.		

Stamped across the face in red ink is the following:

Car loaded by shippers. The St. L., I. M. & S. Ry. Co., getting no revenue except for switching, only handles it on condition that under no circumstances will it be held responsible for quality, quantity or condition of contents. Switching, \$—— per car of 40,000 lbs.; excess at proportionate rate. T. P. Adams, Agent, per D. H.

After the delivery of their freight at Kansas City the cars were loaded by these defendants and started for Spokane. Only one car was sent directly to the last-named city. Two of them carried loads to Seattle and were returned to Spokane from that city. One carried a load to Wardner, Idaho. One had a load to Garfield, Wash. Others delivered freight at different points between Kansas City and Spokane, and were reloaded, some of them several times, and forwarded. None of the cars reached Spokane until June, and some of them did not reach there until in September. There is nothing to indicate that respondent had any dealings with the Missouri Pacific relative to hauling the cars from St. Louis to Kansas City, the arrangements with that company appearing to have been made by appellants' agents. The cars were in St. Louis. Respondent desired them moved to Spokane. With that purpose in mind, it opened negotiations with appellants, and to bring about that result the latter negotiated with the Missouri Pacific in order to have the cars go over the latter's line to where they could be transferred to and carried over appellants' lines. The trial of the case in the superior court resulted in a judgment in favor of the plaintiff for the recovery of the excess freight paid under protest as hereinbefore mentioned. From this judgment the defendants appeal.

The appellants claim that this was a contract between them and the respondent for transportation of the cars from Kansas City to Spokane. The respondent claims that the contract called for the carriage of the cars from St. Louis to Spokane. In view of our conclusion upon another branch of the case, we will assume, without deciding, that the contention of the respondent is correct. The appellants also maintain that the rates on page 21 of the schedule apply to this shipment, while the respondent maintains that

said rates have no application to the shipment in question. We are then brought to the question of whether this contract was a valid one in the light of the interstate commerce law. It has been settled by the decisions of the Supreme Court of the United States that the rates provided and published by railroad companies under and pursuant to said statute must control over the rates agreed upon between the carrier and shipper whenever there is a conflict between the two, and that the carrier is not estopped to collect the full amount prescribed by the rates published under the statute where such amount is in excess of that which the carrier by contract with the shipper has agreed to accept for a given shipment. *Texas & Pacific Ry. Co. v. Mugg & Dryden*, 202 U. S. 244, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910. And it is conceded in this case that respondent is not entitled to recover if the rates in the published schedule apply to this shipment. The appellants maintain that, if this contract be deemed to be one of shipment from St. Louis to Spokane, the contract entered into by respondent and appellants was invalid as being in conflict with section 4 of the interstate commerce law. That section reads as follows: "That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act." They also maintain that the rate prescribed on page 21 hereinbefore mentioned applies to a shipment made either from St. Louis or Kansas City, and further claim that, if said rate applies only from Kansas City, the contract between these parties was nevertheless illegal, because it called for a rate less than that published as applying to such shipments from Kansas City to Spokane, and was not a "joint" rate established as by law required.

The respondent urges that the route from St. Louis to Spokane constitutes a "line" separate and distinct from the "line" composed

of the appellants' roads extending from Kansas City to Spokane, even though the latter constitute a portion of the former; that by reason of this being a separate "line," as that term is understood and used in section 4 of the interstate commerce law, it was legal to make a rate thereover from St. Louis to Spokane which should be less than the rate from Kansas City to Spokane, arguing that such lesser rate was justified by the different conditions that obtained. It appeared in the evidence that companies having railroads between St. Louis and Kansas City could afford to carry freight cars loaded free of charge except what they would obtain as freight upon the goods carried, but that on the lines west of Kansas City this condition did not obtain; that over the latter mentioned lines the greater part of the shipping was towards the east; and that, if these railroad companies hauled cars belonging to other people and filled with freight, it would necessitate hauling an equal number of their own cars empty, and that consequently they would reap no advantage from such an arrangement. It was in evidence that there was sharp competition in both St. Louis and Kansas City as to freight destined to points west of Helena and Ogden. Respondent relies much upon the case of *Chicago, etc., v. Osborne*, 52 Fed. 912, 3 C. C. A. 347, from which it quotes the following: " * * * Where two companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor compelled to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its line. If, therefore, the two companies by agreement make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the reasonableness of the local tariff of either line is determined." Respondent also places reliance upon *Parsons v. Chicago, etc., Co.*, 63 Fed. 903, 11 C. C. A. 489, from which it quotes as follows: "This court held in the case of *Railway Co. v. Osborne*, 10 U. S. App. 430, 3 C. C. A. 347, and 52 Fed. 912, which suit grew out of the establishment by the defendant company of the same freight rate that gave rise to the present action, that, where two connecting carriers unite in putting in force a joint through tariff between given points, such joint tariff is not the standard by which the reasonableness of the local tariff on either line is to be determined. It was decided that, where two connecting carriers unite in a joint tariff, they form practically a new and independent line, and that the joint rate established over such line may be made less than the sum of the local rates, or even less than the local rate of either company over that part of its road constituting a part of the joint line, without violating the long and short haul clause found in the fourth section of the inter-

state commerce law. The court was careful to limit the foregoing proposition by the proviso that, under the first section of the interstate commerce act, all rates, whether local or joint, must be 'reasonable and just.' But it distinctly overruled the contention that a local rate between two points on the same road is necessarily unlawful because it is higher than the rate charged under a joint tariff for a much longer haul over a line which is composed in part of that portion of the road to which the local rate applies." The case of *Chicago, etc., v. Osborne*, supra, is authority for the contention that, where two or more companies owning connecting lines unite in a through tariff, they form practically a new and independent line. But, as we read the opinion in that case, we do not find it an authority for the rate involved in this case. After making use of the language just quoted, Mr. Justice Brewer, who wrote the opinion in that case, said: "That we may not be misunderstood, we do not mean to intimate that the two companies, with a joint line, can make a tariff from Turner to Cleveland higher than from Turner to Buffalo, or any other intermediate point between Cleveland and Buffalo; for when two companies, by their joint tariffs, make a new and independent line, that new and independent line may become subject to the long and short haul clause. But what we mean to decide is that a through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemned."

Respondent urges that the roads of appellants constitute a line from Kansas City to Spokane, bearing the same relationship to the line composed of appellants' roads and the Missouri Pacific as though appellants' roads constituted but one road, and that consequently the rates over this line composed of appellants' roads may be deemed as "local" rates when considered with reference to a rate covering a line from St. Louis to Spokane, and made up of the roads of the Missouri Pacific together with these three of appellants. It seems to us that the fatal defect in this contract of shipment, even assuming that the differences in conditions might justify this rate from St. Louis to Spokane, and notwithstanding the provision in regard to long and short haul of section 4 might not apply, lies in the fact that these appellants and the Missouri Pacific never adopted or published a joint rate such as this contract calls for. It is evident that appellants could not haul these cars over their lines for less than the rate prescribed on page 21 of the schedule, to wit, \$90 per car loaded. Appellants had no line between St. Louis and Kansas City. If they agreed to take the cars at St. Louis, as respondent maintains, they could do so and handle them for shipment only by entering into an arrangement with the Missouri Pacific or some other company having a line from St. Louis to Kansas City, whereby a joint rate would be made

under the shipment from St. Louis to Spokane, or enter into an arrangement with some such company by which the cars would be shipped under an independent contract from St. Louis to Kansas City, and then, under another contract, taken over their lines to Spokane. If the shipment to Kansas City over the Missouri Pacific was by virtue of a contract covering merely that line, and the appellants then took up the shipment as an independent proposition to be handled over their lines from Kansas City to Spokane, it is difficult to understand why the published schedule rate would not apply, and we do not understand respondent as claiming that it would not apply; its contention being that the contract was one of shipment from St. Louis to Spokane. It is admitted, however, that there was no joint rate upon cars of this character from St. Louis to Spokane, unless the rate provided on page 21 of the schedule applied. There is no contention that the Missouri Pacific was a party to the contract of shipment involved herein. The law forbade these appellants to make a contract to haul these cars from Kansas City to Spokane at a rate less than \$90 per car and the freight money earned by the cars. This being true, it certainly does not comport with the spirit of the law if they are permitted to haul the cars, not only over these three roads, but also over them and another road, and without any compensation other than the amount received from the freight hauled in the cars.

Appellants could not make a "joint" rate from St. Louis to Spokane, via Kansas City, without joining with some company that had a road from the latter city to St. Louis. Hence there was no such joint rate unless page 21 of the schedule provides such, which respondent disputes. Appellants could not make a so-called "local" rate from St. Louis, as they had no road reaching that city. It is stipulated that appellants had no interest in the Missouri Pacific, and no interest in the freight money which these cars earned in going over that road from St. Louis to Kansas City, and received no portion thereof. Consequently appellants received no profit on the shipment of the cars prior to their arrival in the latter city. This being true, why should they be permitted to send them on over their lines at less than the schedule rate? Where a rate is made over two or more roads connecting and making a continuous "line," over a portion of which line there is a published joint rate, we understand that the through rate must be that joint rate plus the local rate beyond the further, or to the nearer, terminus of the joint rate "line," and that this can be obliterated only by all of the connecting roads uniting in a joint rate, after notice to the interstate commerce commission, for the entire line made up of all these connecting roads. In the case of *United States v. Wood* (D. C.) 145 Fed. 405, the court said: "And in a case like the one at bar, if a joint tariff had been established by arrangement and fil-

ed with the commission, covering the lines of the Baltimore & Ohio and the Mutual Transit Company to Duluth, neither the Baltimore & Ohio nor the Mutual Transit Company can deviate from that joint tariff, except upon the usual notice to be filed with the commission; and where, as in this case, there was no joint tariff filed from Philadelphia to Winnipeg, neither company over which this shipment of iron pipe passed could lawfully charge or demand or collect a greater or less compensation for the transportation of property than was specified in its schedule of its joint rates filed with the commission. In other words, if these carriers desired to form a continuous line from Philadelphia to Winnipeg, and to make a lower rate for the transportation of property than they were collecting on the two joint tariffs then in force covering the same route, then they should have given notice, according to the act, and filed their schedule with the commission, and so long as they did not do this, they could not lawfully deviate from the rate established, which is the sum of the two joint rates mentioned." Under this interpretation of the law it would seem that to make the contract herein involved valid there must have been a joint rate in the amount specified in the contract, and a schedule of said rate filed with the commission. There being no "joint" rate on these cars from St. Louis to Spokane, we cannot see what difference it made with the rate over appellants' line from Kansas City to Spokane whether the cars came to them from St. Louis or from any other city or town in this country, or whether the shipment originated in Kansas City. Appellants could not make a contract, as carrier, to ship the cars from St. Louis, as they had no road from that city. Hence they could be parties, as carriers, to a shipment from St. Louis to Spokane only by a joint tariff arrangement with some road connecting their lines with St. Louis. The Missouri Pacific Company not being a party to this contract, and no joint rate arrangement being in existence between it and appellants, we are unable to find authority for any rate upon this shipment less than the joint rate from Kansas City to Spokane plus the rate from St. Louis to Kansas City, the latter being in this case merely the freight earned by the cars.

It is further urged by respondent that the use of the cars contemplated by this contract was not the same as that contemplated by the rates provided on page 21 of the schedule; that those rates were meant to apply to cars loaded with through shipments, and were not intended to have reference to such use as was made of these cars by the appellants under this contract. There is nothing to show what the intention of the parties to this contract was as to the manner in which the cars should be used in carrying and distributing and being reloaded with freight along the way. It does not appear that the intention of the parties was that the cars should be load-

ed with freight to their final destination or otherwise. Certainly there is nothing to manifest any intention to make the contract different from that contemplated by the schedule rates found on page 21. Where the facts are such that it is not clear that the conditions are so dissimilar as to render the statute, or the rate published thereunder, inapplicable, such rate will be held, in a civil proceeding, to control. *Missouri Pacific Ry. v. Texas & P. Ry. Co.* (C. C.) 31 Fed. 802. It appears to us that this contract, whether it be deemed one of carriage from Kansas City to Spokane or from St. Louis to Spokane, was squarely in conflict with the rates in the published schedule of tariffs, and as such was, under the holdings of the federal courts, illegal and void. This being true, the appellants were authorized, and it was their duty under the interstate commerce statute, to collect the full rates provided by the published schedule.

The judgment of the honorable superior court is reversed, and the cause remanded, with instructions to dismiss the action.

HADLEY, C. J., and FULLERTON. CROW, and MOUNT, JJ., concur. DUNBAR and RUDKIN, JJ., not sitting.

(49 Wash. 205)

FISHER v. GREAT NORTHERN RY. CO. (Supreme Court of Washington. April 4, 1908.)

1. COMMERCE—REGULATIONS—CARRIERS — INTERSTATE COMMERCE ACT—FOREIGN COMMERCE.

Interstate Commerce Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), declares that the act shall apply to any carrier engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment, and to the transportation in like manner of property shipped from a foreign country to any place in the United States, and carried to such place from a port of entry either in the United States or in an adjacent foreign country. *Held*, that a shipment made from a foreign country to a place in the United States was subject to the terms of the act relating to the posting and publishing of schedules of rates as declared by section 2 (34 Stat. 586 [U. S. Comp. St. Supp. 1907, p. 895]).

2. CARRIERS—CHARGES—CONFLICT BETWEEN POSTED AND AGREED RATE.

When a freight rate has been fixed and properly posted and published as required by the interstate commerce act with reference to shipments to which the act applies, such rate must prevail over an agreement fixing a different rate.

3. COMMERCE—REGULATIONS—VIOLATIONS—JOINT RATES—OCEAN TRAFFIC.

Where a through freight rate included a rate for foreign ocean transportation, the fact that the proportion of the through contract rate allowed for the carriage from the port of entry to destination was less than the rate scheduled for freight originating at such port of entry and carried to the same destination did not render the lesser rate necessarily unlawful as a violation of the interstate commerce act.

4. SAME.

Defendant carrier published a through rate on canned goods from Stavanger, Norway, to

Seattle, of 85 cents per 100. The published schedule also contained a statement that such rates would be protected only when the ocean rate procurable was such as to allow the rail carrier from the Atlantic ports a minimum proportion of 75 cents per 100, and if the difference between the through published rate and the rail line's minimum proportion of 75 cents per 100 was less than the ocean proportion, the through rate would be the ocean proportion plus 75 cents per 100. Defendant made a contract rate for the shipment of canned goods for plaintiff between such ports in accordance with such published rate, but when the shipment was made the best ocean rate procurable was 38.7 cents per 100 on canned goods, which, added to the carrier's minimum, 75 cents per 100, made the total tariff of \$1.137, which defendant claimed the right to charge. *Held* that, in the absence of proof by defendant that the conditions attending ocean competition did not justify the contract rate stipulated for, thereby rendering it unlawful, such contract rate was not necessarily in violation of the interstate commerce law, and was therefore enforceable.

Rudkin, J., dissenting.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Replevin by H. A. Fisher against the Great Northern Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with instructions.

Ira Bronson, D. B. Trefethen, and Loren Grinstead, for appellant. L. C. Gilman and B. O. Graham, for respondent.

HADLEY, C. J. This is an action in replevin, and involves a controversy concerning shipping rates, based upon a dispute as to the application of the interstate commerce law. The agreed facts are that the defendant railroad corporation files with the interstate commerce commission at Washington, D. C., and prints and keeps open for public inspection, schedules of all the rates, fares, and charges for transportation between different points on its own lines, and between points on the lines of any other carrier by railroad or water, when a through rate has been established, and keeps copies of such schedules plainly printed in large type for the use of the public in two public places in every depot, station, and office by it conducted where passengers or freight are received for transportation, in such form that said schedules are accessible to the public, and can be conveniently inspected. From the 19th day of May, 1906, continuously to the present time, the defendant has so filed, published, and posted for inspection a schedule of its tariffs in connection with Atlantic steamship lines operating from different ports in Europe, including the port of Stavanger, Norway, to Seattle, Wash. The said schedule names as a rate on canned goods from said Stavanger to Seattle 85 cents per 100 pounds, and on cheese \$1.31 per 100 pounds. The said schedule of tariffs also contains the following provision: "The rates named herein will be protected only when freight is routed as ordered by a representative of the railroad companies, parties hereto, and when the ocean rate procurable is such as to allow

rail carriers from Atlantic seaboard ports a minimum proportion of seventy-five (\$.75) cents per hundred pounds. If the difference between the through rate published herein and the rail line's minimum proportion of seventy-five (\$.75) cents per hundred pounds is less than the ocean proportion, the through rate will be the ocean proportion plus seventy-five (\$.75) cents per hundred pounds." On or about the 20th day of August, 1906, and while said freight tariffs on canned goods and cheese were in existence and applicable to all shipments of canned goods and cheese from said Stavanger, Norway, to Seattle, the plaintiff applied to the defendant's authorized agent at Seattle for quotations of rates upon canned goods from Stavanger to Seattle, and was verbally informed that the rate was 85 cents per hundred pounds, minimum 30,000 pounds. The above verbal quotation was afterwards confirmed by letter from the agent to the plaintiff. The plaintiff accepted and relied on said quotation of 85 cents per 100 for canned goods, notified the defendant of such acceptance, and thereupon purchased in Stavanger and ordered shipped to Seattle by the defendant's line and its connections 483 cases of canned goods, of the weight of 38,733 pounds, and 3 cases of cheese of the weight of 416 pounds, without prepayment of any of the charges thereon. Said freight was routed as ordered by a representative of the defendant company, and carried by defendant and its connecting rail and water lines from Stavanger to Seattle. At the time the shipment was offered by the plaintiff and received by the defendant the best ocean rate procurable was 38.7 cents per 100 pounds, which, when added to the rail carrier's minimum of 75 cents per hundred, according to the aforesaid posted and published condition, made a total tariff of \$1.137 cents per hundred on the canned goods. The published rate on the cheese was not affected by the condition, and remained at \$1.31 per 100. In addition to the above, the defendant paid 61 cents costs of import bill of lading, and \$1.40 customs charges. About the 6th day of December, 1906, the goods arrived at Seattle, with freight and customs charges due and unpaid thereon. The carriers of the shipment other than the defendant delivered the same to the defendant with freight charges unpaid thereon, and authorized the defendant to collect all freight charges legally due thereon. Upon the arrival of the goods in Seattle the plaintiff tendered to the defendant at its office in Seattle the sum of \$336.69, which was refused. At the time said tender was made the defendant offered to deliver the goods to plaintiff upon payment of \$447.85, which the plaintiff refused to pay. The defendant retained possession of the goods under claim of carrier's lien thereon until possession was taken from it by the plaintiff through the medium of this action. From the foregoing facts the court concluded that the defendant at the time of

the commencement of this action was entitled to possession of the property by virtue of a carrier's lien amounting to the sum of \$447.85, and also to a judgment for the return of the property, or, in case the return thereof cannot be had, to a money judgment for said sum. Judgment was entered accordingly, and the plaintiff has appealed.

That the shipment in question, although made from a foreign country to a place in the United States, is subject to the interstate commerce law, is evident from the terms of the law. Section 1, Act June 29, 1906, 34 Stat. 584, c. 3591 (U. S. Comp. St. Supp. 1907, p. 892), provides among other things as follows: "That the provisions of this act shall apply * * * to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment) * * * and also to the transportation. In like manner, of property * * * shipped from a foreign country to any place in the United States, and carried to such place from a port of entry either in the United States or an adjacent foreign country." The shipment being subject to the operation of the law, it follows that the provisions in relation to the posting and publishing schedules of rates on such shipments must also apply. Section 2 of the act provides as follows: "That every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and

conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act." When a rate has been fixed and properly posted and published within the meaning of the above provisions, it must prevail without regard to any agreement fixing a different rate. In *Southern R. Co. v. Harrison*, 119 Ala. 539, 24 South. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936, the court said: "Whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges. And this lien can be discharged and the consignee can become entitled to the goods only by the payment or tender of payment of such amount. Such is now the supreme law, and by it this and the courts of all other states are bound." The above language was adopted by the Supreme Court of the United States as expressing its own view of the law in *Texas & Pacific Ry. Co. v. Mugg & Dryden*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011. See, also, *Gulf, Colo., etc., Ry. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910; *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553; *Texas & Pacific Ry. Co. v. Cisco Oil Mill*, 204 U. S. 449, 27 Sup. Ct. 358, 51 L. Ed. 562.

It is conceded that private contracts for transportation of interstate shipments are ineffective unless a carrier shall have failed to file and post a proper schedule. It is contended by appellant, however, that the schedule must in all respects comply with the provisions of the law before the public is bound by it: that the burden of proving such compliance is upon the carrier; that, in the absence of proof of full compliance and of evidence demonstrating that a contract rate is unlawful, the contract is assumed to be valid. In the case of *Southern Pacific Co. v. Redding*, 17 Tex. Civ. App. 440, 43 S. W. 1061, a contract in essential respects like the one before us was involved. It related to a shipment from a foreign port to an inland point, and as in this case the proportion of the through contract rate, allowed for the carriage from the port of entry to the destination, was less than the rates scheduled for freight originating at such port and carried to such destination. The Texas court said of the company making that contract as follows: "By making the contract it necessarily affirmed the right to do so, and certainly, if it can release itself from its undertaking by proving that the contract was illegal, the burden is upon it to furnish such proof, and to show, not simply that the contract may have been unlawful, but that it was necessarily so. In other words, it must ex-

clude the existence of any circumstances or conditions which would have made the contract legitimate." It was held that circumstances and conditions might exist which would make the contract legitimate, even under the application of the interstate commerce law; and for want of evidence showing that such circumstances did not exist the contract rate was enforced. That decision by the state court of Texas was based upon the decision of the Supreme Court of the United States in *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940. The opinion of the majority of the court in that case, written by Mr. Justice Shiras, is a very exhaustive one. While it was held that the entire commerce of the United States, foreign and interstate, is subject to the provisions of the act of Congress to regulate commerce, yet it was also clearly held that ocean competition may constitute dissimilar conditions, and that circumstances and conditions which exist beyond the seaboard of the United States may be legitimately regarded for the purpose of justifying a difference in rates charged by railroads with respect to import and domestic traffic. It was directly held that competition in ocean transportation is to be taken into consideration when goods have been imported on a through bill of lading from a foreign shipping point in determining whether the contract rate from the port of entry in the United States to the point of destination is a violation of the act. It was declared that the mere fact that the proportion of the through contract rate allowed for the carriage from the port of entry to the destination may be less than the rate scheduled for freight originating at the same place and carried to the same destination does not necessarily render the lesser rate unlawful. The pronounced view of the court was that it must first be made to appear that the circumstances attending oceanic competition beyond the seaboard of the United States are not such as justify the lesser rate before it can be held that such rate is unlawful. A clear distinction was thus drawn between the application of the law to oceanic commerce originating in a foreign country for importation to an inland point in the United States, and that which is wholly inland and merely interstate. Three judges dissented, and strong reasons were urged by Mr. Justice Harlan and Mr. Chief Justice Fuller against making the distinction between the two classes of commerce. There is much convincing force in the views of the dissenting arguments; but the opinion of the majority constitutes the decision of the court, and inasmuch as the question here involved is a federal one, it must be treated by us in subordination to the views expressed in the decisive opinion. We are not advised that the said decision has been modified in any way by subsequent decisions. All the decisions of

the same court cited by respondent relate to purely inland and interstate commerce, and in no way concern ocean traffic. We, therefore, deem it to be our duty to follow that decision, as was done by the state court of Texas; and to apply the law as we understand from the decision discussed it should be applied to a case of foreign commerce requiring oceanic transportation to a United States port of entry, and thence by inland carriage from such port to the destination. Therefore the scheduled rate is not in itself conclusive as to this class of traffic; and, inasmuch as there was no evidence showing that circumstances and conditions attending oceanic competition did not justify the lesser rate, thereby rendering it unlawful, it follows that it has not been demonstrated that the contract was unlawful.

The judgment is therefore reversed, and the cause is remanded, with instructions to enter judgment in appellant's favor for the possession of the property, and awarding to respondent the amount tendered into court by the appellant.

FULLERTON, MOUNT, CROW, and ROOT, JJ., concur.

RUDKIN, J. (dissenting). It seems to me that the conclusion reached by the majority of the court is neither warranted by the provisions of the act to regulate commerce nor supported by the authorities cited. Section 1 of that act (Act June 29, 1906, c. 3501, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]) expressly declares that its provisions shall apply to the transportation of property shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country. It is needless to say that the traffic here involved falls directly within this provision. Indeed the appellant does not contend otherwise. Nor in my opinion does the court hold in the case of *Texas & Pacific Railway Co. v. Interstate Commerce Commission*, 162 U. S. 197, 18 Sup. Ct. 666, 40 L. Ed. 940, that the transportation of goods partly by water and partly by rail from a foreign country to any place in the United States is a mere matter of private contract between the carrier and the shipper. The court there held that dissimilarity of conditions may warrant a railroad company in carrying imports from a port of entry at a less rate than domestic goods, but this in my opinion falls far short of holding that the transportation of imports is a mere matter of private contract. In *Texas & Pacific Railway Co. v. Interstate Commerce Commission*, supra, the court said: "It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state) as well that between the states and territories as

that going to or coming from foreign countries." In *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, the court said: "That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed it is not open to controversy that to provide for these subjects was among the principal purposes of the act. * * * And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law." If the act covers the whole field of commerce, as well that between the states and territories as that going to or coming from foreign countries, and its chief aim is to prevent unjust discrimination and undue preference by placing on the carrier the positive duty to establish schedules of reasonable rates which shall have a uniform application to all, and which cannot be departed from so long as the established schedules remain unaltered in the manner provided by law, how can the right of private contract exist without defeating the very objects that Congress had in view? While under the decision in *Texas & Pacific Railway Co. v. Interstate Commerce Commission*, supra, a railroad may discriminate between imports and domestic shipments where dissimilar conditions warrant such discrimination, it may not discriminate between different importers, and, while the rate on imports may be less than the rate on domestic goods, the rates must be uniform as to each class. There must be no unjust discrimination or undue preference, and the schedule of such rates must be filed and published, and can only be changed in the mode prescribed by law. If there is any merit in the appeal before us, in my opinion it lies in the fact that the schedules posted and filed were not sufficiently definite and explicit to comply with the requirements of the law; but, inasmuch as this question is not touched upon in the majority opinion, I will refrain from discussing it.

FISHBURNE v. ROBINSON.

(Supreme Court of Washington. April 13, 1908.)

1. JUDGMENT—JUDGMENT NON OBSTANTE VEREDICTO.

It is proper practice for the trial judge to enter a judgment non obstante veredicto when the proceedings warrant it.

2. APPEAL—REVIEW—MOOT QUESTIONS.

Where the trial court did not deny appellant the right to introduce evidence on any matter constituting a defense, whether included in the pleadings as finally settled or not, rulings

relating to the pleadings became moot questions, and were not reviewable on appeal.

3. BILLS AND NOTES — GENUINENESS — EVIDENCE—VERDICT.

In an action on certain notes, evidence held insufficient to sustain a verdict for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1800–1855.]

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by G. P. Fishburne against R. Robinson. Judgment for plaintiff, and defendant appeals. Affirmed.

Harry H. Johnston and Ralph R. Duniway, for appellant. Ells & Fletcher and G. P. Fishburne, for respondent.

PER CURIAM. The respondent sued the appellant to recover upon two promissory notes. The complaint averred the execution of the notes by the appellant, their delivery to the payees named therein, their indorsement by the payees and delivery to the respondent, their nonpayment by the appellant, and demanded judgment for the amount due thereon. The answer of the appellant was a general denial, and affirmative defenses to the effect that the notes had been materially changed and altered since their execution and delivery, that they were executed without consideration, and that they had been paid. The court on respondent's motion struck out certain parts of the answers on the ground that the matter alleged was immaterial and inconsistent with the general denials, and a trial was had before a jury on the remaining issues, resulting in a verdict for the appellant. The respondent thereupon moved for judgment notwithstanding the verdict, which motion the court granted, entering judgment for the full amount demanded in the complaint. From this judgment this appeal is taken.

A large part of the briefs of counsel are devoted to questions of practice and to rulings of the court with reference to the pleadings, but these questions we have not found necessary to discuss at length. That it is proper practice for the trial judge to enter a judgment non obstante veredicto, when the proceedings warrant it, is settled by the case of *Roe v. Standard Furniture Co.*, 41 Wash. 546, 83 Pac. 1109, where the authorities are collated and discussed. The questions relating to the pleadings are moot questions in this court, as the trial court did not deny the appellant the right to introduce evidence on any matter constituting a defense, whether included in the pleadings as finally settled or not.

The only material inquiry is, did the facts testified to by the appellant constitute a defense? The trial court held that they did not, and we are clear that the holding is correct. The evidence consisted of vague statements on the part of the appellant to the effect that he did not remember of signing but two notes payable to the payees named in the notes sued upon, and that on these notes one of the payees signed with him as maker.

But this is too indefinite to overcome the presumptions arising from the face of the notes themselves, which show no such conditions, and bear the admittedly genuine signature of the appellant.

Without discussing the case further, therefore, we conclude that the judgment should be affirmed. It will be so ordered.

KRUEGER v. TOWN OF COLVILLE.

(Supreme Court of Washington. April 20, 1908.)

1. INTOXICATING LIQUORS — MUNICIPAL LICENSES — FORFEITURE — RIGHT TO RETAIN UNEARNED FEE.

Under Ballinger's Ann. Codes & St. § 2935 (Pierce's Code, § 5715), requiring the holder of liquor license to give bond not to sell to minors and providing for a forfeiture of a license on a violation of its terms, a town may revoke a license, and retain the unearned part of the license fee, where the holder has pleaded guilty to selling liquors to minors, though he has paid the fine imposed.

2. SAME—CONSTITUTIONAL LAW.

Ballinger's Ann. Codes & St. § 2935 (Pierce's Code, § 5715), providing that, on a violation of the terms of a liquor license, it shall be forfeited and the holder be subject to the other penalties provided by law for unlawful sales, is not unconstitutional as imposing an excessive penalty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 113.]

3. CONSTITUTIONAL LAW — DUE PROCESS OF LAW—REVOCATION OF LIQUOR LICENSE.

Ballinger's Ann. Codes & St. § 2935 (Pierce's Code, § 5715), authorizing the forfeiture of a liquor license on a violation of its terms, is not unconstitutional as depriving the holder of property without due process of law.

Appeal from Superior Court, Stevens County; Henry L. Kennan, Judge.

Action by Arnold Krueger against the town of Colville. From an order sustaining a demurrer to the complaint and dismissing the action, plaintiff appeals. Affirmed.

Robertson & Rosenhaupt, for appellant. Jessep & Grinstead, for respondent.

MOUNT, J. The lower court sustained a general demurrer to the plaintiff's complaint, and dismissed the action. The appeal is prosecuted from that order.

The complaint shows the following facts: On April 1, 1906, the town of Colville issued a liquor license to the appellant, authorizing him to retail intoxicating liquors in said town for the term of one year. Appellant paid the fee therefor, which was \$750. Subsequently appellant was charged under the statute with the crime of selling intoxicating liquors to minors. He pleaded guilty to that charge, and was sentenced to pay a fine. The fine was paid. Thereafter, on June 1, 1906, the town revoked the license because of the conviction above stated, and declared the unearned portion of the license fee forfeited. The prayer is for \$625, being the unearned portion of the license fee.

The question in the case is: May the town revoke the license under the circumstances set out, and retain the unearned portion of the license fee? We think there can be no doubt upon this question. The statute provides: "In granting the license authorized by this chapter the proper authorities shall exact from each applicant a bond in the sum of one thousand dollars, conditioned that the applicant shall keep an orderly house, and will not sell liquors to minors. He shall in case of violating the terms of the license forfeit the same, and be subject to the other penalties provided by law for illegal selling of spirituous, fermented, malt, or other intoxicating liquors; the authorities granting the license shall have full authority and power to declare it forfeited for the violation of any of the terms upon which it is granted." Ballinger's Ann. Codes & St. § 2935 (Pierce's Code, § 5715). It is clear from this statute that the town had power to forfeit the license. There is no statute in this state which authorizes the return of money paid for a liquor license revoked or forfeited, and it has been held that municipalities are not required to repay in such cases, especially where it is revoked or forfeited by reason of an act of the licensee. *Parrent v. Little*, 72 N. H. 566, 58 Atl. 510; *Curry v. Tawas*, 81 Mich. 355, 45 N. W. 831; *Melton v. Moultrie*, 114 Ga. 462, 40 S. E. 302; *Toman v. Westfield*, 70 N. J. Law, 610, 57 Atl. 125. We think this rule is the correct rule, and that it applies to this case. Appellant relies upon the case of *Pearson v. Seattle*, 14 Wash. 438, 44 Pac. 884, but that was a case where the city revoked the license because of a change in an ordinance passed after the license was issued, and the city by its own act rendered the license valueless. It will be readily seen that there is quite a difference between the facts there and the facts here. The rule applied there cannot justly be applied to this case, for the appellant here forfeited his license by his own act by violating, not only the letter of his contract, but also the law of the state in force when the license was issued.

Appellant contends that the statute above quoted imposes an excessive penalty, and is therefore unconstitutional. He also argues that the appellant has paid the fine imposed by the court, and that he ought not to be liable upon his bond, and, in addition thereto forfeit the unearned license fee. He also argues that the revocation or forfeiture of the license is in conflict with the Constitution because it deprives the appellant of his property without due process of law. There is no merit in any of these contentions, and we shall not discuss them further than to say that we held in *State ex rel. Aberdeen v. Superior Court*, 44 Wash. 520, 87 Pac. 818, in substance that a license to sell intoxicating liquors is merely a temporary permit, and not a contract, giving vested or property rights.

The lower court properly sustained the de-

murrer to the complaint, and the judgment appealed from is therefore affirmed.

HADLEY, C. J., and ROOT, FULLERTON, and CROW, JJ., concur.

(49 Wash. 298)

STATE v. PRESTON.

(Supreme Court of Washington. April 20, 1908.)

1. INFORMATION — CONVICTION OF OFFENSES INCLUDED—GAMING.

Laws 1903, p. 63, c. 51, provides that a person who shall conduct, carry on, open, or cause to be opened, either as owner, proprietor, employe, or assistant, or in any manner whatever, whether for hire or not, any game of faro, monte, or roulette, in any house where persons resort for the purpose of playing, dealing, or operating any such game, machine, or device, shall be guilty of a felony, and Ballinger's Ann. Codes & St. § 7260 (Pierce's Code, § 1877), declares that each and every person who shall deal, carry on, open, or cause to be carried on, etc., any game of faro, monte, roulette, etc., for money or other representation of value, shall be guilty of a misdemeanor. *Held*, that the offense defined by the latter section was included in that prohibited by the former, so that a person under a charge of conducting a gambling resort could be properly convicted of conducting and carrying on a game of roulette under Ballinger's Ann. Codes & St. § 6956 (Pierce's Code, § 2205), authorizing a conviction of an offense necessarily included in that charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 604.]

2. GAMING—INFORMATION—SUFFICIENCY.

An information charging the felony was also sufficient to charge the misdemeanor.

3. SAME—SECRET GAMES.

Ballinger's Ann. Codes & St. § 7260 (Pierce's Code, § 1877), provides that each and every person who shall deal or carry on, or open or cause to be opened, or who shall conduct either as owner, proprietor, or employe, whether for hire or not, any game of roulette, etc., for money, shall be guilty of a misdemeanor. *Held*, that such section was not limited to games conducted only where the public was invited, but included private games played for money in places from which the public was excluded.

4. SAME—CHARACTER OF PERSON CONDUCTING GAME.

The statute not only prohibits the conducting of such a game as proprietor, but prohibits the game by each and every person conducting the same, whether as owner or proprietor or employe, whether for hire or not, so that it was not essential that an information thereunder should charge that accused conducted the game either as owner, proprietor, or employe.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 206-217.]

Appeal from Superior Court, Walla Walla County; Thos. H. Brents, Judge.

Charles Preston was convicted of conducting and carrying on a game of roulette, and he appeals. Affirmed.

Cain & Hurspool, for appellant. Otto B. Rupp and John H. McDonald, for the State.

MOUNT, J. The appellant was charged with conducting a gambling resort. Upon a trial he was found guilty of "conducting and carrying on a game of roulette," and sen-

tenced to pay a fine. He appeals from the judgment pronouncing sentence.

Two questions are presented for consideration: (1) Is the crime for which appellant was convicted necessarily included in the charge of conducting a gambling resort? and (2) if so, does the evidence show that appellant conducted and carried on a game of roulette? The information, omitting formal parts, is as follows: "Charles Preston is accused by the prosecuting attorney of Walla Walla county and state of Washington, by this information, of the crime of conducting a gambling resort, committed as follows: The said Charles Preston on the 6th day of October, 1907, in the county of Walla Walla aforesaid, then and there being, did then and there willfully, unlawfully, and feloniously conduct and carry on a game of roulette, then and there being a game played and operated with a roulette table and wheel and chips and money, said chips being then and there representatives of value; and that said game was played, carried on, and conducted in a certain building at No. 116 Main street in the city of Walla Walla, Wash., the same being a place where persons then and there resorted for the purpose of playing said game, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Washington." The statute under which this information was filed is as follows: "Any person who shall conduct, carry on, open, or cause to be opened, either as owner, proprietor, employé, or assistant, or in any manner whatever, whether for hire or not, any game of faro, monte, roulette, * * * whether the same be played or operated for money, checks, credits, or any other representative or thing of value, in any house * * * where persons resort for the purpose of playing, dealing, or operating any such game, machine, or device, shall be guilty of a felony. * * *" Laws 1903, p. 63, c. 51. This statute, as its title states, was clearly intended to "prohibit the maintaining of gambling resorts," and it is conceded that the prosecution in this case was based upon and proceeded under this statute. The misdemeanor statute under which the verdict was returned is as follows: "Each and every person who shall deal, or carry on, or open, or cause to be opened, or who shall conduct, either as owner, proprietor, employé, whether for hire or not, any game of faro, monte, roulette, * * * or other game played with cards, dice, or any other device, whether the same be played for money, checks, credits, or any other representative of value, shall be guilty of a misdemeanor. * * *" Ballinger's Ann. Codes & St. § 7260 (Pierce's Code, § 1877). This statute was evidently intended to prohibit the games named, and to make each person conducting and carrying on such games guilty of a misdemeanor. It seems to us under the wording

of these two sections that the lesser crime is necessarily included in the greater, because, in order to convict under the felony statute first above quoted, it is necessary to allege and prove both that the prohibited games are conducted, carried on, or opened, and also that they are conducted, carried on, or opened in a place where persons resort for that purpose. The rule is settled that a defendant may be convicted of an offense, the commission of which is necessarily included within that with which he is charged. Ballinger's Ann. Codes & St. § 6956 (Pierce's Code, § 2205). The information in this case clearly charges the misdemeanor in charging the felony. The evidence in the case shows that the appellant owned certain gambling paraphernalia, among which was a roulette wheel, which he had stored in the basement of a certain building in Walla Walla; that three other persons besides himself, on three or four different occasions in a space of three or four months, requested appellant to take them to this place, and thereupon the appellant did take them there, where they played at roulette with chips representing money; that the appellant sold and redeemed these chips and managed the game; that no other persons were permitted there, and the door of the storeroom was kept locked during the time they were there and at other times; that this room was an ordinary storage room, and not open to the public.

It is contended that the statute, by the use of the words "deal or carry on, or open, or cause to be opened, or who shall conduct, either as owner, proprietor, employé," etc., means that such games shall not be dealt or carried on openly or publicly, and also that, before a conviction can be had, the information should allege that the accused conducted the game either as owner or proprietor or employé. As to the first contention, the evidence clearly shows that the appellant did not conduct a public game, but that the games were strictly private, from which the public was excluded. But the statute referred to, in our opinion, means to prohibit the games mentioned, even though dealt or opened or carried on in private, when they are dealt or carried on for gain. Section 7268 (section 1878) permits games of chance played for amusement or pastime, and not for gain. The words "each and every person who shall deal or carry on or open," used in the statute, are not limited by any word which indicates that they were used to express games conducted only where the public are invited, and we think it was not the intention of the Legislature to so limit them in this act. That was done in the felony act above quoted. We are of the opinion also that it was not necessary to allege that the accused conducted the game as owner, proprietor, or employé, because the statute prohibits "each and every person" who shall conduct such games, "either as owner, pro-

prietor, employé, whether for hire or not"; the evident intention being to make immaterial the capacity in which the game was conducted by the operator. This court said, in *State v. Wilson*, 9 Wash. 16, 36 Pac. 967: "It is the conducting of the game as proprietor, and not the gambling with any particular person, which the statute prohibits." When that remark was made, the court was not then considering the question now presented. The statute does prohibit "the conducting of the game as proprietor," and it does more than that—it prohibits the game by each and every person who shall conduct the same, whether as owner, proprietor, or employé, whether for hire or not.

We find no error in the record, and the judgment must therefore be affirmed.

HADLEY, C. J., and ROOT, FULLERTON, and CROW, JJ., concur.

CITY OF SPOKANE v. GRIFFITH.

(Supreme Court of Washington. April 16, 1908.)

MUNICIPAL CORPORATIONS—ORDINANCES—EVIDENCE.

On trial de novo on appeal from a conviction of violating an ordinance, the existence and contents of the ordinance were sufficiently established by being read from a legally authorized publication thereof, no exception having been taken to the reading, and no question being raised as to the authenticity of the ordinance so read, under Ballinger's Ann. Codes & St. § 1299, requiring copies of ordinances printed by authority of a city to be received as prima facie evidence that the ordinances were duly passed, under section 4937, requiring courts to take judicial knowledge of the existence of an ordinance on the title and the date of its passage being pleaded, and under section 6851, requiring defects in criminal proceedings not affecting substantial rights to be disregarded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, §§ 288, 289.]

Appeal from Superior Court, Spokane County; Miles Polindexter, Judge.

R. J. Griffith was convicted in the police court of the city of Spokane of disorderly conduct, and he appealed to the superior court, whence he appeals from a conviction on a trial de novo. Affirmed.

Alex. M. Winston, for appellant. L. R. Hamblen, F. D. Allen, and Harry A. Rhodes, for respondent.

ROOT, J. Appellant was charged in the police court of the city of Spokane with disorderly conduct and convicted. He appealed to the superior court, and upon a de novo trial a verdict of guilty was returned. A motion to vacate the verdict and discharge the prisoner was denied, and judgment and sentence was entered upon the verdict. From this judgment the present appeal is prosecuted.

In his brief appellant says: "There is but one question presented by this appeal.

Did the failure of respondent at the trial of this cause in the superior court to introduce evidence of the existence of, or the contents of, Ordinance No. A1324, constitute a complete failure of proof?" The ordinance mentioned is that under which appellant was prosecuted. The statement of facts recites that the court gave the jury the substance of the ordinance, and also "that counsel for the plaintiff called the court's attention and submitted to the court for examination Ordinance No. A1324 of the Code and Charter of the city of Spokane." Said ordinance was in a bound and printed volume, which bore the certificate of the city clerk, and was printed by the authority of the city of Spokane. The court read the ordinance in full to the jury in giving its instructions to them. There is some difference of opinion among the authorities as to whether an appellate court may take judicial notice of a city ordinance in a case appealed from a municipal court which was authorized to take such notice of the ordinance. It is unnecessary for us to pass upon this question, as we think the existence and contents of this ordinance were sufficiently established by being read to the jury from a legally authorized publication thereof. No exception appears to have been taken to this reading to the jury, and no question was raised as to the authenticity of the ordinance so read. As to competency of the evidence, see Ballinger's Ann. Codes & St. §§ 1299, 4937, 6851.

The judgment of the superior court is affirmed.

HADLEY, C. J., and CROW, J., concur.

FULLERTON and MOUNT, JJ. As I understand the rule, the appellate court will take judicial notice of any fact that the court of original jurisdiction must judicially notice. Here the ordinance in question was within the judicial knowledge of the police court, and, being so, it was equally within the knowledge of the superior court to which the cause was appealed. The city of Spokane, therefore, was under no necessity of proving the ordinance, and its omission to do so regularly was not fatal to its case. For this reason I concur in the judgment.

HARRIS v. WASHINGTON PORTLAND CEMENT CO.

(Supreme Court of Washington. April 24, 1908.)

1. MASTER AND SERVANT—INJURY TO EMPLOYÉ—ACTION FOR DAMAGES—QUESTION FOR JURY.

Under the evidence in an action for injury to an employé caused by a precipitation of water on the opening of a flume gate, held proper to refuse to direct a verdict for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1001-1050.]

2. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Error in excluding a question asked plaintiff on cross-examination was harmless, where it was answered in substance many times.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

3. TRIAL—INSTRUCTIONS—EVIDENCE TO SUPPORT.

In an action for injury to an employé while at work, it was proper to refuse to instruct that, if a safe and an unsafe method were open to him and he voluntarily adopted the unsafe one, he could not recover, where there was no testimony tending to bring the employé within the rule.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Personal injury action by William H. Harris against the Washington Portland Cement Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. S. Eskridge, Philip Tindall, and Smith & Brawley, for appellant. R. H. Lindsay and Fredk. R. Burch, for respondent.

MOUNT, J. The plaintiff in this case recovered a judgment for \$8,000 for the loss of a leg alleged to have been caused through the negligence of the defendant. The case was tried to a jury. At the close of the plaintiff's evidence the defendant's counsel moved for a directed verdict upon the ground of the insufficiency of the evidence, and at the close of all the evidence a similar motion was made. These motions were denied, and the case was submitted to the jury. The evidence shows that the plaintiff was directed to assist in raising a gate in order to let a large body of water escape from a flume; that while he was so engaged at the lower outside part of the gate, and in a dangerous position, the appellant's foreman, who knew of his position, and without notice to the respondent, suddenly raised or caused the gate to be raised from the inside, thereby precipitating a large body of water on to the respondent and causing his injury.

The main question of fact in the case was whether the respondent knew, or ought to have known, that an effort was being made to raise the gate from the opposite side. A careful reading of the evidence convinces us that this was a question for the jury. It is not claimed that the jury was not properly instructed upon this question, but it is urged that the question was one for the court. The plaintiff's testimony clearly made out a case. There were some minor facts, such as that the end of a board projected through under the gate, which board might have been seen by the respondent, and which would have indicated to him that others were attempting to raise the gate; but when we consider his position, the rush and roar of the water, and all his surroundings, such facts are not sufficient to overcome his positive statements. We think the court properly denied both motions.

In the course of respondent's cross-examination he was asked this question: "Mr. Harris, will you state positively that Mr. Bush did not have time to walk back to the pressure box and get halfway back with the peavey between the time the plank was put through and the happening of the accident?" An objection was sustained to this question. Both before and after this question was put to the witness he testified that he could not fix any length of time between these events. "It happened quicker than I can tell you," "Instantaneous," and like expressions were used. While the exact question was not answered by the witness, it was answered many times in substance, and the error, if any, was thereby cured.

Appellant also requested an instruction to the effect that, if in doing his work two methods of procedure were open to respondent, one of which was safe and the other unsafe, and he voluntarily adopted the unsafe method, he could not recover. This instruction was refused, and appellant argues that this ruling was error. The rule is correctly stated, and should be given in cases to which it applies, but it applies only to cases where there are obviously two ways of doing a certain act, one way safe and the other way obviously dangerous, and the servant voluntarily elects the dangerous way. *Ramm v. Hewitt-Lea Lumber Company* (filed April 11, 1908) 94 Pac. 1081. We find nothing in the record in this case to bring the respondent within the rule requested. The instruction, therefore, would tend to confuse rather than enlighten the jury, and it was not error to refuse the instruction.

We find no error in the record. The judgment must therefore be affirmed.

HADLEY, C. J., and ROOT, CROW, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

(11 Ariz. 436)

TRIBOLET v. UNITED STATES.

(Supreme Court of Arizona. March 27, 1908.)

1. MONOPOLIES — COMBINATION AND RESTRAINT OF TRADE—INDICTMENT.

An indictment alleged that defendants did engage in a combination in form of trust, and entered a conspiracy in restraint of trade and commerce as follows: That defendant, T., and others, were engaged in the wholesale and retail meat business in competition prior to August 1, 1906, and that thereafter on August 23d, they being engaged in a combination and form of trust, and in a conspiracy in restraint of trade in furtherance thereof, entered into a contract and formed defendant corporation, to which they transferred the business of each of them, agreeing not to again engage in the meat business in the city of Phoenix; that the combination and conspiracy was formed to carry out restrictions in trade and commerce, and to increase the price and prevent competition in the sale of fresh meats in such city, etc. *Held*, that the indictment did not charge defendants with making a contract which was in itself in restraint of trade and commerce, but that the contract was alleged only as one of the steps

by which the "combination or conspiracy" was brought about, and as an overt act in furtherance thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 20.]

2. INDICTMENT—DUPLICITY—"COMBINATION" OR "CONSPIRACY."

Sherman Anti-Trust Law (Act July 2, 1890, c. 647, § 3, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3201]) declares that every contract, combination, and form of trust or otherwise, and conspiracy in restraint of trade or commerce in any territory of the United States, or in restraint of trade or commerce between any such territory and another, etc., are declared illegal, and that every person who shall make any such contract or engage in any such "combination or conspiracy" shall be deemed guilty of a misdemeanor. *Held*, that the words "combination or conspiracy" as so used were synonymous, and hence an indictment alleging that defendants entered into a "combination or conspiracy" in restraint of trade was not duplicitous as alleging two distinct offenses.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1275, 1454-1461; vol. 8, p. 7613.]

3. MONOPOLIES—STATUTES—SCOPE OF PROHIBITION.

Sherman Anti-Trust Law (Act July 2, 1890, c. 647, § 3, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3201]), prohibiting combinations or conspiracies in restraint of trade or commerce in any territory of the United States, was not limited to combinations and conspiracies which operated in restraint of the trade of substantially an entire territory, but applied as well to a combination and conspiracy in restraint of trade and commerce in a single city in a territory.

4. INDICTMENT—DEFECTS OF FORM—STATUTORY OFFENSES.

Where an indictment for combination or conspiracy in restraint of trade in violation of Sherman Anti-Trust Law (Act July 2, 1890, c. 647, § 3, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3201]) was uncertain as to some of its allegations, owing to the fact that the offense was first charged in the language of the statute, and the purposes and objects of the conspiracy were not fully stated until after the overt acts were described, the defect was one of form, and not of substance, not prejudicial to defendant, and therefore immaterial under U. S. Rev. St. § 1025 (U. S. Comp. St. 1901, p. 720), providing that no indictment shall be quashed for a nonprejudicial defect of form.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 480, 487.]

5. MONOPOLIES—INDICTMENT—OBJECT.

The object of a combination or conspiracy in restraint of trade being unlawful both at common law and by statute, an indictment therefor was not objectionable for failure to allege the means by which the combination or conspiracy was to be accomplished.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 20.]

6. SAME — COMBINATION IN RESTRAINT OF TRADE—CORPORATIONS—LIABILITY OF OFFICERS.

Where defendant and H. entered into a combination and conspiracy in restraint of trade to control the meat business in Phoenix, Ariz., and for this purpose organized a corporation, the fact that defendant acted merely as an officer and stockholder in such corporation, and that the corporation was held not guilty, did not prevent defendant's conviction for violating the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, § 3, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3201]), prohibiting a combination or conspiracy in restraint of trade.

Appeal from District Court, Third District; before Justice Edward Kent.

S. J. Tribolet was convicted of violating the Sherman anti-trust law, and he appeals. Affirmed.

Thomas Armstrong, Jr., and G. P. Bullard, for appellant. J. L. B. Alexander, U. S. Atty., and George D. Christy, Asst. U. S. Atty.

CAMPBELL, J. P. T. Hurley, S. J. Tribolet, and the Phoenix Wholesale Meat & Produce Company, a corporation, were indicted for a violation of the provisions of section 3 of the act of Congress approved July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201), commonly known as the "Sherman Anti-Trust Law," which reads: "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another * * * is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor. * * *" Upon the trial Hurley testified on behalf of the United States and was given immunity; the indictment against him, upon motion of the government, being dismissed. In submitting the case to the jury the trial court directed that a verdict of not guilty be returned in favor of the Phoenix Wholesale Meat & Produce Company, a corporation, on the ground that there was no testimony warranting its conviction. The jury found the defendant, S. J. Tribolet, guilty, and from the judgment entered upon the verdict, and from the refusal of the court to grant a new trial, he brings this appeal.

The indictment charges that the defendants, "on or about the 1st day of September, A. D. 1906, and within the said Third Judicial District of the Territory of Arizona, and within the county of Maricopa in said territory of Arizona, did then and there unlawfully, willfully, and knowingly engage in a combination in form of trust and into a conspiracy each with the other in restraint of trade and commerce in the city of Phoenix, in the county of Maricopa, and within said Third Judicial District of the Territory of Arizona, in the manner following: That on and prior to the 1st day of August, 1906, P. T. Hurley and J. C. Hurley, under the firm name of P. T. Hurley, S. J. Tribolet, A. Well-er, and the Co-operative Meat Company, were engaged in the business of slaughtering beef cattle, sheep, goats, and swine, and selling at retail and wholesale the fresh meats thereof in said city of Phoenix, and were each of them then and there engaged in said business in open and free competition with the others; that thereafter, to wit, on or about the 23d day of August, 1906, the said P. T. Hurley and J. C. Hurley, under the firm name of

P. T. Hurley, and the said S. J. Tribolet, being then and there engaged in a combination in form of trust and in a conspiracy in restraint of trade and commerce, and in furtherance of said combination and said conspiracy in restraint of trade and commerce." Then follow allegations that the defendants Hurley and Tribolet obtained control and possession of the Co-operative Meat Company and discontinued its business; that they, in further pursuance of the combination and conspiracy, organized the defendant corporation and transferred to it the business theretofore conducted by each of them, receiving in exchange the capital stock of the corporation, and that they became the directors and officers of the corporation, and as such conducted its affairs; that all of the defendants, in furtherance of the combination and conspiracy, thereupon purchased the business of Weller, and caused it to be transferred to the corporation, and caused Weller to execute a contract with the corporation whereby he agreed not to again engage in the business of slaughtering fresh meats in the city of Phoenix. The combination and conspiracy is then described as having been "formed for the purpose of carrying out restrictions in trade and commerce in, increasing the price and preventing competition in the sale of certain commodities intended for sale and consumption in, the city of Phoenix, in the county of Maricopa, territory of Arizona, to wit, fresh beef, fresh mutton, fresh goat, and fresh pork, and for the purpose of unlawfully fixing and maintaining uniform and graduated figures for the sale of said fresh meats in said city of Phoenix that the price thereof might be increased"; and then it is alleged that in further pursuance of said combination prices of meats were arbitrarily increased 20 per cent. to purchasers by wholesale and 40 per cent. to purchasers by retail. A demurrer was interposed and overruled, and the ruling of the court in that respect is assigned as error.

It is claimed that, if any offense is pleaded, the indictment is bad for duplicity, for that three separate and distinct offenses are alleged in the single count of the indictment, namely: (1) The making of a contract in restraint of trade and commerce; (2) a combination in form of trust in restraint of trade and commerce; (3) a conspiracy in restraint of trade and commerce, and that the statute denounces each of them as a separate and distinct offense. As we view the indictment, it does not charge the defendants with the making of a contract which in itself was in restraint of trade and commerce. It would be difficult, if not impossible, to effect a combination or conspiracy without a contract or agreement. We construe the indictment as alleging the contract to have been made as one of the steps by which the combination was brought about, and as an overt act in furtherance of the conspiracy. The indict-

ment does, however, directly charge a combination and conspiracy. It appears to be appellant's contention that Congress means to punish as conspirators those who engage to do those things which are unlawfully in restraint of trade or commerce, though in fact no restraint is accomplished, and also to denounce a combination which actually results in restraint of trade or commerce and punish those who engage in it. The meaning of these terms as used in this section, which are precisely those used in the first section of the act, which relates to interstate commerce, have been commented upon by different courts, but the difference between a combination and a conspiracy in restraint of trade, if any exists, has not authoritatively been pointed out. By some the words as used here seem to be regarded as synonymous. Mr. Justice Holmes, in his dissenting opinion in *Northern Securities Company v. United States*, 193 U. S. 197, in discussing the act, says, at page 403, 24 Sup. Ct. 436, at page 469 (48 L. Ed. 679): "The words hit two classes of cases, and only two—contracts in restraint of trade, and combinations or conspiracies in restraint of trade." The bill of the government in that case refers throughout to the acts of the defendants as constituting an "unlawful combination or conspiracy." The majority opinion also frequently refers to the defendants as having engaged in a "combination or conspiracy," and quotes with approval from the case of *Morris Run Coal Company v. Barclay Coal Company*, 68 Pa. 173, 8 Am. Rep. 159, in which the Supreme Court of Pennsylvania says, in referring to a combination in violation of a state statute: "In all such combinations where the purpose is injurious and unlawful the gist of the offense is the conspiracy." In *Rice v. Standard Oil Company (C. C.)* 134 Fed. 464, Judge Lanning quotes the words of Mr. Justice Holmes, and says: "In one count there may be a charge of an unlawful contract, and in another a charge of an unlawful combination or conspiracy; but the two unlawful things cannot be declared upon as synonymous terms, and charged in a single count." See, also, *Chicago W. & V. Coal Co. v. People*, 214 Ill. 444, 73 N. E. 770. But whether the words have the same meaning, or whether they describe two offenses, they both have reference to the same object sought to be accomplished by the statute, to wit, the prevention of restraint of trade and commerce. In *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, the indictment was drawn to charge an offense under section 5421, Rev. St. (U. S. Comp. St. 1901, p. 3667), and alleged the doing of several different acts, and the causing to be done of the same acts, all of which acts and the causing to be done of such acts were prohibited by the statute. In discussing the indictment the Supreme Court says: "Undoubtedly the section of the revised statutes under which the

Indictment was framed embraces several distinct acts, the doing of either of which is punishable. * * * The second count charged in substance, not only that the defendant did things and each of them, the doing of which or either of which the statute prohibited, but also that he caused the doing of such things and each of them. Was the count, thus drawn, so defective as to require that judgment upon it be arrested? * * * We are of opinion that the objection to the second count upon the ground of duplicity was properly overruled. The evil that Congress intended to reach was the obtaining of money from the United States by means of fraudulent deeds, powers of attorney, orders, certificates, receipts, or other writings. The statute was directed against certain defined modes for accomplishing a general object, and declared that the doing of either one of several specified things, each having reference to that object, should be punished by imprisonment at hard labor for a period of not less than 5 years nor more than 10 years, or by imprisonment for not more than 5 years, and a fine of not more than \$1,000. We perceive no sound reason why the doing of the prohibited thing in each and all of the prohibited modes may not be charged in one count so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to an accused who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect of any of the matters embraced by it." In enacting the statute under consideration the general purpose of Congress was to prevent restraint of trade and commerce. It is directed against certain defined modes of accomplishing that general object, and declares that the engaging in either of those modes, each having reference to that object, shall be punished. We think this indictment comes squarely within the rule as above announced by the Supreme Court, and that this objection to it is not well taken.

It is next urged by the appellant that the indictment does not charge any violation of the law, for the reason that it charges an engaging in a combination and conspiracy in restraint of trade and commerce in the city of Phoenix, and not in or throughout the territory; that the act prohibits only those combinations and conspiracies which affect substantially the trade or commerce of the entire territory, and not those in restraint of the trade or commerce of a particular community. We think the construction contended for entirely too narrow. It might as justly be claimed that the language of the first section making illegal such combinations or conspiracies "in restraint of trade among the several states or with foreign nations" applies only to those combinations which di-

rectly affect trade and commerce among all the states, or with all the foreign nations.

Appellant further contends that the indictment is insufficient for the reason that it is not direct and certain, and charges a combination or conspiracy only in the language of the statute without stating the objects, purposes, and ends to be achieved. We think the indictment open to criticism as to not being direct and certain as to some of its allegations. The confusion arises from the pleader first charging the offense in the language of the statute, and not fully stating its purposes and objects until after the overt acts are described. The defect, however, is one of form rather than one of substance, and does not tend to the prejudice of the defendant. Therefore the indictment is not invalid. Section 1025, Rev. St. (U. S. Comp. St. 1901, p. 720).

It is further claimed that the indictment should allege the means by which the combination or conspiracy was to be accomplished; but this we regard as unnecessary, since the object to be attained by the combination or conspiracy in itself is unlawful both at common law and by statute. See authorities collected in 8 Cyc. p. 667.

The refusal of the court to direct a verdict of not guilty as to appellant is assigned as error. His argument in support of this assignment, if we apprehend it correctly, is not that the evidence does not disclose that he engaged in the combination and conspiracy with the defendant Hurley, but since his acts centered in and about the corporation, and he simply acted as its officer and stockholder, he could not be guilty and the corporation innocent. The corporation was the instrument by and through which the combination of those who promoted it became effective, and, had there been a verdict of guilty against it, we should have been disposed to hold it supported by the evidence, for the same reasons given by the Supreme Court for holding that "the Securities Company made itself a party to a combination in restraint of interstate commerce that antedated its organization, as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it." *Northern Securities Company v. U. S.*, supra.

There was sufficient evidence to warrant the jury in arriving at the verdict which they returned, and we will not disturb it, even though the trial court may have erred in directing a verdict of not guilty as to the defendant corporation.

The refusal of the court to give two certain instructions requested by appellant is assigned as error. The legal proposition involved in one is disposed of by what we have heretofore said, and the other was given in substance in the general charge of the court.

No error appearing, the judgment of the district court is affirmed.

SLOAN, DOAN, and NAVE, JJ., concur.

(11 Ariz. 223)

GILL v. MANHATTAN LIFE INS. CO.

(Supreme Court of Arizona. March 27, 1908.)

1. INSURANCE—CONTRACT OF INSURANCE—ACTION ON POLICY—TIME TO SUE.

An agreement in a life policy limiting the time within which an action may be brought thereon to a period less than that prescribed by the statute of limitations will be enforced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1545.]

2. SAME—INCORPORATION OF TERMS.

Terms may be incorporated in a policy by reference, and when so incorporated they will be enforced as a part thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 308.]

3. SAME.

A condition in a life policy limiting the time within which an action thereon may be brought is a matter of contract, and applies to an infant as effectually as to one having attained his majority.

4. PLEADING—CONCLUSIONS OF LAW—ADMISSION BY DEMURRER.

Matters pleaded as a conclusion of law are not admitted by demurrer; the court drawing the inference from the facts as pleaded, and ignoring the pleaded inferences.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Pleading, §§ 526½, 527.]

5. SAME—MATTERS OF FACT OR CONCLUSIONS.

An allegation which, when accompanied by the details of fact, may properly be held to be a conclusion inferred from such details, may, when unaccompanied by the details, be considered a pleading of ultimate fact, and not obnoxious to a demurrer, and the adverse party desiring a full detail must attack the pleading by motion.

6. SAME—CONSTRUCTION OF PLEADING.

While under the Code a pleading must be liberally construed with a view of obtaining substantial justice, a complete defect of averment cannot be supplied by construction.

7. INSURANCE—ACTION ON LIFE POLICY—COMPLAINT—SUFFICIENCY—"TO CONCEAL."

The application for a life insurance policy, which was expressly made a part of the policy, contained a stipulation limiting the time within which any action should be brought. A complaint in an action on the policy alleged that insurer "purposely and willfully concealed" from plaintiff the contents of the application to induce her to delay the bringing of the suit until after the expiration of the time limited, and purposely, willfully, and with intent to defraud induced her to delay the bringing of the action until the time limited had elapsed, and that she was never able to obtain an inspection of the application, and that the copy attached to the complaint was a copy of the application as furnished by insurer after repeated demands therefor, and that the application was not furnished until after the expiration of the time limited. *Held*, that the complaint was insufficient for failing to aver facts on which to predicate relief from the consequences of the delay; the words "purposely" and "willfully" adding nothing to the charge that the insurer concealed the contents of the application, for "to conceal" means purposely to keep from discovery.

8. FRAUD—PLEADING—CONCLUSION OF LAW.

The mere characterization of an act in a pleading as having been done "with intent to defraud the plaintiff" does not charge fraud, but the facts relied on as constituting the fraud must be pleaded.

Doan, J., dissenting.

Appeal from District Court, Coconino County; before Justice Richard E. Sloan.

Action by Lillie S. Gill against the Manhattan Life Insurance Company. From a judgment against plaintiff rendered on sustaining a demurrer to the complaint, she appeals. Affirmed.

Thomas Armstrong, Jr., E. E. Ellinwood, and John M. Ross, for appellant. Walter Bennett, for appellee.

NAVE, J. Lillie S. Gill brought suit against the Manhattan Life Insurance Company to recover on a policy insuring the life of her deceased husband. The policy, set forth in the complaint, recites, among other considerations for the insurance, that it is issued "in consideration of the application for this insurance, and the statements and covenants therein contained, which are a part of this contract." The application, also set forth in the complaint, contains the following: "It is expressly agreed on behalf of the applicant and of any person who shall have or claim any interest in any policy issued upon this application * * * that no suit shall be brought against the company upon such policy after the expiration of 2 years from the time that the cause of action shall have accrued." This action was instituted after the expiration of two years from the time of the accrual of the cause thereof. A special demurrer was interposed by the defendant, setting up that the action is barred by the terms of the contract sued upon. The demurrer was sustained, and judgment thereon rendered against the plaintiff. From this judgment, plaintiff has appealed. The sole issue is the correctness of the ruling on the demurrer.

Plaintiff alleges in her complaint that at the time of the accrual of the cause of action she was under the age of 21 years, and that she attained her majority within less than 2 years prior to the institution of the action. She avers also that the defendant purposely and willfully concealed from her the contents of the application made by the deceased for the purpose of inducing her to delay the bringing of the suit until after the 2 years mentioned in the application had expired, and did purposely, willfully, and with intent to defraud her induce her to delay the bringing of this action until more than 2 years had elapsed after her cause of action had accrued; that she has never been able to obtain an inspection of the application; and that the copy attached to the complaint is a copy of said application as furnished to her by the defendant after repeated demands therefor, and that the same was not furnished to her until after the lapse of the 2 years mentioned in the application. No act of the defendant is pleaded tending to prevent the plaintiff from acquiring knowledge of the contents of the application, or to induce her to delay suit.

1. It is settled in this jurisdiction that an agreement in a contract of insurance limit-

ing the time within which an action may be brought thereon to a period less than that prescribed by the statutes of limitations will be enforced. *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. (U. S.) 389, 19 L. Ed. 257.

2. It is also determined in this jurisdiction by authority specifically to the point, as well as by the elemental law of contracts, that terms may be incorporated in the policy of insurance by reference, and that, when so incorporated, they will be enforced as part of the contract of insurance. *Conner v. Manchester Assur. Co.*, 130 Fed. 743, 65 C. C. A. 127, 70 L. R. A. 106.

3. The limitation upon this action being a matter of contract, and not a matter of statute, it applies to an infant as effectually as to one who has attained majority. *Mead v. Phoenix Ins. Co.*, 68 Kan. 432, 75 Pac. 475, 64 L. R. A. 79, 104 Am. St. Rep. 412.

4. Appellant contends that the complaint is not obnoxious to demurrer by reason of the allegation that defendant concealed from plaintiff the contents of the application, and, with intent to defraud, induced her to delay the suit. Appellee urges that these allegations are of that variety denominated "conclusions of law" as distinguished from allegations of ultimate facts. The line of separation between a conclusion of law and an allegation of ultimate fact is as uncertain as the lines separating the cardinal colors in the spectrum. The distinction between them in matters of pleading more commonly is made where, coupled with allegations of fact, are allegations of conclusions, or inferences from the facts. Where matters are so pleaded, it is unquestionable that a demurrer to the pleading does not admit these inferences. The court draws the inferences from the facts as pleaded and ignores the pleaded inferences. *Dillon v. Barnard*, 21 Wall. (U. S.) 430, 22 L. Ed. 673; *U. S. v. Ames*, 99 U. S. 35, 25 L. Ed. 295. On the other hand an allegation which, if the details of fact were set forth, might properly be held to be a conclusion inferred from those details, may, when unaccompanied by details, very properly be held to be a pleading of ultimate fact, and not obnoxious to demurrer. If the adverse party desires fuller details, either for information or to lay a foundation for a demurrer, he should attack such a pleading by motion. *Phillips v. Smith* (decided at this term) 95 Pac. 91. In the pleading before us the allegation of concealment may, in this light, be said to be the allegation of an ultimate fact; so also the allegation that the defendant induced the plaintiff to delay. The defect in the averment consists, not in that these are averments of inferences, but that they are averments of facts which, unsupported by other facts, are not sufficient upon which to predicate relief for the plaintiff from the contractual consequence of delay. No fact appears in the complaint which cast

upon the defendant a duty to advise the plaintiff as to the contents of the application for the insurance. The adverbs "purposely" and "willfully" add nothing to the charge that the defendant concealed the contents of the application, for to conceal means purposely to keep from sight or discovery. While it is a rule of Code practice that a pleading shall liberally be construed with a view to obtaining substantial justice between the parties, yet, on the other hand, complete defect of averment cannot be supplied by construction. The original application manifestly became a part of the records of the defendant company. Doubtless it was "purposely and willfully concealed" among the records of the defendant company from plaintiff, and from all the world except its custodians.

It is not averred that any artifice was resorted to to induce the plaintiff to overlook the application; while the only allegation with respect to an endeavor upon her part to procure a copy thereof is coupled with the information also that she obtained it. The insurance policy itself, as we have noted, made express reference to the application so that plaintiff was put upon notice of its contents. Similarly the allegation that the defendant induced plaintiff to delay the bringing of the action must be disposed of. Mere characterization of the act as being "with intent to defraud the plaintiff" does not charge fraud. *Cochise County v. Copper Queen C. M. Co.*, 8 Ariz. 233, 71 Pac. 946. Such an adverbial phrase may sufficiently define the purpose of the defendant, but the purpose of the defendant is of no moment if its acts were not such in law as to perpetrate fraud. *Pullman's Palace Car Co. v. Mo. Pac. Ry. Co.*, 115 U. S. 596, 6 Sup. Ct. 194, 29 L. Ed. 490. It may be conceded by virtue of this allegation in the complaint that by some action or inaction on the part of the company plaintiff was led to delay the institution of this suit; but, in absence of an averment of the facts by which she was so led, it cannot be determined that the defendant perpetrated a fraud upon her, or is for any reason estopped to take advantage of her delay. The allegations indeed are open to the interpretation that the cause of plaintiff's delay was the concealment from her of the terms of the application, under which interpretation the allegation that she was induced to delay the suit would fall with the allegation that the contents of the application were concealed from her. There is nothing to suggest that even the earliest of her "repeated demands" for a copy of the application was made before the action was barred.

It follows that the demurrer was properly sustained, and that the judgment must be affirmed.

KENT, C. J., and CAMPBELL, J., concur.
DOAN, J., dissents.

(11 Ariz. 309)

PHILLIPS v. SMITH et al.

(Supreme Court of Arizona. March 27, 1908.)

1. PLEADING—ALLEGATIONS—CONSTRUCTION.

The court in construing a complaint should make every reasonable intendment, and sustain the pleading if possible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 66, 69.]

2. SAME—DEFECTS—MOTIONS.

Where substantial facts constituting a cause of action can be inferred by reasonable intendment from the matters set forth in a complaint, though the allegations of the facts are imperfect and defective, the objection cannot be raised by demurrer, but must be raised by motion to make the allegations more definite and certain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 409.]

3. MINES AND MINERALS—CLAIMS—LOCATION—QUIETING TITLE—COMPLAINT.

A complaint, in a suit to quiet title to a mining claim in support of an adverse proceeding pending in the land office, which alleges that defendant, as a prior locator, did not have a valid location; that his claim "was never marked nor monumented on the ground so that the boundaries thereof could be distinctly traced"; and that the surface boundaries of the claim were "never marked by any substantial posts projecting four feet above the surface, * * * nor by substantial stone monuments three feet high, nor to mark nor monument the same at all"—shows, as against a demurrer, a noncompliance with Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426), providing that a location must be distinctly marked on the ground so that its boundaries can be readily traced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 95.]

4. SAME.

The allegation in the complaint that plaintiff in fixing the boundaries and marking his claim on the ground selected the same points for the corner monuments that had been fixed for corner monuments for the claim of defendant by the locator thereof, and that the boundaries and monuments of the two claims were identical, was not an admission that defendant had marked and monumented his claim, and did not nullify a prior allegation that defendant's claim was never marked nor monumented on the ground so that the boundaries thereof could be distinctly traced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 95.]

5. SAME.

A complaint which alleges that plaintiff entered on the grounds comprised within the mining claim of defendant "in a peaceable and lawful manner and explored said premises and discovered and found placer gold" is sufficient as against the objection that it shows on its face a forcible, clandestine entry by plaintiff to make his location, in the absence of anything in the complaint to support a conclusion that defendant's claim was occupied by him, since, if defendant was not in the actual possession of the ground, plaintiff was within his right in exploring, and may litigate his contention that he acquired the claim as against defendant, though the word "lawful" in the quoted clause adds nothing to the allegation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 95.]

6. SAME.

A complaint which alleges that because defendant and his grantors and predecessors never discovered any mineral on the claim of defendant, and because a valid location thereof was never made, the land covered by the pretended claim was vacant and unclaimed mineral lands

of the United States, subject to location, and that plaintiff claims the legal right to occupy and possess the premises, and is entitled to the exclusive possession thereof by virtue of a compliance with the laws, shows that the ground in controversy was unoccupied public mineral land open to plaintiff's location.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, §§ 95, 97.]

Appeal from District Court, Cochise County; before Justice Fletcher M. Doan.

Action by T. O. Phillips against Hoval A. Smith and another. From a judgment against plaintiff rendered after sustaining a demurrer to the complaint, he appeals. Reversed and remanded.

L. Kearney, for appellant. Seth E. Hazard, for appellee Smith.

NAVE. J. T. O. Phillips brought suit against Hoval Smith and Martin Costello to quiet title to a mining claim in support of an adverse proceeding pending in the land office. Defendants demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, plaintiff having declined to amend, judgment was rendered against him. From this judgment he has appealed. The question before us, therefore, is whether the complaint states a cause of action.

The complaint is long, is involved, and pleads several pages of evidential matter. It would not be useful to set it forth in full, or to abstract it. It will suffice to take up the defects urged against it by the appellee Smith through his counsel.

1. Plaintiff, the subsequent locator, seeks in his complaint to show that the defendants, prior locators, have not had a valid mining location, and specifies in detail the alleged deficiencies in the location proceedings. Among other matters in this behalf he pleads "that the said Key lode, defendants' claim, was never marked nor monumented on the ground so that the boundaries thereof could be distinctly traced, and that the surface boundaries of the said Key lode were never marked by any substantial posts projecting four feet above the surface of the ground, nor by substantial stone monuments three feet high, nor to mark or monument the same at all." The infinitive verbs in the concluding clause of this allegation do not have, as infinitives, a syntactical relation with any finite verb in the sentence. It has been held by this court that, in construing the language of a complaint, "we should make every reasonable intendment, and * * * sustain the pleading if possible." *Santa Fé, etc., Ry. Co. v. Hurley*, 4 Ariz. 258, 36 Pac. 216. In *Pomeroy's Code Remedies* (3d Ed.) § 549, the author has said: "The true doctrine to be gathered from all the cases is that, if the substantial facts which constitute a cause of action * * * can be inferred by reasonable intendment from the matters which

are set forth, although the allegations of these facts are imperfect, incomplete, and defective—such insufficiency pertaining, however, to the form rather than to the substance—the proper mode of correction is not by demurrer, * * * but by motion before the trial to make the averments more definite and certain by amendment. * * * If the pleader should aver conclusions of law in place of fact, the resulting insufficiency and imperfection would pertain to the form rather than to the substance. The mode of correction would be by motion, and not by a demurrer." See, also, *Gill v. Manhattan Life Ins. Co.* (decided at this term) 95 Pac. 89, and *Shea v. Nillma* (9th Circuit) 133 Fed. 209, 66 C. O. A. 263. If the defendants were not satisfied with the allegation that "the said Key lode was never marked nor monumented on the ground so that the boundaries thereof could be easily traced" as an allegation of ultimate fact, they should have attacked the allegation by motion; and, if they were perplexed as to the syntax of the infinitive verbs, the remedy likewise was by motion. Giving the first clause its full weight, it discloses a violation of the requirement of the federal statute that "the location must be distinctly marked on the ground so that its boundaries can be readily traced." Section 2324, Rev. St. (U. S. Comp. St. 1901, p. 1426). Extending but little indulgence to the concluding clause, we may regard it as an allegation that the location was not marked or monumented in anywise. The sufficiency of the allegations in the other clauses of the quoted portion of the complaint is attacked by reason of the fact that it does not appear from the complaint that the location of the Key lode was made at a time when the Arizona statutes required that the location should be marked by substantial posts projecting at least four feet above the ground, or by substantial stone monuments at least three feet high. The deficiency in these last-mentioned clauses is negligible, since the first and last clauses in the quotation charge facts which, if true, disclose that the defendants have not a valid location under the federal statutes.

But appellee contends that the effect of this pleading is nullified by the subsequent allegations in the complaint that "in fixing the boundaries and marking the claim upon the ground and making the monuments on the Bonanza placer claim, plaintiff's claim, the plaintiff fixed upon and selected the same points for corner monuments that had been selected and fixed for corner monuments for said Key lode by the locators thereof, and that the boundaries and monuments of the said Key lode and amended Bonanza claim are identical," with a certain exception. Applying the rule of liberal construction, we do not feel, in the face of the allegation that the Key lode was not marked or monumented, that we should interpret this last expression as an admission that it was marked and

monumented. Certainly it may not be construed as an admission that the Key claim was "distinctly marked on the ground so that its boundaries can be readily traced."

2. Appellee contends that the complaint is insufficient by reason of the fact that it shows upon its face a forcible, clandestine, or surreptitious entry by the plaintiff in order to make his location. This criticism is directed at plaintiff's allegation that he "entered upon the grounds comprised within the Key lode in a peaceable and lawful manner, and explored said premises, and discovered and found placer gold." The adjective "lawful," as contended by appellee, adds nothing to the strength of the allegation; and of course the entry could have been peaceable, and still have been clandestine. *Nev. Sierra Oil Co. v. Home Oil Co. (C. C.)* 98 Fed. 673. But there is nothing in the complaint to support a conclusion that the Key claim was ever occupied by the defendants or in their possession other than as constructive possession may be inferred from their acts of location. If the defendants were not in actual possession of the ground, plaintiff was within his rights in exploring and locating the ground, and may be heard to litigate his contention that he has acquired the mining claim as against the defendants. *Walsh v. Henry* 38 Colo. 393, 88 Pac. 449.

3. Appellee submits that it is not averred in the complaint that at the time of the location by plaintiff or at any other time the ground in controversy was unoccupied mineral ground, subject to location. Plaintiff's allegation in this behalf is "that by reason of the defendants, their grantors and predecessors in interest, never having discovered any vein, lode, ledge, or mineral in place on said Key lode, and never having made a valid location or appropriation thereof as required by law as hereinbefore alleged, that all the hereinbefore described lands covered by their pretended location of the said Key lode was and ever since has been vacant, unoccupied, and unclaimed mineral lands of the United States, and subject to location under the mining laws thereof," until plaintiff located; and, further, that "the plaintiff has and claims the legal right to occupy and possess all those premises hereinbefore described in his amended location notice of said Bonanza claim, is the legal owner thereof, and is entitled to the immediate and exclusive possession of every part and parcel thereof by virtue of a full compliance with the local laws and rules of miners in said mining district, the laws of the United States, and of the territory of Arizona, by pre-emption, and by actual prior possession, as a placer mining claim, located on the public domain of the United States." Extending to these allegations the liberal interpretation demanded by the rule hereinbefore announced, we hold that they sufficiently aver that the ground in controversy was unoccupied

public mineral land open to plaintiff's location.

These are the only points of attack by the appellee which we need to consider. We have given the complaint careful examination, and are satisfied that it states a cause of action. The demurrer should have been overruled.

The judgment of the district court is reversed, with direction to that court to overrule the demurrer to the complaint to the end that further proceedings may be had not inconsistent with this opinion.

KENT, C. J., and SLOAN and CAMPBELL, JJ., concur.

(11 Ariz. 353)

TERRITORY ex rel. LIVE STOCK SANITARY BOARD v. KENNEY et al.

(Supreme Court of Arizona. March 27, 1908.)

LICENSES—LICENSE FEES—RECOVERY.

Rev. St. 1901, tit. 42, Laws 1903, p. 40, No. 26, and Laws 1905, p. 65, No. 51, establishing a live stock sanitary board, providing for a salaried veterinary surgeon, and for stock and slaughterhouse inspectors, charged with the duty of protecting live stock and the public, authorizing the licensing of slaughtering business on payment of fees, and making it a misdemeanor for any person to engage in the slaughtering business until he shall have obtained a license, impose license fees within the police power of the state, and not its taxing power; and, where a license is not obtained, there is no obligation to pay the fee, and an action for its recovery cannot be maintained, though defendant may be liable criminally for doing business without a license.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 66.]

Error to District Court, Cochise County; before Justice Fletcher M. Doan.

Action by the territory, at the relation of the live stock sanitary board, against James Kenney and another, copartners. There was a judgment against plaintiff rendered on sustaining a demurrer to the complaint, and he brings error. Affirmed.

E. S. Clark, Atty. Gen., and D. L. Cunningham, for plaintiff in error. Neale and Ross, for defendants in error.

NAVE, J. The territory of Arizona, at the relation of the live stock sanitary board, brought suit against James and Fred Kenney, copartners doing business under the name of Kenney Bros., to recover \$150 alleged to be due from Kenney Bros. by reason of the fact that during the year 1905 they were engaged in the slaughtering business, but did not apply for or procure a license for that business, or pay to that board by way of a license the amount of the license fee, though payment thereof was demanded of them. Kenney Bros. demurred to the complaint on the ground that it does not state a cause of action. The demurrer was sustained, and judgment rendered against the

plaintiff. From this judgment the plaintiff has sued out a writ of error.

The live stock laws as contained in title 42 of the Revised Statutes of 1901, Act No. 26, p. 40, Laws 1903, and Act No. 51, p. 65, Laws 1905, are involved in the consideration of this case. These laws provide for the establishment of the live stock sanitary board, a salaried body, for a salaried secretary of that body, for a salaried veterinary surgeon, and for stock inspectors, slaughterhouse inspectors, and detectives. These officials are charged with the duty of protecting live stock in the territory from contagious and infectious diseases, discovering and destroying diseased stock, protecting the public from diseased and unwholesome meat products, and protecting stock owners from the theft of their stock. Among other details of the system there is a provision under which the board shall grant licenses to persons engaged in the slaughtering business upon the payment of varying fees. The fee applicable to the defendants in error is \$150. It is made a misdemeanor for any person to engage in slaughtering until and unless he shall have obtained such license. Furthermore all such persons are required to give bond to the territory of Arizona conditioned that they shall not slaughter or expose for sale any animal or meat thereof, which they do not own, with a penalty for violation of the condition, accruing in shares to the true owner, the informer, and the license and inspection fund. All license fees are placed in the license and inspection fund, which fund is used upon the order of the board for the payment of inspectors, of attorneys' fees, and of such other expenses as may be incurred in enforcing the stock laws. All fees for inspection, and all other sums of money accruing by reason of any provisions of these laws, are placed in that fund for that purpose, excepting those which go directly to inspectors as their compensation. A system of stock inspection and carcass inspection is provided, involving the supervision not only of slaughtering, but also of animals upon the range, of their removal from one range to another, and of their transportation into, through, or out of the territory. There is no provision authorizing action to collect the license fees, nor method pointed out to enforce such collection, except by the indirect means of criminal prosecution. The demurrer was sustained upon the theory that an action to collect such fees is not maintainable.

The territory makes two contentions: First, that the fee for which it sues is imposed as a tax for revenue purposes; and, second: that, there being no specific provision by law for the collection of that tax, the territory may avail itself of the general laws, and bring this action as for a debt—citing *Lexington v. Wilson*, 118 Ky. 221, 80 S. W. 811; *Dollar Savings Bank v. United States*, 19 Wall. (U. S.) 227, 22 L. Ed. 80, and other decisions of which these are typical. The statutes

which we have summarized patently are intended solely for the regulation of the live stock and butchering businesses, with a view to protecting owners of live stock and purchasers of meats. They contemplate the obtaining by their various fee provisions of only sufficient funds for the maintenance of the system. The license provisions are therefore not exercises of the taxing power, but exercises of the police power. *Cooley on Taxation*, ch. 19; *Gray Lim. Tax. Power and Pub. Indebt.* ch. 20; *Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 370, 19 S. W. 1053; *Ellis v. Frazier*, 38 Or. 462, 63 Pac. 642, 53 L. R. A. 454; *State v. Ashbrook*, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. Rep. 765; *Terre Haute v. Kersey*, 159 Ind. 300, 64 N. E. 469, 95 Am. St. Rep. 208.

We are not cited to any authority suggesting that, in advance of the issuance of the licenses, such license fees can be collected by suit, except by virtue of specific statutory authority. The law before us does not give rise to an obligation, but offers an opportunity of which one desirous of engaging in the licensed business may avail himself. Of it, however, he cannot be compelled to avail himself, except in so far as such compulsion may be effected by criminal prosecution. The fee is to be paid for the license. When a license is not obtained, there cannot be implied an obligation to pay for a license, merely by reason of the unlawful engaging in the business. *Santa Cruz v. Santa Cruz R. R. Co.*, 56 Cal. 143; *Monterey Co. v. Abbott*, 77 Cal. 541, 18 Pac. 113, 20 Pac. 73; *Merced Co. v. Helm*, 102 Cal. 166, 36 Pac. 399.

The complaint does not state a cause of action. Wherefore the judgment must be affirmed.

KENT, C. J., and SLOAN and CAMPBELL, JJ., concur.

(11 Ariz. 334)

COPPER BELLE MINING CO. et al. v.
COSTELLO.

(Supreme Court of Arizona. March 27, 1908.)

1. APPEAL—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR—ERROR AFFECTING CO-PARTY.

That demurrers were sustained to a petition of intervention by stockholders in a foreclosure suit against the corporation is not a ground of complaint by the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3584.]

2. ACKNOWLEDGMENT—REQUISITES OF CERTIFICATE OF ACKNOWLEDGMENT BY CORPORATION.

A certificate of the acknowledgment of the execution of a mortgage by a corporation, that persons named, personally known to be the president and secretary of the corporation, appeared and acknowledged that they executed the mortgage as president and secretary, respectively, by authority of a resolution of the board of directors, was in substantial compliance with Rev. St. Ariz. 1901, par. 739, providing that, where an acknowledgment is made by the of-

ficers of a corporation, the certificate shall show that such persons as such officers acknowledged the execution of the instrument as the free act and deed of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, § 218.]

3. CORPORATIONS—POWERS—MORTGAGES.

A mining corporation, in the absence of any restrictive provision, either in its charter or in the laws of the state under which it was organized, is not prohibited from executing a note or mortgage because the charter itself does not expressly authorize such an act. It is a necessary power, that exists by implication of law, and as incident to its right to incur an indebtedness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1517, 1775.]

4. SAME—PURCHASING CORPORATION'S OWN STOCK.

A purchase by a mining corporation of its own stock is valid, as against the corporation, where made in the discretion of the officers of the corporation, in good faith, and in the exercise of their control of the affairs of the corporation, for the purpose of getting rid of a superintendent whose management was believed to be injurious, and where it does not appear that at the time of purchase the corporation was insolvent, or that any of its officers or stockholders had reason so to believe, or that the one advancing money to help purchase the stock had any knowledge on the subject whatever.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1530.]

5. SAME.

In the absence of any statute prohibiting the purchase by a corporation of its own stock, such purchase is not void per se; but its validity depends on the circumstances of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1530.]

6. SAME.

A purchase by a mining corporation of its own stock is valid, as against nonassenting stockholders, where there is no proof of any loss or injury to them because of the purchase.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1530.]

7. SAME—REPRESENTATION OF CORPORATION BY BOARD OF DIRECTORS—EXECUTION OF MORTGAGE.

A corporation may, in the absence of any statutory requirement that the assent of stockholders is necessary, under authority of its board of directors, without the stockholders' assent, authorize the execution of a note and mortgage as a part of the business incident to the corporation and properly carried on by the directors; and hence, the stockholders' assent not being requisite to the validity of a mortgage, the fact that notice of a special stockholders' meeting at which the directors were authorized to execute a mortgage may have been insufficient in not setting forth the purpose of the meeting is not a ground of invalidity of the mortgage, where the execution of the mortgage was duly authorized by the directors' meeting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 666, 1857.]

8. SAME—FORECLOSURE OF MORTGAGE—DEFENSES—PERSONS AGAINST WHOM AVAILABLE.

In a foreclosure suit on a note and mortgage executed by a corporation to procure funds to make a cash payment on the purchase of a stockholder's interest and in settlement with him, it is no defense, as against the mortgagee, that the stockholder did not transfer his stock, and could not transfer it by reason of a pooling agreement under which the stock was held in escrow for a certain length of time after the giving of the mortgage.

9. MORTGAGES—DEBTS SECURED—ASSESSMENT WORK ON MINING CLAIMS.

Under a mortgage of mining claims, requiring the mortgagor to perform the annual assessment work and providing that on failure to do so, if the mortgagee should consider it necessary to perform such assessment work, such expenditure should be a further lien on the claims, the mortgagee was within his rights in performing assessment work on such claims as the mortgagor omitted to do work upon, and was not, because of performance of a large amount of work by mortgagor on one of the claims, obliged to accept the same as done for the benefit of all the claims, and thereby risk the chance of an adverse determination of the question as to the sufficiency of such work for all the claims.

10. APPEAL—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—MATTERS NOT PRESENTED.

Where, in a foreclosure suit, it does not appear that there was any application to the trial court to make a sale in parcels, nor any ruling of the court in that respect, or objection in the lower court to the method of sale, and it does not appear that it was presented in the motion for new trial, the Supreme Court will not be disposed to review the action of the trial court in its determination as to the method of sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1018.]

11. CORPORATIONS—MORTGAGES—FORECLOSURE—ACCOUNTING.

In a foreclosure suit on a note and mortgage executed by a corporation to procure funds to make a cash payment on the purchase of a stockholder's interest and in settlement with him, wherein the stockholder was made a party defendant, an application by the corporation for an accounting between the stockholder and the corporation, and for a reference to determine what recovery should be had by the corporation against the stockholder on account of any judgment rendered for the holder of the note and mortgage against the corporation, was properly denied, as the facts sought to be thus proved would have afforded no defense on the note and mortgage as against the holder, and were not within the issues.

12. SAME—EVIDENCE—ADMISSIBILITY.

In a foreclosure suit on a note and mortgage executed by a corporation to procure funds to make a cash payment on the purchase of a stockholder's interest and in settlement with him, evidence as to representations made by the stockholder with respect to the indebtedness of the corporation and reliance thereon was not material, in the absence of proof of insolvency or financial embarrassment of the corporation.

13. SAME.

In a foreclosure suit on a note and mortgage executed by a corporation to procure funds to make a cash payment on the purchase of a stockholder's interest and in settlement with him, a certified copy of a list of debts proved in bankruptcy against the corporation was immaterial, where not tending to prove any indebtedness at the time of the execution of the mortgage.

14. APPEAL—REVIEW—QUESTIONS PRESENTED—ADMISSIBILITY OF EVIDENCE.

Error predicated on the exclusion of a document offered in evidence cannot be determined, where the document is not preserved in the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2905-2909.]

15. SAME—HARMLESS ERROR—EXCLUSION OF EVIDENCE—FACTS OTHERWISE APPEARING.

The exclusion of a document offered in evidence does not appear to have been prejudicial, where subsequently other evidence was introduced to the same effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194-4199.]

16. JUDGMENT—CONFORMITY TO PLEADINGS AND PROOF.

Where, in a foreclosure suit on both a first mortgage and a second mortgage, the court all through the trial considered the second cause of action as not before it for adjudication, because prematurely brought, and defendants were precluded by the court's action in that regard from offering testimony material to their defense thereto, it was error to include in the judgment an amount found to be due plaintiff as interest on the notes secured by the second mortgage, whatever may have been the legal effect of the notes and mortgage and the right of plaintiff to secure in the action a judgment for the interest then due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 434-445.]

17. APPEAL—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR.

The action of the trial court, in a foreclosure suit on first and second mortgages, in holding that the second cause of action had been prematurely brought and was not properly before it, not having been taken to the Supreme Court for review by plaintiff, must be held correct.

Appeal from District Court, Cochise County; before Justice Fletcher M. Doan.

Action by Martin Costello against the Copper Belle Mining Company and others. Judgment for plaintiff, and the mining company and another appeal. Modified and affirmed.

The Copper Belle Mining Company, a West Virginia corporation, was the owner of certain mining claims situated in this territory. In 1899 one John Gleeson was the owner of 8,000 shares of the capital stock of the company, was its general manager and superintendent, on a salary, and had an interest in the net profits of a store of the company on its premises. Gleeson had general charge at the mines, paying the wages of the employees by checks drawn upon funds deposited in the bank by the company for that purpose. The matte from the mines was shipped to various points by Gleeson; the proceeds therefrom not being collected by him, he retaining no management or control thereof, and the business of the company being transacted in New York. Gleeson had been elected a director, but never met as one of the board of directors, or qualified or acted as such. In January, 1902, certain of the officers of the company came to Arizona for the purpose of effecting an arrangement to get Gleeson out of the company. An arrangement was entered into between Gleeson and these representatives of the company, by which the company agreed to pay Gleeson for his interest in the store, for salary due him, and for his 8,000 shares of stock the sum of \$68,100. Gleeson demanded a partial cash payment. Mr. James Reilly, who was the local counsel of the company, agreed to procure from Costello (the appellee) a loan to the company for the amount of the cash payment demanded by Gleeson, provided the company would duly authorize such loan, and would give a mortgage for the amount thereof upon its property. Thereupon the visiting officers of the company returned to New York, a

stockholders' meeting was called, and authority was given at such stockholders' meeting to the board of directors, authorizing such board to execute a note of the company to Costello for \$15,100 and a mortgage on its property to secure the same, and, further, to execute to Gleeson four promissory notes of the company, for \$13,250 each, the same to be secured by a second mortgage on the property. Thereafter, and on the 1st of February, 1902, the board of directors held a meeting, at which the minutes of the meeting of the stockholders were read, and at which the directors authorized the president and secretary to draw up and execute the notes and mortgages referred to. The note for \$15,100, and the first mortgage securing the same, were transmitted to Costello, together with a draft, drawn by the company on Costello in favor of Gleeson for the amount of the note, which draft was paid by Costello. The four notes of the company, payable to Gleeson, and the second mortgage securing the same, were delivered to him. These transactions were in February, 1902. Subsequently Costello purchased from Gleeson the four notes, for \$13,250 each, and the second mortgage securing the same. The note to Costello for \$15,100 was a three year note, and became due on February 4, 1905. The four notes to Gleeson were four, five, six, and seven year notes, becoming due February 4, 1906, February 4, 1907, February 4, 1908, and February 4, 1909, respectively. By the terms of the mortgage to Costello, the latter was authorized to have the assessment work required by law done on the mining claims, if he found it necessary for the preservation of the title thereto. For this purpose Costello expended the sum of \$802.75. The company paid the interest due on the note to Costello to February 4, 1903, but failed to make any further payment thereon, either of principal or interest, or the amount paid out by Costello for assessment work. The interest due on the notes to Gleeson to February 4, 1903, was also paid; but no further payments were made on such notes. In February, 1903, the corporation was adjudged a bankrupt. Thereafter all the property covered by the mortgages was deeded to a new company, organized under the laws of the territory of Arizona, bearing the same name, to wit, the Copper Belle Mining Company.

In July, 1905, subsequent to the maturity of the \$15,100 note, but prior to the maturity of the other notes, Costello brought this action against the Copper Belle Mining Company of West Virginia and the Copper Belle Mining Company of Arizona for the foreclosure of the mortgages. The complaint was divided into two causes of action: First, on the \$15,100 note and the \$802.75 assessment expenditures; the second, on the four notes, for \$13,250 each, which Gleeson had assigned to Costello. The plaintiff prayed judgment for the amount of the principal and interest due on the \$15,100 note, and for "the

present value of the four promissory notes mentioned in the second cause of action of the plaintiff's complaint," and for a sale of the mortgaged premises. A petition in intervention was filed by certain stockholders, alleging the acts of the corporation with respect to the execution of the notes and mortgage to be ultra vires. A demurrer to this intervening petition was sustained by the court. Upon application of the defendant companies, Gleeson was made a party defendant to the suit. The defendant companies in their answer demurred to the complaint generally, and specially to the second cause of action, on the ground that none of the notes sued on in the second cause of action were due at the time the complaint was filed. They answered on the merits, denying the allegations of the complaint, averring that the assessment work done was unnecessary; that the notes set up in plaintiff's second cause of action were not due; that Gleeson was a director, superintendent, and general manager, and occupied a fiduciary and trust relation towards the corporation and its stockholders; that Gleeson made false representations to the stockholders and officers of the corporation respecting the value of the mines, the freedom of the company from debts, and the profits of the store business; that he induced the execution of the agreement between the company and himself for the purchase of his stock and interest in the company by means of false representations as to the extent of the company's revenues and income, and its freedom from debts. They further alleged the invalidity of the notes and mortgage for want of consideration, for want of authority on the part of the officers of the company to execute them, and alleged that the acts of the corporation in that behalf were ultra vires. They alleged that at the time of the execution of the notes and mortgages the company was insolvent; that it owed debts in excess of \$40,000, which had been incurred by Gleeson in his capacity as director, superintendent, and general manager, which fact Gleeson and Costello knew, but which fact Gleeson concealed from the company, its officers, agents, and stockholders; that at the time of the execution of the notes the company had no net profits in its business. They set up suits brought by creditors against the company in July, 1902, a petition in bankruptcy of July 29, 1902, and the subsequent adjudication of the company as a bankrupt, the amount of debts proved, a sale and assignment to the Arizona company of the claims of the creditors, the indebtedness of Gleeson to the West Virginia Company, the invalidity of the stockholders' meeting (by reason of the failure to give proper notice thereof) at which the notes and mortgages were authorized, the nonassent of certain stockholders thereto, and prayed for an accounting between the company and Gleeson, the appointment of a referee for that purpose, a credit as an offset of

any amount found to be due from Gleeson to the company, that Costello and Gleeson be required to deliver up the notes and mortgages for cancellation, and that they be perpetually enjoined from enforcing payment of the notes. The trial court rendered judgment for Costello for the amount of the \$15,100 note, principal and interest, for the amount expended by him for the assessment work, and for the interest due on the four notes to Gleeson covered by the second mortgage, and ordered a foreclosure to satisfy the same. From this judgment the two corporations have appealed.

Frank H. Hereford and Francis M. Hartman, for appellants. James Reilly and Ben Goodrich, for appellee.

KENT, C. J. (after stating the facts as above). The appellants have assigned numerous errors, which we will consider separately, so far as it seems necessary so to do. The appellants claim that the trial court erred in sustaining the demurrers to the petition of intervention of the stockholders. If the case was a proper one for an intervention by nonassenting stockholders, it is not necessary to consider the correctness of the trial court's ruling in sustaining the demurrer to the petition in intervention, since the petitioners have not appealed therefrom, but are content with the ruling of the court, and the corporation cannot be heard to complain of the court's action in that respect.

It is claimed that the court erred in admitting in evidence, as against the Arizona corporation, the mortgage securing the \$15,100 note; the objection being that the acknowledgment thereto did not recite that the officers executed the same "as the act and deed of the corporation," and hence it was not entitled to be recorded. Our statute provides: "If the acknowledgment is made by the officers of a corporation, the certificate shall show that such persons as such officers (naming the office of each person) acknowledged the execution of the instrument as the free act and deed of such corporation, by each of them voluntarily executed." Paragraph 739, Rev. St. Ariz. 1901. The acknowledgment was in the following terms: "Before me, Oliver W. Beals, a notary public in and for the county aforesaid, on this day personally appeared B. Brunner and George E. Crawford, both personally known to me to be the president and secretary, respectively, of the Copper Belle Mining Company, the corporation that executed the foregoing instrument, and they each for himself acknowledged to me that he executed said instrument as president and secretary, respectively, of the said corporation, by the authority of a resolution of the board of directors of said corporation passed the 1st day of February, 1902, for the purpose and consideration therein expressed." The resolution of the board of directors referred to was later put

95 P.—7

in evidence. A literal and precise language of the statute "to secure site, if there has been a substantial thereto," once therewith. In the case before us, an order of resolution of the board of directors (the order of the corporation) expressly authorized the execution of the instrument, and the acknowledgment recited that it was executed by the authority of such resolution and for the purpose therein expressed. We think it was sufficient in form, and not subject to the objection urged. *Miller v. Boone*, 63 Tex. 91; *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. 734.

The principal assignments of error relate to the action of the court in rendering judgment on the \$15,100 note and foreclosing the mortgage given to secure the same. It is claimed that the corporation was not authorized or empowered by its charter to make a note and mortgage, and the same was, therefore, ultra vires and void. In the absence of any restrictive provision, either in the charter or in the laws of the state under which it was organized, a corporation such as the one in question is not prohibited from executing a note or mortgage by reason of the fact that the charter itself does not expressly authorize such an act. It is a necessary power that exists by implication of law, and as incident to its right to incur an indebtedness. *Cook on Corporations*, § 779, and cases cited.

It is further claimed that the note and mortgage were given by the corporation in payment for the purchase of shares of its own stock from Gleeson, a director; that the corporation was not authorized or empowered by its charter to purchase its own stock; and that the transaction was therefore ultra vires. It is claimed that Reilly was acting in this transaction on behalf of Costello, and that Reilly had full knowledge of all the facts, and that his knowledge must be imputed to Costello; that at the time of making the note and mortgage the company had no net profits in its business, and no surplus; that the mortgage covered all the property of the company, and was virtually a conveyance of all the company's property to Costello for the benefit of Gleeson, in effect making Gleeson a preferred stockholder, in fraud of the other stockholders and creditors. We think the evidence discloses that, while Reilly was the local attorney for the company, he was also the legal adviser of Costello, acting generally for him, and that in the matter of the loan in this instance he was acting as the representative of Costello, and that his knowledge must be imputed to Costello. It is shown that Reilly had knowledge that the company intended to "buy Gleeson out" and to purchase his stock. Reilly further had knowledge of the action of the stockholders and the board of directors in regard to the authorization of the transaction; but there is no evidence that Costello or Reilly had any knowledge that the company

stockholders' authority was not required to act in compliance with the

97

by the court. In this case, while some states forbid it, the better rule seems to be that, in the absence of statutory restriction, and where there is no statutory liability on the stock, a solvent corporation may in good faith purchase its own stock, subject to the right of creditors, upon a showing that they have been injured thereby, and in some instances of nonassenting stockholders, to have such purchase declared illegal. *Cook on Corporations*, § 310 et seq.; *Lowe v. Pioneer Threshing Co.* (C. C.) 70 Fed. 646; *Clapp v. Peterson*, 104 Ill. 26; *Blalock v. Manufacturing Co.*, 110 N. C. 99, 14 S. E. 501; *City Bank of Columbus v. Bruce*, 17 N. Y. 507; *First Nat. Bank v. Salem Co.* (C. C.) 39 Fed. 89; *New England Co. v. Abbot*, 102 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; *C. P. & S. W. R. R. Co. v. Marselles*, 84 Ill. 643; *Farmers' Bank v. Champlain Transp. Co.*, 18 Vt. 131; *Iowa Lumber Co. v. Foster*, 49 Iowa, 25, 31 Am. Rep. 140; *Shoemaker v. Lumber Co.*, 97 Wis. 585, 73 N. W. 333.

In the case before us, we think the purchase by the company of its stock was a valid one, as against the corporation. It was done in the discretion of the officers of the company in good faith, and in the exercise of their control of the affairs of the company, for the purpose of getting rid of a superintendent, the owner of a small amount of stock, whose management of the company was believed to be injurious. At the time of the purchase there is no evidence that the company was insolvent, or that any of the officers or directors of the company, or any of its stockholders had reason so to believe, or that Costello or Reilly had any knowledge on the subject whatever. The answer of the defendants in terms alleges the insolvency of the company, but also that Gleeson concealed from the officers, directors, and stockholders of the company the real condition, and that he at the time represented to them that the company had no debts other than to him. There is no evidence that any false representations were made by Gleeson. The only evidence as to the financial condition of the company at the time shows it to have had about \$12,000 of debts due to Gleeson and some \$650 due to Reilly, and that it had ore and matte of the value of some \$36,000 or more, in addition to the value of the mining claims themselves. In this case, no proof was offered of any statute of West Virginia

that the transaction a preferred her stockholders the appellants, a matter of fact seems to be the rule corporation may not own stock. The objection a transaction is the corporate funds property is received apt the right to re-

on the subject and no Arizona statute prohibits such purchase. In the absence of any statute prohibiting the purchase by a company of its own stock, such purchase is a transaction not per se void; but its validity depends upon the circumstances of the case. The transaction might in some instances be avoided by stockholders who did not assent, if injured. It might be avoided by creditors who were injured. But there are no such facts in the record before us of the condition of the company at the time when the purchase of this stock was made as would warrant us in declaring such purchase illegal at the instance of the corporation. As to the nonassenting stockholders, if, waiving the question of laches and considering them to be here rightfully complaining because of the defense in their behalf made by the company, there is no proof of any loss or injury to such stockholders by reason of the transaction. The defendant the Arizona corporation in its answer claims to be the assignee of the creditors who proved their claims in the bankruptcy court, and to stand in their shoes; but no evidence of the assignment to that company of any claims is in the record, and, further, no proof of the existence of any such claims or creditors at the time of the execution of the note and mortgage, or, indeed, of any bankruptcy proceedings at all, further than the fact that the company was adjudged a bankrupt in 1903, was offered. We find no ground, therefore, upon which the transaction may be avoided as an illegal purchase of stock by the corporation.

It is further alleged that the notes and mortgage are invalid for the reason that no proper notice was given of the special meeting of the stockholders, and that all the stockholders of the company did not vote for the resolution. The evidence shows that the total outstanding shares of the stock of the company were 145,495, that all the stockholders were actually notified of the meeting and that of such amount 133,480 shares were voted at the meeting in favor of the transaction; the owners of 12,015 shares not voting or being present in person or by proxy. It therefore appears that, while the great majority of the stock was voted in favor of the transaction, a small minority was not present and did not by vote assent to it. It is alleged that the call for the meeting was invalid, in that the object of the special meeting was not stated in the call. If it be that the notice of the special stockholders' meeting was insufficient in not setting forth the purpose for which the same was called, the mortgage was not invalidated thereby. A directors' meeting was duly called and held, at which the execution of the notes and mortgages was duly authorized. In the absence of any statutory requirement that the assent of the stockholders is necessary, it is the established rule that a corporation may, under the authority of its board of directors duly exercis-

ed, without the assent of the stockholders, authorize the execution of such a note and mortgage as a part of the business incident to the corporation and properly carried on by the directors. Cook on Corporations, § 803, and cases cited. We have not had our attention called to any provisions, either of the West Virginia statutes or the Arizona statutes, that require the approval of such a mortgage by the stockholders. The assent of the stockholders not being a requisite of the validity of such mortgage, the fact that certain stock was not represented at the meeting, though not properly called, affords no ground to contest the validity of the mortgage or for the reversal of the judgment.

It is further urged that there was no consideration passing from Gleeson to the corporation for the making by the corporation of the note and mortgage to Costello; it being claimed that Gleeson did not transfer the 8,000 shares of stock to the corporation, and could not transfer it by reason of a pooling agreement by the terms of which the stock was held in escrow for a certain length of time after the date of the giving of the mortgage. It is to be noted that the stock was only a part of the consideration for the arrangement, and that, if the claim alleged were true, it would only be a partial failure of the consideration. It appears, however, from the evidence in the case, that the stock did come into the possession of the defendants, since a tender of the stock was made in court by them to Costello in connection with their demand for a cancellation of the notes and mortgage. But in any event the ground alleged would afford no defense for the company upon this note, as against Costello.

The next assignment relates to the alleged error of the court in rendering judgment for the \$802.75 expended by Costello in performing the assessment work not done by the company on certain claims. It is claimed by appellants that the mining claims in controversy, of which there were ten, form one group, and that the company had already performed several thousand dollars' worth of work upon one of the claims for the year in question, and that the work so performed was for the benefit of the whole group, and rendered unnecessary any assessment work on the other claims by Costello. However this may have been as a matter of law, we think Costello, under the facts, was justified in the performance of the work, and that it was a proper subject of recovery in the action. The mortgage provided that the company should "do and perform the annual assessment work on each of the said mines and mining claims not patented hereby mortgaged during the continuance of this mortgage, and in case the said party of the first part shall fail to do and perform said annual assessment work on any of said mines and mining claims, and the said party of the second part shall consider it necessary to do and perform said assessment work on any or all of said

mines and mining claims in order to secure the title and right of possession thereto," such expenditure should be a further lien on the mines described by the mortgage. Under this explicit provision of the mortgage, we think Costello was within his rights in performing the assessment work on such claims as the company had omitted to do the work upon, and that he was not, by reason of the performance of a large amount of work by the company on one of the claims, obliged to accept such work as work done for the benefit of all the claims, and thereby risk the chance of an adverse determination of the legal question as to the sufficiency of such work for such purpose thus presented.

It is further urged that the court erred in ordering a sale of the property as an entirety, "for the reason that the same comprised ten separate mining claims, and each claim could be sold separately." The contention of the appellants in this respect seems to be at variance with their contention that the ten claims comprise one group of mines, upon which the assessment work for one would accrue to the benefit of all. We do not find in the record any application to the trial court to make a sale in parcels, rather than in an entirety, nor any ruling of the court in that respect, or objection in the lower court to the method of sale, nor was it presented in the motion for a new trial. Upon the facts as they are before us, and upon the record, we are not disposed to review the action of the trial court in its determination as to the method of sale. Furthermore the fact of the lien on the property of the second mortgage, not yet due, may have properly had weight with the court in the determination of the method of sale and the application of the proceeds, and the court's control thereof.

The court refused the application of the defendant companies for an accounting between Gleeson and the West Virginia company, and for a reference for that purpose; and the appellants claim that this was error, since they had a right to have determined what recovery should be had by the company against Gleeson on account of any judgment that might be rendered in favor of Costello against the company. Apart from the fact that no circumstances had been developed upon the trial that made necessary or proper the ascertainment of such facts by means of a reference, rather than by proof adduced in court, the facts sought to be thus proved would have afforded no defense upon this note as against Costello, and were not within the issues in the action. The court was right in denying the application.

It is urged that the court erred in refusing to allow the testimony of the witness Mack to stand as to representations made to him by Gleeson with respect to the indebtedness of the company at the time in question, and as to Mack's reliance upon such statements. It is true that such testimony might have supported the allegation of the answer that Glee-

son made representations to the officers of the company that the company was at the time solvent, and that Mack relied thereon; but, whether made or not, such representations, and their effect upon the officers, were not material, in the absence of proof of insolvency or financial embarrassment of the company.

The defendants offered in evidence a certified copy of a list of debts proved in bankruptcy against the West Virginia company. The offer was objected to, and was refused. The list is not preserved in the record, and we have no means of knowing whether the document was in itself competent. The evidence was material, if it showed the existence of the debts at the time of the execution of the note and mortgage. An examination of the reporter's transcript shows that in ruling upon the objection the court said: "I can't admit it in evidence, unless there is something in it or to it whereby we can determine how much of it existed on January 9th, and how much accrued afterwards. You present me a list of accounts in 1903, without any distinguishing marks on them. They do not prove anything." The evidence offered, therefore, if competent, seems to have been immaterial, as not tending to prove any indebtedness at the time of the execution of the mortgage.

The nineteenth assignment of error is as follows: "The court erred in rejecting defendants' offer to prove that the Copper Belle Mining Company of West Virginia was largely indebted at the time Gleeson was superintendent of its mining properties, and at the time the mortgage was given to Costello, and that the Company thereafter went into the hands of the bankrupt court, and subsequently while in the bankruptcy court, all the creditors' claims were purchased by E. J. Moneuse and thereafter transferred to the Copper Belle Mining Company of Arizona." The evidence referred to in this assignment of error was clearly material, and its exclusion would have been error prejudicial to the appellants. The difficulty with the assignment is that it is not founded upon fact, as no such testimony was excluded. There was no evidence offered at any time of the purchase by or assignment to the Arizona company of the creditors' claims, and no offer of proof thereof refused by the court. The only evidence offered of the financial condition of the West Virginia company at the time of the execution of the note and mortgage was adduced from Gleeson upon his cross-examination by defendants' counsel. The court allowed all the questions put by counsel with regard to such condition to be answered, and the testimony of the witness (which was the only testimony on the subject, except as to the indebtedness to Reilly of \$650) showed the assets of the company at the time to be largely in excess of its indebtedness. It is also claimed that the court erred in not admitting in evidence a certified copy of the claim of Reilly filed in the bankruptcy proceedings. This document is not preserved

in the record, and we cannot, therefore, determine whether it was admissible or material. But the appellants do not seem to have been injured by its exclusion, as subsequently evidence was introduced which showed that the indebtedness of the company to Reilly at the time in question was some \$650.

Other errors are assigned in regard to the rulings of the trial court in the rejection of evidence, but it is not necessary to consider whether the court was right in the rulings referred to, as the exclusion of the evidence would not, under our view of the case, be prejudicial error.

Passing to the second cause of action in the complaint, relating to the four notes, for \$13,250 each, running to Gleeson and assigned by him to Costello, we find numerous errors assigned as to the action of the trial court in respect to this branch of the case. A demurrer was interposed on the ground that, under the allegations in the complaint, neither the principal nor interest on these notes was due at the time the action was brought. The first of the notes was due February 4, 1906 (subsequent to the commencement of this action). The notes were dated February 4, 1902, and each provided that the interest was to be paid yearly at the end of each year, and, if not so paid, to be added to the principal and to draw interest therewith from the date of its accrual. The trial court was of opinion that under this provision the interest was not due, in the sense that would warrant a foreclosure of the mortgage, as there was no provision in the mortgage for default in case of nonpayment of the interest at any time prior to the maturity of the notes; but, on the contrary, the notes provided that if the interest was not paid it should be added to the principal and draw interest. The demurrer, however, was overruled on the ground that, the court having had its attention called to the existence of the notes and the second mortgage lien on the property, it was proper to take evidence of the value of the notes, in order that the surplus on the sale, if any, should be held subject to the claims of the second mortgage. Upon the trial the four notes and the mortgage were offered in evidence and objected to, on the ground, among others, that the action was prematurely brought, since none of the notes, or the interest thereon, was then due. The court, in passing on this objection, held that the notes had not yet matured, and that the terms of the mortgage did not provide for the foreclosure of the mortgage because of the nonpayment of the interest at any date before the maturity of the notes, and that the validity of the mortgage did not necessarily enter into the trial of the cause, but, inasmuch as the mortgage had been executed by the company to secure the payment of the notes, and the holder was thereby placed in the position of a creditor against the property, that the notes would be admitted in evidence

for the purpose of establishing the plaintiff as being the holder of the notes and mortgage, and for the purpose, in case a foreclosure was ordered for the collection of the judgment on the first note, of enabling the court to determine the disposition to be made of the surplus; and the court admitted the notes in evidence for that purpose. A similar ruling was made with respect to the second mortgage, covering the notes. Later on, when the witness Costello was under examination, the court again stated that the details regarding the mortgages and notes were not to be gone into; that proof was only to be allowed of the fact that Costello was the owner and holder of the notes and mortgage, and that they had not been paid. Counsel for the defendants offered on the record to prove, and, if given permission to interrogate the witness, to show facts which would establish the contention set up in the answer that Costello was not a bona fide holder for value of the notes. The court excluded the evidence, and any evidence other than that of the existence of the notes and mortgage. In rendering judgment, the court did, however, render judgment, not only for the \$15,100 note given to Costello, with interest thereon, and for the amount expended by him for assessment work (the items embraced in the first cause of action), but also rendered judgment for the sum of \$3,523.07, an amount found to be due the plaintiff on his second cause of action for interest that had accrued on the four notes in question, and ordered a foreclosure as against the defendants to satisfy this amount, as well as the amount found due under the first cause of action. The reason for this action of the trial court seems to have been that a further examination of the mortgage given to secure the four notes in question disclosed the fact that by the terms of the mortgage, in case default was made in the payment of interest for the term of three months after such interest became due, then the mortgagee was empowered to sell the property covered by the mortgage. Whatever may be the legal effect of the provisions of the notes and mortgage, and the right of the plaintiff to secure in this action a judgment for the amount of interest then due, we think, upon the record in the case, that the trial court erred in granting judgment for any amount under this second cause of action. The record is clear that the court, not only all through the trial of the case considered that the second cause of action was not before it for adjudication, but it is clear that the defendants were precluded by the action of the trial court in that regard from offering testimony which was material to their defense with respect to Costello's title thereto. Upon such a state of the record it would not be just to the defendants to preclude them from making the proof desired and contesting the validity of the notes and mortgage in question, as the judgment would do pro tanto.

The action of the trial court in holding that the second cause of action, having been prematurely brought, was not properly before it in this action, not being brought here for review by the plaintiff, must be held to be correct.

The judgment of the district court is therefore modified, in so far as it adjudges the defendants to be indebted to the plaintiff in the sum of \$3,523.07, or any other sum, upon the second cause of action set forth in the complaint, or provides for a foreclosure of the mortgage to satisfy the same, without prejudice to the plaintiff to enforce such rights as he may have thereunder. In all other respects, the judgment is affirmed, with costs in this court to the appellants.

SLOAN and CAMPBELL, JJ., concur.

(12 Ariz. 10)

ROMERO et al. v. TERRITORY.

(Supreme Court of Arizona. March 27, 1908.)

1. CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—CERTIFIED TRANSCRIPT.

Under Rev. St. 1887, par. 874, Rev. St. 1901, pt. 2, tit. 17, cc. 17, 19, and Laws 1907, c. 74, § 15, requiring certification of a bill of exceptions by the trial judge, and Code Cr. Proc. 1901, § 983, declaring that the statute relating to exceptions, the record, and the manner of making oral proof a part of the record in civil cases shall be applicable to all criminal cases, the reporter's transcript cannot serve as a bill of exceptions in a criminal case unless certified by the trial judge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2887.]

2. SAME—REVIEW OF EVIDENCE.

Rulings with respect to the introduction or exclusion of evidence in a criminal case cannot be reviewed on appeal in the absence of a bill of exceptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2816.]

Appeal from the District Court, Yuma County; before Justice John H. Campbell.

Rafael Romero and another were convicted of a felony, and they appeal. Affirmed.

Charles L. Brown, for appellants. E. S. Clark, Atty. Gen., for the Territory.

KENT, C. J. The appellants, having been indicted and convicted in the court below for the commission of a felony, have appealed.

The only question discussed in the brief of the appellants is the alleged error of the trial court in the admission of testimony. There is no bill of exceptions nor statement of facts; and, while the reporter's transcript of evidence has been sent up to this court, it has not been certified by the judge below. Section 983 of the Code of Criminal Procedure of 1901 provides as follows: "The statute relating to exceptions, what constitutes the record, and the manner of making oral proof a part of the record in civil cases is hereby made applicable to all criminal cases." In order that the statement of facts shall operate as a bill of exceptions, it is necessary un-

der our statute relating to exceptions, what constitutes the record, and the manner of making oral proof a part of the record in civil cases, that the same shall be certified by the trial judge. These provisions of the statutes have existed for many years (paragraph 874, Rev. St. 1887; chapters 17 and 19, p. 2, tit. 17, Rev. St. 1901; section 15, c. 74, Laws 1907), and we have repeatedly held that under our statutes the reporter's transcript cannot serve as a bill of exceptions, and that the rulings of the court with respect to the introduction or exclusion of evidence cannot be reviewed on appeal to this court in the absence of a bill of exceptions, unless the reporter's transcript has been certified by the trial judge; in other words, that the reporter's transcript cannot serve as a bill of exceptions unless it is so certified. *Tletjen v. Snead*, 3 Ariz. 196, 24 Pac. 324; *Smith v. Blackmore*, 3 Ariz. 348, 29 Pac. 15; *City of Tombstone v. Reilly*, 4 Ariz. 102, 33 Pac. 823; *Meyers v. Farmers' & Merchants' Bank*, 7 Ariz. 67, 60 Pac. 880; *Leatherwood v. Richardson* (Ariz.) 89 Pac. 503; *Montezuma Canal Co. v. Smithville Canal Co.* (Ariz.) 89 Pac. 512; *Liberty Mining & Smelting Co. v. Geddes* (Ariz.) 90 Pac. 332. These provisions of our statutes relating to appeals are by section 983 of the Code of Criminal Procedure, *supra*, made applicable to appeals in criminal cases, and are as binding upon appellants and upon the court in criminal cases as in civil cases. Upon the state of the record, therefore, in this case, we cannot consider the question argued by counsel for appellants in his brief.

No error appearing upon the record of the case as it is before us, the judgment of the district court is affirmed.

SLOAN, DOAN, and NAVE, JJ., concur.

(12 Ariz. 14)

MOLINA v. TERRITORY.

(Supreme Court of Arizona. March 27, 1908.)

1. CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—CERTIFICATION.

Under Pen. Code 1901, § 983, providing that the statutes concerning the taking of oral matters part of the record in civil cases are controlling alike in criminal cases, the certificate of the trial judge to the reporter's transcript, or to a statement of facts covering objections to the court's rulings on evidence, and with reference to instructions to the jury, is necessary to a review thereof on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2887.]

2. HOMICIDE — INDICTMENT — MEANS OR INSTRUMENT.

An indictment for homicide is not fatally defective because it fails to allege the means or instrument by which the wound was inflicted, or the nature of such wound.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 215.]

Appeal from District Court, Yuma County; before Justice John H. Campbell.

Ygnacio L. Molina was convicted of manslaughter, and he appeals. Affirmed.

A. Buck and Thos. D. Molloy, for appellant. E. S. Clark, Atty. Gen., and P. Tillinghast, for the Territory.

NAVE, J. Molina was indicted of murder, and under the indictment was convicted of manslaughter. From the judgment of conviction he has appealed.

His assignments of error raise questions based upon the testimony, the court's rulings during the trial, and the instructions to the jury. The statutes concerning the making of these oral matters part of the record in civil cases are controlling alike in criminal cases. Section 983, Pen. Code 1901. The certificate of the trial judge to the reporter's transcript of these proceedings or to a statement of facts covering them is a prerequisite to the examination thereof. Laws 1907, p. 129, c. 74, § 15, subd. 5. *Romero v. Ter.* (decided at this term) 95 Pac. 101; *Liberty, M. & S. Co. v. Geddes* (Ariz.) 90 Pac. 332; *Montezuma Canal Co. v. Smithville Canal Co.* (Ariz.) 89 Pac. 512; *Leatherwood v. Richardson* (Ariz.) 89 Pac. 503; *Myers v. Bank*, 7 Ariz. 67, 60 Pac. 880; *Tombstone v. Reilly*, 4 Ariz. 102, 33 Pac. 823; *Smith v. Blackmore*, 3 Ariz. 349, 29 Pac. 15; *Tletjen v. Snead*, 3 Ariz. 196, 24 Pac. 324. The record is not so authenticated in this case, and may not be considered.

Turning to an examination of those portions of the record which are properly before us to ascertain whether there are fundamental errors, we find only one matter meriting consideration. The charging part of the indictment is "that the said Ygnacio L. Molina, on or about the 29th day of April, A. D. 1906, and before the finding of this indictment, at the county of Yuma, territory of Arizona, unlawfully, willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought did kill and murder Jim, a Cocopah Indian, a human being, whose true name is unknown to the grand jury, by then and there willfully, unlawfully, feloniously, deliberately, premeditatedly, and of his malice aforethought inflicting upon the body of him, the said Jim, a Cocopah Indian, a mortal wound, from the effects of which mortal wound he, the said Jim, a Cocopah Indian, did then and there die." The defendant demurred to this indictment upon the ground, among others, "that it does not allege the means or instrument by which the mortal wound was inflicted or the nature of the wound inflicted." It is well known that our Penal Code was adopted almost in its entirety from the Penal Code of California. The statutes defining murder, prescribing the form of indictments, and defining what shall constitute sufficient indictments have their origin in the California Code. At a period antedating our adoption of these statutes the Supreme Court of California determined that under these provisions it is not necessary in an indictment for murder to state the in-

strument with which the killing was accomplished (though preferable to do so), or to define the nature of the wounds inflicted. The early decisions have been adhered to consistently by that court until the present time. The reasons for so determining are sufficiently set forth in the opinions. We believe these decisions to be well founded. The indictment is sufficient. *People v. Sterenton*, 9 Cal. 273; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *People v. Alviso*, 55 Cal. 230; *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Davis*, 73 Cal. 355, 15 Pac. 8; *People v. Hyndman*, 99 Cal. 1, 33 Pac. 782; *People v. Suesser*, 142 Cal. 356, 75 Pac. 1093.

There appearing no fundamental error in the record, the judgment is affirmed.

KENT, C. J., and SLOAN and DOAN, JJ., concur.

(11 Ariz. 359)

RICHARDSON et al. v. AINSA.

(Supreme Court of Arizona. March 27, 1908.)

1. APPEAL—LAW OF CASE.

The decision of the federal Supreme Court on appeal from a judgment dismissing a cause for want of jurisdiction of the trial court over the subject-matter, which adjudges that the court has jurisdiction thereof, is the law of the case on a subsequent trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4661.]

2. STATUTES—CONSTRUCTION—STRICT CONSTRUCTION.

A statute in derogation of a common-law right must be strictly construed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 320.]

3. PUBLIC LANDS—GRANTS—CONFIRMATION—EFFECT.

The provision in the act of Congress creating the Court of Private Land Claims with jurisdiction to determine the rights of claimants under Mexican land grants, etc., that, where land decreed to any claimant shall have been granted by the United States to another, the title of the latter shall remain valid, notwithstanding the decree does not apply to confirmation of grants in suits by the government against claimants, who did not voluntarily appear to obtain the benefits of the act, and where the court in a suit by the government against plaintiff and defendant confirmed a grant to plaintiff without excepting the lands of defendant, though by the pleadings its attention was called to the fact that titles had been issued to portions of the grant by the United States to defendant, plaintiff obtains title, and is entitled to quiet title as against defendant.

Appeal from District Court, Santa Cruz County; before Justice Campbell.

Action by Frank Ely prosecuted on his death by Santiago Ainsa, administrator with will annexed, against R. R. Richardson and others. From a judgment for plaintiff, defendant R. R. Richardson appeals. Affirmed.

J. B. Wright, for appellant. S. M. Franklin, for appellee.

SLOAN, J. This suit was originally brought in the district court of Pima county by one Frank Ely in 1887, and was entitled "Frank

Ely v. New Mexico & Arizona Railroad Company et al." The complaint was in form one to quiet title, the subject-matter of the action being a Mexican land grant situated in Santa Cruz county, and known as the "Rancho San Jose de Sonolita." The grant, at the time the suit was brought, was unconfirmed. The defendants, of whom there were a large number, demurred to the complaint upon the ground that it did not state a cause of action, in that it appeared therein that the plaintiff was not in the possession of the grant, and in order to maintain the action was required to show that he was without adequate remedy at law, and to set up grounds for equitable relief. This demurrer was sustained. This court affirmed this ruling of the district court, whereupon the plaintiff appealed to the Supreme Court of the United States, which reversed the judgment of this court, and remanded the cause for trial. In 1893, Ely having in the meantime died, and Santiago Ainsa, as administrator with the will annexed, having been substituted as plaintiff, the case was tried on its merits, and judgment entered dismissing the case upon the ground that the court had no jurisdiction over the subject-matter of the action, for the reason that it appertained to the title of an unconfirmed Mexican land grant. This judgment was affirmed on appeal by this court, but subsequently reversed by the Supreme Court of the United States, 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84. The holding of the Supreme Court of the United States was that, after the passage of the act of Congress, approved March 3, 1891, c. 539, 26 Stat. 854 (U. S. Comp. St. 1901, p. 765), establishing the Court of Private Land Claims, the courts of this territory had jurisdiction, as between private parties, to determine the title of an unconfirmed Mexican grant, which had not been rejected by, or was not pending before, Congress, and which was asserted to be complete and perfect at the date of the cession. It was therefore found that the court had jurisdiction of the case. The complaint was amended by consent on the 27th day of September, 1907, in the respect that certain defendants were omitted from the suit, among them being the railroad company, and certain additional facts being set up. The essential allegations of this amended complaint are: That the plaintiff, as administrator with the will annexed of the estate of Frank Ely, deceased, is the owner in fee of the grant in question; that at the time of the Gadsden Purchase this grant was complete and perfect; that in 1902 the United States brought suit in the Court of Private Land Claims against plaintiff and the defendants in this suit to try the title of said grant; that thereafter said Court of Private Land Claims confirmed said grant in plaintiff as a valid, complete, and perfect grant at the date of the cession, and specifically described the boundaries thereof; that thereafter, in pursuance of said decree of confirmation, the United States issued its patent to said grant

to the original grantee from the Mexican government, his heirs, successors in interest, and assigns; that the defendants and each of them were, without any right, title, or interest, asserting claims to the lands included within the boundaries of said grant as thus confirmed and patented. The defendants in their answer, among other defenses, set up various patents from the United States issued before the original suit, under the various land laws of the United States, and prayed that these titles be quieted as against plaintiff. The cause was tried upon the issues thus presented, and judgment rendered in favor of the plaintiff. From this judgment the defendant R. R. Richardson has appealed.

Counsel for appellant has raised two questions by his assignments of error: First, that the lower court had no jurisdiction over the subject-matter of the action; second, that under the provisions of the act of Congress creating the Court of Private Land Claims appellant's lands, having been theretofore patented by the United States, were eliminated from the grant, notwithstanding the confirmation of the title by the Court of Private Land Claims and the patent from the government.

1. The question of jurisdiction, whatever might otherwise have been open to adjudication by us in this respect, has been definitely settled adversely to the contention of appellant by the Supreme Court of the United States upon the second appeal in this cause. The question of jurisdiction was directly decided in that case, and this ruling has become the law of the case. *United States v. Camou*, 184 U. S. 572, 22 Sup. Ct. 505, 46 L. Ed. 694; *Thompson v. Maxwell Land Grant & R. Co.*, 168 U. S. 451, 18 Sup. Ct. 121, 42 L. Ed. 539; *Snyder v. Pima County*, 6 Ariz. 41, 53 Pac. 6.

2. The act creating the Court of Private Land Claims conferred upon it jurisdiction in three classes of cases. The first class included suits brought by claimants of Mexican land grants which, at the time of the passage of the act, were unconfirmed or not otherwise finally decided upon, and which were not already complete and perfected, to have such grants validated and confirmed and their boundaries ascertained. The second class included suits brought by claimants of grants which had not been acted upon by Congress, and which were asserted to have been complete and perfect at the time of the cession from Mexico to the United States of the territory wherein they might lie, to have the titles to such grants confirmed and their boundaries ascertained. As to such latter cases the act specifically provided that "confirmation shall be for so much land only as such perfected title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States," etc. The third class included suits brought by the United States against claimants of grants who should not voluntarily apply to said court for the confirmation of said grants in cases where, in the opinion of the

Attorney General, the titles to such grants should be adjudicated and the boundaries ascertained.

Section 14 of the act reads as follows: "That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree, and upon proof being made to the satisfaction of said court of such sale or grant, and the value of the lands so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so sold or granted," etc.

The question presented is whether said section 14 applies to those cases which, under the provisions of the act, might be brought against grant claimants who might not voluntarily sue for the confirmation of their titles, and whose titles, in suits brought by the United States, should be found by the Court of Private Land Claims to have been complete and perfect, and who should receive patents to the lands included within the boundaries of the grants confirmed to them. It has been held by the Supreme Court of the United States in *United States v. Martinez*, 184 U. S. 441, 22 Sup. Ct. 422, 46 L. Ed. 632, that said section 14 of the act does apply to the second class of cases we have enumerated, and that one holding a Mexican land grant by perfect and complete title, who brought suit in the Court of Private Land Claims for the confirmation of his title, did so upon the condition that, if any portion of such lands might be found to be sold or granted by the United States to another person, the title from the United States to such other person should remain valid, and that in such case he might obtain judgment against the United States for the value of the land so granted. We know of no case, however, decided by the Supreme Court of the United States, or by any federal or state court, in which the precise question here presented has been decided.

The Secretary of the Interior, in the case of *Ely's Administrator v. MacKee*, 34 L. D. 612, has construed the act as limiting the application of said section 14 to cases of confirmations of grants where the grant claimants have brought suit in the Court of Private Land Claims, and as not applying to cases of confirmation of grants in suits brought by the government against claimants who have not voluntarily appeared in said court to obtain the benefits of the act. The Secretary in his decision points out the distinction between the two classes of claimants, and applies to the latter the doctrine expressed in *Alusa v. New Mexico & Arizona Railroad Company*, supra, that the private holder of any complete and perfect grant may, at his election, have its validity deter-

mined as against the United States in the Court of Private Land Claims, but that in case he should not so elect his title will nevertheless be valid and enforceable in the ordinary courts of justice, and under the treaty with Mexico he is entitled to have his title recognized in the latter courts as the absolute owner in fee of such grant. He distinguishes between the case of one voluntarily seeking relief under the act in the Court of Private Land Claims and the case of one who was brought into such court at the suit of the United States. The reasoning is that the claimant who chose to avail himself of the act, and who brought suit, was bound by the terms imposed, and must be held to have accepted the condition that he should not have decreed to him, in any such suit, land the title to which had passed to other parties from the United States. In the latter case the appearance of the grant claimant not being voluntary, and he not being bound by the act to invoke the aid of the court in the settlement and confirmation of his title, and having all the title that was necessary to enforce his rights as the owner of the grant in the ordinary courts of justice, the act should not be construed as intending that the suit brought by the United States should operate arbitrarily to confiscate his claim or any portion thereof against his consent; that before such a construction should be given the act, it being in derogation of a common-law right, it ought to clearly appear from the statute, which, in such case, is to be strictly construed.

The record in this case discloses that the Court of Private Land Claims did not except the lands, or that of any other of the defendants from its decree of confirmation, although by the pleadings it appears that its attention was called to the fact that titles had been issued to portions of the grant by the United States to said defendants. We infer from this, therefore, that the Court of Private Land Claims construed the act as did the Secretary of the Interior in the MacKee Case. The reasoning of the Secretary in the latter case is convincing, and, no other authority appearing to the contrary, we adopt his construction of the act. It follows, therefore, that appellant's lands were not excepted from the confirmation of the grant and from the patent of the government.

The judgment is therefore affirmed.

KENT, C. J., and DOAN and NAVE, JJ., concur.

(12 Ariz. 85)

GREENE et al. v. HEREFORD.

(Supreme Court of Arizona. March 27, 1908.)

1. APPEAL—REVIEW—INTERLOCUTORY ORDERS—JUDGMENT ON PLEADING.

The denial of a motion for judgment on the pleadings, in the absence of error assigned to the ruling or appeal taken therefrom, cannot

be considered on an appeal from the final judgment rendered.

2. SAME—REVIEW—HARMLESS ERROR—PLEADING—CROSS-COMPLAINT—MOTION TO STRIKE.

Where plaintiff, in an action to recover compensation for services as attorney, moved to strike a cross-complaint, and also demurred thereto, and the court sustained the motion to strike, and overruled the demurrer on account of the cross-complaint having been stricken out, it is immaterial to the defendant that the wrong form of disposing of the cross-complaint was used.

3. SET-OFF AND COUNTERCLAIM—SUBJECTS OF COUNTERCLAIM—CLAIMS ARISING OUT OF SAME TRANSACTION.

Under the statute authorizing counterclaims founded on a cause of action arising out of, or incident to, or connected with, plaintiff's cause of action, defendant, in an action to recover compensation for services as an attorney for the buying up of scrip lands, may not set up as a counterclaim a cause of action arising from the failure of plaintiff to deed other lands bought with money of defendant, and which on demand plaintiff had refused to deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 43-51.]

4. DEPOSITIONS—FAILURE OF WITNESS TO APPEAR—INTERROGATORIES TAKEN AS CONFESSED—EFFECT ON SUBSEQUENT TESTIMONY.

Rev. St. 1901, §§ 2516, 2517, authorizes a notary to compel the attendance of witnesses to answer interrogatories on the taking of depositions; and when these provisions have been complied with by the notary, and a witness fails to appear, the interrogatories may, under section 2531, be taken as confessed. *Held*, that the testimony of one who failed to appear before the notary was not inadmissible at the subsequent trial, on the ground that no evidence inconsistent with the interrogatories taken as confessed was admissible, where the notary did not comply with sections 2516, 2517, since in such case the penalty provided by section 2531 was not incurred.

5. ATTORNEY AND CLIENT—RIGHT TO COMPENSATION—NEGLIGENCE.

In an action to recover compensation for services as an attorney, defended on the ground of his negligence or want of due diligence in purchasing scrip land at the lowest price possible, testimony of one witness that at one time the value of scrip did not exceed \$2.50 per acre, which testimony was qualified by the witness stating that he gave it only from hearsay, is not sufficient to show negligence or want of diligence of the attorney, though he paid \$4.85 per acre for the land purchased.

6. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

A requested instruction, not applicable to the evidence, is properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

7. SAME—INSTRUCTIONS ALREADY GIVEN.

The refusal of an instruction substantially covered by one given is not error, as the court is not obliged to repeat instructions once given, or to place substantially the same idea before the jury in several different instructions, differing but slightly in their phraseology.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

8. SAME—INVADING PROVINCE OF JURY.

An instruction, in an action for compensation by an attorney, that if the jury find from the evidence that by the terms of the contract of employment plaintiff was to give his entire time and attention to the service of defendant, the evidence is insufficient to warrant the jury in finding that such provision of the contract was waived by defendant, is erroneous, since the very duty of the jury is to determine, where

there is any evidence, whether such evidence is sufficient or insufficient to warrant the jury in finding the fact in support of which such evidence was offered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 439-466.]

9. APPEAL—REVIEW—EXAMINATION OF WITNESSES.

Where an objection is sustained to the question put to a witness, but the witness answers, and the answer is neither withdrawn nor stricken out, and remains in the record, an assignment of error to such ruling is idle.

10. DEPOSITIONS—INTERROGATORIES—RESPONSIVENESS OF ANSWER.

Where an interrogatory calls upon deponent to state conversations which he had with a person, and asks him to state when and where each of such conversations took place, and who was present, and all that was said, the answer is properly stricken out, where the witness did not attempt to give the conversations, but only stated that he told the person certain things, and where a large portion of the answer is incompetent, because it is testimony concerning the contents of written documents and witness' conclusions as to the effect thereof.

11. APPEAL—ASSIGNMENT OF ERRORS—NECESSITY.

Exclusion of a deposition at the trial, not assigned as error, cannot be considered on appeal.

12. DEPOSITIONS — ADMISSIBILITY IN EVIDENCE.

Where a deposition is excluded at a trial, a request to permit the reading of an answer to an interrogatory in such deposition is properly denied.

13. EVIDENCE—DOCUMENTS—BEST EVIDENCE.

A general manager of a corporation may not testify as to what the nature of his duties are, where the by-laws of the corporation prescribe such duties, since the by-laws are the best evidence.

14. WITNESSES — EXAMINATION — LEADING QUESTIONS.

A question to a witness, "Did Mr. H. deny that he had agreed to give Mr. G.'s business his entire attention?" is leading and objectionable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 838.]

Appeal from District Court, Pima County; before Justice John H. Campbell.

Action by Frank H. Hereford against W. C. Greene and the Greene Cattle Company to recover compensation for services as attorney. From a judgment for plaintiff, defendants appeal. Affirmed.

Eugene S. Ives, S. L. Pattee, and S. V. McClure, for appellants. S. E. Hazzard and Frank H. Hereford, for appellee.

DOAN, J. On April 26, 1906, Frank H. Hereford was an attorney at law, practicing in the courts of the territory of Arizona with one Seth E. Hazzard, under the firm name of Hereford & Hazzard. At that time W. C. Greene was the president of the Greene Cattle Company, and in behalf of himself and the Greene Cattle Company he entered into a contract with Hereford. No one, other than Greene and Hereford, was present at the time the contract was made, which was oral, with the exception that at its conclusion Greene wrote and gave to Hereford a memorandum showing what ranches he

wanted scrip laid upon, and dictated, and signed as president, a letter to F. B. Mosen, secretary of the Greene Cattle Company, setting forth the general scope of Hereford's duties under the contract, which work, so outlined, Hereford afterwards attended to, and the compensation for which, under said contract is the subject-matter of this action. Hereford and Greene differ as to the nature of the contract. Hereford alleges that Greene and the Greene Cattle Company employed him at a salary of \$5,000 per year, to be paid by the defendants and each thereof to the plaintiff, to act as general counsel and attorney at law of the Greene Cattle Company, and the special counsel of the defendant Greene, in matters and proceedings in the United States Land Office, and for similar matters affecting the property owned or used by the said Greene Cattle Company. Greene alleges that Hereford agreed to devote his entire time exclusively to the service of Greene and the Greene Cattle Company. Hereford denies that he agreed to devote his entire time to the service of the defendants, or either of them, but admits that he did agree to give Greene's business his first attention. It is conceded that Hereford devoted a large portion of his time to the service of other clients than the defendants. Hereford in his reply alleged that, if the contract of employment did provide that he should give his entire services exclusively to the defendants, such provision was waived by the defendants, and sets up facts which he claims constituted such waiver. The appellants contend that the facts alleged in the reply are not sufficient to constitute a waiver. The evidence establishes that Hereford received, between the 26th day of April, 1901, and the 6th day of August, 1903, from the defendants, the sum of \$32,081.75, and that these moneys were advanced to Hereford by Greene for compensation, and partly for funds with which to purchase scrip to be located by Hereford, and partly to reimburse him for moneys expended under the contract. Attached to the complaint is a statement of an account rendered by Hereford to the defendants, the correctness of all of the items of which is conceded by the defendants, except those made in the purchase of scrip. Hereford credits himself with \$21,764.69 for the purchase of 4,474 acres of scrip, or an average of \$4.85 for each acre of scrip so purchased. The defendants allege that the reasonable value of such scrip at the time the purchases were made was \$2.75 per acre. This Hereford denies.

The defendants filed as a part of their first amended answer a cross-complaint, in which they allege that they advanced to the plaintiff between the 26th day of April, 1901, and the 15th day of October, 1903, about \$32,000 in compensation for his services under the contract, and to be used and expended by him in the purchase of scrip on behalf

of the defendant Greene; that the plaintiff purchased a large amount of scrip, and located the same upon diverse tracts of land, aggregating many hundreds of acres, some being located in the name of the plaintiff, and some in the name of other persons, and that in purchasing scrip and locating lands therewith the plaintiff expended certain moneys so advanced to him; that the plaintiff had refused to convey or cause to be conveyed these lands to the defendants, or either of them, though often requested so to do. Defendants asked for judgment that the plaintiff be required to convey or cause to be conveyed to the defendants all lands so acquired with moneys advanced by the defendants, the record title whereof is in the name of the plaintiff, or any other persons other than the defendants. Upon motion of the plaintiff the court struck out this cross-complaint, to which the defendants excepted. The defendants also allege that in or about the summer of 1903 Greene terminated the contract of employment, which is denied by the plaintiff.

The case was tried to a jury, which brought in a verdict for the amount demanded in the complaint, being the sum of \$15,000, for three years' salary, from April 26, 1903, to April 26, 1906, and \$238 and some cents, conceded to be due to Hereford, for petty expenses. There was no dispute as to the amount of the items. Judgment was rendered on the verdict, and, on the denial of separate motions by the defendants for a new trial, an appeal was taken from the judgment and order of the court. The counsel for the appellee calls our attention to the record, which discloses that on the trial of the case the appellee had moved for a judgment on the pleadings, which motion was denied, and asked a review of such ruling by this court. As there has been no appeal taken or error assigned by the appellee, based upon this ruling, we may not consider it.

The questions presented upon this appeal are, with the exception of the order striking out the defendants' cross-complaint, confined to the rulings of the court upon the admission and exclusion of testimony, and to the correctness of the court's instructions to the jury, and the refusal of instructions requested by the defendants. It is alleged by the appellant that the court erred in striking from the amended answer the cross-complaint contained therein on motion of plaintiff. The first argument of the appellant is directed to the manner in which this cross-complaint was stricken out. It is urged that, if objectionable, it was not subject to a motion to strike, but should have been reached by a demurrer. We do not think this feature of the case entitled to much consideration, for the reason that the record shows that the plaintiff presented a motion to strike, and also demurred upon the same grounds, to the cross-complaint. The court sustained the motion to strike, and then overruled the demurrer, on account of the cross-complaint having been

stricken out. If the remedy could only be reached as a matter of form by demurrer, rather than by motion, the error of the court in the manner of its disposal was technical, rather than prejudicial to the defendants. Unless the exclusion of the cross-complaint was reversible error, it was immaterial to the defendants whether it was disposed of by a motion or demurrer, in a case where both were urged against it.

The motion was based on the grounds "that the matters contained in said cross-complaint are not a proper subject of counterclaim in this action, and that said cross-complaint is irrelevant"; and the demurrer was based upon the ground that the cross-complaint did not "state facts sufficient to constitute a defense or counterclaim in this action," and that "the matters stated * * * are not a proper subject of counterclaim in this action." Our statute provides "that a pleading in all civil suits in courts of record shall be by complaint and answer." "The plaintiff may demur to the answer, or to any defense or counterclaim therein contained, upon the ground that the same does not state facts sufficient to constitute a defense or counterclaim, and to a counterclaim on the ground that the matters stated are not a proper subject of counterclaim in the action." "Sham, irrelevant or frivolous answers and frivolous demurrers may be stricken out * * * on motion. * * *" "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion." "If the suit be founded upon a certain demand, the defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort, or breach of covenant on the part of the plaintiff." "Nothing in the preceding section shall be so construed as to prohibit the defendant from pleading in set-off any counterclaim founded on a cause of action arising out of, or incident to, or connected with the plaintiff's cause of action." It is conceded by the defendants, that their right, if any, is conferred under this last quoted provision. We need, therefore, only examine the pleading to ascertain if it contains a counterclaim founded on the cause of action arising out of, or incident to, or connected with the plaintiff's cause of action, such as can be pleaded in set-off against such cause of action. If it cannot be so pleaded, it would be subject to be stricken out on motion as irrelevant under the provisions cited for striking. After a careful examination of the pleadings in question, we are satisfied that the subject-matter thereof does not state a counterclaim that could be offered in set-off against the plaintiff's cause of action, and the fact that it does state facts sufficient to constitute a cause of action that might be maintained as an independent action does not authorize its introduction in the pleadings in this case, and the action of the court in striking it as irrelevant did not constitute reversible error.

It is alleged (2) that the court erred in admitting the testimony of the plaintiff, over the objection of the defendants, for the reason that the defendants summoned the plaintiff as a witness to give his deposition, and the plaintiff refused to appear and answer interrogatories on that occasion, and for that reason, by virtue of paragraph 2531 of our statute, such interrogatories were taken as confessed, and no evidence inconsistent with the answers taken as confessed was admissible. It will be observed that paragraphs 2516, 2517, and 2518, Rev. St. 1901, provide for the notary compelling the attendance of witnesses and propounding to them the interrogatories, and 2531 provides a penalty for the refusal to answer when the provisions of paragraphs 2516 and 2517 have been complied with; but in this instance the provisions of paragraphs 2516 and 2517 were not complied with by the notary, and for that reason the penalty was not incurred, and the court's ruling was not error.

The third assignment of error is not sustained by the record. The court instructed the jury that there was no evidence to support the allegation of negligence, or want of due diligence, and the only evidence cited by the appellant is the testimony of one witness that at one time the value of scrip was not to exceed \$2.50 per acre, and that testimony was qualified by the witness stating that he gave it only from hearsay. There is nothing in this testimony, even if competent and true, to establish negligence or want of diligence, because, while that might have been the value at one time in one part of the United States, a careful man, in the exercise of due diligence, might pay \$4.85 for scrip in some other locality and at other times, when scrip was purchased by the plaintiff.

The fourth assignment of error directed to the court's instruction relative to the evidence of waiver by the defendants, or either of them, of the agreement of exclusive service, if such was made, and based upon two propositions: "(1) That the plaintiff did not properly allege facts sufficient to constitute waiver; and (2) that there is no evidence of waiver by either of the defendants"—is not sustained by the record. Sufficient allegations of facts to constitute a waiver are found in paragraph 10 et seq. of plaintiff's reply, and the record discloses evidence, oral and documentary, sufficient to go to a jury tending to show waiver by each of the defendants.

The instruction of the court that is called in question by the fifth assignment of error is a correct declaration of the law on that subject.

The sixth assignment is not tenable, for the reason that there is no evidence in the record of acquiescence in the demand of the defendant for the devotion of plaintiff's exclusive time, or any expression of intent on the part of the plaintiff to devote his entire time to the business of the defendants, and, therefore, there being no evidence on which

to base the instruction, the refusal was not error.

The defendants were not entitled to the instruction referred to in the seventh assignment of error, for the reason that there was no evidence that the defendants at all times insisted that the plaintiff should devote his entire time to their services; but, if it were error to refuse such instruction, the refusal would not avail the defendants, because the instruction was afterwards substantially given.

This same statement can be made relative to the instructions the refusal of which have been assigned as error in assignments No. 8, 9, and 10. The court is not obliged to repeat instructions once given, or to place substantially the same idea before the jury in several different instructions, differing but slightly in their phraseology.

The court correctly refused to give the instruction referred to in the eleventh assignment of error: "The jury are instructed that, if they find from the evidence that by the terms of contract of employment between the plaintiff and defendants the plaintiff was to give his entire time and attention to the services of the defendants, the evidence is insufficient to warrant the jury in finding that such provision of the contract was waived by the defendants." The very duty of the jury is to determine, where there is any evidence, whether such evidence is sufficient or insufficient to warrant the jury in finding the fact in support of which such evidence was offered.

The court correctly sustained the objections to the questions cited in assignments 12 and 13, for the reason that in both instances the questions were based upon unwarranted assumptions.

The objection to the question "What did he tell you?" cited in assignment 14, was properly sustained. It was immaterial what Greene may have told him about a transaction after its completion. The record does not indicate that the answer would have been material to any issue in the case.

The fifteenth assignment of error is idle, for the reason that, although the court sustained the objection to the question, the witness nevertheless answered the question after the objection was sustained, and the answer was neither withdrawn nor stricken out on motion, but remains in the record.

And likewise the error, if any, alleged in assignment 16, in sustaining an objection to the question, because the substance of that conversation, which would constitute the answer to this question, is given elsewhere.

The rulings of the court sustaining the objections referred to in assignments 17 and 18 were correct, as the answer in each case was immaterial, the paper in regard to which the questions were asked having been read and placed in evidence.

The appellant alleges (19) that "the court erred in striking out the answer to interroga-

tory 9 of the deposition of W. C. Greene." The interrogatory called for conversations had with Hereford, and deponent was asked to state when and where each of said conversations took place, and who was present, and all that was said at such conversations. The motion to exclude was based on the ground that the witness, asked for a conversation, did not attempt to give it, but only said that he told Mr. Hereford certain things, and, further, that a large portion of the answer is incompetent, because it is testimony concerning the contents of a written document or documents, and the conclusion of the witness concerning the effect of those documents. The answer was properly excluded on the grounds given.

It is alleged (20) that the court erred in striking out the answer in the deposition of Greene to the eleventh interrogatory. There were two depositions of Greene's presented, one taken at El Paso, prior to the first trial, and the other at Nogales, just before the second trial. The second deposition was objected to, and the objection sustained, and it was excluded from evidence. The ruling of the court excluding said second deposition has not been assigned as error; hence is not before us. The entire deposition having been excluded, there was no error in this ruling.

The rulings of the court on which the twentieth and twenty-first assignments are based were in reference to the answer to interrogatory No. 11 in the second deposition (the one that had been excluded). The request to read the answer to this interrogatory was properly denied. No request was made at this time to read the answer to interrogatory No. 11 (the same interrogatory) of the deposition that was in evidence.

The appellant alleges (22) that "the court erred in admitting, over the objection of the defendants, and each of them, the following: Plaintiff's Exhibits 7A, 11A, 14A, 15A, 25A, 26A, 27A, 28A, 29A, 30A, 31A, 32A, 33A, 34A, 36A, and 39A, for the reason that they were immaterial, were not proper rebuttal, and did not tend to establish waiver, and for the reason that the plaintiff was barred from introducing them by reason of having refused to produce them when summoned to give his deposition." The exhibits referred to tended to show waiver, and more than half of them tended to rebut the statement of Greene "that neither himself nor the Greene Cattle Company at any time authorized any one to employ the services of the plaintiff for either himself or the Greene Cattle Company, or authorized any one to employ the services of the plaintiff to be rendered subsequent to the month of July, 1904." The reference to the failure of the plaintiff to produce them when summoned to give his deposition was disposed of in our consideration of the second assignment of error.

It is alleged (23) that "the court erred in

sustaining the plaintiff's objections to the following questions: 'Q. Mr. Mosen, what was the nature of the duties you exercised as general manager? Q. What duties did you fulfill as general manager? Q. Did Mr. Hereford deny that he had agreed to give Mr. Greene's business his entire attention?' " The answer to the first question was objected to on the ground that it was not the best evidence; the articles and by-laws in writing constituting the best evidence. The record showing that the by-laws specified the duties of the general manager, the objection was properly sustained. The answer to the second question was properly excluded as immaterial. The last question was properly objected to as a leading question, addressed by counsel to his own witness.

The judgment of the lower court is affirmed.

KENT, C. J., and SLOAN, J., concur.

(11 Ariz. 366)

IN RE DELEHANTY'S ESTATE.

(Supreme Court of Arizona. March 27, 1908.)

1. DEEDS—FOREIGN CONVEYANCES—COMITY.

Comity will not prevail to the extent of giving effect to a foreign statutory conveyance of real estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 1.]

2. BANKRUPTCY—FOREIGN ASSIGNMENT—ACKNOWLEDGMENT—CONVEYANCE OF LAND.

A foreign assignment by a bankrupt, though voluntarily executed, will not operate to convey real estate in Arizona where it was not acknowledged as provided by the Arizona statute for the acknowledgment of deeds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 227.]

3. DESCENT AND DISTRIBUTION—ASSIGNMENT BY PROBATE COURT—CONVEYANCE.

Rev. St. 1901, par. 1904, authorizes the probate court to assign shares of real estate only to the heirs or to persons to whom they have "conveyed." Held, that the probate court had no power to assign the share of a bankrupt heir to his foreign assignees in bankruptcy, who did not hold a valid conveyance sufficient to pass the title to land in Arizona.

4. BANKRUPTCY—BANKRUPT NEXT OF KIN—PERSONAL PROPERTY—ASSIGNMENT OF FOREIGN ASSIGNEES.

Where there were no local creditors to be protected, the probate court was authorized to assign to foreign assignees of a bankrupt next of kin, the bankrupt's share in the personal estate of the bankrupt's decedent.

Appeal from District Court, Cochise County; before Justice Fletcher M. Doan.

Judicial settlement of the estate of P. J. Delehanty, deceased, in which John A. Macconchy and another, foreign assignees in bankruptcy of Walter Delehanty, one of decedent's heirs at law and next of kin, applied to have his share in such estate set off to them. From a judgment denying such relief, and from an order denying petitioners' motion for a new trial, they appeal. Reversed and remanded.

O. Gibson, for appellants. Ben Goodrich, for appellee.

CAMPBELL, J. It appears from the petition filed in this case that in July, 1904, P. J. Delehanty died intestate in Cochise county, leaving an estate of real and personal property. His heirs at law and next of kin are a sister, Mary Power, and a brother, Walter Delehanty. The sister was appointed administratrix of the estate. On October 5, 1904, the brother, then a resident of Ireland, was, upon a petition of his creditors, adjudicated a bankrupt by the High Court of Justice in Ireland, King's Bench Division, in Bankruptcy. By choice of the creditors John Arthur Maconchy and Alexander Knox McIntire were appointed official assignees in bankruptcy. On October 25, 1904, the bankrupt executed an instrument in writing by which he undertook to assign to the said official assignees in bankruptcy all his share in the real and personal estate of P. J. Delehanty, upon trust to be held by them as such assignees, and to be dealt with by them as a part of the assets of the bankrupt and applied according to the course of the court in such case made and provided. In July, 1906, and after more than one year had elapsed from the issuing of letters of administration upon the estate of P. J. Delehanty, the official assignees filed their petition in the probate court of Cochise county, alleging that they, by reason of the assignment, have become and are entitled to distribution to them of one-half of the entire estate of the deceased after the debts of said deceased have first been paid and the expenses of administration deducted, and prayed that the court ascertain and declare the rights of all persons to the estate and all interest therein, and to whom distribution thereof should be made. This proceeding is provided for in paragraphs 1891, 1892, 1893, and 1894 of the Revised Statutes of 1901. Walter Delehanty and Mary Power, as heirs and next of kin, disputed the rights of the assignees upon the ground that the assignment was a proceeding in foreign involuntary bankruptcy, and did not operate to convey title to property in this country. Upon a hearing had in the probate court the claim of the assignees to the share of Walter Delehanty was rejected. Appeal was thereupon taken to the district court. At the trial before a jury in the district court an objection to the offer in evidence of the assignment was sustained, and a verdict in favor of Walter Delehanty directed. From the judgment entered upon such verdict, and from the order denying a new trial, this appeal is brought.

The trial court sustained the objection to the admission in evidence of the assignment upon the ground that it appeared therefrom that it was an involuntary assignment in bankruptcy, made under the laws of a foreign country, and therefore did not operate to convey title to real and personal property in this territory. While the assignees claim that neither from the instrument itself nor by the

pleadings is it made to appear that it was not voluntarily executed, we shall, for the purposes of this opinion, treat it as having been made under an order of the foreign bankruptcy court, and hence involuntary. Therefore the matter for our determination is the effect we will give to a foreign involuntary assignment in bankruptcy upon property in this territory. The question is one that has been before the courts of this country in many cases and from almost the beginning of our national existence. The English rule is to give full effect to such transfers of personal property, but as early as 1809 Chief Justice Marshall, in *Harrison v. Sterry*, 5 Cranch (U. S.) 289, 3 L. Ed. 104, held that the bankrupt law of a foreign country could not operate a legal transfer of property in this country. Chancellor Kent, in *Holmes v. Remsen*, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581, followed the English rule, holding the assignment valid, even as against domestic creditors. *Holmes v. Remsen* was disapproved in *Abraham v. Plestoro*, 3 Wend. (N. Y.) 538, 20 Am. Dec. 742, and in *Willitts v. Waite*, 25 N. Y. 577, and it has been the almost universal holding of the courts that *ex proprio vigore* the assignment has no extraterritorial effect. The most recent expression on the subject by the Supreme Court of the United States is in *Security Trust Company v. Dodd, Mead & Co.*, 173 U. S. 624, 19 Sup. Ct. 545, 43 L. Ed. 835, where, after a discussion as to the effect to be given to voluntary or common-law assignments, it is said: "But the rule with respect to statutory assignments is somewhat different. While the authorities are not altogether harmonious, the prevailing American doctrine is that a conveyance under a state insolvent law operates only upon property within the territory of that state, and that with respect to property in other states it is given only such effect as the laws of such state permit, and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another state. Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the state where the property is actually situated."

In nearly all of the cases in which the question has arisen the rights of attaching creditors have been involved. Here no such rights are involved. The contest is entirely between the bankrupt and his assignees. No case has been brought to our attention in which effect has been refused the assignment of personal property where it did not deprive creditors pursuing their rights in the local forum of a security, or violate the public policy of the state. Where effect is given, it is not upon the theory that the assignment operates to convey the title, but is given under the general rule of comity. *Oakey v. Bennett*, 11 How. 33, 13 L. Ed. 593; *Willitts*

v. Walte, supra; Happy v. Prickett, 24 Wash. 290, 64 Pac. 528. Professor Minor, in his recent work on Conflict of Laws, at page 322, thus states the principle: "But it does not follow, because ex proprio vigore the assignment has no extraterritorial effect, that no such effect is under any circumstances to be accorded it. On the contrary, except with respect to land, the general rule of comity is to recognize the title conferred by the lex domicilii upon the assignee in every state where the insolvent's property may be located, save only where the interests of the forum or of creditors require that it be disregarded. Hence, if the case does not affect creditors in the forum, but merely relates to the title of the assignee and his right to collect and sue for debts due the insolvent, the transfer to the assignee under the lex domicilii is sustained." According to all the authorities, however, comity will not prevail to the extent of giving effect to a foreign statutory conveyance of real estate. We need not pursue the reasons for this here, because the instrument before us, even if it was voluntarily executed, does not operate to convey real estate, since it is not acknowledged as provided by our statute. *Lewis v. Herrera* (Ariz.) 85 Pac. 245, affirmed on appeal by the Supreme Court of the United States, 28 Sup. Ct. 412, 52 L. Ed. —. Paragraph 1904, Rev. St. 1901, authorizes the probate court to assign shares of real estate only to the heirs, or to persons to whom they have "conveyed"; and that court has no authority to assign the share of an heir to another who does not hold a valid conveyance of the title. *Martinovich v. Marsicano*, 137 Cal. 354, 70 Pac. 459; *In re Ryder's Estate*, 141 Cal. 371, 74 Pac. 993.

While no effect can be given the assignment so far as the real estate is concerned, we see no reason why effect should not be given to it so far as it relates to the distributive share of personality. There are no local creditors to be protected. No policy of this territory will thus be violated. On the contrary, we think such action will conform to the present policy of the country, since, by the national bankruptcy act, our citizens, upon being adjudged bankrupts, are required to execute to their trustees transfers of all their property in foreign countries (clause 5, § 7, Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]); and we thus seek, through the comity of foreign nations, to secure for the creditors of our bankrupts the rights asked by the assignees here.

We think, for the foregoing reasons, that the trial court erred in refusing to admit the assignment in evidence, and in denying the motion for a new trial. The judgment is therefore reversed, and the cause remanded for a new trial.

KENT, C. J., and SLOAN and NAVE, JJ., concur.

(11 Ariz. 425)

FLOWING WELLS CO. v. CULIN.

(Supreme Court of Arizona. March 27, 1908.)

1. CORPORATIONS — DISSOLUTION — GROUNDS — FAILURE TO APPOINT AGENT.

Sess. Laws 1903, p. 147, No. 82, providing that, where a corporation shall fail to appoint an agent on whom service of process may be had, any resident may maintain an action for a judicial dissolution, and that, where a petition shows such situation exists, the court shall cite such corporation to appear, and if, on hearing, it appears that such situation exists, the court shall thereupon dissolve the corporation, predicates authority to dissolve on the existence of such situation at the time of hearing, and the corporation then having such an agent cannot be dissolved, though on the filing of the petition it had no such agent.

2. STATUTES—CONSTRUCTION.

A court has no authority to extend a law beyond the fair and reasonable meaning of its terms, because of some supposed policy of the law, or because the Legislature did not use proper words to express its meaning.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 259-265.]

Appeal from District Court, Pima County; before Justice John H. Campbell.

Action by Frank L. Culin against the Flowing Wells Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

This case comes to this court upon an agreed statement of facts. The plaintiff in the court below filed his petition on October 23, 1907, under the provisions of Act No. 82, p. 147, Sess. Laws 1903, alleging that the defendant had failed to appoint an agent as provided by said act, and praying for its dissolution and disincorporation. Thereafter, on October 29, 1907, the court issued a citation to show cause, in response to which the defendant, on January 4, 1908, appeared and filed its answer and return, setting forth therein that it had always believed that a duly authorized agent had been appointed, and that it had no intention or design to disobey the law, and that the failure to appoint an agent was an inadvertence and oversight; that immediately upon the filing of the petition by the plaintiff, and five days before the order to show cause was issued, the defendant had appointed an agent, and filed the notice of such appointment with the Territorial Auditor; and at the time of the hearing or trial the defendant had a duly appointed agent, as provided by the statutes. To this answer and return the plaintiff presented a general demurrer, which was sustained by the court. The defendant, electing to stand upon its answer and return, the court thereupon entered judgment dissolving and disincorporating the defendant corporation, from which judgment the defendant appeals, and has assigned as errors: "(1) The court erred in sustaining the demurrer of the plaintiff to the defendant's answer and return. (2) The court erred in entering a judgment dissolving and disincorporating the defendant corporation."

Wm. M. Lovell and S. L. Kingan, for appellant. Denton Dick, for appellee.

DOAN, J. As the second assignment of error stands or falls with the first, the two will be considered together. The proper determination of the question presented involves a construction of Act No. 82, p. 147, Sess. Laws 1903. This act, eliminating that part which has no application to the present case, provides as follows: "That whenever any corporation * * * shall fail to appoint a bona fide agent * * * then * * * any resident * * * may bring, prosecute and maintain * * * in his own name, an action in any court of record * * * to have and procure a judicial dissolution and disincorporation; * * * and whenever it is made to appear to any such court by petition or complaint * * * that * * * the above named * * * situation or condition exists, * * * such court shall forthwith order or cite such corporation to appear before it, * * * and if, upon hearing of [or] trial it be made to appear that * * * said * * * condition or situation * * * exists, such court shall thereupon dissolve and disincorporate such corporation," etc.

The plaintiff below, who is the appellee herein, bases his argument in support of the judgment upon the broad ground that the defendant having, at the time of filing the petition, failed, whether through inadvertence or otherwise, to appoint an agent under the provisions of the act above cited, the court is thereupon bound to dissolve and disincorporate the defendant, and the appointment of such agent after the filing of the petition and the institution thereby of the action is of no avail. The language used indicates that the primary object of this provision of the act was to secure the appointment of an agent on whom process could be served. This is all the interest of the public would require. The dissolution and disincorporation was only the penalty that should be imposed upon the failure or refusal of the corporation to carry out the primary object of the statute, and this penalty was apparently provided as the means to compel obedience to this requirement. In harmony with this construction, the statute, in directing the mode of procedure to enforce compliance with its requirements and to impose a penalty for failure or refusal so to do, provides that if, after the corporation has had notice of its dereliction it still fails to appoint an agent, and the situation or condition alleged in the petition exists at the time of the hearing, then, a distinct refusal to obey the law being manifest, the court is authorized to inflict the penalty provided by the act. There is no authority conferred upon the court to dissolve or disincorporate unless this condition exists at the time of the hearing or trial. The language used does not support the theory of appellee that the Legislature, by the word

"exists" meant to refer to the time the action was instituted. If the Legislature had meant this, it could have said this, and could have enacted that, "whenever it is made to appear that at the time of filing said petition * * * the above named * * * situation or condition existed," citation should issue, "and if the facts alleged in the petition be satisfactorily established by competent evidence upon the hearing or trial, such court shall thereupon dissolve and disincorporate said corporation." But it did not say this, but instead thereof said, "And if upon hearing of trial it be made to appear that * * * said * * * condition or situation * * * exists, such court shall thereupon dissolve and disincorporate such corporation." This language plainly and unquestionably predicates the court's authority to dissolve and disincorporate upon the existence of such condition or situation at the time of hearing or trial.

If we should concede the theory of the appellee, which we do not think is sustained by sound reasoning, and is certainly not supported by the language of the act, we nevertheless recognize that it is the duty of all courts to confine themselves to the words of the Legislature—nothing adding thereto; nothing demitting. The court has no authority to extend a law beyond the fair and reasonable meaning of its terms, because of some supposed policy of the law, or because the Legislature did not use proper words to express its meaning. *Everett v. Wells*, 2 Scott (N. C.) 531; *Tompkins v. First Nat. Bank* (Sup.) 18 N. Y. Supp. 234. This act, while remedial in its object, is also highly penal, and those affected by penal statutes are entitled to have the same construed strictly. Therefore, under the rule that "a close construction should be given to statutes which work forfeitures or confiscation of property," the court, in construing this statute, will not give that meaning to the words used which would operate to dissolve or disincorporate, unless it plainly and unequivocally appears that such was the intention of the Legislature. *Abbott v. Wood*, 22 Me. 541; *U. S. v. Athens Armory*, 35 Ga. 344, Fed. Cas. No. 14,473.

The answer and return of defendant stating that the situation or condition alleged in the petition did not exist at the hearing or trial, but that the defendant had theretofore appointed an agent in full compliance with the law; that said appointment had not been revoked, but that it was then, and at all times since the making thereof had been, in full force and effect; that it had been and was then duly filed with the Territorial Auditor; and that the failure of defendant to appoint an agent and file said appointment did not then exist, for the reason that defendant had theretofore made and filed such appointment—stated facts sufficient to constitute a defense, and the court erred in sustain-

ing the demurrer thereto, and in entering the judgment ordering the dissolution of the corporation.

The judgment is reversed, and the case remanded to the lower court, with instructions to overrule the demurrer, and for such further proceedings as are consistent with this opinion.

KENT, C. J., and SLOAN and NAVE, JJ., concur.

(11 Ariz. 236)

SCHLEY v. VAIL et al.

(Supreme Court of Arizona. March 27, 1908.)

1. PUBLIC LANDS—SCHOOL LANDS—PREFERRED RIGHT TO LEASE—STATUTES—CONSTRUCTION—"IMPROVEMENTS."

Rev. St. 1901, pars. 4035-4037, providing that actual or bona fide settlers who have placed improvements on school lands shall have the preferred right to lease the same, and defining "improvements" as anything permanent in character, the result of labor or capital, enhancing the value of the land, etc., require, to acquire a preferred right to lease school land, that a person be an actual and bona fide settler and that he place on the land improvements permanent in character, the result of labor or capital, which enhance the value of the land.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3454-3459.]

2. SAME—COMPLAINT—SUFFICIENCY.

A complaint in an action based on plaintiff's preferred right to lease school land leased to another, which alleges that plaintiff, prior to the leasing of the land, was in possession thereof and placed thereon valuable permanent improvements, but which fails to allege that the improvements are the result of labor or capital, or that the improvements enhance the value of the land, or that the improvements are not such as may be removed, is fatally defective, under Rev. St. 1901, pars. 4035-4037, giving a bona fide settler on school land the preferred right to lease the same on his making permanent improvements thereon as the result of labor or capital and enhancing the value of the same.

3. SAME—IMPROVEMENTS.

A settler on school land who places thereon a house, barns, corrals, fences, and who cleans off the undergrowth to prepare the ground, and who uses the same for grazing purposes or for dry farming, has the preferred right to lease the same, within Rev. St. 1901, pars. 4035-4037.

4. SAME—"VALUABLE IMPROVEMENT."

A frame house, firmly constructed on school land by a settler thereon, is a "valuable improvement," within Rev. St. 1901, pars. 4035-4037, giving the preferred right to lease school land to the settler thereon making permanent improvements thereon, etc., and the building may be used by the settler for a warehouse in which to store supplies for use on adjacent property, or to sell to proprietors of adjacent property, or for a saloon to invite the patronage of employees on adjacent property; but a house placed on blocks or pillars is not an appurtenant to the realty and is not an improvement.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7273.]

Appeal from District Court, Pima County; before Justice John H. Campbell.

Action by Otto W. H. Schley against Ed. L. Vail and others. From a judgment against plaintiff, rendered on sustaining a demurrer to the complaint, he appeals. Affirmed.

Otto W. H. Schley brought suit in the court below against the board of supervisors of Pima county, Ariz., and F. B. Close, alleging: That on December 30, 1905, and for a long time prior thereto, he had been the actual and bona fide occupant of, and in possession of, certain school land situate at or near Vails Station, in Pima county, Ariz. That prior to said date, and while he was so occupying said lands and in possession thereof, he placed thereon valuable permanent improvements. That during all such times he was willing and anxious to lease said school lands from the board of supervisors, and that he had the preferred right to lease said school lands. That the board of supervisors and Close all the time knew that he was occupying said lands, and in possession thereof, and the improvements thereon, and that he had prior to December 30, 1905, caused to be placed on said lands valuable permanent improvements, and that he was willing and anxious to lease the same. That the board of supervisors, on or about December 30, 1905, with full knowledge of all these facts, and without any notice to him, made a purported lease of said lands to Close for five years. To the original complaint a demurrer was interposed by the defendants, and sustained by the court, and the same demurrer was later sustained to the first amended complaint. To the second amended complaint Close and the board of supervisors again demurred on the ground that it did not state facts sufficient to constitute a cause of action, and more particularly that the facts alleged were not sufficient to entitle the plaintiff to any preference right to lease said lands, which demurrer was also sustained by the court. Plaintiff chose to stand on his second amended complaint, and judgment was rendered against him. From this judgment plaintiff has appealed, and among his assignment of errors has alleged: "That the court below erred: (1) In sustaining the demurrer to plaintiff's complaint. * * * (4) In holding that plaintiff's complaint did not state facts sufficient to constitute a cause of action."

Francis H. Hartman, for appellant. Frank H. Hereford, for appellees.

DOAN, J. Plaintiff's action was based upon his preferred right to lease the land. In order to state a cause of action, it was necessary, therefore, to allege in the complaint facts showing such right. The statute (Rev. St. 1901) authorizing boards of supervisors to lease such land provides:

"Par. 4035 (Sec. 4). Actual or bona fide settlers or occupants who have placed improvements on school or university lands, shall have the preferred right to lease the land whereon such settlement has been made.

"Par. 4036 (Sec. 5). 'Improvements' within the meaning of this title shall be held to mean anything permanent in character, the

result of labor or capital expended on such land in its reclamation or development, and the appropriation of water thereon, which has enhanced the value of the same beyond what said land would be worth had it been permitted to remain in its original state.

"Par. 4037 (Sec. 6). Any one occupying school or university lands refusing or not wishing to lease said land, and other parties making application so to do, the board of supervisors shall appoint three disinterested persons, householders and citizens of the territory, living adjacent to said land, and engaged in agricultural pursuits, if said land is agricultural in character, and engaged in stock raising if the land should be grazing, to go upon said lands and appraise the value of the improvements and appurtenances thereon as set forth in section 5 of this title, and make due return of said appraisal to the supervisors under oath, and they shall file the same, and the party wishing to lease shall pay to the board of supervisors the amount of such appraisal and the per diem of the appraisers, before the board of supervisors shall execute a lease to him for said lands. The money so paid for such improvements, the supervisors shall pay to the occupant of the land when he shall vacate said land, and give possession to the lessee."

* * *

In order to acquire a preferred right to lease such land the above provisions require that a person be an actual and bona fide settler or occupant, and that he has placed on said lands improvements permanent in character, the result of labor or capital expended on such land in its reclamation or development, which has enhanced the value of the same beyond what said land would be worth, had it been permitted to remain in its original state. The appropriation of water thereon is mentioned as an improvement of this character in recognition of the well-known and universally conceded fact that in this arid country an appropriation of water invariably operates to reclaim and develop the land to which it is applied, and to enhance the value of the same beyond what said land would be worth, had it been permitted to remain in its original state. The complaint alleges: "That prior to the said 30th day of December, 1905, and during the time plaintiff was occupying said school lands and in possession thereof, he placed thereon valuable permanent improvements, and was during all such time, and is now, in the actual possession thereof, and occupying said improvements and said lands." This is the only allegation in the complaint tending to show in the plaintiff a preferred right to lease the land, or to impose upon the board of supervisors any duty to notify him of the application of Close to lease the said land, or to appoint a committee to appraise the improvements that are alleged in the complaint to have been placed thereon, and is insufficient to effect that purpose, for the reason that it is required by section 5

that, in order to confer a preferred right to lease, the improvements must not only be permanent in character, but they must be the result of labor or capital expended on such land in its reclamation or development, which expenditure has enhanced the value of the land beyond what it would be worth, had it been permitted to remain in its original state. And paragraph 4037 (section 6), which provides for the appointment of appraisers to appraise the value of the improvements on such lands when the occupant thereof fails to apply for lease, and another applies therefor, confines such appraisal to "the improvements and appurtenances thereon as set forth in section 5 of this title." Until, therefore, such improvements as are set forth in section 5 are alleged to have been placed thereon, no duty to appoint such appraisers is shown. The complaint fails to allege that the improvements are the result of either labor or capital expended on the land in either its reclamation or development, or that such improvements or expenditures have enhanced the value of such land, or to allege any facts tending to establish either of these propositions, and the complaint therein is fatally defective, in that it for that reason fails to state facts sufficient to constitute a cause of action, and the general demurrer thereto on that ground was properly sustained.

It is urged by the appellant that placing upon school lands a dwelling house, barns, corrals, fences, cleaning off the brush and undergrowth to prepare ground for grazing purposes, and the cultivation of the ground for raising crops thereon without irrigation should confer upon the occupant a preferred right to lease without the appropriation of water on such land. The answer to this is that in case the land was not susceptible of irrigation, and the occupant was using it for grazing purposes or for dry farming, these improvements unquestionably would confer such right, and constitute one class of improvements contemplated in paragraph 4037 (section 6); but the complaint in this case does not allege the placing upon the land described therein of any such improvements, and the appellant herein cannot, therefore, be aided by that fact. There is no allegation in the complaint that the improvements are not such as might be readily removed from the land, and therefore, though valuable and permanent in themselves, confer no enhanced value upon the land. A frame house, firmly constructed, would be a permanent structure, and could be properly termed a "valuable improvement," and might be used by the occupant for a warehouse in which to store goods or machinery or supplies to use on adjacent property, or to sell to operators of adjacent properties, or for a saloon to invite the patronage of employes of adjacent properties; but, if placed on blocks or pillars, as such buildings frequently are, it would not be an appurtenant to the realty, but could be readily removed, and neither being the result

of labor or capital expended on such land in its reclamation or development, nor having enhanced the value of the same beyond what said land would be worth, had it been permitted to remain in its original state, would not constitute either "improvements" or "appurtenances" thereon, "as set forth in section 5" above cited.

The appellant elected in the lower court to stand upon his complaint, and let judgment be entered on the demurrer. Therefore the conclusion reached on this subject is decisive of the case, and renders unnecessary the consideration of the other questions presented.

The judgment of the lower court is affirmed.

KENT, C. J., and SLOAN and NAVE, JJ., concur.

(12 Ariz. 48)

INDUSTRIAL BLDG. & LOAN ASS'N v. MEYERS-ABEL CO. et al.

(Supreme Court of Arizona. March 27, 1908.)

1. CORPORATIONS—FOREIGN CORPORATIONS—FILING COPY OF ARTICLES, ETC.—STATUTE CONSTRUED.

Rev. St. 1887, pars. 347, 348, now repealed, required a foreign corporation doing business in the territory to file a copy of its articles and an appointment of an agent to receive service of summons, etc., with the Secretary of the territory and the recorder of the county in which its office or business was located. *Held* that, unless a foreign corporation had an office, or its enterprise had or proposed to have some established location within the territory, it complied with the statute by filing with the Secretary a copy of its articles of incorporation and an appointment of an agent, and that the requirement as to filings with county recorders did not apply to corporations effecting their transactions solely through traveling solicitors or correspondence.

2. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—IMPAIRMENT—FOREIGN CORPORATIONS.

That a foreign corporation has not complied with Rev. St. 1901, requiring such corporations to file copies of their articles of incorporation with certain officers, etc., does not prevent it from suing to vacate judgments based on business transacted before the enactment of such requirements, the corporation having transacted no new business in the territory since the law became effective, since to require such compliance as a condition precedent to the suit would impair the obligation of its contract.

Appeal from District Court, Navajo County; before Justice R. E. Sloan.

Action by the Industrial Building & Loan Association against the Meyers-Abel Company and others. From a judgment dismissing the petition and refusing a new trial, plaintiff appeals. Reversed and remanded, with directions.

W. H. Stillwell, for appellant. Clark & Tillinghast, for appellees Meyers-Abel Company and F. W. Nelson, trustee. J. F. Wilson, for appellees John, Martha, and Benjamin Downs.

CAMPBELL, J. Appellant is a corporation organized under the laws of the state of Colorado for the purpose of conducting a

building and loan business in the state of Colorado and in any other state of the United States in which it may desire to do business. In March, 1900, it sold to John Downs and Martha Downs, his wife, residents of Navajo county, Ariz., 50 shares of its stock, and upon their application made to them a loan of \$4,000. To secure their note evidencing the loan Downs and wife executed a trust deed conveying certain real estate in Navajo county to Bromfield and Adams, as trustees. Thereafter they and their son, Benjamin Downs, became indebted to the firm of Lowenthal & Meyers of Albuquerque, N. M., and gave to that firm a note, securing it by a mortgage upon the same premises. Lowenthal and Meyers transferred the note and mortgage to the appellee the Meyers-Abel Company. In 1902 the Meyers-Abel Company brought suit against the Downs to foreclose their said mortgage, making the appellant herein and the trustees, Bromfield and Adams, parties. The complaint alleged that the appellant was a foreign corporation doing business in this territory, but had failed to comply with the law requiring it to file a certified copy of its articles of incorporation and an appointment of an agent, and prayed that the trust deed given by John and Martha Downs to secure their indebtedness to appellant be declared void. Appellant denied that it had failed to comply with the territorial law as alleged, and asked to have its deed of trust adjudged prior in right, and foreclosed. This cause was numbered 127, and is hereinafter referred to by that designation. The case came on for trial on October 9, 1905. There was introduced in evidence a certificate made by the Territorial Auditor, which recited that the "Industrial Building & Loan Association of Denver" had not filed in his office a copy of its articles of incorporation nor an appointment of an agent. The court entered judgment foreclosing the mortgage of the Meyers-Abel Company, and decreed it to be a first and paramount lien upon the premises, and barred and foreclosed appellant and the trustees of all right, claim, or equity of redemption in the premises. On October 12, 1905, John and Martha Downs filed an answer to the cross-complaint of appellant, in which it had asked a foreclosure of its trust deed, setting up the failure of appellant to comply with the law regulating the doing of business of foreign corporations, and praying that the trust deed given by them to appellant be declared void. On the same day the case was tried, and judgment entered in accordance with the prayer of the complaint. Shortly after these judgments were rendered Martha and Benjamin Downs transferred the premises to appellee Nelson, as trustee, to secure an indebtedness. This action was brought by appellant to reopen the judgments rendered in cause No. 127. The complaint sets up the proceedings had in that cause, and states the facts to be that

prior to the time that it made the loan to John and Martha Downs it had filed with the Secretary of the territory a duly certified copy of its articles of incorporation and also an appointment of an agent, and that said articles and appointment of agent were on file and of record in the office of the Territorial Auditor (to which, by law, such records have been transferred) at the time said Auditor made the certificate which was introduced in evidence in cause No. 127, but that its corporate name was and is "Industrial Building & Loan Association," and not "Industrial Building & Loan Association of Denver." Further allegations are made charging misconduct on the part of the attorney who had been employed by appellant and of other facts in support of its claim for equitable relief, which are not necessary in the consideration of this case to be here set forth. The complaint prays that the judgments in cause No. 127 be vacated; that the trust deed executed by John and Martha Downs be adjudged a first lien on the premises therein described, and for judgment foreclosing the trust deed. Upon the trial of this action the court found sufficient of the allegations of mistake and constructive fraud to be true to entitle the plaintiff to relief in equity against the judgments, save and except that it may not maintain this action, and had no right to maintain its action in cause No. 127, because that it had, during the year 1900, an agent soliciting business in the territory and in different counties of the territory, and was doing and carrying on business during said year in Navajo county, and particularly at the time the loan was made, and, further, "that on or about the 14th day of January, 1897, it filed in the office of the Secretary of Arizona a duly authenticated copy of its articles of incorporation, and on the same date the appointment of agent upon whom notices and processes, including summons, might be served, but that said plaintiff had not at the time of the execution of said mortgage, or prior thereto, or at any other time, complied with the laws of the territory of Arizona relating to foreign corporations by filing a duly certified copy of its articles of incorporation and the appointment of agent upon whom all notices and processes, including the service of summons, might be served with the county recorder of Navajo county, and that said plaintiff had not then, or at any time, published at least six times in some newspaper published in said Navajo county a copy of its articles of incorporation, duly certified." The court further found that appellant has never had an office in the territory. It is not found that it has ever had or proposed to have a definite location for its business in the territory. As a conclusion of law the trial court held that appellant, not having complied with the law of the territory relating to foreign corporations, in that it had failed and neglected to file with the coun-

ty recorder of Navajo county a copy of its articles of incorporation and an appointment of an agent, as required by chapter 7, Rev. St. Ariz. 1887; that the trust deed sought to be foreclosed is null and void; and that it was without right to prosecute its action for the vacation of the judgments. From the judgment entered dismissing its petition, and from the refusal of the court to grant a new trial, this appeal is brought.

Many questions are sought to be raised by appellant, but the determination of one of them is decisive of this case, since the trial court has found facts sufficient to warrant setting aside the judgments in cause No. 127, unless appellant is barred from maintaining its action by reason of its failure to file a copy of its articles of incorporation and appointment of agent with the county recorder of Navajo county. The Revised Statutes of 1887, which were in force at the time the loan was made, though since repealed, imposed upon foreign corporations doing business within this territory the following requirements:

"347. (Sec. 1.) Any company incorporated under the laws of any other state or territory, for any enterprise, business pursuit or occupation, proposed to be carried on, or the principal office or place of business is proposed to be located, within this territory, shall make and file certified and duly authenticated copies of their articles of incorporation, with the Secretary of this territory, and the county recorder of the county in which its business or principal office is located.

"348. (Sec. 2.) It shall be the duty of any association, company or corporation organized or incorporated under the laws of any other state or territory or foreign country for the purposes of engaging in or carrying on any enterprise, business, pursuit or occupation, or acquiring, holding or disposing of any property within this territory, to file with the Secretary of this territory and the county recorder of the county in which such enterprise, business, pursuit or occupation is proposed to be located, or is located, the lawful appointment of an agent, upon whom all notices and processes, including service of summons, may be served, and when so served shall be deemed taken and held to be a lawful personal service on such association, company or corporation for all purposes whatsoever.

"349. (Sec. 3.) No corporation such as is mentioned in section one of this chapter shall transact any business whatsoever in this territory until and unless it shall have first filed its articles of incorporation and appointment of an agent as required in the two preceding sections, and every act done by it prior to the filing thereof shall be utterly void."

This statute required a foreign corporation incorporated for the purpose of engaging in or carrying on any enterprise, business pursuit, or occupation in this territory to file a copy of its articles of incorporation and an appointment of an agent with the Secretary of

the territory. It was also required to file the same with the recorder of the county in which its office or business was located. It appears that appellant had never had an office within the territory; that such business as it has transacted has been obtained through a solicitor who traveled through the various counties; that, when a loan was desired, the application was made to the office of the company in Colorado and further negotiations carried on by mail. The notes given to evidence the loan were payable at the office in Colorado. Can it be said that the business of appellant was located in Navajo county? Webster defines "locate" as "to place; to set in a particular site or position; to designate the site or place of." And by the Century Dictionary it is defined: "To fix in a place; establish in a particular spot or position; to fix the place of; to reside; to place one's self or be placed; adopt or form a fixed residence." As we have said, appellant maintained no office in Navajo county, and so far as disclosed has had but the single transaction in that county. If a foreign corporation had an office or its enterprise was definitely located in one county, it was required to file a copy of its articles and appointment of agent with the recorder of that county; but the statute did not require it to file such copy and appointment in each of the other counties to which its enterprise might lead it to transact business. If it had no definite location within the territory, was it required to file such copy and appointment in each county in which it proposed to have a transaction? We think not. We are of opinion that, unless a foreign corporation had an office, or its enterprise had or proposed to have some established location within the territory, it complied with the requirements of the statute by filing with the Secretary of the territory a copy of its articles of incorporation and an appointment of agent; that the requirement as to the filing of such with the county recorders had no application to corporations which effected their transactions solely through traveling solicitors or correspondence. We think this view was entertained by this court in *Babbitt v. Field*, 6 Ariz. 6, 52 Pac. 775, although the decision turned upon another point.

It was pleaded, and the court finds, that appellant has not complied with the requirements of the Revised Statutes of 1901, and it seems to have been urged upon the trial court that the failure to so comply precludes it from maintaining this action. The statutes now in force differ materially from those which were in force at the time the loan involved in this action was made. It is now required that a foreign corporation file a copy of its articles of incorporation with the Territorial Auditor and with the recorder of each county in which it proposes to carry on any business whatsoever, and that the articles be published at least six times in a newspaper published in each of such counties. It is fur-

ther required that a foreign corporation of the character of appellant file with the Territorial Treasurer a bond in the sum of \$50,000 for the security of resident stockholders. It is the undisputed testimony that the appellant has transacted no new business in the territory since the Revised Statutes of 1901 became effective. To require it to comply with the provisions of the Statutes of 1901 as a condition to maintaining its action would impair the obligation of its contract. *Bedford v. Eastern Building & Loan Association*, 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834.

The judgment of the district court is reversed, and the cause remanded, with directions to set aside the judgments in cause No. 127, and to take such further proceedings as are equitable.

KENT, C. J., and NAVE, J., concur.

(11 Ariz. 415)

In re BLACK DIAMOND COPPER MINING CO.

Appeal of SOTO BROS. & RENAUD et al.

(Supreme Court of Arizona. March 27, 1908.)

1. BANKRUPTCY—COMPOSITIONS.

The bankruptcy law does not provide that compositions, though informal, or preferences, shall be void as between the parties.

2. ACCORD AND SATISFACTION—PART PAYMENT—CONSIDERATION.

A settlement of an unsecured debt by merging it in a secured obligation for a smaller amount is based on a consideration, and is enforceable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Accord and Satisfaction, §§ 111–115.]

3. BANKRUPTCY—SECURED DEBTS—DISALLOWANCE.

Where a bankrupt corporation gave a creditor certain bonds in settlement of a claim, the presumption was that the bonds were of such secured character as to support the court's order disallowing the creditor's claim filed in the bankruptcy proceedings on the ground that it had been settled.

4. SAME—PAYMENT OF DEBT.

After the filing by a corporation of a petition in bankruptcy, but before the adjudication, the corporation gave its check to a creditor for part of the debt, and also a certificate reciting that there was due the creditor in bonds of the corporation a certain face value which, when delivered, was with the check to constitute payment in full of the account. *Held*, that the receipt by the creditor of the check, which was later paid, and the tender of the bonds by the corporation, gave rise to a new obligation, which satisfied the original indebtedness.

5. SAME—DEBTS PROVABLE.

Under Bankr. Act July 1, 1898, c. 541, § 63, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), providing that the debts of a bankrupt which may be allowed against his estate are a fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing, at the time of the filing of the petition, against him, etc., new obligations evidenced by bonds given by a corporation after the filing by it of a petition in bankruptcy in settlement of a claim were not provable in the bankruptcy proceedings.

Appeal from District Court, Cochise County; before Justice Fletcher M. Doan.

Proceedings in involuntary bankruptcy of

the Black Diamond Copper Mining Company. From orders disallowing claims filed by them. Soto Bros. and Renaud and others appeal. Affirmed.

For former report, see 85 Pac. 653.

James Rellly, for appellants. Ben Goodrich, for appellee.

NAVE, J. In November, 1904, several creditors of the Black Diamond Copper Mining Company, a corporation, hereinafter called the "Company," filed a petition in bankruptcy against that company. An adjudication of bankruptcy was made in November, 1906, pursuant to the order of this court in a former appeal of this same case (In re Black Diamond Cop. M. Co., 85 Pac. 653), and the matter was referred. Soto Bros. & Renaud, hereinafter called "Soto Bros.," and Albert Steinfeld & Co., hereinafter called the "Steinfeld Company," have appealed from orders disallowing claims filed by them against the bankrupt, successively made by the referee, and, upon review, by the district court.

In March, 1905, several months after the filing of the petition in bankruptcy, but before the adjudication, appellants, who were then creditors of the company, made informal compositions with it. Similar settlements were effected between the company and other creditors, as disclosed in our former opinion, cited *supra*. The settlement with the Steinfeld Company consisted of the payment to it of \$800 in cash and the delivery to it of \$600 in bonds of the company, the Steinfeld debt being originally in the sum of \$1,000. The indebtedness to Soto Bros. was in the sum of \$4,300.99. The company paid to them \$2,150.48 by a check, which was subsequently cashed, and at the same time delivered to them a certificate signed by it, reading as follows: "This is to certify that there is due Soto Bros. & Renaud from this company, in bonds of said company, the face value of \$4,300, which is to be delivered to them by Mr. Hoffman, president of this company, within a few days, and when so delivered, together with the check paid to them this day of \$2,150.48, is payment in full of their account, and this duebill ceases to be of any value, and is null and void (merchandise and cash account)." It will be observed that by this arrangement Soto Bros. were to receive bonds of a face value equal to the full amount of the debt, and in addition one-half of the amount of the debt in cash, by check. Three days after this transaction Soto Bros. advised the company that they would not accept the bonds, and that they repudiate the settlement. The bonds nevertheless were delivered at their place of business, and left with one of the partners against his protest. An attempt was afterwards made by Soto Bros. to return the bonds to the company by mail. At the hearings of this matter each party disclaimed knowledge of the whereabouts of these bonds. Without detailing the nature of the claims filed

by these appellants, it is sufficient to state that they were disallowed, by reason of the view that they were settled by the informal compositions.

It is contended by appellants that the filing of the petition in bankruptcy against the company deprived it of power to effect a composition in any other way than that prescribed by the bankruptcy law; hence that the settlements are void, and that the bonds also are void. The terms of these bonds are not disclosed by the record before us. We do not entertain the view that these informal settlements are void, although for a variety of reasons they may be found voidable at the instance of other creditors. The bankruptcy law does not provide that compositions, though informal, or preferences, shall be void as between the parties. Neither appellant complains because of the inequality in the settlements effected.

Appellants further contend that they are not bound by these settlements, for that the agreements to accept full satisfaction are without consideration. The settlement effected with the Steinfeld Company involved the payment of half the indebtedness in cash, and satisfaction of the remaining half by the delivery of \$600 face value (being \$200 less than that half) in the company's bonds. The bonds were delivered, and are still in the possession of the Steinfeld Company, although the return of them was tendered at the trial of this proceeding. Thus the accord was fully executed. A theory on which it might be held to be ineffective would be that the so-called bonds are in fact but unsecured promises to pay part of the former indebtedness, and do not vary the pre-existing obligation, except to reduce its amount. Wherefore what purports to be satisfaction is without consideration. Without determining whether this point would be well taken as a matter of law (it finds abundant support in authority), we cannot apply it because we are not advised by the record as to the facts. Some facts appear, on the contrary, from which an inference may be drawn that the bonds are of the customary secured variety. If so, it is well settled that a settlement of an unsecured debt by merging it in a secured obligation for a smaller amount is based upon a consideration, and will be enforced. The record discloses that the bonds themselves were produced before the trial judge, though not produced before us. The presumption is that these bonds are of such character as to support the court's order.

As to the consideration for the accord between the bankrupt and Soto Bros., there is more difficulty. The question arises whether the accord was fully executed. Decisions in which the points here involved are fully treated are so numerous that we deem it unnecessary to elaborate our view upon them. Extensive citation of authorities will be found at 1 Am. & Eng. Cyc. of Law (2d Ed.) 408 et seq., and 1 Cyc. 319 et seq. It suffices to express our conclusion that the receipt by Soto

Bros. of the check for \$2,150.48 contemporaneously with their acceptance of the certificate of the company as above quoted, coupled, as it was, with the express agreement of the parties that settlement should be had on the basis disclosed by the certificate, gave rise to a new obligation, and satisfied the original indebtedness. An enforceable contract was consummated, subject only to interference by other creditors, by which the company was obliged to deliver to Soto Bros. bonds of the face value of \$4,300. Doubtless Soto Bros. could have rescinded the contract if the check had proved uncollectible, or the bonds had not been tendered; but the fact that they afterwards refused the bonds does not seem to us to alter the status of the case. We regard the situation as being the same that it would have been if the bonds had been delivered and accepted, together with the check. It follows for the same reasons applied in considering the accord with the Steinfeld Company that there was an executed accord between Soto Bros. and the bankrupt upon a consideration, and therefore a satisfaction of the debt.

The new obligations evidenced by the bonds are not provable in the proceeding, because they have arisen since the filing of the petition in bankruptcy. Bankruptcy Law, Act July 1, 1898, c. 541, § 63, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447); *In re Burka* (D. C.) 104 Fed. 326; *In re Pennewell*, 119 Fed. 139, 55 C. C. A. 571; *In re Garlington* (D. C.) 115 Fed. 999.

The judgment of the district court is affirmed.

KENT, C. J., and SLOAN and CAMPBELL, JJ., concur.

(11 Ariz. 371)

SANDOVAL et al. v. RANDOLPH.

(Supreme Court of Arizona. March 27, 1908.)

1. PLEADING — OBJECTIONS TO PLEADINGS—WAIVER—FAILURE TO DEMUR.

Where no general demurrer was interposed to the complaint in the trial court prior to the trial, no error was committed in permitting the case to go to trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1355, 1356.]

2. APPEAL—RECORD—OBJECTIONS TO PLEADINGS.

Where the record on appeal discloses that the complaint is not sufficient to support a judgment, the judgment rendered thereon constitutes fundamental error, for which the judgment will be reversed in the appellate court, though the point is not raised by appellant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 1226-1240, 1141-1146.]

3. ACTION — NATURE OF ACTION — FRAUD OR MONEY RECEIVED—COMPLAINT.

A complaint charged that defendants agreed as agents for plaintiff to buy a certain mine at the lowest possible price, that defendants as such agents purchased the mine, and with intent to deceive and defraud claimed to have paid therefor \$20,000 in American gold, when, in fact, they only paid \$20,000 in Mexican silver, and that plaintiff, relying on defendants' state-

ments, paid defendants \$20,000 in American gold for a conveyance of the mine; that at the date when defendants paid the sum of \$20,000 in Mexican silver to the owners of the mine such amount was worth \$9,600 American gold, and no more, by reason of which defendants became indebted to plaintiff in the sum of \$10,400 gold, no part of which they had paid, though often requested so to do. *Held*, that the complaint stated a sufficient cause of action for money had and received, and not an action for damages for fraud, and that the allegations of fraud should be therefore rejected as surplusage.

4. VENUE—TRANSITORY ACTION—MONEY RECEIVED.

An action against certain agents for money had and received is transitory, and may be brought in any jurisdiction where the defendants can be served with process.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 3.]

5. PLEADING—AMENDMENT—DISCRETION.

It is within the sound discretion of the trial court to permit or refuse an amendment to the pleadings after the trial has begun.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 653-675.]

6. APPEAL—DISCRETION—REVIEW.

Refusal of the trial court to permit a trial amendment in the exercise of discretion will not be reviewed on appeal, unless it is plainly shown that the court's discretion has been abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3825-3833.]

7. LIMITATION OF ACTIONS — RELIEF FROM FRAUD—STATUTES—APPLICATION.

Laws 1903, No. 16, barring actions to obtain relief from fraud after one year from the discovery of the acts constituting the fraud, applies only to actions to obtain equitable relief, based wholly on fraud and in which no relief can be granted unless fraud is proved, and has no application to an action for money had and received against plaintiff's agents to compel a return of money furnished to them which they had not used for the purpose intended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Fraud, §§ 182-186.]

8. APPEAL—REVIEW—PREJUDICE.

Defendants were not prejudiced by the court's refusal to permit a trial amendment pleading limitations where the action was not barred under the statute sought to be pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4106-4109.]

9. SAME—FINDINGS.

The Supreme Court will not disturb findings of fact of the trial court based on conflicting evidence, where they are supported by any substantial testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

Appeal from District Court, Santa Cruz County; before Justice Frederick S. Nave.

Action by Epes Randolph against A. Sandoval and another. Judgment for plaintiff, and defendants appeal. Affirmed.

A. Orfila and Eb. Williams, for appellants. Eugene S. Ives, S. L. Pattee, and S. V. McClure, for appellee.

DOAN, J. An action was brought in the district court of Santa Cruz county by the appellee against the appellants for a sum of money alleged to have been paid by the appellee and his assignor, L. Lindsay, to the

appellants, for the purchase of the San Francisco mine, in the state of Sonora, Republic of Mexico, by the appellants as the agents of the appellee and his assignor, Lindsay. From a decision for the plaintiff, the defendants appealed.

The facts found by the trial court, before whom the case was tried without a jury, are as follows: "In or about the spring of 1905 the defendants A. Sandoval and P. Sandoval entered into a certain agreement with the plaintiff and one Lycurgus Lindsay, whereby the defendants agreed that they, on behalf of the said plaintiff and the said Lindsay would undertake to purchase for them a certain mining claim called the 'San Francisco mine,' in the Altar mining district, in the state of Sonora, Republic of Mexico, at the lowest possible price. Thereafter the said defendants, in pursuance of such agreement, and on behalf of the said Lindsay and this plaintiff, did purchase the said mining claim from the owners thereof for the full consideration of \$20,000, Mexican silver, and that the defendant P. Sandoval, as copartner of the defendant, A. Sandoval, did thereupon obtain a deed of the said mining claim from the original owners thereof, and did pay therefor the sum of \$20,000, Mexican silver, and no more; and the said defendants did thereupon, and in further pursuance of said agreement, procure the said P. Sandoval to convey the said mining claim to one H. S. MacKay, who was the agent of the plaintiff and of the said Lindsay; and the said Lindsay and the plaintiff in pursuance of said agreement, and in the belief that the defendants had paid for the said mine the said sum of \$20,000, American gold, did pay to the defendants the said sum of \$20,000, American gold. The plaintiff and the said Lindsay paid the said sum of \$20,000 in gold in three separate installments, the last thereof being paid on the 25th day of May, 1906, for the sum of \$12,000, American gold. The said sum of \$20,000 Mexican silver paid by the defendants to the original owners of the said mining claim was worth in American gold the sum of \$10,000 at the time the said payments were made. The said Lycurgus Lindsay prior to the commencement of this action duly assigned his claim against the defendants arising out of the aforesaid transaction to the plaintiff for a valuable consideration."

The first error assigned by the appellant is that the complaint does not state facts sufficient to constitute a cause of action, and is subject to a general demurrer. No general demurrer was interposed in the lower court prior to the trial; hence no error was committed by the trial court in permitting the case to come to trial. It would be error to render a judgment on a complaint so fatally defective as to be insufficient to support a judgment, but such error is not assigned. However, if the record should disclose that the complaint was not sufficient to support

a judgment, the rendition of a judgment thereon would constitute fundamental error as manifest in the record, and the judgment would be reversed in the appellate court, even if the point was not raised by the appellant. It is urged by the appellant that this is an action for fraud, and, inasmuch as the complaint does not contain the allegations of facts constituting fraud that are essential in a complaint for fraud, it fails for that reason to state facts sufficient to constitute a cause of action. We cannot agree with the counsel for the appellant that the action is one of fraud. It is true that the complaint contains the words "with intent to deceive and defraud," but, in addition to this charge, the complaint alleges (omitting the part not pertinent to this question): "The defendants agreed, as agent for Lindsay and the plaintiff, * * * to buy a certain mine for the use and benefit of the said Lindsay and the plaintiff at the lowest possible price. * * * That thereafter * * * the said defendants did * * * as agents as aforesaid * * * purchase said claim * * * and pay therefor the sum of \$20,000, Mexican silver, * * * and the owners of said claim did * * * convey the said claim to the defendants * * * and the said conveyance was accepted by the said defendants for the use and benefit of the said Lindsay and the plaintiff. * * * That the defendants * * * did report to Lindsay and the plaintiff that they had agreed to pay the owners of said mine \$20,000 American gold therefor, and said sum was the lowest sum for which they could purchase the same from said owners, and that Lindsay and the plaintiff, relying upon said statements of defendants, did pay to the said defendants the sum of \$20,000, American gold. * * * That at the date when the defendants paid the said sum of \$20,000 Mexican silver to the owners of said claim the said \$20,000 Mexican silver was worth the sum of \$9,600, gold, and no more, and that, by reason of the foregoing facts, the defendants became indebted to the said Lindsay and the plaintiff in the sum of \$10,400, gold, and that they have not paid the same, or any part thereof, though often requested so to do." The facts thus alleged in the complaint are sufficient to constitute a cause of action without the necessity of alleging fraud. That being the case, the allegation of fraud that the appellant characterizes as defective and insufficient having been pleaded as matter of inducement only is immaterial, and may be treated as surplusage, and the complaint, independent thereof, is fully sufficient to sustain an action of debt for money had and received.

Another error assigned is that the court erred in overruling the demurrer of the defendants. This demurrer was urged upon the ground that the court had no jurisdiction over the persons of the defendants or the subject-matter of the action. The record

shows jurisdiction over the persons of the defendants acquired both by service of the summons and the copy of the complaint, and by a general appearance entered by their answer filed February 12, 1908. As to the jurisdiction of the court over the subject-matter, this is a transitory action, and may be brought in any county where the defendants can be served with process. In *Mostyn v. Fabrigas*, 1 Cowp. 161, it is held that, if A. becomes indebted to B. in Paris, an action may be maintained against A. in England, if he is there found. And in this case Lord Mansfield said: "Any action which is transitory may be laid in any county in England, though the matter arises beyond the seas." This doctrine in respect to transitory actions has been repeatedly affirmed in the courts of the United States. *McKenna v. Flisk*, 1 How. U. S. 241, 11 L. Ed. 117; *Mitchell v. Harmony*, 13 How. U. S. 115, 14 L. Ed. 75. At the conclusion of the plaintiff's evidence, the defendants asked leave to file an amended answer, setting up the statute of limitations. The plaintiff refused consent to the amendment, and the court denied the application. This denial is assigned by the appellant as error. After the trial of a case has begun, the court may, in its sound discretion, permit or refuse an amendment to the pleadings. This action, like any other that rests in the discretion of the trial court, will not be reviewed on appeal, unless it is plainly shown that the lower court has abused its discretion. *United States v. Atherton*, 102 U. S. 372, 26 L. Ed. 213. The statute sought to be pleaded by the proposed amendment was the limitation provided by Act 16, Laws 1903. The actions barred under this statute by the lapse of more than one year from the discovery of the acts constituting the fraud are those brought to obtain equitable relief, which are based wholly on fraud, and in which no relief can be granted unless fraud be proven. This action is not a bill in equity for relief on the ground of damage from fraud, but is a suit at law to recover money alleged to have been advanced to defendants as agents to pay the price of a mine purchased by them for plaintiff and Lindsay as principal. The complaint alleges that \$20,000 gold was furnished defendants, and only \$9,000 was paid by them, whereby they became indebted to the plaintiff in the sum of \$10,400, gold, which was not applied to the purpose for which it was furnished, and remained in their hands, the property of their principals. Before application to amend was made, it was established by undisputed evidence that of the money furnished defendants, \$12,000, which included all the excess over the price actually paid (for which excess this action was brought), was furnished in May, 1906. No cause of action arose prior to the receipt of the money by defendants, May 25, 1906. This action was begun on the 26th day of November, 1906,

six months after the statute began to run. Consequently it is apparent that in refusing to permit the defendants to amend, and plead the statute of limitations, the court deprived them of no defense.

The appellant assigned as error the findings of fact and conclusions of law of the trial court. The evidence is conflicting. There is abundant testimony to warrant the findings of the court. It is the rule that the appellate court will not disturb the findings of fact of the trial court based upon conflicting evidence when they are supported by any substantial testimony. The conclusions of law expressed by the trial court are proper, in connection with the facts as found.

The appellee calls attention to section 23, c. 74, p. 131, Laws 1907, Ter. Ariz., and urges the enforcement of the penalty therein provided. We do not assume the responsibility of holding that the appellant was in this case actuated in taking the appeal solely by the desire to delay, and therefore will not impose the penalty.

The judgment of the trial court is affirmed.

KENT, C. J., and SLOAN and CAMPBELL, JJ., concur.

(12 Ariz. 42)

SHERMAN et al. v. GOODWIN.

(Supreme Court of Arizona. March 27, 1908.)

1. APPEAL—REVIEW—PRESUMPTION—PARTICULAR FACTS NECESSARY TO SUSTAIN DECISION.

Where a mortgagee sought to foreclose his mortgage against the grantee of the land, and the latter pleaded that she did not know that the deed contained a clause assuming the mortgage indebtedness, and that she received no consideration for such assumption, and judgment was rendered in her favor, the court on appeal will presume, appellant not having included the evidence in the record, that the grantee sustained her pleading by testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3675.]

2. MORTGAGES—TRANSFER OF PROPERTY BY MORTGAGOR—ASSUMPTION BY PURCHASER.

Where a mortgagor conveys the premises, warranting against all incumbrances, and afterwards the grantee conveys the premises to a third person by a deed not describing or referring to the mortgage, but containing a general assumption clause relieving the grantee from warranting the title and assuming all mortgage and other liens standing against the property, the third person is thereby obligated to pay all valid mortgages and liens, but is not estopped from defending against any invalid mortgage or lien that may be preferred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 737.]

3. SAME—TRANSFER OF PROPERTY MORTGAGED—ASSUMPTION BY PURCHASER.

A property owner mortgaged his property to secure certain notes payable to himself, which notes were delivered to defendant without consideration. Thereafter the mortgagor conveyed the property by warranty deed. Subsequently the grantee conveyed the property to plaintiff by a deed containing a general assumption clause obligating plaintiff to assume all liens and incumbrances standing against the property. *Held*,

that the assumption clause did not constitute such a contract with the grantee for defendant's benefit as to make the case an exception to the general rule that a mortgagee foreclosing against a subsequent grantee maintains his action on the doctrine of subrogation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 737.]

Sloan, J., dissenting.

On rehearing. Former opinion reversed and judgment below affirmed.

For former opinion, see 89 Pac. 517.

Walter Bennett and D. H. Pinney, for appellants. W. J. Kingsbury (J. F. Wilson, of counsel), for appellee.

DOAN, J. This case was originally presented last term, and is now before us on rehearing. The opinion in the case in 89 Pac. 517 gives a full statement of the facts, and our consideration of the errors assigned, to which reference is here made. The statement there made satisfactorily presents the facts, with the exception of our statement of the answer of the plaintiff to the cross-complaint, on which the case was tried. In the confused state of the record we failed to note that in the verified answer of Goodwin to the cross-complaint of Pinney she stated in regard to the assumption clause in the deed from Watrous "that she was not present when said deed was prepared and signed by said Watrous and wife; that she did not know that said words were inserted therein; that she had had no conversation with the said Watrous and wife, or any one representing them, or either of them, in regard to the insertion of said words in said deed; that she never read the said deed; that she had never had the same in her possession; that she did not know that it contained the provisions hereinbefore set forth until it was brought out during the former trial of this suit; that she received no consideration for the liability accruing to her, if any did accrue on account of the insertion of said words in said deed"—and it is fair to presume, the appellant not having included the evidence in the record, that she sustained these facts by testimony. This becomes important for the reason that, after considering the other points raised, we held that Wilson, the mortgagor, having, after the execution and record of this mortgage, conveyed the land to Watrous by deed covenanting against incumbrances, and without any assumption clause, and Watrous having conveyed to Goodwin and Desda Wilson by deed containing the following clause, viz.: "And it is hereby mutually agreed between the parties hereto that the grantees herein named do hereby assume all mortgage liens, and other liens or incumbrances which stand against the property hereby conveyed, and that the said grantor does not warrant or agree to defend the title of said premises, it being fully agreed between the parties hereto that the said grantor shall

not be held responsible for any defect of title thereto"—and Desda Wilson and James Wilson, the mortgagor, having thereafter conveyed to Goodwin by warranty deed their interest in the said land, that by her acceptance of the deed from Watrous containing said assumption, Goodwin was estopped from showing the invalidity of that mortgage, and from availing herself of a good defense thereto. On a further investigation of the facts as pleaded in this case, and the authorities we then cited, we find that this rule of estoppel has been enforced only in cases where the mortgage assumed is described in the deed of conveyance, and such agreement or assumption has been made in the nature of a contract, and for a valuable consideration. In our former opinion we said that "a grantee who assumes payment of a mortgage in a deed of conveyance is estopped from setting up as a defense the invalidity of such mortgage on the ground that his grantor was not personally liable to pay the same, for the reason that the law presumes that the grantee received a consideration for his assumption of the mortgage debt, in that the amount of the latter was either deducted from the agreed purchase price, or considered by the parties in fixing such agreed purchase price. Cobb v. Fishel, 15 Colo. App. 384, 62 Pac. 625; Gage v. Cameron, 212 Ill. 146, 72 N. E. 204; McGregor v. Eastern B. & L. Ass'n, 5 Neb. (Unof.) 563, 99 N. W. 509. The rule estopping the grantee from setting up the invalidity of the mortgage in such a case rests upon the broad doctrine that having agreed with his grantor to pay and discharge the mortgage, and presumably having received a consideration for this agreement, it would be inequitable and a breach of contract on his part to deny the validity of the incumbrance he has thus agreed to recognize and discharge. He would, if he were allowed, be taking advantage of his failure and refusal to carry out his agreement to the prejudice of another."

In the case of Locke v. Homer, 131 Mass. 109, 41 Am. Rep. 199, also cited, the deed conveyed the premises "free from incumbrances, except a mortgage to Margaret Aitken of four thousand dollars, which the grantee assumes and agrees to hold the grantors harmless from." In Cobb v. Fishel, 15 Colo. App. 384, 62 Pac. 625, the deed from Jones to Cobb stated the consideration to be \$12,000, the receipt whereof was acknowledged, followed by a clause reciting the existence of a mortgage of \$3,250, which the grantee assumed and agreed to pay. It was there held that "this was an agreement made by Cobb with Jones, which would inure to the benefit of the holder of the notes. This liability could be enforced in an action at law, as well as in an equitable suit, and is not at all dependent upon the doctrine of subrogation, but was a contractual liability, and the party to whose benefit the promise inured could maintain the

action." In the case of *Am. W. W. Co. v. Farmer L. & T. Co.*, 73 Fed. 962, 20 C. C. A. 138, the deed by which the property was conveyed by the Illinois company to the New Jersey company described the outstanding incumbrances existing thereon, to wit: "The aforesaid incumbrances for four hundred thousand dollars and four million dollars respectively, and expressly declared that the property was conveyed to the grantee, company, 'subject to said incumbrances.'" The court said: "The New Jersey company, we think, is estopped from asserting the invalidity of the mortgages executed by its predecessor, the Illinois company, by virtue of the well-established rule that the purchaser of property who accepts a conveyance thereof which describes incumbrances existing thereon, and expressly declares that the conveyance is made subject thereto, will not be allowed to question the validity of such incumbrances"—and follows that expression with the one we cited in our former opinion: "One who thus buys property has no right to challenge the validity of a mortgage lien existing thereon at the date of his purchase which his grantor by the terms of his conveyance did not see fit to challenge, but recognized in the most formal manner by declaring that he conveyed the property subject to the existing lien." The additional cases cited as sustaining this doctrine are likewise those in which the incumbrances assumed were particularly described in the deeds, which conveyed the property "subject to said incumbrances." The case of *Gage v. Cameron*, 213 Ill. 146, 72 N. E. 204, is not an exception to our statement of the above rule. In that case the court held the assumption clause to render the purchaser liable, but the doctrine of estoppel was not invoked; on the contrary, the court went into the case thoroughly, took testimony on all the facts, and decided on the merits of the case that the claims were valid, and known by the grantee to be such, and were intended to be assumed under the deed.

It is not contended by the appellee in this case that the conveyance of the land by the mortgagor to Watrous by a deed warranting against incumbrances, without making it subject to this mortgage, would operate to release the land from any valid lien of such mortgage, but the contention is that such transfer from the mortgagor, and the acceptance of a deed from such grantee by the present owner containing only an assumption clause relieving such grantee from the warranty of title, and assuming all mortgage and other liens standing against the property, obligated the present owner to pay all valid liens against the same, but does not estop her from defending against any void mortgage or invalid lien or claim that may be preferred. Her right in this respect is recognized in *Gage v. Cameron*, just cited, and in *Robinson Bank v. Miller*, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 440, 46 Am. St. Rep.

883, where it is held that "the grantee of land who takes it subject to incumbrances is not bound to pay a mortgage thereon which did not constitute a part of the consideration of his purchase, and which was not made in good faith for a real indebtedness." This was held upon the reason that is applicable here, that in a case of this kind where there are several liens or incumbrances the term, "subject to incumbrances," may refer to incumbrances which are made in good faith, and is based upon the doctrine announced in *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547, that a grantee in a deed who purchases "subject to incumbrances to secure indebtedness" may not be under obligations to pay some of such indebtedness if the amount thereof is not included in and does not form a part of the consideration of the conveyance. The contention is not made in this case that the mortgage secures a valid indebtedness, but that the effect of the assumption clause is to estop the appellee from availing herself of a good defense against a void mortgage on the ground that, having assumed the payment of this mortgage, it would be inconsistent with equity and good conscience to permit her to set up the defense to which she would otherwise be entitled.

We hold that the clause inserted in the deed from Watrous being general in its nature, and not describing or referring to this mortgage only obligating the grantee to assume all liens and incumbrances that stand against the property, may be understood to refer to valid liens, and does not estop her from defending against a void mortgage. We are strengthened in this view of the case by the fact that there were at the time of the transfer valid mortgage and other liens standing against the property, and the further fact that the presumption that Goodwin intended to assume this mortgage, or received from Watrous a consideration for such assumption, is negated by the facts pleaded in her verified answer, and which we are warranted by the verdict of the jury and the findings of the court in presuming were sustained by evidence. The assumption clause in the Watrous deed under the facts in this case does not constitute such a contract with Watrous for Pinney's benefit as to make this an exception to the general rule that obtains in this jurisdiction that a mortgagee foreclosing against a subsequent grantee maintains his action on the doctrine of subrogation, as laid down in *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; *Union Mutual v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118; *Johns v. Wilson*, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. Ed. 613; *Id.*, 6 Ariz. 125, 53 Pac. 583.

The judgment of the lower court is affirmed.

CAMPBELL, J. When we considered this case at the last term I briefly expressed my views. Upon the more extended considera-

tion which the case has received at this term, I find no reason to change my opinion as then expressed. I therefore concur in the conclusion arrived at by DOAN, J.

SLOAN, J. I adhere to the views expressed by me in the opinion filed upon the former hearing, and therefore dissent.

The CHIEF JUSTICE, deeming himself disqualified, took no part in the determination of this case.

(11 Ariz. 395)

RICHARDSON et al. v. WREN et al.

(Supreme Court of Arizona. March 27, 1908.)

1. BILLS AND NOTES—CONSIDERATION—SUFFICIENCY—PRE-EXISTING INDEBTEDNESS.

Promissory notes given to plaintiff for pre-existing indebtedness on consideration that defendants, a commercial firm, be allowed to sell their stock to pay other creditors, and that plaintiff furnish them new stock, were for a valuable consideration.

2. MORTGAGES—EQUITABLE MORTGAGE—MORTGAGEE AS BONA FIDE PURCHASER.

Where plaintiff, a creditor of defendants, a commercial firm, allows them to sell the stock to pay the other creditors, and agrees to furnish them additional stock on consideration that they execute to plaintiff a mortgage on a farm belonging to some of the defendants, plaintiff will be held to be an equitable mortgagee for value of the farm.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 43-50.]

3. SAME.

Where plaintiff, holding an equitable mortgage on defendant's property, agrees that defendants may exchange that property free of incumbrance for other property on consideration that it be given a mortgage on the property received in exchange, plaintiff is an equitable mortgagee for value of such property.

4. EXCHANGE OF PROPERTY—REAL PROPERTY—FRAUD—RESCISSION—RIGHTS OF BONA FIDE PURCHASER.

Where property on which plaintiff holds an equitable mortgage is exchanged with plaintiff's consent, and plaintiff is given a legal mortgage on the property received in exchange, which is duly recorded, the grantor of plaintiff's mortgage cannot rescind the conveyance for fraud on the part of the mortgagor as against plaintiff, since plaintiff was a purchaser in good faith, and the conveyance voidable only, and not void.

Appeal from District Court, Cochise County; before Justice Fletcher M. Doan.

Action by John D. Richardson and others as trustees against R. H. Wren and others. From a judgment for defendants, plaintiff's appeal. Reversed and remanded, with instructions.

Edward J. Flanigan, for appellants. Thomas D. Bennett and Geo. H. Neale, for appellee Manz.

NAVE, J. The appellants in this case are liquidation trustees, under the laws of the state of Missouri, of the Richardson-Roberts Dry Goods Company, a Missouri corporation, and represent the interest of that corporation in the subject-matter of this lawsuit.

In this opinion we shall denominate the appellants as the "company." The appellees Wren have a common interest in the subject-matter of this lawsuit, and will be referred to as the "Wrens." The Wrens were merchants in Missouri in the early part of 1903 and prior thereto. At that time they were heavily indebted. One of their creditors was the company. Purposing to wind up their business and liquidate their debts, the Wrens proposed to the company that if the company should permit them to sell off their stock and pay the other creditors first, and would furnish them new stock to freshen up their stock, so that it would sell to advantage, they would give notes for the amount due the company, and give as partial security for the payment thereof a mortgage on a farm in Missouri owned by certain of the Wrens. The company accepted the proposition, and complied with its part of the agreement. It was then the expectation of all parties that all creditors, including the company, could be paid from the proceeds of the business by putting the plan into operation. This expectation was not realized. The company demanded the execution of the notes and mortgage pursuant to the agreement. The notes were executed, but the Wrens represented to the company that there was an opportunity to dispose of the farm to advantage by a trade; and, if the company would permit it to be made without requiring a mortgage to be executed upon the farm as originally agreed, in lieu thereof they would give a mortgage upon the property acquired by the trade. The company agreed to this. The farm was traded for some real estate in Douglas, Ariz. After the consummation of the trade, the company requested the Wrens to execute a mortgage upon the Douglas property. The Wrens then represented to the company that they were about to subdivide the Douglas property into town lots, and sell it by the lot, and that such sales could better be accomplished by permitting the property to remain unmortgaged, but subsequently advised the company that they were purposing to exchange the Douglas property for property in Bisbee, Ariz., and if the company would not insist on having a mortgage on the Douglas property, and would make no objection to the trade, they would give a mortgage upon the Bisbee property as soon as the trade should be effected. To this latter proposition the company assented. The Douglas property was then exchanged for the Bisbee property, the owner of which at the time of the exchange was the appellee Henry Manz, who gave the Wrens a formal conveyance thereof, which was duly placed of record. The company thereafter demanded a mortgage upon the Bisbee property. This the Wrens executed, and it was promptly placed of record. After the execution and recording of this mortgage the appellee Manz brought suit against the Wrens to rescind

the exchange of the Bisbee and Douglas property on the ground that the Wrens had defrauded him in the exchange. In this suit he was successful. The conveyance of the Bisbee property by Manz to the Wrens was canceled by judicial decree. The suit now before us was then instituted by the company to foreclose the mortgage obtained by it from the Wrens upon the Bisbee property. The foreclosure was resisted by Manz. The trial court rendered personal judgment against the Wrens, but refused to foreclose the mortgage upon the Bisbee property, apparently upon the ground that the mortgage was given as security for a pre-existing debt, and that, therefore, the mortgagee was not a purchaser for value within the meaning of the statute of frauds. The court found the facts to be in substance as stated above, finding, also, as a fact that the company acted in good faith in securing the mortgage in question, and was not a party to or cognizant of the fraud perpetrated by the Wrens upon Manz. From this judgment the company has appealed. The sole question before us is whether upon this state of facts the company was entitled to foreclose its mortgage upon the Bisbee property.

Without inquiring into the equitable basis of the proposition that a mortgage given for a pre-existing debt is not based upon a valuable consideration as that expression is here used, and recognizing that the state courts are not unanimous upon this question, it is sufficient to observe that the matter is so determined for this tribunal by the Supreme Court of the United States. *People's Savings Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. 679, 30 L. Ed. 754. It is contended by appellant, however, and conceded by the appellee, that if the mortgagee at the time of taking his mortgage to secure a pre-existing debt surrenders some security, agrees to extend the time of payment, or in some other respect increases his risk, this will afford a consideration which will render the mortgagee a purchaser for value. This position is undoubtedly sound. *O'Brien v. Fleckenstein*, 180 N. Y. 350, 73 N. E. 30, 105 Am. St. Rep. 768; *Sullivan Savings Institution v. Young*, 55 Iowa, 132, 7 N. W. 480; *Farmers' Nat. Bank v. James*, 13 Tex. Civ. App. 550, 36 S. W. 288. The major controversy before the trial court, as well as in the argument before us, was waged over the question whether the company had granted the Wrens a further extension of time for the payment of the notes at the time that it was agreed that the mortgage should not be given upon the Douglas property, but should later be given upon the Bisbee property for which the Douglas property would be exchanged. All of the evidence in the case is in the form of stipulations and depositions, nor is there any conflict therein, so that the evidence is as fully before us, and the determination of the ultimate facts may as readily and as ap-

propriately be made by us as by the trial court. With respect to this point the trial court expressly found that there was no agreement for such extension of time. In the view which we take of the case, it is immaterial whether there was such an extension of time, so we shall not review the testimony upon this point. The notes in controversy were given to the company by the Wrens for a pre-existing debt, but they were given at a time and under circumstances (sufficiently stated above) such that it cannot be gainsaid that they were upon an adequate consideration. If the mortgage upon the Missouri farm had been given contemporaneously with the notes, the mortgagee company would have been under that mortgage a purchaser for value. The promise of a mortgage upon the Missouri property, coupled with the compliance by the company with its part of the agreement in furnishing additional goods to freshen up the stock and in subordinating its claims to those of other creditors, gave the company that right which is familiarly denominated an equitable mortgage. It is a trite maxim that "equity will treat that as done which by agreement is to be done." Applying that maxim, we find vested in the company the full rights of a mortgagee for value of the Missouri farm. By subsequent agreement they waived this mortgage upon the condition that they should receive a mortgage upon property for which the Missouri farm should be exchanged. If a mortgage had actually been executed upon the Missouri farm, and had been surrendered in exchange for a mortgage upon the Douglas property for which the Missouri farm was exchanged, it would be unquestionable that the mortgage upon the Douglas property would be upon a valuable consideration and the company a purchaser for value under that mortgage. Applying again the maxim, it is equally clear that the surrender of the equitable mortgage was an adequate consideration for an equitable mortgage of the Douglas property, and that the company acquired an equitable mortgage of the Douglas property for a valuable consideration. Through an identical process of reasoning it follows that the company acquired by the similar transaction an equitable mortgage of the Bisbee property. This equitable mortgage was merged into a legal mortgage and duly recorded before the suit was brought by Manz to rescind the exchange of his Bisbee property for the Wrens' Douglas property, and before the company was informed or put upon notice of any equitable weakness in the Wrens' title to the Bisbee property. Under this mortgage the company was a purchaser for value of the Bisbee property. The conveyance by Manz to the Wrens of the Bisbee property was not a void conveyance, but a voidable conveyance—voidable by reason of the fraud perpetrated upon Manz in the exchange. The conveyance not being void, Manz's surviving interest ex-

isting by reason of the fraud was but an equity. This equity as against the company was lost when the company in good faith merged its equity—its equitable mortgage—in a legal mortgage upon that property. This is but an application of another trite maxim: "Where equities are equal, the legal title will prevail." It follows that the company is entitled to the foreclosure of its mortgage upon the property in question, and that the trial court in holding to the contrary was in error.

The cause is remanded to the district court, with instruction to that court to enter a decree of foreclosure as prayed.

KENT, C. J., and SLOAN and CAMPBELL, JJ., concur.

(11 Ariz. 408)

CITY OF GLOBE v. SLACK.

(Supreme Court of Arizona. March 27, 1908.)

1. PUBLIC LANDS—DISPOSAL—TOWN SITES—UNOCCUPIED LANDS—ENTRY BY COUNTY JUDGE—RIGHTS OF "OCCUPANT."

Rev. St. U. S. § 2387 (U. S. Comp. St. 1901, p. 1457), provides that, whenever any portion of the public lands have been occupied as a town site, it is lawful for the judge of the county court, in case the town is unincorporated, to enter the lands so occupied in trust for the benefit of the occupants thereof, the execution of which trust shall be regulated by the legislative authority of the territory, etc. *Held*, that the "occupants" for whom the trustees took the legal title under the act were those who were such at the time the town site was entered.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 4904-4906.]

2. SAME — STREETS — POWER OF TRUSTEE TO CREATE.

Rev. St. U. S. § 2387 (U. S. Comp. St. 1901, p. 1457), provides that, whenever any portion of the public lands have been occupied as a town site, the judge of the county court may enter the land so occupied in trust for the occupants thereof, the execution of such trust to be conducted under the regulations prescribed by legislative authority. Section 2391 (page 1459) provides that any act of a trustee not in conformity with such regulations is void. Comp. Laws Ariz. 1877, c. 80, made it the duty of the probate judge, whenever requested by the occupants of an unincorporated town, to enter a town site and to appoint three commissioners to have a survey made to conform as nearly as possible to the original plan of the town, and a plat made thereof, designating the lots containing improvements, with the names of the owners thereof, and to give notice of a date upon which the commissioners would sell off the lots, etc., to persons entitled thereto. *Held* that, while the occupants had a vested interest in the streets and alleys as they existed when the town site was entered, the commissioners had no authority under the act to create additional streets.

3. SAME.

It is competent for the Legislature, under Rev. St. U. S. § 2387 (U. S. Comp. St. 1901, p. 1457), to authorize the trustee of such town sites to divide unoccupied land within the town sites into lots and blocks and dispose of them for the public benefit, and to that end establish streets and alleys to such unoccupied land.

4. PARTIES — DEFENDANTS—NECESSARY PERSONS—TRUSTEES.

In a suit to enjoin interference with land entered under the act as a town site, in which

plaintiff claimed an equitable interest, through the trustee, as grantee of the original occupant, the trustee not being a party, it was not proper to adjudge that plaintiff was entitled to the exclusive possession of the tract.

Appeal from District Court, Gila County; before Justice Frederick S. Nave.

Suit by Charles W. Slack against the city of Globe, a municipal corporation, to enjoin defendant from entering on certain land. From a decree enjoining defendant from entering upon the land, and adjudging exclusive possession thereof in plaintiff, defendant appeals. Judgment modified and affirmed.

George R. Hill, for appellant. L. L. Hemry, for appellee.

CAMPBELL, J. In May, 1882, the probate judge of Gila county entered the town site of what is now the city of Globe under the provisions of the act of Congress approved March 2, 1867 (14 Stat. 541, c. 177, now section 2387, Rev. St. [U. S. Comp. St. 1901, p. 1457]), and thereafter a patent to the same was issued to him by the government. At the time of the entry one Charles A. McDonell was an occupant of a tract of land within the town site. A commission was appointed in conformity with the provisions of the act of the territorial Legislature approved February 16, 1871 (chapter 80, Comp. Laws 1877), who caused the town site to be surveyed into lots, blocks, and streets, and caused lists to be made of the owners and occupants of lots in said town site, and caused a notice to be published that on a certain date said commissioners would proceed to set off to the persons entitled to the same according to their respective interests the lots and squares of ground to which each of the occupants thereof should be entitled. Pursuant to such proceedings, and in the manner provided by statute, the commissioners allotted and set apart to the said McDonell, as such occupant, lot 1, in block 74, of the town site, according to the official map prepared by the commissioners. Thereafter McDonell paid to the probate judge the pro rata assessed against the lot and took a deed for the premises. The official map made and filed by the commissioners showed a street between blocks 65 and 74, which was designated thereon as "Hill street." At the time of the entry of the town site, and since 1878, McDonell occupied a dwelling which was upon lot 1, block 74, as subsequently surveyed. At that time McDonell also had a barn and closet within what is designated upon the map as Hill street. He continued to occupy the premises until May, 1889, when he sold and conveyed to Charles W. Slack, appellee herein, by deed, lot 1, in block 74, according to the plat. Slack thereupon took possession of the premises and of the barn and closet in Hill street, and has been in possession of the same ever since. In 1880 he extended a fence from the barn in Hill street to the corner of the lot, and has maintained the same since that time. The said portion so oc-

cupled by McDonell and Slack has never been used for street purposes.

This action was brought by Slack to obtain a writ of injunction against the city of Globe, its agents and officers, to restrain them from entering upon the premises or in any manner interfering with his exclusive use and occupation of the same, and for a judgment decreeing him to be entitled to the exclusive possession of the tract of land embraced within Hill street between blocks 65 and 74. It appears from the complaint that the city desires to open up the street as platted, and threatens to remove and destroy the fence and buildings maintained by Slack thereon. Upon the trial the court found the facts as above set forth, and "that plaintiff claims title to said premises solely by reason of said deed from McDonell and his said occupancy of said Hill street; that plaintiff's occupation of said portion of Hill street, to wit, that occupied by the barn and closet aforesaid, has been peaceful, actual, open, notorious, and uninterrupted," and gave judgment restraining the city of Globe, its agents and officers, from in any manner entering upon or in any manner interfering with plaintiff's exclusive possession, use, occupation, and enjoyment of the portion of the land described in the judgment, and within which is included some of the land shown by the map to be Hill street, and adjudged that the plaintiff was entitled to the exclusive possession of the tract of land as so described. Appellee's contentions as to his rights within the strip of land platted as Hill street are three-fold: First, that he has the equitable title as an occupant under the statute, for whom the probate judge holds the legal title; second, that the street over the strip of land in controversy has never been lawfully established, and therefore the city has no interest therein; third, that he has gained title by adverse possession.

As to the first contention it is to be observed that McDonell was the occupant at the time the town site was entered, and has not conveyed any rights to the strip in controversy he may have had as such occupant to appellee. His deed is only for lot 1, in block 74, as described on the plat. Appellee's occupancy of Hill street dates only from 1889, while the entry was made in 1882. The occupants for whom the trustee took the legal title, who are entitled to claim the lands occupied, are those who were such at the time the town site was entered. *Martin v. Hoff*, 7 Ariz. 247, 64 Pac. 445.

In considering the question whether the street has ever been lawfully established, we must examine the legislation of Congress and of this territory. The act of Congress under which the town site was entered provides:

"Sec. 2387. Whenever any portion of the public lands have been or may be settled upon and occupied as a town site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if

not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereunder, to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated."

"Sec. 2391. Any act of the trustees not made in conformity to the regulations alluded to in section twenty-three hundred and eighty-seven shall be void." [U. S. Comp. St. 1901, p. 1459.]

The act of the territorial Legislature of February 16, 1871 (Laws 1871, p. 57; chapter 80, Comp. Laws 1877), in force at the time this town site was entered, made it the duty of the probate judge of the county, whenever called upon by any of the occupants of an unincorporated town situated upon public lands, to enter the town site under the act of Congress, and provided that after such entry he should appoint three commissioners, whose duty it was to cause a survey to be made "conforming as near as may be to the original plan of the town and cause a plat thereof to be made, designating on such plat the lots or squares on which improvements are standing, with the names of the owner or owners thereof, together with the value of such improvements. They shall also make out a list of all owners or occupants of lots, or parts, in said town site, including therein all persons who shall own or be possessed, either actually or constructively, of any part or lot situated in said town site." It was further provided that when the plat and list was completed notice should be given by publication designating a day upon which the commissioners would proceed to set off the lots, squares, or grounds to the persons entitled to the same according to their respective interests.

Neither the act of Congress nor that of the territorial Legislature specifically make provision for the dedication of streets, nor for the disposal by the probate judge of any part of the lands for other public purposes. The occupants, however, had a vested interest in the streets and alleys as they existed at the time the town site was entered, and the trustee had no authority to destroy them. *Ashby v. Hall*, 119 U. S. 526, 7 Sup. Ct. 308, 30 L. Ed. 469. But no authority was given to establish new ones. The authority of the commissioners appointed by the probate judge was limited to causing a survey to be made "conforming as near as may be to the original plan of the town," causing a plat thereof to be made, with a list of the occupants, and to set off to the occupants the lots to which they were entitled. In attempting to create additional streets; however desirable such a

general plan may have been, they exceeded their authority, and the streets which they platted, existing only on paper, were not lawfully established. *Bingham v. City of Walla Walla*, 3 Wash. T. 68, 13 Pac. 408; *Helena v. Albertose*, 8 Mont. 499, 20 Pac. 817; *Pueblo v. Budd*, 19 Colo. 579, 36 Pac. 599; *Cerf v. Pfleging*, 94 Cal. 131, 29 Pac. 417. Nor does it appear that there has been a dedication of the land for street purposes by the occupants. We have no doubt the trustees of such town sites may be authorized by the Legislature to divide into lots and blocks unoccupied lands within the town site and to dispose of them for the benefit of the community, and to that end to establish streets and alleys through such unoccupied land to afford convenient means of access to such lots; but this street was not established under such legislative authority. We express no opinion as to what rights the town would have acquired in the land, had it, after being platted as a street, been actually opened and used as such by the common consent of the occupants, or if it was made to appear that the occupants assented to a dedication of the land as a street to be opened and used as such at such future time as the needs of the town might require.

Since it does not appear that the so-called Hill street has ever been lawfully established, the city of Globe, as a municipality, has no interest therein. The legal title is still in the probate judge, unless appellee has acquired it by reason of adverse possession. It is not necessary to examine the equitable rights of McDonell as an occupant at the time of the entry of the town site, or to determine whether, if he had rights, he has waived or abandoned them; nor is it necessary to determine whether appellee has acquired rights by adverse possession. The City of Globe threatens, without right, to intrude upon land of which appellee is in possession and to which he claims title. It was proper, therefore, for the trial court to enjoin the city, its agents and officers, and thus protect the possession of appellee. It was not necessary, nor proper, in this view of the case, the trustee not being a party, for the court to adjudge that appellee is entitled to the exclusive possession of the tract of land in controversy.

The decree is modified, by striking out that portion of it, and, as so modified, is affirmed.

KENT, C. J., and SLOAN, J., concur.

KNIPE v. ANACONDA COPPER MINING CO. et al.

(Supreme Court of Montana. April 14, 1908.)

1. APPEAL — HARMLESS ERROR — ERRORS NOT AFFECTING RESULT.

Where, under any view of the evidence, a verdict for plaintiff could not be sustained, and the court should have directed a verdict for defendant, errors in the admission of evidence on a matter not pertinent to the issue and in instructions were not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4034.]

2. MINES AND MINERALS—LIABILITIES INCIDENT TO WORKING MINES — INJURIES TO SURFACE.

In an action by a grantee of the surface holding under deeds reserving the minerals with a right to mine by means of underground workings against the grantee of the rights reserved under conveyances from the same grantor for injuries caused by mining operations to improvements on plaintiff's land, evidence held not to show that defendant caused or contributed to the injury complained of, defeating a recovery, whether plaintiff under the deeds is entitled to an absolute right to subjacent and lateral support to the surface, or whether he has no right to complain of any injury except as results from want of ordinary care in the conduct of mining operations.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Action by Alpheus W. Knipe against the Anaconda Copper Mining Company and the Washoe Copper Company. The cause was dismissed as to the first defendant, and judgment was rendered in favor of the second defendant, and plaintiff appeals. Affirmed.

John J. McHatton, for appellant. A. J. Shores, C. F. Kelley, and D. Gay Stivers, for respondent.

BRANTLY, C. J. This action was brought to recover a judgment for damages against the defendants alleged to have been caused by mining operations conducted by them beneath the surface of plaintiff's land and lands in the immediate vicinity thereof. Some time prior to the conclusion of the trial the action was dismissed as to the Anaconda Copper Mining Company, and thereafter it proceeded as against the Washoe Copper Company alone. For all the land included in what is known as the Leggat-Foster addition to the city of Butte, in Silver Bow county, patent was issued to John A. Leggat and others in 1880, the application being based upon a placer location. Subsequently the land covered by the patent, or a portion of it, was platted into blocks and lots and made an addition to the city. It is alleged in the complaint, substantially, that the plaintiff is and was at the times mentioned the owner of lots 1 and 22 in block 11 of this addition; that he is and was entitled to the quiet and peaceable possession, use, and occupation of the surface thereof, and the earth underlying them to a depth necessary to permit the maintenance of buildings and improvements thereon; that he has held and maintained thereon certain

buildings for residence and business purposes; that neither the defendants nor any other person or persons have or had any right to carry on any mining or to do any other work beneath the surface thereof, or to do any blasting or other act, or to omit to do any act with reference to the surface of said lots, or any underground portions thereof, which would disturb the lots or the surface thereof in its natural condition, or move or disturb the buildings thereon, or in any wise interfere with plaintiff's quiet and peaceable use and enjoyment thereof; that heretofore, and particularly during the year 1905, and during the possession and ownership of the plaintiff, the defendant has been engaged in carrying on underground mining operations under the surface of plaintiff's premises and in lands in the immediate vicinity thereof, without plaintiff's consent; that it has carelessly, negligently, and wrongfully made excavations by drilling and blasting, using large quantities of powder, thus unnecessarily and carelessly disturbing plaintiff's right and title to the surface and the buildings thereon; that it has left the excavations so made in such an unprotected condition that the surface, being without its natural support, has sunk and settled and is rendered unfit for use, and has cracked and injured plaintiff's buildings; and that by reason of the premises plaintiff has been injured in the sum of \$10,000. Judgment is demanded for this amount. In a second cause of action equitable relief is sought by way of injunction to prevent further injury, which it is alleged is likely to result from a continuance of defendant's mining operations. In its answer the defendant Washoe Copper Company, after admitting its corporate capacity, alleges that it is the owner of all the mineral, veins, lodes, ledges, or mineral-bearing quartz and rock, or earth contained in, or belonging to, the lots claimed by plaintiff, with the right to mine for and extract the ores therein by means of underground workings to within 50 feet of the natural surface of the earth in such manner as not to destroy or interfere with the surface. It then denies generally all the other allegations of the complaint. The reply puts in issue the claim of the defendant to the ores underlying plaintiff's lots and its alleged right to mine and extract the same. A trial of the issue thus framed resulted in a verdict and judgment for the defendant. The appeal is from an order denying plaintiff's motion for a new trial. Plaintiff's contention is that the motion should have been granted because of errors in admitting certain evidence and in charging the jury, and because the evidence is insufficient to justify the verdict. We are of the opinion that the motion was properly denied, for the reason that the evidence admitted at the trial would not from any point of view have sustained a verdict for plaintiff for any amount. For this reason it is not a material inquiry whether there was error in admitting evidence or in submitting the charge to the

Grant street, but that he did not know when this work had been done. He expressed the opinion that, if the cracking and damage appeared before these excavations were made, the damage could not be attributed to them. None of the witnesses on the part of the plaintiff had any knowledge of the conditions underground at the time the damage was observed in December, 1902, or January, 1903. It appeared from the testimony of other witnesses, that the excavations to the westward of the Cambers shaft, to the existence of which plaintiff attributed the injury, were not made until long after the injury occurred. In fact, it appears, without contradiction, that none of these excavations were made until as late as April, 1905, or just before this action was brought. It further appears that, owing to extensive mining operations by several other companies to the north of plaintiff's premises, there has been an extensive movement of the earth toward the south, accompanied by a subsidence of the surface and a series of cracks, extending generally from west to east, through the central portion of the city, resulting in damage to all buildings either on the line thereof or in close proximity thereto. One of these openings, attended by a decided change of the level of the surface for some distance on either side of it, extends through the Leggat-Foster addition to the north of Galena street, traceable for 1,100 feet westward and 400 or 500 feet eastward from Grant street, affecting buildings having the same situation relative to it, as those of plaintiff, and in the same way, and to a like extent. This is indicated by the dotted line extending through blocks 10 and 11. It does not appear that the operations in the Cambers mine have contributed in any way to this condition, or that they have aggravated it; so that a verdict for plaintiff, upon the issue as presented by the pleadings, could not have been justified by the evidence.

But counsel for appellant contends that plaintiff was entitled to a verdict for nominal damages in any event, because the evidence shows without contradiction that the blasting in the Cambers mine during the months of April and May, 1905, was attended by concussions so violent as to break a window in one of plaintiff's buildings on lot 1, and rendered it so uncomfortable that a tenant then occupying it could not remain there. Assuming that under the allegations of the complaint disturbance from concussion could properly be proved as an element of damage, the proof fails to show that the particular disturbance was the result of defendant's operations either alone or in connection with other mining in the vicinity, also attended by blasting. At best the testimony on this subject left the jury no substantial basis upon which to make a finding in favor of the plaintiff.

A considerable portion of the argument of

counsel in their briefs is devoted to the question whether, under the reservations in plaintiff's deeds, he is entitled to an absolute right to subjacent and lateral support to the surface of his lots and the quiet enjoyment thereof, or whether, having purchased subject to the reservation in favor of the owner of the mineral rights, he has no right to complain of any injury or disturbance, except such as results from the want of ordinary care in the conduct of mining operations necessary to prospect for and extract ore. For the purposes of this case it is not necessary to discuss or decide this question. Whether we should adopt the one or the other view the result would be the same; for, since the evidence fails to show that the defendant caused or contributed to the injury complained of, it is a matter of no consequence what rule of law is applicable.

Let the order be affirmed.

Affirmed.

HOLLOWAY and SMITH, JJ., concur.

(14 N.M. 442)

READE v. DE LEA.

(Supreme Court of New Mexico. Feb. 26, 1908.)

1. HUSBAND AND WIFE—PROPERTY RIGHTS—SPANISH LAW—WHAT LAW GOVERNS.

It is the settled doctrine of this court that property rights of husband and wife are, except as modified by local statute, to be judged by the Spanish law in force in this territory at the date of its acquisition from Mexico.

2. SAME—COMMUNITY PROPERTY—RIGHT OF WIFE DURING MARRIAGE RELATION.

Under the community system, which was a part of that system of law, the wife had, until the termination of the marriage relation, no vested or tangible interest in the community property, and her interest therein was a mere expectancy, similar to that which an heir possesses in the estate of an ancestor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 917.]

3. SAME—RIGHT OF HUSBAND.

Under that system the husband, on the other hand, was, so long as the marriage relation existed, for all practical purposes, the real and veritable owner of the community property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 917.]

4. SAME—SALE BY HUSBAND.

Under that system the husband, subject always to the limitation that he should not act in fraud of his wife's expectancy, had, during the marriage relation, full power to sell community property, and it was not necessary that his wife join in the conveyance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 930.]

5. CONSTITUTIONAL LAW—VESTED RIGHTS—LEGISLATIVE INTERFERENCE.

The right of alienation by his personal deed thus given the husband attaches as a vested right in community property, as such is acquired, and such right is not subject to legislative interference.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 930.]

6. SAME.

The act of March 20, 1901 (Laws 1901, p. 113, c. 62, § 6), providing that neither husband nor wife shall dispose of real estate ac-

quired during coverture by onerous title, unless both join in the execution of the deed, does not affect such property acquired prior to the passage of the act.

7. SAME.

A deed, executed subsequent to that act, for property deeded to the husband, for valuable consideration, previous to the act, and during the marriage relation, conveys the title, although such deed was signed only by the husband.

Abbott, J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Dona Ana County; before Justice Frank W. Parker.

Suit to quiet title by D. M. Reade against Pilar S. De Lea. Judgment for plaintiff, and defendant appeals. Affirmed.

One Adolpho Lea and the defendant Pilar S. De Lea, were married in December, 1851, and continued to be husband and wife until the former's death intestate, in Dona Ana county, on April 23, 1902. The premises involved were acquired by two conveyances, running to the husband, Adolpho, dated, respectively, April 6, 1889, and June 14, 1893. In April, 1902, and thus only a few weeks before his death, the husband, for a valuable consideration, executed to D. M. Reade a warranty deed for the land in dispute. The wife did not join in the deed. Reade brought suit to quiet the title against the wife, and the trial court, holding that she had no interest in the land, rendered judgment for Reade, from which decision she prosecutes this appeal.

Numa C. Frenger, for appellant. Fall & Moore and Moore & Paxton, for appellee.

POPE, J. (after stating the facts as above). The case turns upon the effect of the deed from Adolpho De Lea to Reade. The appellant contends that it conveyed no title because the wife did not join, as required by section 6, c. 62, p. 113, Laws 1901, which provides that "neither husband nor wife shall convey, mortgage, incur or dispose of any real estate or legal or equitable interest therein acquired during coverture by onerous title unless both join in the execution thereof." The appellee concedes that the property was acquired during coverture by onerous title. He admits that, if that act is applicable, the judgment was wrong. He contends, however, that the act cannot apply to property acquired previous to its date, for the reason that, as to such, vested rights existed in the husband, which it was beyond the power of the Legislature to take away by requiring the wife to join. Was the trial court right in sustaining this view? This involves an inquiry as to what were the rights of the husband in the property prior to the act of 1901.

This court has, in a number of cases, dealt with questions of property rights between husband and wife, and has uniformly recognized the civil law, in the absence of specific statute, as controlling. A brief review of former decisions of this court, upon this point, will demonstrate this. In *Chavez v. Mc-*

Knight, 1 N. M. 148, decided in 1857, opinion by Judge Brocchus, it was held that the civil law was the rule of practice in this territory, and that by its terms the wife acquires a tacit lien or mortgage upon the property of the husband, to the amount of the dotal property of which he became possessed through her. This case has been referred to in one or two very recent decisions of this court. *Ilfeld v. De Baca*, 89 Pac. 244; *In re Myer*, 89 Pac. 246. In *Martinez v. Lucero*, 1 N. M. 208, decided the same year by the same judge, it was held, applying the civil law, that during marriage the administration of the dotal property belongs exclusively to the husband, and the wife cannot during the conjugal association recover it from her husband, without showing waste or dissipation of it by her husband. In *Laird v. Upton*, 8 N. M. 409, 415, 45 Pac. 1010 (decision in 1897, by Mr. Justice Collier), reference is made to the community system, and the presumption inhering in that system, that all acquisitions during marriage are community property. In *Barnett v. Barnett*, 9 N. M. 207, 50 Pac. 337, opinion by Chief Justice Smith, it was held that, in the absence of any statute ascertaining the rights of husband and wife, after legal separation, and during the lives of each, the civil law of Spain governs, and that under this law the wife, by adultery, forfeits the right, which that law gives on dissolution of the community, to one-half of the community property. In *Crary v. Field*, 9 N. M. 229, 50 Pac. 342, Id., 10 N. M. 257, 61 Pac. 118, the right of the surviving husband, under the civil law, to sell so much of the community realty as may be necessary to pay the community debts is declared, and the validity of such a sale is upheld. In *Neher v. Armijo*, 9 N. M. 325, 54 Pac. 236, opinion by Mr. Justice Crumpacker, it is held, announcing a familiar civil-law doctrine, that the legal presumption that property acquired by either husband or wife during the matrimony is community property may be overcome by clear and conclusive proof to the contrary. In *Gilllett v. Warren*, 10 N. M. 523, 542, 62 Pac. 975 (opinion by Mr. Justice Parker), the community system is recognized as in force, and it was there held that the surviving husband, not only had the power under the system to sell community real estate in payment of community debts (as ruled in *Crary v. Field*, supra), but community personality as well. In *Strong v. Eakin*, 11 N. M. 107, 66 Pac. 539 (opinion by Mr. Justice McFie), the Spanish law as to community or acquist property is again held to be in force, in so far as not abrogated by statute; and, interpreting that law, it is held that all property acquired and held by husband and wife during coverture is presumed to be community property, and to be subject to community debts, and that every debt contracted during marriage is likewise presumed to be a community debt. In *Brown v. Lockhart*, 12 N. M. 10, 71 Pac. 1086 (opinion by Chief Justice Mills), the doctrines announced

In *Strong v. Eakin*, supra, are reiterated. In *McAllister v. Hutchison*, 12 N. M. 111, 117, 75 Pac. 41 (opinion by Mr. Justice Baker), the civil-law community system is recognized as governing the alienation of marital property. From the foregoing we consider it declared, by the harmonious decisions of this court, both before and since the introduction of the common law by Act Jan. 7, 1876 (Comp. Laws, § 2871), that the civil law controls the present case, unless modified by the act of 1901. Indeed, this is not controverted by counsel in their briefs.

It only remains, therefore, to determine, first, what was the nature of the community system as to matters of property; second, what were the husband's rights as to such property (the marriage still existing), at the date of the act of March 20, 1901; and, third, what effect, if any, that act had upon such rights. The general principles applicable to the community system are declared, with great unanimity, by the authorities. Upon marriage the law recognized a partnership between the husband and wife, as to property acquired during such relation, by title not gratuitous. Schmidt, *Law of Spain and Mexico*, pp. 12-14. The relationship has been variously described as a community of property (Ballinger on Community Property, § 18), a conjugal partnership (*Childers v. Johnson*, 6 La. Ann. 634; *Mable v. Whittaker*, 10 Wash. 662, 39 Pac. 172), a matrimonial copartnership (*Ord v. De La Guerra*, 18 Cal. 67), a property partnership (*Fuller v. Ferguson*, 26 Cal. 569). Of course the word "partnership," as thus used, is a matter of mere analogy, since the marital relation, viewed in its business aspect, differs very evidently from the commercial partnership. Ballinger, § 16. Under the community system the husband has the fullest power of management and disposition of the community property, subject only to the condition that he shall not act in fraud of his wife. He has the right to sell community property, real or personal, during her lifetime, without her consent. *Succession of Cason*, 32 La. Ann. 792; *Brewer v. Wall*, 23 Tex. 585, 76 Am. Dec. 76; *McAllister v. Hutchison*, 12 N. M. 117, 75 Pac. 41; *Garrozi v. Dastas*, 204 U. S. 64, 27 Sup. Ct. 224, 51 L. Ed. 369. He might give it away (*Smith v. Smith*, 12 Cal. 216, 73 Am. Dec. 535; *Lord v. Hough*, 43 Cal. 581; *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; *Trahan's Heirs v. Trahan*, 8 La. Ann. 455), at least to relatives, in moderate amount (Schmidt, art. 54; 1 *Febrero Mexicano*, c. 10, § 20, p. 226). In all suits affecting the community property the wife is not a party, but such suits must be brought by the husband (*Mott v. Smith*, 16 Cal. 534; *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; *Moseley v. Heney*, 66 Cal. 478, 6 Pac. 134; *Murphy v. Coffey*, 33 Tex. 508) or against him (*Althof v. Conheim*, 38 Cal. 230, 99 Am. Dec. 363). If the community property be stolen, the in-

dictment alleges that he is the owner (*State v. Gaffery*, 12 La. Ann. 265), and his wife's consent to the taking of the property affords the thief no defense (*People v. Swalm*, 80 Cal. 46, 22 Pac. 67, 13 Am. St. Rep. 96). While all these characteristics of the community are generally admitted by the law-writers, a very marked difference of authority is encountered when we come to define the relative estates of the spouses in the community, the precise question here. The "perplexity" of this question is noted by Mr. Ballinger in section 32 of his very useful work. The divergence of opinion is present here, for it is contended by the appellants that the wife is the half owner of the community estate, that the plenary powers given the husband are purely as an agent or trustee, and not of his own right, and that, as a corollary from this, the Legislature may change or limit these provisions without interfering with vested rights; the argument being that there can be no vested right to administer a trust. On the other hand, it is urged by appellees that the complete dominion of the husband over the community estate is a property interest, held as a present personal right, and this vested beyond possibility of legislative interference.

The cases containing expressions upon the relative estates of husband and wife under the community law are quite numerous, but an examination of these will develop that such expressions are usually made arguendo, and often without distinguishing between such rights during the marriage relation and after its dissolution. The later decisions, also, are more or less influenced in their views by statute and by modern tendency toward greater property rights for the weaker sex. In dealing with the matter we have found the greatest help in the early authorities from the civil-law states, where the courts have dealt with the subject in the very light of the ancient law, aided by a bar trained under that system, and where they have thus, uninfluenced by modern thought, declared what the Spanish law was, not what, in the light of advancing civilization, it should have been.

Consulting these authorities, it is found that those from the state of Texas, countenance at least the first of the propositions urged on behalf of the appellants, and in Washington are found decisions sustaining all three. Thus it was said in the early Texas cases of *Wright v. Hayes' Adm'r*, 10 Tex. 130, 60 Am. Dec. 200: "The rights of property of husband and wife in the effects of the community are perfectly equivalent to each other. The difference is this, that during coverture her rights are passive; his are active." Proceeding to hold that, upon abandonment of the wife by the husband, the wife has the power to manage and sell community property, the court observed: "Her right in that property is equal to that of the husband. During his presence he has the administration, subject to the trust incumbered upon the property. This

right of control must necessarily cease when he can and will no longer exercise it; and the wife, the other joint owner, must be vested with the authority, or it cannot exist anywhere." This right of the wife to administer the community property upon abandonment by her husband has been repeatedly recognized by the Texas courts (*Cheek v. Bellows*, 17 Tex. 613, 67 Am. Dec. 686; *Veramendi v. Hutchins*, 48 Tex. 550; *Zimpelman v. Robb*, 53 Tex. 274), and has been recognized in the case of the husband being confined in the penitentiary (*Slator v. Neal*, 64 Tex. 222), and in one case it was held that this applied even in the case of his insanity (*Forbes v. Moore*, 32 Tex. 196). So far, however, as *Wright v. Hayes' Adm'r*, and the subsequent Texas cases above cited tend to declare that the wife's and husband's titles are legally equal under the community system, they are discountenanced by the later cases of *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87, and *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909, which declare that the spouses have "an equal beneficial interest." This modification of the original Texas doctrine is pointed out in *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 1030, a case from the other jurisdiction, supporting the enlarged view of the wife's rights under the community system. The extent of the wife's rights in the Texas community are also discussed by Judge Maxey, in *Kircher v. Murray* (C. C.) 54 Fed. 626, where, upon a full review of the Texas cases, she is declared to have only "an equitable interest and title."

In Washington the early case of *Holyoke v. Jackson*, 3 Wash. T. 235, 3 Pac. 841, went to the full length of the propositions above named. This being the authority principally relied upon by appellant, we shall consider it with some detail. In that case it appears that the Legislature of 1879 passed an act similar to our act of 1901, requiring the wife to join with the husband in disposing of community property. The husband, without joining his wife, and subsequent to that law, contracted to convey community property. The validity of that act was the question. It was there said: "It [the community] is like a partnership, in that some property, coming from or through one or the other, or both of the individuals, forms for both a common stock, which bears the losses and received the profits of its management, and which is liable for individual debts, but it is unlike, in that there is no regard paid to proportionate contribution, service, or business fidelity, that each individual, once in it, is incapable of disposing of his or her interest, and that both are powerless to escape from the relationship, to vary its terms, or to distribute its assets or its profits. In fixity of constitution a community resembles a corporation. It is similar to a corporation in this, also, that the state originates it, and that its powers and liabilities are ordained by statute. In it the proprietary interests of husband and wife are equal, and those interests do not seem to be

united merely, but unified; not mixed or blent, but identified. It is *sui generis*—a creature of the statute. By virtue of the statute this husband and wife creature acquires property. That property must be procurable, manageable, convertible, and transferable in some way. In somebody must be vested a power, in behalf of the community, to deal and dispose of it. To somebody it must go in case of death or divorce. Its exemptions and liabilities as to indebtedness must be defined. All this is regulated by statute. Management and disposition may be vested in either one or both of the members. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community. This power the statute of 1873 chose to lay upon the husband, while the statute of 1879 thought proper to take it from the husband, and lay it upon the husband and wife together. As the husband's 'like absolute power of disposition as of his own separate estate,' bestowed by the ninth section of the act of 1873, was a mere trust, conferred upon him as a member and head of the community, in trust for the community, and not a proprietary right, it was perfectly competent for the Legislature of 1879 to take it from him and assign it to himself and his wife jointly. This was done. When, therefore, in 1880, the plaintiff in error, without his wife, entered into an agreement to sell the land in question, he agreed to do what he himself, by himself, could not do, and, therefore, could not agree to do. To make an actual sale or conveyance without his wife he had no power. The law says such a thing should not be done." There are similar expressions in *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. 172. It is unnecessary to consider how far the Washington decisions are influenced by the fact that the community system in that state is, as pointed out in *Brotton v. Langert*, 1 Wash. St. 79, 23 Pac. 688, purely a creature of local statute, nor how far *Holyoke v. Jackson* is discredited by certain expressions in the later case of *Sadler v. Niesz*, 5 Wash. St. 182, 31 Pac. 630, 1030, from the same court, or by the fact that *Hill v. Young*, 7 Wash. 33, 34 Pac. 144, another Washington case, seems to consider as an open question the very point ruled by *Holyoke v. Jackson*. We forbear the discussion of these questions, for the reason that we believe the case of *Holyoke v. Jackson*, even conceding to it all that may be claimed upon these matters of detracting, is against the great weight of authority explanatory of the Spanish community system, and its assumptions as to the rights of the spouses are contrary to the spirit of the civil law. These authorities we will proceed to consider in detail.

Among the earliest decisions are those from Louisiana. That court is entitled to peculiar respect, because of the high learning of its early judges in civil-law matters.

Perhaps the first accessible case dealing with these questions is *Dixon v. Dixon's Executors*, 4 La. 188, 23 Am. Dec. 478, decided in 1832. In that case there are expressions to the effect that the wife has a present right to a share of the acquet property, arising not as a result of dissolution of the marriage, but as originating out of the very marriage contract. It is recognized in that case, however, that the doctrine thus announced is contrary to authority, for we find the following language: "We are aware the principles here recognized do not correspond with the doctrine taught by the highest authorities in the French law, by Dumonlin, Pothier, and Toullier. They hold that the wife has no right whatsoever until the marriage is dissolved, or the community otherwise terminates. That she has nothing but a mere hope or expectancy." The court seeks, however, to distinguish the French law from the law of Louisiana, upon the ground that the latter (borrowed from the Spanish law) permits the wife, upon the death of her husband, to bring an action to set aside an alienation made in fraud of her, by him, during coverture. It is argued as follows: "The exercise of such a right does appear to us utterly opposed to the principle that the wife has no interest in the property until the community is dissolved; for, if she has not, how can she maintain an action to set aside the alienation?" The effect of this case, as authority and an answer to the argument it makes, is found in the later and leading case of *Gulce v. Lawrence*, 2 La. Ann. 228, decided in 1847. In that case it is distinctly held that the laws of Louisiana, like those of Spain, recognize no title in the wife, during marriage, to any part of the acquets, and that she becomes the owner of the one-half only after the dissolution of the marriage. In speaking to this point the court says: "The laws of Louisiana have never recognized a title, in the wife, during marriage, to one-half of the acquets and gains. The rule of the Spanish law on that subject is laid down by Febrero, with his usual precision. 'The ownership of the wife,' says that author 'is revocable and fictitious during marriage. As long as the husband lives, and the marriage is not dissolved, the wife must not say that she has gananciales, nor is she to prevent the husband from using them, under pretext that the law gives her one-half. But, soluto matrimonio, she becomes irrevocably the owner of one undivided half, in the manner provided by law for ordinary joint ownership. The husband is, during the marriage, real y verdadera dueño de todos, y tiene en el efecto de su dominio irrevocable.' Febrero Adic. tomo 1 y 4, pt. 2, bk. 1, c. 4, par. 1, Nos. 29, 30; Pothier, *Communauté*, p. 35 and following; L 2 Toullier, c. 2, Nos. 2-31; 14 Duranton, *Droit Franc.* p. 281 and following; 10 Dalloz, *Jurispr.* p. 198 and following. The provisions of our Code on the same subject are the embodiment of those of the Spanish law, without any change. The husband is head and master of

the community, and has power to alienate the immovables which compose it, by an incumbered title, without consent or permission of his wife. Civ. Code. art. 2373."

Referring to the argument above quoted from *Dixon v. Dixon's Ex'rs*, supra, it is said: "With the reasoning of the court in 4 La. 188, 23 Am. Dec. 478, we cannot agree, although the conclusions to which they come may have been correct on other grounds. The difference supposed by the court to exist between our Code and that of France is imaginary. Under both cases of fraud are excepted from the general power given to the husband to alienate the acquets and gains. See 7 *Slercy*, p. 401, § 1. The proviso of article 2373 cannot be construed as giving or recognizing a title to or in the wife. As well might it be said that children have a title in the property of their father, because he is prohibited from disposing of it in fraud of their legitime." We may interpolate here the observation that the right of the wife, during the husband's lifetime, to proceed in equity to set aside a conveyance in fraud even of dower is well established. *Smith v. Smith*, 12 Cal. 216, 73 Am. Dec. 533, citing *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; *Stroup v. Stroup*, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 527; *Petty v. Petty*, 4 B. Mon. (Ky.) 215, 39 Am. Dec. 502. And yet dower under the common-law system is a mere expectancy, constituting, during the husband's lifetime no vested right, and being subject to legislative repeal or limitation at any time before it vested by the husband's death. *Randall v. Krieger*, 23 Wall. (U. S.) 148, 23 L. Ed. 124; *Cooley's Cons. Limit.* (7th Ed.) pp. 513, 514; *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256, and note; monographic note to *Rose v. Rose*, 84 Am. St. Rep. 430, 446.

Recurring from this observation upon a common-law parallelism to the Louisiana authorities, we find language similar to *Gulce v. Lawrence* in *Succession of Boyer*, 36 La. Ann. 506, 511, where it is said: "Under our law the husband is head and master of the community. During its existence he may dispose of its effects as he pleases, subject only to the right of the surviving wife, upon its dissolution, to proceed against his heirs for the one-half of the same, provided she can prove that the transfer or other disposition was made with the fraudulent intent to injure her. In fact, the wife has during the marriage no vested proprietary interest in any property composing the community, but only an inchoate right, which entitles her to the hope or expectation that, if she survives her husband, she can receive or own half of the property that may be left after payment of the community debts." In *Succession of Cason*, 32 La. Ann. 792, it was said: "During the existence of the community the husband is practically the owner of the community property."

In the more recent Louisiana cases the

doctrine of *Gulce v. Lawrence* is consistently followed, and that case also has the sanction of as high authority as the federal Supreme Court. In the recent case of *Garrozi v. Dastas*, 204 U. S. 64, 27 Sup. Ct. 224, 51 L. Ed. 369, the appeal was from the United States District Court from Porto Rico. The trial court held that, upon dissolution, by divorce, of the marriage and the adjustment of the community rights there involved, the husband was chargeable with unreasonable or extravagant expenditures. In holding this to be error, and in upholding the very broad powers of the husband during marriage, it is said by the court, speaking through Mr. Justice White, himself a Louisiana lawyer and jurist: "The question, therefore, is this: Is the power of the husband, as the head and master and administrator of the community, in its nature so restricted that, in the absence of express limitation he can, after dissolution of the community, be called to account and compelled to return the community money which he has actually expended during the existence of the community, because, in the judgment of the court, such expenses may be deemed to have been not suitable to his situation in life, extravagant, or even reckless? To answer this question in the affirmative would be to destroy the whole fabric of the community system, as prevailing, not only under the Spanish and Porto Rican Codes, but as obtaining in those countries of the continent of Europe and here, where that system prevails. We need not consider whether the community was derived from the Roman law, from an express provision of the early Saxon law, or from the ancient customary law of the continent; for, however derived, the very foundation of the community and its efficacious existence depend on the power of the husband, during the marriage, over the community, and his right, in the absence of fraud or express legislative restrictions, to deal with the community and its assets as the owner thereof. The purpose of the community, as expounded from the earliest times, whilst securing to the wife on the dissolution of the marriage an equal portion of the net results of the common industry, common economy, and common sacrifice, was yet, as a matter of necessity, during the existence of the community, not to render the community inept and valueless to both parties, by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and, consequently, inefficient agent."

It is pointed out in the decision that, under the law of France prior to the Napoleon Code, "the extent of the power of the husband, as to the community property, was so great that it was considered, in theory, that the rights of the wife in or to the community were not merely dormant during marriage, but had no existence whatever," and "that the wife, during the existence of the

community, had but a mere hope or expectancy, and hence no interest whatever in the property or goods of the community until the community was dissolved," and that from this arose the legal epigram "that the community was a partnership which only commenced on its termination." Referring to the power of the husband over the community, the court quotes as follows from the French author Troplong: "This power of the husband, which effaces the personality of the wife, and which is manifested by the name of lord and master of the community, given to the husband, this power, which seems like unto an absolute sovereignty, exists as well in the relations of the spouses between themselves as in their dealings between third parties. In effect, the husband can dissipate the goods of the community. He can lose, destroy, break, and dilapidate. 'Maritus potest perdere, dissipare, abuti.' This is an elementary axiom of the Palace (of Justice). The wife has no right to call the husband to account, no damage to obtain for his acts. Hence it is true, indeed, that the husband is more than an administrator. He is an administrator *com libera*." It is further pointed out by the court that, while these principles of the French law were somewhat modified by the Code Napoleon, the power of the husband, under the Spanish system, was in principle more extensive than it was under the Code Napoleon; and, in elucidation of his authority under that system, the quotation, which we have made above from *Gulce v. Lawrence*, is inserted in full, wherein, following *Febrero Mejicano*, it is said that the wife must not say, during coverture, that she has *gananciales*, under the pretext that the law gives her one-half.

Next in age to the Louisiana decisions are those of Missouri. While the Spanish law of community was displaced in that state as early as 1807, there are several cases which discuss it. Thus, in *Riddick v. Walsh*, 15 Mo. 519, decided in 1852, it was said: "By the Spanish law of community the husband and wife became partners in all the estate, real and personal, which they respectively possessed. All that was acquired or purchased during coverture, whether real or personal estate, went into partnership, as being presumed to have been the fruits of the joint industry and economy of the husband and wife. On the dissolution of the partnership by death, the surviving party and the representatives of the deceased each took back what was brought on his or her side into the partnership, in value or kind—in value, of personal estate, in kind, of real estate—and what remained, being considered as gain or profits, was equally divided as between partners. The husband, being the most suitable person, managed the concerns of the partnership, and might, without the consent of the wife, dispose of any of the partnership effects, purchased during the marriage." In *Moreau v. Detchemendy*, 18 Mo. 522,

the question involved was not dissimilar from that at bar. There the inquiry was as to whether the introduction of the common law took away from the husband the right, which existed in him previously under the community system, of disposing of community property without the consent of the wife. In deciding this question in the negative the court uses the following language: "The right which the wife had in the property of the community, acquired during the marriage, was not the estate of a joint owner, entitled to claim its administration or to call the other owner to account. It is said by Febrero that the ownership of the wife is revocable and fictitious during marriage. As long as the husband lives, and the marriage is not dissolved, the wife cannot say that she has acquisitions, nor is she to prevent her husband from using them, under the pretext that the law gives her one-half. But, the marriage being dissolved, she becomes irrevocably the owner of one undivided half, in the manner provided by law for the joint ownership. The husband is, during the marriage, the actual and true owner of all. Febrero, bk. 1, c. 4, par. 1, Nos. 29, 30."

In Nevada, in dealing with a statute identical with the California statute (which, as we shall presently see, was simply declaratory of the Spanish community law), it was said in *Crow v. Van Sickle*, 6 Nev. 149: "The power of management and absolute disposition of the common property thus conferred by the statute clothes the husband with such ownership and authority as to warrant the allegation, in a complaint of this kind, that he is the owner of the chose in action. Certainly the wife has no interest which will justify any interference on her part, nor has the defendant in such case any ground of complaint; for the plaintiff is the owner of the moiety, and, so far as the right of prosecuting the action is concerned, he is, in effect, the absolute owner of the entirety."

In California, as early as 1850, an act was passed "giving the husband the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate property." This act has been treated by the courts of California as practically declaratory of the civil law (*Panaud v. Jones*, 1 Cal. 488; *Meyer v. Kinzer*, 12 Cal. 248, 73 Am. Dec. 538), so that the observations of that court on the Spanish community system are peculiarly pertinent. The property right of husband and wife during the existence of the marriage were considered by the courts of that state as early as 1851, when the Supreme Court, in *Panaud v. Jones*, 1 Cal. 488, 515, quotes, as defining the property rights of the spouses, the following from Febrero *Mejicano*, 225, §§ 12, 20: "The wife is clothed with revocable and feigned dominion and possession of one-half of the property acquired by her and her husband during the marriage; but, after his death, it is transferred

to her effectively and irrevocably, so that, by his decease, she is constituted the absolute owner, in property and possession, of the half which he left. The husband needs not the dissolution of the marriage to constitute him the real and veritable owner of all the gananciales, since, even during the marriage, he has, in effect, the irrevocable dominion, and he may administer, exchange, and, although they be neither castrenses nor quasi castrenses acquired by him, may sell and alienate them at his pleasure, provided there exists no intention to defraud the wife. For this reason the husband living, and the marriage continuing, the wife cannot say that she has any gananciales, nor interfere with the husband's free disposition thereof, under pretext that the law concedes the half to her, for this concession is intended for the cases expressed, and none other."

In *Van Maren v. Johnson*, 15 Cal. 308, it was said, the opinion being by Mr. Justice Field: "The common property is not beyond the reach of the husband's creditors existing at the date of the marriage, and the reason is obvious. The title to that property rests in the husband. He can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor"—citing *Guice v. Lawrence*, 2 La. Ann. 226, supra. Likewise, in *Packard v. Arellanes*, 17 Cal. 539, it was said, the opinion being by Judge Cope, and concurred in by Justice Field: "During the marriage the husband is the head of the community, and the law invests him with discretionary power in all matters pertaining to its business or property. In fact, its business is conducted and its property acquired in his name, and his authority in the administration of its affairs is exclusive and absolute. The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property rests in the husband, and for all practical purposes he is regarded by the law as the sole owner. It is true the wife is a member of the community, and entitled to an equal share of the acquets and gains; but, so long as the community exists, her interest is a mere expectancy, and possesses none of the attributes of an estate, either at law or in equity." This language was adopted verbatim, as a part of the opinion of this court, in *Barnett v. Barnett*, 9 N. M. 214, 50 Pac. 337, and must be regarded, therefore, as peculiarly persuasive. In *Grelner v. Grelner*, 58 Cal. 115, 118, it is reiterated that "the interest of the wife during the coverture was a mere expectancy, like the interest which an heir may possess in the property of his ancestor." It is true that there are expressions in *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125, *De Godey v. Godey*, 39 Cal. 157, and, perhaps, other California cases tending to support the view that, during the existence of

the community, the wife has a present vested interest rather than a mere expectancy. That this is not the view of the California court, however, is shown, not only by the cases first above cited, but also by the recent and well-considered case of *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 490-502, 58 Am. St. Rep. 170-177, where these latter cases are noted, reviewed, and discredited, and the California doctrine of *Van Mar-en v. Johnson*, supra, emphatically reiterated.

It being thus established by expressions from leading community law states, approved by this court and the Supreme Court of the United States, that the wife had, under the Spanish law, "a mere expectancy" in the community property, and that the husband, pending the dissolution of the marriage relation, was "the real and veritable owner of said property," with power of alienation by his personal deed, can an act of the Legislature, requiring that a deed be signed by both his wife and himself, be held constitutionally to apply to property previously acquired? We think it cannot. The wife's interest being merely an expectancy, it constituted no vested right. The wife having no vested interest, and it being evident that the proprietary right must be vested somewhere, it follows, under the rule of exclusion, that such right must be found in the husband. Among the incidents of this property right so vested in him was the right, not only to hold, but to convey. To detract from this last by statute was to take away a property right. *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *Bruce v. Strickland*, 81 N. C. 267; *Gladney v. Sydnor*, 172 Mo. 333, 72 S. W. 554, 60 L. R. A. 880, 95 Am. St. Rep. 517. This very question was presented in *Spreckels v. Spreckels*, supra. It was there considered whether the husband's right could be disturbed by a statute, passed subsequent to the acquisition of the property involved, requiring the wife to join in gifts of community property. It will be perceived that the only difference between that case and the case at bar is that the California statute required the wife's signature only in the case of gifts, whereas our act of 1901 applies to all alienations. It was there held that the statute was without effect as to previously acquired property.

A like question was present in the earlier California case of *Ingoldshy v. Juan*, 12 Cal. 564, 579, where, in dealing with a similar state of facts it was said: "But the subject of the act of the 17th of April was the separate property itself, and that statute was passed to define and fix the relations of the parties to it, and by the sixth section the husband is made the manager of the separate property of the wife, and then the power of sale by him is denied, and the mode of sale fixed; but this, only by obvious rules of construction, applies to separate property, afterwards acquired, or to property held, as separate, by women married after the pas-

sage of the act. The Legislature had no power to affect marital regulations or rights fixed by law previously; and, if they had, we are not to presume, in the absence of an express declaration to that effect, that they so intended."

A line of North Carolina cases further illustrate the principle. In *Sutton v. Askew*, 66 N. C. 145, 8 Am. Rep. 500, it was held that, where the wife had only an inchoate right of dower in her husband's lands, subject to be defeated at any time by the husband's conveyance, subsequent legislation, restoring her the common-law right of dower, could not affect the rights of the husband, nor restrict his power of alienation, nor confer upon the wife any additional right of dower in lands acquired by the husband before the act was passed, although held to apply to lands acquired subsequent to the act, notwithstanding the marriage was before. *Holliday v. McMillan*, 79 N. C. 315. And in *Bruce v. Strickland*, 81 N. C. 267, it was said: "The marriage took place and the title vested in the defendant previous to the restoration by statute of the common-law right of dower, and before the creation of a homestead in land. It was then in the power of the defendant, by his deed, to convey a full and complete title in fee to the land. Has this absolute dominion over his property been abridged by any act of subsequent legislation, or could it be, under the principles of the Constitution, without the owner's consent or concurrence? The value of property consists in its use, disposition, and conversion into something else, and these are the elements constituting a vested right, which the legislative body cannot take away, except for public use, and then only by making compensation to the owner. This security is guaranteed in the Constitution of the United States in the clause declaring the obligations of contracts inviolable."

The Missouri cases of *Moreau v. Detchemendy*, 18 Mo. 522, cited supra, and *Gladney v. Sydnor*, 172 Mo. 319, 72 S. W. 554, 60 L. R. A. 880, 95 Am. St. Rep. 517, are similarly in point. In the latter case it was held that the right of the husband who acquired his homestead prior to Acts 1896, p. 185 (requiring the joining of the wife in the conveyance) to sell the homestead without the wife's joining is a vested right, and that he could, notwithstanding such act, alienate property acquired prior to it, without joining his wife in the deed. It is very fully pointed out in that case that the *jus disponendi*, no less than the *jus tenendi*, is an element of property protected against legislative confiscation. The case of *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160, is similarly instructive.

We are of opinion, therefore, that the facts of this case, when read in the light of the authorities, bring it within the doctrine announced by this court in *Newton v. Thornton*, 3 N. M. (Johns.) 180, 5 Pac. 257, where,

in construing our statute, giving the value of improvements in ejectment to the party making them, to be inapplicable to improvements erected prior to the act, it is said: "No Legislature can take or destroy private property for private use, by statutory enactments, and, so far as this statute attempts anything of that kind, it is clearly void." We, therefore, hold that the act of 1901 does not apply to community property previously acquired, and that, as to such, the husband's right of disposition is left intact.

We may add that we find nothing in *Warburton v. White*, 176 U. S. 486, 20 Sup. Ct. 404, 44 L. Ed. 555, opposed to the doctrine here announced. That case dealt with matters of succession, not the rights of spouses in esse. The court in that case expressly says: "No question is presented on this record of the nature and scope of his (the husband's) authority during the existence of the marriage, and we intimate no opinion on that subject." And the court declined to review or consider *Spreckels v. Spreckels*, supra (which we have seen decides the very point here in issue), upon the ground that it was without pertinency to the question there involved.

The judgment is accordingly affirmed.

MILLS, C. J., and McFIE and MANN, JJ., concur. PARKER, J., having tried the case below, took no part in the decision.

ABBOTT, J. (dissenting). In the judgment and opinion of the court I do not concur, and, as the questions involved are highly important, I state my reasons for dissenting. That the property rights of husband and wife in this territory are, except as modified by local statutes, to be judged by the Spanish law in force at the time of its acquisition from Mexico need not be questioned, if by the Spanish law is meant the law as it existed in modified form in Mexico at that time. But I cannot agree that, under the community system as it is here, the wife has, until the termination of the marriage relation, no vested or tangible interest in the community property, but "only a mere expectancy, similar to that which an heir possesses in the estate of an ancestor," and that the husband's power over the community property is a vested interest in the property itself, and not subject to legislative interference. In my view the wife has a present, fixed, and definite interest in the community property, determinable, as to any particular item of it, through alienation by the husband, and in other ways, and although he has the exclusive power of managing and selling the common property, that power is not a property right, but the authority necessary to the advantageous use of the property which, as a matter of public policy, may be intrusted to either or both of the parties to the community and changed from time to time as the Legislature may determine, and that, in consequence, the

statute (page 113, c. 62, § 6, Laws 1901), by which the legislative assembly attempted to prevent the conveyance of community real estate by the husband without the consent of the wife, was a proper and valid exercise of power, as to real estate acquired before its passage, as well as to that subsequently acquired.

In determining what the law was at the time of the acquisition of New Mexico there are doubtless unusual difficulties. Baillinger in his work on Community Property, § 5, p. 26, says: "The absence of an authoritative code of law in Spain leaves all legal subjects open to the varying definitions of the authors on the subject of Spanish legislation, and, being devoid of that judicial interpretation found in Anglo-Saxon countries, leaves the subjects of the law in a similar uncertainty to that prevailing in the science of philosophy and metaphysics." There is, besides, the impossibility of finding, in the terminology of the common-law system, words which exactly represent ideas and things which are peculiar to another system. It has been said by a noted writer that it is impossible for any one to put in words precisely what he thinks. If he cannot do that in his native language, how much further from accurate expression is he when he attempts to tell, in his own language, what another thought and inadequately expressed in another language. Especially is this the case, when the whole way of thinking for centuries, by the people using the one language, has been so widely different from that of the people using the other as that of the Spanish people has been from that of the Anglo-Saxon on the subject here in question. It plainly appears, I think, that some of our courts have forced the thoughts of Spanish lawwriters into verbal molds of their own making, and that they come to us in that somewhat distorted form. No instance has been brought to our attention in which, prior to the acquisition of Spanish territory by the United States, the right of the sovereign to change the method of administering community property has been denied. Nor is it suggested that any writer on the Spanish law has ever declared that the husband could not be deprived by law of the power of alienation which he had by the law. The possession of that power by the husband alone was not a necessary feature of the community system, since, as Baillinger says (section 3), in Gelderland: "The husband could not, without the wife's consent, alienate any part of the immovable property subject to the community." It is, however, alleged for the appellee that such is the necessary inference from the passages quoted from the writers on Spanish law. I find no such quotation, either in the appellee's brief or in the majority opinion, which seems to me to sustain or even favor that contention as against the doctrine that the husband is only the master of the community, with power to alienate its property, with

the possible exception of a passage cited from Tapia's *Febrero*, title, *Bienes Gananciales*. That directly or indirectly furnishes the greater part of the material both for the foundation and superstructure of the argument for the appellee's position. It was cited in *Gulce v. Lawrence*, *infra*, and practically made the basis of the opinion in that case, and in *Panaud v. Jones*, 1 Cal. 488, served a like purpose.

In *Van Maren v. Johnson*, 15 Cal. 308, Judge Field's dictum that the interest of the wife during marriage, in the community property "is a mere expectancy, like the interest which an heir may possess in the property of his ancestor," adopted by this court in the case at bar, was based, by reference, on *Gulce v. Lawrence*. Let us examine the passage on which so much has been made to depend. The citation is in English, as quoted from *Panaud v. Jones*, *supra*. "The wife is clothed with the revocable and feigned dominion and possession of one-half of the property acquired by her and her husband during the marriage; but, after his death, it is transferred to her effectively and irrevocably, so that, by his decease, she is constituted the absolute owner in property and possession of the half which he left. The husband needs not the dissolution of the marriage to constitute him the real and veritable owner of all the gananciales, since even during the marriage, he has in effect, the irrevocable dominion, and he may administer, exchange, and, although they be neither *castrenses* nor *quasi castrenses* acquired by him, may sell and alienate them at his pleasure, provided there exists no intention to defraud the wife." The Spanish has it thus: "A la mujer casada se comunica y transfiere en habito y potencia el dominio y posesion revocable y ficta de la mitad de los bienes que durante el matrimonio gana y adquiere con su marido; mas despues que este fallece, se le transfiere irrevocable y efectivamente, de suerte que por su fallecimiento se constituye dueña absoluta en posesion y propiedad de la mitad que deje, al modo que en los socios convencionales lo dispone la ley. Por este a la mujer no solo la esta prohibido donar sus bienes dotales y gananciales durante el matrimonio, sino tambien dar limosna sin licencia de su marido, excepto en cuatro casos. * * * El marido no necesita la disolucion del matrimonio para constituirse real y verdadero dueño de todos los gananciales, pues durante este tiene en el efecto su dominio irrevocable asi los plede administrar, trocar, y no siendo *castrenses* ni *cuasi castrenses*, vender y enagenar a su arbitrio, cesante el doloso animo de defraudar a su mujer, como se praebe de la ley."

There is, so far as I can learn, no authoritative translation of *Febrero's* treatise. It is clear that the translation used in *Panaud v. Jones*, is, in some important particulars, incorrect, and in others the meanings attributed to Spanish words are not necessary ones. Thus "que este fallece" may mean, and according to *Escriche, infra*, a more reli-

able authority, should be, not the death of the husband, but the expiration of the marriage community, a very important difference. The adjective "*ficta*," which is translated "feigned," has also the meaning "artificial," and corresponds fairly to our word "nominal." "*Dueño*," translated "owner," has also the meaning, "master." Judging from the fact that *Escriche*, in his very comprehensive Dictionary or Encyclopedia of Law, does not define or even mention it, the word has no established and recognized meaning in Spanish law and was used loosely in the statement under consideration. The word "*dominio*" is here rendered "dominion," and properly so, I think, but in *Gulce v. Lawrence* the word "ownership" is used as its equivalent. In the brief for the appellee the latter meaning is given to it, in a citation from *Escriche*, with the effect of converting the citation into an authority for the appellee from one against him, as it seems really to be. The citation, leaving that word in the original, is as follows: "The husband and wife have the *dominio* of the acquet property, with the difference that the husband has it nominally and in fact and the wife only nominally; the fact becoming effective when the marriage is dissolved." *Escriche, Dic. Raz. de Leg. y Jur. Tom. 2, p. 86.* The real meaning of the word "*dominio*" becomes therefore a matter of, perhaps, decisive importance. If its meaning is not, in that connection, ownership, but dominion, right of control, and disposition, then *Febrero* and the cases founded on his authority do not aid the appellee's contention, and *Escriche* is distinctly against it. That the latter, rather than the former, is its ordinary meaning the dictionaries inform us. Its meaning, as used in law, is given in the *Cyclopedia of Law and Procedure* as: "The right or power to dispose freely of a thing, if the law, the will of the testator, or some agreement does not prevent." That definition is taken from the remarkable case of *United States v. Andres Castillero*, which occupies almost half of the second volume of *Black's Reports*. 2 Black, 17, 17 L. Ed. 360. The case is remarkable besides, from the fact as asserted in argument, that, "in the bulk of the record and the magnitude of the interest at stake," it was probably "the heaviest case ever heard before a judicial tribunal," from the corresponding eminence of the counsel engaged in it, and the wealth of research and learning lavished upon it by court and counsel.

Justice Wayne adopted and incorporated entire, in his dissenting opinion, the opinion of Judge Ogden Hoffman, the district judge, from whose judgment the case was appealed, "as the best way of expressing my appreciation of the law and the merits of the case and of his judicial learning and research in connection with it." Mr. Justice Catron, who, with Mr. Justice Grier, also dissented, spoke in even higher terms of praise of Judge Hoffman's learning. In Judge Hoffman's opinion, as adopted by Justice Wayne, on pages 226,

227 of the volume named, occurs the definition referred to, and, in connection with it, a discussion of various Spanish terms, employed to describe different interests in real property, quoted from Spanish writers. The opinion shows that "dominio" alone has the meaning already given, adopted by the *Cyclopedia*. Other words are added when it is desired to express full and complete ownership, as "dominio pleno y absoluto" or "con el dominio y propiedad," meaning "with the right of disposition and property," making the two elements of ownership distinct. While it is true that the opinion of Judge Hoffman did not prevail with the majority of the Supreme Court, there was nothing in the decision of that tribunal to detract from the encomiums on his learning by the dissenting justices, and the definitions he gives are, besides, cited from Spanish lawwriters of the highest repute.

It is not claimed that the right of the wife to dominion and possession of half the common property was not revocable and artificial or, as we should say, determinable or defeasible and nominal during marriage, nor that the husband was the real master of the community and its property. All that might be consistent with her having a proprietary interest in it, which other expressions of the Spanish and Spanish-Mexican treatises abundantly indicate that she had. Thus it is said in *Novisimo Sala, Mexicano*, section 2 A, titulo 4, that a feature of marriage is "the acquisition, for both spouses, by the halves, of that which each may gain during the marriage, so that all the property which the husband and wife may have, belonged to both, one-half to each, minus that which either may prove to belong to him separately." Ballinger says (pages 384, 395), quoting from Schmidt's *Civil Law*: "The law recognizes a partnership between the husband and wife as to the property acquired during marriage."

* * * Husband and wife are entitled to an equal share in the community although one of them should, at the time of marriage, have been without any means. At the same time both are liable, in equal proportions, for the losses and debts during its existence." And of like tenor are all the statements I have found from similar sources as to the effect of marriage in making the gains of the parties to it their common property. Indeed, the very expression "community property" is a misnomer if that is not the case, all the learned treatises on it are little better than waste paper, and the celebrated chapter on the natural history of Iceland "Concerning Snakes" might have been substituted for them with great gain in brevity and not much loss in substance. All that the decision of the court leaves of the system might have been expressed in a half dozen lines—that, if the wife survives the husband she shall have a certain share of the property of which he dies possessed, which they gained during their marriage by onerous title. That it was something substantially more than that is

shown by the fact that the wife's half was subject to confiscation without affecting the half of the husband. Ballinger, *Com. Prop.* p. 396; *Escríche's Dic. Raz. de Leg. y Jur.* p. 86, et seq. Surely that which is nonexistent, or exists only as a mere expectation, if at all, cannot be reached by a present act of confiscation. Equally significant is the fact that, on the decease of the wife half of the community property subject to the payment of its debts, etc., went to her heirs. If up to the moment of her death her husband was the owner of it, how could it thereupon become a portion of her estate subject to the law of descent? And, finally, that the husband's power of alienation was that of an agent or trustee, and not that of an owner, is manifest from the fact that the wife's interest in the proceeds of a sale made by him of community property was the same as in the property itself. In that respect her interest differs fundamentally from a wife's right of dower, which does not attach to the proceeds of the sale of the land in which the inchoate right existed.

The appellee places great reliance on *Guice v. Lawrence*, 2 La. Ann. 226. Let us examine its title to be considered authority by us. It was decided as far back as 1847, avowedly on the Louisiana Code, in a case in which the right of the husband to convey real estate of the community to pay his separate debts, contracted before marriage, was involved. The widow claimed that she was entitled to one-half of the community property remaining after the payment of the community debts, but the court held that the alienation by the husband was valid for the purposes of that case at least. The right to proceed against the heirs of her husband, on the ground that the transfer was made in fraud of her rights, was especially reserved to the widow by the court. As to the correctness of the decision itself, I make no question, nor do I affirm that it would not have been correct if it had been based on the Spanish law. But the court went beyond the requirements of the case to declare that the laws of Louisiana have never recognized any title to the wife, during marriage, to one-half of the acquets, which may have been the case, and the provisions of the Code on the subject are "the embodiment of the laws of Spain, without any changes," which is not admitted. The statement of Febrero, already referred to, is quoted to sustain that proposition. But that, as before stated, is not equivalent to saying that the husband is the owner of the community property. It declares only that he is the "master" of the community, as indeed the court elsewhere states, and adds that he "has power to alienate the immovables which compose it, by an incumbered title, without the consent or permission of the wife." As Ballinger points out (section 6), the Louisiana law on the subject is a hybrid. Louisiana became a French colony in 1700, with imported French laws. It was transferred by France to Spain in 1763, which

led to more or less modification of the existing laws. It was returned to France in 1800, and the Code Napoleon became the law of the land, but it could hardly have taken deep root since the territory was ceded to the United States in 1803. In 1806-08, a Code was adopted, which was revised in 1822-24, and to it, presumably, reference is made by the court in *Guice v. Lawrence*, supra. It should be borne in mind, in this connection, that it was not the Spanish law as it was when Louisiana was a Spanish province, or before, which came with New Mexico, but that law as modified in Mexico after her independence and, very likely, before, to some extent. That was the law of California, as well as of New Mexico; but in that state it has been changed by statute in essential particulars. The early California cases are so conflicting as to practically neutralize each other. In *Panaud v. Jones*, supra, as has been said, the doctrine of *Guice v. Lawrence* was adopted. But in *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125, the court said: "The wife's interest in the common property is a present, definite, and certain interest." In *Van Maren v. Johnson*, 15 Cal. 308, the court, through Judge Field, made the declaration, which this court now adopts, that the interest of the wife was, during marriage, "a mere expectancy, similar to that of an heir in the estate of his ancestor"—citing *Guice v. Lawrence*, supra, as authority for that proposition. That statement was in the nature of a dictum, as the question was whether the common property was liable for the debt of the wife contracted before marriage, and it was held in the affirmative. Not many years later it was said in *De Godey v. Godey*, 30 Cal. 157, that, although we had, perhaps, no better word than "expectancy" for the wife's interest, yet her right is as well defined, in contemplation of law, even during marriage, as that of her husband." Later radical changes were made in the statute law of the state, and they should be taken into account in considering cases subsequent to them, such as *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, on which the appellee lays so much stress. Of the California statutes Ballinger says (section 77): "The interest of the wife does not ripen into a legal right even upon her death, in California, for want of a statute making her estate entitled to it," and it was so held in *Packard v. Arellanes*, 17 Cal. 539, on the ground that the California statute on the subject merely designated the persons to whom half of the community property should go on the death of the wife, but did not make it a part of her estate. By statute in 1861 it was distinctly provided that, upon the dissolution of the community by the death of the wife, the entire community property should go to the husband, and it has since been added that it "shall go" to him "without administration," "except such portions thereof as may have been set

apart to her by judicial decree for her support and maintenance." By those provisions the wife's interest was indeed "a mere expectancy" depending on her surviving her husband, and the decision in *Spreckels v. Spreckels*, supra, although not in terms based on the statute, was quite in keeping with it. As Beatty, C. J., said, at the close of his opinion, concurring in the result, "If the husband survives the wife, he will get everything he had not voluntarily parted with." But no such conditions have ever obtained here, and why should we import conclusions when the premises are lacking? Says Ballinger (section 6): "The territory of New Mexico seems to have borrowed the Spanish law of property rights of married persons in its entirety and with slight modifications." He adds: "The present condition of the laws of New Mexico, and the difficulty of access thereto, prevents an accurate statement of their provisions." This court fortunately is not under that disability, and can easily resort to this uncorrupted source of information.

Section 2030, Comp. Laws 1897, the existing statute law of the territory, provides that "one-half of the acquest property which remains after the payment of the common debts of the marriage, shall be set apart to the surviving husband or wife absolutely." By section 2031 it is provided that, after the payment of the common debts, the deduction of the survivor's separate property, and his or her one-half of the acquest property, and, subject to the payment of the debts of the decedent, "the remainder of the acquest property and the separate estate of the decedent shall constitute the body of the estate for descent and distribution, and may be disposed of by will or in the absence of a will shall descend as follows: one-fourth thereof to the surviving husband or wife, and the remainder in equal shares to the children of the decedent." The power which the wife has under this statute to dispose of her share of the community property by will, to take effect during the life of her husband, makes her ownership distinct and certain. The statute even makes her husband one of the distributees, assuming to give him, if the view of the appellee is sound, what he already owns. It provides also that her share shall go to her children, even though they are not his. No distinction is made between what remains of her separate estate, after deductions, and what remains of her half of the community property, but they are united to make up the "body of the estate." It is significant that this has been the statute law of the territory, in essentials, from the beginning, in 1851. It was probably in the main an adoption of the Spanish-Mexican law, but it was made by those who had levied under that law, and knew what it was at that time. From that time, whatever its origin, it became the law of New Mexico, to be interpreted by this court in accordance with the fair intent of its own terms, and not

to meet the views of other courts, growing out of departures from the standard to which New Mexico has adhered. It gave the wife an interest widely different from "that of an heir in the estate of his ancestor." Until the interest of an heir in the estate of an ancestor, who survives him, will pass by his (the heir's) will or descend to his heirs, the similarity declared in *Van Maren v. Johnson*, supra, lacks much of complete likeness. Rather is her interest like that of a minor under guardianship, whose ownership is complete, although his property is subject to control and alienation, as the law provides, but who has, in general, no power in himself, either to manage or sell it, and will never have such power, unless he happens to live to the age at which the law admits him to that right.

The statute in question is not the first assertion by the territorial assembly of its right to limit the power of the husband to alienate the community property. As far back as 1887, by chapter 37 of the Session Laws of that year, it was provided that the "wife and family" of a mortgagor should not lose their right of homestead through a mortgage in which she had not joined. Until now the validity of that law has not been questioned, in this court at least. If the wife is the present owner of a like equal interest with the husband in the community property, although it is determinable by the exercise of his undoubted, although not absolute, right of sale, that fact goes far towards proving that the power, which the law confers upon him by force of the marriage itself, is that of an agent, manager, or trustee only. The recent case of *Garrozi v. Dastas*, 204 U. S. 64, 27 Sup. Ct. 224, 51 L. Ed. 369, is cited for the opposite view; but I am unable to perceive how it affords it any support. Says the court, through Mr. Justice White: "The very foundation of the community and its efficacious existence depend on the power of the husband, in the absence of fraud or express legislative restriction, to deal with the community and its assets as its owner, * * * and not to render the community inept and valueless to both parties by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and, consequently, inefficient agent." No question is made that the husband, with the exceptions above stated, has the same power to deal with the community property that he would have if he were "the owner" of the whole, instead of being as to one-half the "agent" or trustee of the owner. That the meaning of the court was not what is claimed for it is put beyond question, as it seems to me, in the opinion by the same justice, himself, as the majority opinion suggests, presumably learned in the civil law, in *Warburton v. White*, 176 U. S. 484, 20 Sup. Ct. 404, 44 L. Ed. 555, sustaining the decision of the Supreme Court of Washington, and commenting with full approval on *Holyoke v. Jackson*, 3

Wash. T. 235, 3 Pac. 841, *Hill v. Young*, 7 Wash. 33, 34 Pac. 144, and *Mable v. Whitaker*, 10 Wash. 656, 39 Pac. 172, the three cases in which the Washington doctrine is fully and ably set forth. As this case is, to my mind, conclusive of the question for this court I quote from the opinion at length, including here, instead of stating them apart, the extracts from the Washington cases referred to, which the learned justice stamped with his approval in the course of his opinion: "The nature of common or community property, within the territory of Washington, as such property, was constituted by Act 1873 (Laws 1873, p. 4, c. 1) and the operation of Act 1879 (Laws 1879, p. 77) upon property of that character, acquired prior to the passage of the latter act, was considered, in 1882, in the case of *Holyoke v. Jackson*, 3 Wash. T. 235, 3 Pac. 841. The question for decision in that case was whether, while the act of 1879 was in force, a husband could, without his wife joining, make a valid contract to sell community property acquired prior to 1879. In deciding this question in the negative the court, in the course of the opinion, said (page 238 of 3 Wash. T., and page 841 of 3 Pac.): 'By the provisions of the husband and wife acts, passed in 1879 and previously, the husband and wife were conceived as constituting together a compound creature of the statute called a "community." * * * In it the proprietary interest of husband and wife are equal, and those interests do not seem to be united merely, but united; not mixed or blent, but identified. It is sui generis—a creature of the statute. By virtue of the statute this husband and wife creature acquires property. That property must be procurable, manageable, convertible, and transferable in some way. In somebody must be vested a power, in behalf of the community, to deal with and dispose of it. * * * Management and disposition may be vested in either one or both of the members. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community. This power the statute of 1873 chose to lay upon the husband, while the statute of 1879 thought proper to take it from the husband and lay it upon the husband and wife together. As the husband's "like absolute power of disposition, as of his own separate estate," bestowed by the ninth section of the act of 1873, was a mere power, conferred upon him as a member and head of the community in trust for the community, and not a proprietary right, it was perfectly competent for the Legislature of 1879 to take it from him, and assign it to himself and his wife conjointly. This was done.' In *Hill v. Young*, 7 Wash. 33, 34 Pac. 144, it was decided that the husband's power to dispose of the common property was not a vested right which would not be taken away

by subsequent statute. In the subsequent case of *Mable v. Whittaker*, 10 Wash. 656, 39 Pac. 172, the provisions of the law of 1869 were again considered. Land had been purchased on August 10, 1871, by one Mable, with community funds, during the existence of the act of 1869, Laws 1869, p. 318. While Mable held the legal title, the Legislature repealed the act of 1869, and on November 29, 1871, an act was approved which, in section 12 (Laws 1871, p. 701), provided that the husband should have the management of all the common property, but should have the right to sell or incumber real estate without the joinder of his wife. * * * The court, however, said: 'But, leaving out of consideration all question as to whether he could only exercise such right while his wife was living, and could not convey the entire title, under the former law, after her death, and cut off her heirs, we think the subsequent act took away his power to do so. It was immaterial whether the record title to the community lands stood in the name of the husband or the wife, or of both of them, when considered with reference to the power of the Legislature to authorize either or both of them to convey. The Legislature could as well have provided that the wife could convey as the husband; and, if it had power to say that either could dispose of the community interest of the other, it could say that neither could do so. Changing the manner of the conveyance did not alter the status of ownership. It could not make the interest of either spouse, in community lands, greater or less. * * * The statute of 1871 did not undertake to divest any right which had become vested. Mable, receiving this conveyance under the act of 1869, thereby became the owner of an undivided one-half interest in the land, and his wife thereby became the owner of the other half. Her right was as much a vested right as his.'

Following the quotations from the Supreme Court of Washington, of which the foregoing are excerpts, the opinion proceeds as follows: "The rule announced in the foregoing cases was reiterated in the opinion delivered in the case at bar, it being held that Bacon did not become the sole owner of the property in question by the purchase in 1877, but that it became and continued community property so long as the community existed, and that the descent of such property was subject to regulations, at will, by the Legislature. Now, it cannot in reason be denied that the decision from which we have just quoted held that the purpose of the Legislature of Washington, whether territorial or state, in the creation of community property, was to adopt the features essentially inhering in what is denominated 'the community system,' that is, that property, acquired during marriage with community funds, became an acquest of the community, and not the sole property of the one in whose name the property was bought, although by the law existing the husband was given the management,

control, and power of sale of such property, this right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community, the proceeds of the property, when sold by him, becoming an acquest of the community, subject to the trust which the statute imposed upon the husband, from the very nature of the property relation engendered by the provision for the community. * * * Obviously, the reasoning of the plaintiff in error, upon which the assumption that community property, bought during the existence of the act of 1873, was solely the property of the husband, involves not only a contradiction in terms, but invokes, at the hands of this court, in order to overthrow the rule of property in the state of Washington, an interpretation of the statutes of that state which is not only confusing, but self-destructive. It cannot be doubted, under the text of the act of 1873, the property relations of husband and wife were controlled by what is denominated 'the community system,' and that, in consonance therewith, the statute referred to treated property acquired during marriage with community money as community or common property. Although this is patent, the argument is that the provision in the statute, giving the administration and disposition of the community property to the husband, operated to destroy the community system and render it impossible, under the statute, for community or common property to exist. In other words, the interpretation relied upon asked us to say that because of a provision which simply pointed out how common property should be administered, it resulted that there was no common property to be administered. This would be but to declare that the statute brought about a result which was contrary to its express language, providing for the existence of the community system. It is a misconception of that system to suppose that, because power was vested in the husband to dispose of the community acquired during marriage, as if it were his own, therefore, by law the community property belonged solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community, since the common ownership would attach to the result of the sale of the property."

How this court's view of the nature of the rights of husband and wife in the community property, as stated in the majority opinion, is to be reconciled with what Mr. Justice White, speaking for a unanimous court, here says, I am unable to perceive. When it is said, by way of attempted distinction, that *Warburton v. White* rests on a statute of Washington, it should be added that the statute provided that the husband should have the entire management and control of the common property "with the like absolute power of disposition as of his own separate estate," quite as clear and explicit a statement of his dominion as the Spanish law furnishes. The general principle on which such legisla-

tion as that in question is based is well stated in *Baker's Executors v. Kilgore*, 145 U. S. 487-490, 12 Sup. Ct. 943, 944, 36 L. Ed. 780. "Moreover his [the husband's] right prior to that enactment did not come from contract between himself and his wife, or between him and the state, but from a rule of law established by the Legislature, and resting alone upon public considerations arising out of the marriage relation. * * * The relation of husband and wife is therefore formed subject to the power of the state to control and regulate both that relation and the rights directly connected with it, by such legislation." That it is a wise and beneficent measure of public policy which confers on the wife the power to protect herself and her children, to some extent, against the improvidence, caprice, or purposely harmful conduct of the husband, by withholding her assent to the alienation of their homestead or other real estate, few would question. It is the established policy of nearly or quite all the states of the Union.

The decision of the court renders ineffective section 5, c. 62, p. 113, Acts 1901, and, by necessary inference, section 16, c. 37, p. 48, Acts 1907, which in part supersedes it, but which makes the assent of the wife essential to a valid conveyance of the homestead, so far as either may relate to real estate acquired before its enactment. This is a result greatly to be deprecated, and one which we all, doubtless, agree should not be brought about by this court, unless it is constrained thereto in obedience to plain principles of law. Certainly no law of the territory, or decision of the Supreme Court of the United States, or previous decision of this court, constrains us to that course. To say the least, the decisions of the other courts, to which the judgment of this court is now made to conform, are, in my opinion, open to such serious doubt that they should not be followed to reverse the express will of the legislative branch of the government.

GORDAN v. GRAHAM, Judge of Superior Court. (S. F. 4,965.)

(Supreme Court of California. March 28, 1908.)

1. APPEAL—RIGHT OF REVIEW—PERSONS AGGRIEVED—SALE IN PARTITION—CONFIRMATION.

Since a valid sale and conveyance of land in a partition suit would terminate a tenant in common's interest and right of possession, she could oppose the confirmation of a sale and have it vacated if not made legally, or for an adequate price, and could appeal from an order confirming such sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 947-952.]

2. SAME—DECISIONS REVIEWABLE—WRIT OF ASSISTANCE.

For appeal purposes an ex parte order in a partition suit that a writ of assistance issue to let the purchaser into possession, a sale having been confirmed must be considered as an order made after final judgment; it being as plainly in aid of the order of sale as the order of confirmation, and, the tenant in pos-

session having no notice of such ex parte order, she could, to secure an available record on appeal, move to vacate the order and writ, and, on denial of the motion, appeal from the order of denial, instead of appealing directly from the ex parte order.

3. MANDAMUS—ACTS OF COURTS—PROCEEDINGS FOR REVIEW.

An order in a partition suit denying defendant's motion to vacate an order for a writ of assistance directing defendant's removal from the premises and the placing of the purchaser in possession, a sale having been confirmed, being in substance an order for the delivery of possession of land, it was the judge's duty, under the express terms of Code Civ. Proc. § 945, on proper application, to fix the amount of the undertaking to be given to stay proceedings on the writ pending defendant's appeal; and mandamus lies to compel performance of that duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 116.]

4. APPEAL—BILL OF EXCEPTIONS—NECESSITY.

The Supreme Court will not declare an appeal from an order confirming a partition sale to be without merit because no bill of exception to the order has been proposed or settled, and the time therefor has expired where the order has not been exhibited to the Supreme Court, since it may be erroneous on its face.

In Bank. Application by Pauline Gordan for mandamus against Thomas F. Graham, judge of the superior court of the city and county of San Francisco. Writ granted.

W. T. Kearney, for petitioner. Louis Hirsch and Jesse H. Steinhart, for respondent.

SHAW, J. This is an application for a writ of mandate. On February 14, 1908, in an action for partition, entitled *Rosa Bloom v. Pauline Gordan et al.*, the superior court made an order denying the petitioner's motion to vacate an order for a writ of assistance theretofore issued therein, directing the sheriff to remove petitioner from the premises involved in the suit and place one Fannie Abrahamson in possession thereof. Desiring to appeal from this order, and to obtain a stay of proceedings on the writ pending the appeal, the petitioner applied to the respondent to fix the amount of the undertaking necessary to stay such proceedings. This the respondent refused, and petitioner asks a mandate to compel respondent to proceed to fix the amount of the proposed undertaking.

An interlocutory decree of partition directing the sale of the property by the referees was filed in *Bloom v. Gordan* on January 9, 1908, and it became final on March 10, 1908, if not before. *Bloom v. Gordan*, 150 Cal. 763, 90 Pac. 115. The sale was made by the referees to Fannie Abrahamson in pursuance of the decree, and, after due notice, it was confirmed by an order made on January 15, 1908, and entered on February 3, 1908. The writ of assistance was issued by authority of an order made ex parte on February 11, 1908. On February 13, 1908, the petitioner, Pauline Gordan, gave notice of appeal from the order confirming the sale and filed the undertaking on appeal as required by law. She had notice of the making of that order, but

no formal notice of the entry thereof, so far as appears, has ever been given to her. The interlocutory order of partition adjudged that Pauline Gordan was the owner of an undivided one-third of the premises as tenant in common. She was in possession. A valid sale and conveyance under the order would terminate her interest and right of possession. She had the right, therefore, to oppose the confirmation of a sale and to have it vacated if not made in conformity with law, or for an adequate price, and the corresponding right to review, on appeal, an order confirming such sale. It has been held that the purchaser at such a sale may appeal directly from an order vacating the sale; that, so far as he is concerned, such order is appealable as an order made after final judgment; and that the interlocutory order directing a sale is to be regarded as a final judgment with respect to subsequent orders in aid of its execution. *Hammond v. Cailleaud*, 111 Cal. 213, 43 Pac. 607, 52 Am. St. Rep. 167; *Dunn v. Dunn*, 137 Cal. 56, 69 Pac. 847. If it is an order made after final judgment and appealable as such by the purchaser, it must be so as to the adverse parties, the tenants in common. The appeal of Pauline Gordan from the order confirming the sale is therefore a valid appeal, if regularly taken. In so far as *Rovegno v. Hunt*, 83 Cal. 446, 23 Pac. 524, is contrary to this conclusion, it must be considered as overruled by the decisions in *Hammond v. Cailleaud* and *Dunn v. Dunn*, *supra*. We think it was wrong in principle, on that point. Neither the interlocutory order for the sale, nor the order confirming the sale, directed that the purchaser be let into possession. That direction was first given by the court when it made the ex parte order that a writ of assistance should issue to the sheriff. The latter also must be considered, for the purposes of an appeal, as an order made after final judgment; it being as plainly in aid of the order of sale as is the order of confirmation. Being made ex parte, the tenant in possession having no notice, she had the right, in order to secure an available record on appeal, to move for a vacation of the order and writ, and, if the motion were denied, to appeal from the order of denial, instead of appealing directly from the ex parte order. *Pignaz v. Burnett*, 119 Cal. 163, 51 Pac. 48. In substance this appeal is from an order for the delivery of possession of real estate, and it was therefore the duty of the respondent under section 945, Code of Civil Procedure, upon a proper application in that behalf, to fix the amount of the undertaking to be given to stay proceedings on the writ pending the appeal, and mandamus lies to compel performance of the duty. This was expressly decided in *Green v. Hebbard*, 95 Cal. 39, 30 Pac. 202.

Rovegno v. Hunt, 83 Cal. 445, 23 Pac. 524, is cited as a case holding that mandamus is not maintainable in such a case. In that case, however, the order confirming the sale directed that the purchaser be put into pos-

session upon the delivery of the deed. No appeal had been taken therefrom, and it had become final by lapse of the time for appeal. Hence there could be no merit in an appeal from a subsequent order granting a writ of assistance, and it was obviously taken merely to vex and annoy the purchaser. For that reason the writ of mandate in that case was denied. Mandamus is a discretionary writ, and it may perhaps be denied when it is sought in aid of an obviously vexatious and fruitless appeal. *Wiedwald v. Dodson*, 95 Cal. 453, 30 Pac. 580; *Gay v. Torrance*, 145 Cal. 147, 78 Pac. 540; 26 Cyc. 149, 156; 19 Am. & Eng. Ency. of Law, 754, 758. It is suggested that the appeal from the order confirming the sale is likewise without merit, because no bill of exception to the order has been proposed or settled and the time therefore has expired. But the order has not been exhibited to us, and we cannot say that it may not be erroneous on its face. See 26 Cyc. 152.

It is ordered that a peremptory writ issue as prayed for, and that proceedings on the writ of assistance be stayed until the expiration of five days after the respondent shall have fixed the amount of the undertaking to be given by petitioner to stay proceedings thereon pending an appeal from the order refusing to vacate the order directing the issuance of the writ of assistance.

We concur: BEATTY, C. J.; SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.

153 Cal. 288

CITY OF SAN DIEGO v. POTTER, Auditor.
(S. F. 4,975.)

(Supreme Court of California. March 28, 1908.)

1. MUNICIPAL CORPORATIONS—FISCAL MANAGEMENT—ISSUANCE OF BONDS—PURPOSES.

St. 1901, p. 27, c. 32, authorizing the incurring of expenses by cities, towns, and municipal corporations for municipal improvements, including street work, etc., and regulating the acquisition, construction, and completion thereof, did not authorize the issuance of bonds except for the purposes for which ordinary revenues of a city might be expended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1897-1905.]

2. SAME—CONSTRUCTION OF STREETS AND BOULEVARDS.

Under St. 1901, p. 27, c. 32, authorizing the incurring of expenses and issuing of bonds by cities, etc., for municipal improvements, including street work, and Vrooman Act (St. 1885, p. 161, c. 153) § 26, as amended by St. 1891, p. 206, c. 147, providing that the city council may order the whole or any part of the work mentioned therein, which includes street work, paid out of the city treasury from such fund as it may designate, the building and construction of streets, highways, and boulevards are objects for which the city council may in its discretion expend the ordinary revenues of the city, and bonds may be issued for those purposes under St. 1901, notwithstanding the existence of Act March 19, 1889 (St. 1889, p. 361, c. 243), authorizing the city to acquire public parks and boulevards.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1899.]

3. SAME—PURCHASE OF LAND FOR STREETS.

The charter of San Diego authorizes the common council to pay for land to be used for streets, highways, etc., out of the ordinary revenues of the city, and makes the general laws of the state relative thereto applicable. St. 1889, p. 70, c. 76, provides for the laying out, etc., of streets, and section 22 (page 76) provides that, if the council deem proper that the boundaries of the district to be benefited by the improvements shall include the whole city, the commissioners shall purchase the lands, and, if there is not sufficient money in the city treasury to pay for such improvements, the cost shall be assessed upon the whole taxable property, and be included in the next general assessment, and St. 1908, p. 386, c. 268, § 36, relative to street improvements, provides that it shall not affect the act of 1889. *Held*, that these statutes authorized the council to pay for lands to be used for roads, boulevards, etc., out of the ordinary revenues of the city, and hence propositions to acquire lands for those purposes were properly submitted under St. 1901, p. 27, c. 32, authorizing the incurring of indebtedness by cities, etc., and this is true, notwithstanding the existence of St. 1889, p. 361, c. 248, authorizing the construction of parks and boulevards.

4. SAME—SUBMISSION OF QUESTION TO VOTE—QUESTIONS SUBMITTED.

St. 1901, p. 27, c. 32, authorizing the incurring of indebtedness by cities, etc., for municipal improvements, provides that the council, having first determined that the public necessity demands the acquisition, construction, etc., of any municipal improvement, including street work, or other works necessary to carry out the purposes of the city, may at a subsequent meeting call a special election, submitting a proposition for incurring the debt set forth in the resolution, and no other question than the incurring of the indebtedness for that purpose shall be submitted, provided that propositions for incurring debts for more than one purpose may be submitted at the same election. *Held*, that the act authorized the submission of several propositions for incurring indebtedness, and the fact that a proposition submitted was for an indebtedness which the city had no power to incur did not invalidate the election as to the remaining authorized propositions.

5. SAME—PUBLIC PARK.

The act authorized the submission of a proposition by the city for incurring an indebtedness for acquiring a public park.

6. SAME—STATUTE AUTHORIZING INDEBTEDNESS.

It was not necessary, under St. 1901, p. 27, c. 32, authorizing the council of cities, etc., to incur indebtedness for municipal improvements, and submit at a special election the proposition of incurring a debt for the purpose stated in the resolution, that the council, in the ordinance calling the election, designate whether the bonds were issued under the act of 1901, or under the park and boulevard act of 1889 (St. 1889, p. 361, c. 248), the provisions of the act of 1901 having been strictly complied with.

7. SAME—PROVISION FOR PAYMENT—SUFFICIENCY.

St. 1901, p. 27, c. 32, authorizes the incurring of indebtedness for municipal improvements, and section 5, p. 28 provides that a part of the bonds issued thereunder, to be determined by the city council, which shall not be less than one-fortieth of the whole amount of such indebtedness, shall be paid each year. Bonds were authorized by popular vote to be issued in the sum of \$59,108.55; the ordinance providing there should be 119 bonds issued, 118 to be of the denomination of \$500, and one of the denomination of \$108.55, three of the bonds to become due yearly, the order of payment beginning with the smallest number, and continuing until all were paid. *Held*, that the manner provided by

the ordinance for the issuance and payment of the bonds was a sufficient compliance with the statute.

In Bank. Mandamus by the city of San Diego, a municipal corporation, against Daniel Potter, as auditor of the city, to compel defendant to issue certain bonds. Peremptory writ awarded.

Geo. Puterbaugh, City Atty., for petitioner. Sam Ferry Smith, for respondent. O'Melveny, Stevens & Millikin, as amici curiae.

ANGELLOTTI, J. Application for writ of mandate prayed to be directed against Daniel Potter as auditor of the city of San Diego. This is an application for a writ of mandate to compel defendant to perform certain ministerial acts relative to certain municipal bonds of plaintiff. It is conceded that he is bound to perform these acts if the bonds are not void, and defendant's refusal to so perform is based on the contention that they are void. The bonds were issued under the act of the Legislature enacted in the year 1901, entitled "An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations for municipal improvements, and regulating the acquisition, construction, or completion thereof" (St. 1901, p. 27, c. 32), and admittedly all the proceedings were in strict accord with the provisions of that act except as hereinafter noted.

Seventeen separate matters were specified in the resolution adopted by the common council expressing the determination of the council as to the public interest and necessity, with a statement of the estimated cost of each, and the ordinance subsequently adopted calling a special election submitted to the electors 17 separate propositions for incurring a bonded indebtedness, one proposition as to each of the matters specified in the former resolution. Each of 14 of these propositions received at such special election the requisite number of votes to carry it, and the bonds were issued thereon. The other 3 propositions were defeated. It is claimed that among the 17 propositions submitted at this election there were 3 which were not authorized to be submitted by the provisions of the act (2 of which were carried), and that the effect of including the same was to render the election a nullity as to all the propositions submitted.

The propositions attacked are the following:

"Fourth. Shall the city incur a bonded indebtedness of \$70,000, other and different than any other indebtedness proposed in this ordinance, for the extension and improvement of the street and highway system of the city, all as shown in the said resolution and in the recital thereof in the preamble of this ordinance?" In such resolution and preamble the matter is stated thus: "(4) The building, construction, and acquisition of the following lines of boulevards in said city, namely"—followed by a designation and general descrip-

tion of various boulevards, and a statement of the estimated cost of each.

"Fifth. Shall the city incur a bonded indebtedness of \$5,000, other and different than any other indebtedness proposed in this ordinance, for the building, construction, and acquisition of a road from the intersection of M and Thirty-Second street to Mount Hope Cemetery, all as shown in the said resolution and in the recital thereof in the preamble of this resolution?" In such resolution and preamble the proposition is put in the same way, except that after the words "Mount Hope Cemetery" the following is stated: "Together with the acquisition of the land on which such road may be located, according to the survey thereof made by the city engineer of said city, and filed with the city clerk thereof," etc.

"Seventeenth. Shall the city incur a bonded indebtedness of \$5,000, other and different than any other indebtedness proposed in this ordinance, for the construction of three public lavatories to be hereafter located in the city," etc.

The fourth and fifth propositions may be considered together. It is established by the decision of this court in *Redondo Beach v. Cate*, 136 Cal. 146, 68 Pac. 586, that the general act of March 19, 1889 (St. 1889, p. 399, c. 26), did not authorize the issuance of bonds except for a purpose for which the ordinary revenues of the city might be lawfully expended. This doctrine has not been modified by any subsequent decision. The act of February 25, 1901, is the same as the general act of March 19, 1889, in every respect material to this question, and is not susceptible of a different construction. If, therefore, any proposition included a purpose for which the ordinary revenue of the city could not be used, it was not authorized by the act of 1901. It is clear that the fifth proposition included, in addition to the building and construction of the road to Mount Hope Cemetery, the acquisition of the land on which the road was to be located. We think it is equally clear that the fourth proposition included, not only the building and construction of certain boulevards, but also the acquisition of the land upon which at least some of them were to be constructed. The term "acquisition" used in relation to the boulevards is certainly broad enough to include the obtaining of the lands upon which they are to be laid out. The building and construction of streets, highways, and boulevards are objects for which the legislative body of a city or town may, in their discretion, expend the ordinary revenues of the city (section 26, Vrooman Act [St. 1885, p. 161, c. 153] as amended by St. 1891, p. 206, c. 147), and for that reason fall within the purposes for which bonds may be issued under the act of 1901, besides being included in the term "street work" used in said act, which has been defined to mean "work upon a street—work in repairing or making a street." See *Mill Valley v. House*, 142 Cal.

700, 76 Pac. 658. And bonds may be issued for those purposes under the act of 1901, notwithstanding the existence of the public park and boulevard act of March 19, 1889. St. 1889, p. 361, c. 248. See *City of Oakland v. Thompson* (Cal. Sup.) 91 Pac. 387. But if there be included with these authorized purposes an unauthorized purpose, for the whole of which a single aggregate sum is specified, it is impossible to separate the good from the bad, and the whole must fall.

Defendant's claim in this regard is that there is no law that authorizes the common council of the city of San Diego to pay for the land to be used for roads, streets, highways, or boulevards from the ordinary revenues of the city. This claim does not appear to us to be well founded. The city charter expressly empowers the council to widen any road, and to open or lay out any new street or highway through public or private property, and makes the general laws of the state relative to such matters applicable. The general laws applicable appear to be the act of 1889 (St. 1889, p. 70, c. 76), and the act of 1903 (St. 1903, p. 376, c. 268), under either of which it was the right of the city to proceed (St. 1903, p. 386, c. 268, § 36). As is claimed by learned counsel, the act of 1889 does provide for the payment of the expenses of acquiring the necessary land, etc., from a fund to be collected by an assessment upon the property of the district benefited thereby; but the effect of section 22 thereof clearly is to authorize the council to pay the whole thereof from the ordinary revenues of the city, if they deem the improvement of such general benefit to the city that the whole city constitutes the district to be benefited thereby. The section is practically the same in effect in the respect under discussion as section 26, Vrooman Act (St. 1885, p. 161, c. 153, as amended by St. 1891, p. 206, c. 147), authorizing the council to pay the whole or any portion of the cost of street work out of the ordinary revenues of the city. We are of the opinion that this is a complete answer to the objection made by learned counsel to the fourth and fifth propositions, based upon the decision of this court in *Redondo Beach v. Cate*, *supra*; the propositions being for certain designated boulevards and roads which the council had in effect declared to be of such general benefit to the city that the city should pay the whole cost thereof. These propositions were therefore within the act of 1901, and this is true notwithstanding the existence of the public park and boulevard act. *City of Oakland v. Thompson*, *supra*.

The seventeenth proposition, the proposed issuance of bonds for \$5,000, for the construction of three public lavatories, was not carried at the election, and no bonds have been issued thereon. The question whether it was an authorized proposition under the act of 1901 is therefore important only in the event that it be held that the submission of a proposition for an indebtedness not author-

ized by the act at an election held under the act would invalidate the election as to all the other propositions submitted. The contention to this effect is based on the language of the act which, after providing that the legislative body of the municipality, having first determined by resolution that the public interest or necessity demands the acquisition, construction, or completion "of any municipal improvement, including bridges, waterworks, water rights, sewers, light or power works or plants, buildings for municipal uses, * * * street work, or other works, property or structures necessary or convenient to carry out the objects, purposes, and powers of the municipality," provides that such legislative body may at any subsequent meeting, call a special election, and submit thereat "the proposition of incurring a debt for the purpose set forth in said resolution, and no question other than the incurring of the indebtedness for said purpose shall be submitted, provided that propositions of incurring indebtedness for more than one object or purpose may be submitted at the same election." The proviso as to different propositions being submitted at the same election was enacted for the first time in the act of 1901; the former act covering the same subject-matter, and that of March 19, 1889 (St. 1889, p. 399, c. 261), not containing any such proviso. The proviso was not essential to the proper submission at the same election of more than one of the propositions included in the act, for without it the act clearly permitted such submission, and such was undoubtedly the practice under the former act. See *Derby v. Modesto*, 104 Cal. 515, 38 Pac. 900; *City of San Luis Obispo v. Haskin*, 91 Cal. 549, 27 Pac. 929. It is to be noted that the former act, without the proviso, provided, immediately after the limitation above quoted, that "the ordinance calling such special election shall recite the objects and purposes for which the indebtedness is proposed to be incurred," which is a confirmation of this construction of the previous language. We cannot assume that the object of the insertion of the proviso in the act of 1901 was simply to authorize that to be done which was already fully authorized by the language of the former act. It appears clear to us that the object of the proviso was to limit the prohibition immediately preceding by making it inapplicable to any proposition of incurring indebtedness. This is the plain literal meaning of the language used in the limitation and proviso, and such meaning appears to us to give full effect to the legislative purpose.

The argument of learned counsel that the purpose of the prohibition was to secure a free and fair expression of the will of the voters on the propositions for indebtedness, unaffected by the consideration of other questions, and without the opportunity of political trades and combinations that would be afforded by the submission at the same time of

other propositions, may be conceded to be well based; but, as we view the language of the act, it must be held that the Legislature deemed that this purpose would be sufficiently attained by a limitation of the electors to a consideration of propositions for indebtedness, unembarrassed by the consideration of propositions of a different nature. It will be noted that the act of 1901 is broad enough in terms to include the issuance thereunder of bonds for practically every kind of municipal improvement that a city is empowered to make by the law applicable to it, and it can hardly be assumed in the face of language admittedly permitting the submission at the same election of propositions for indebtedness for the many different purposes authorized by the act that the Legislature was in any degree seeking to avoid possible evils resulting from the submission at one time of many different propositions for indebtedness. We cannot see that the fact that a proposition for indebtedness submitted is one for an indebtedness which the city has no power to incur affects the question at all. Although unauthorized, it is nevertheless a proposition of incurring indebtedness, the submission of which is not prohibited by the prohibitory clause relied on, and therefore its submission does not invalidate the election as to the remaining authorized propositions. In view of our conclusion upon this point, it is unnecessary to determine whether the city of San Diego had the power to expend municipal funds for "public lavatories."

The demurrer of defendant also makes the point that a proposition for a bonded indebtedness of \$25,000 for the acquisition of a park was unauthorized. This proposition was, like the public lavatory proposition, defeated at the election. What we have said in regard to the lavatory proposition is applicable to this. However, in view of the decision in *City of Oakland v. Thompson*, supra, it must be held that the proposition for this indebtedness was properly submitted under the act of 1901.

We see no force in the contention that the proceedings for the issuance of the bonds are void for failure on the part of the council to designate in their ordinance calling the election, or in some order or record prior to the election, whether the bonds proposed for boulevards and parks were to be issued under the park and boulevard act of 1889, or the general act of 1901. It seems to us that it was apparent on the face of the record that the proceeding was one under the act of 1901, but whether this be so or not it is clear that the provisions of the act of 1901 as to notice, etc., were literally complied with, and that there is nothing in the law requiring the designation referred to.

The only other objection made is one to the ordinance adopted after the election providing for the issuance of the bonds. The

act of 1901 provides in section 5 that bonds issued under the act shall be payable substantially in the manner following: "A part to be determined by the legislative body of the municipality, which shall be not less than one-fortieth part of the whole amount of such indebtedness, shall be paid each and every year on a day and date, at the city treasury, to be fixed by the legislative branch of the municipality," etc. As to the bonds to be issued in the sum of \$59,108.55 for a certain indebtedness authorized by the electors, the ordinance provided that there should be 119 of said bonds, 118 of which should be of the denomination of \$500, and one of the denomination of \$108.55, the \$500 bonds to be numbered from 1 to 118, consecutively, and the \$108.55 bond to be numbered 119, and also: "Three of said bonds shall become due and payable annually at the time and in the manner hereinafter specified, the order of payment beginning with the smallest numbered bond, and continuing from the less to the greater until all of said bonds shall have been paid." It is said that as 119 is not a multiple of three it would be impossible for the ministerial officers charged with the duty of preparing the bonds to prepare them so as to make them payable three each year. We see no room for misunderstanding as to the requirement of the ordinance in this regard. What it means and provides is that the 119 bonds shall be so prepared that, commencing with the smallest numbered bond, three shall become due and payable each year, leaving two to become due and payable the last or fortieth year.

We have now noticed all of the objections made by counsel to the bonds, and are of the opinion that none is well based. It follows that plaintiff is entitled to the relief sought.

Let a peremptory writ of mandate issue in accord with the prayer of the petition.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

McFARLAND, J., not having heard the argument in this case, does not participate herein.

153 Cal. 356

TRACY et al. v. COFFEY, Judge of Superior Court. (S. F. 4,872.)

(Supreme Court of California. April 3, 1908. Rehearing Denied April 30, 1908.)

1. WILLS—PROBATE PROCEEDINGS—ORDERS—ENTRY IN MINUTE BOOK OF COURT.

Code Civ. Proc. § 1704, provides that orders in probate proceedings must be entered at length in the minute book of the court. An order admitting a will to probate recited in the caption: "In the Superior Court of the City and County of San Francisco, * * * Department 9, Probate." The order was signed by the judge. In thereafter entering the order in the minute book the quoted words in the caption were omitted, and the word "said" in

the phrase "the said proofs" in the order was also omitted. *Held* that, in the absence of a statute expressly authorizing the making of a memorial of the terms of an order by the method of writing it on a separate piece of paper signed by the judge, the entry of the order was sufficient notwithstanding the discrepancies between the entry and the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 809.]

2. SAME—TIME TO APPEAL—COMMENCEMENT OF PERIOD—ENTRY OF ORDER.

The time within which to appeal from an order admitting a will to probate begins to run from the date of the entry of the order in the minute book of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 828.]

In Bank. Application for writ of mandate by Laura E. Tracy and others against James V. Coffey, as judge of the superior court of the city and county of San Francisco, to compel respondent to settle a bill of exceptions. Denied.

Horace W. Philbrook (W. J. Barnett and Wm. T. Baggett, of counsel), for petitioners. J. C. Campbell and Thomas H. Breeze, for respondent.

SHAW, J. The petitioners apply for a writ of mandate to compel the respondent, as judge of the superior court of the city and county of San Francisco, to settle a bill of exceptions relating to the proceedings and evidence taken upon the making of an order admitting to probate the will of Jacob Z. Davis, deceased, the purpose of the petitioners being to use the said bill of exceptions upon an appeal to the Supreme Court from said order.

The order in question was made on August 17, 1897, and was entered at length in the regular minute book of the department of the superior court on September 5, 1897. The time for taking the appeal therefrom expired on November 4, 1897. Before this entry the order was reduced to writing and signed by the judge. The document as signed had a caption at the top of its first page beginning with the words: "In the Superior Court of the City and County of San Francisco, State of California, Department 9, Probate." In entering the order in the minute book this part of the caption was omitted. At another place in the entry the word "said" of the phrase "the said proofs," as the order was drawn in the document, was omitted. Claiming that these omissions vitiated the act of entering the order and rendered the entry null and void, the petitioners caused it to be again entered in the minute book of the court on July 31, 1907, with the aforementioned part of the caption and the word "said" carefully inserted. Their contention now is that this latter entry is the only valid and effectual entry of the order that has ever been made, and that the time wherein they could appeal therefrom did not begin to run until that date. Acting upon that theory, they took proceedings for an appeal to this court within 60 days after the said date, and

asked for the settlement of the proposed bill of exceptions.

The variations aforesaid of the minute book entry of September 5, 1897, from the signed order, did not vitiate it, or annul its effect as an entry of the order. It is admitted that that entry was made in the proper minute book. The part of the caption omitted was not a necessary part of the order, and the omission of the word "said" did not affect the meaning of the phrase, and was of no importance or significance. There is no statute expressly authorizing the making of a memorial of the terms of an order of the superior court by the method of writing it on a separate piece of paper, and having the judge attach his signature thereto. It has become customary to do so in many instances, and the courts have often recognized such a memorial as competent evidence of the terms of the order. But the Code (Code Civ. Proc. § 1704) expressly requires probate orders to be entered in the minute book of the court. It is the order there entered which is the order of the court, and it is the date of the entry of this order which, under our decisions, set the time running for an appeal. In making entries in the minute book it is neither necessary, nor, so far as we are advised, customary, to begin the entry of each order with a statement of the name of the court in which it is made. The fact that another memorial exists consisting of a document filed with papers in the case, and that there are some slight discrepancies, such as those above mentioned, between the filed order and the entry in the minute book, would not affect the validity of the minute entry, nor extend the time of appeal until another entry was made. The petitioners have no valid appeal, and no right to any bill of exceptions on the appeal they are attempting to take.

The petition is denied.

We concur: BEATTY, C. J.; HENSHAW, J.; LORIGAN, J.; ANGELLOTTI, J.; SLOSS, J.

153 Cal. 307

GREAT WESTERN GOLD CO. v. CHAMBERS. (Sac. 1,444.)

(Supreme Court of California. April 1, 1908.)

1. APPEAL — ORDER DENYING NEW TRIAL — SCOPE OF REVIEW.

Upon an appeal from an order denying a new trial, review is limited to the grounds upon which such a motion may be based, enumerated by Code Civ. Proc. § 657, and upon which the new trial was asked; and questions relating to the sufficiency of the complaint, rulings upon demurrers, and the sufficiency of the findings to support the judgment cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3476-3482.]

2. SAME.

The failure of a trial court to find upon a material issue is an error of law, and error in denying a new trial asked on that ground may be reviewed on appeal from the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3476-3482.]

3. SAME—RECORD—CONTENTS—PRESENTATION OF GROUNDS FOR REVIEW—MOTIONS FOR NEW TRIAL.

Though it was not essential that defendant's notice of intention to move for a new trial, on judgment for plaintiff, be incorporated in the statement on appeal or the bill of exceptions, it is essential to the Supreme Court's right to review the trial court's action on the motion that it should appear by the record that the ground for a new trial presented on appeal was presented by the motion, and mere general specifications in the statement or bill of exceptions that the court erred in rendering judgment for plaintiff and against defendant are not sufficient to constitute such a showing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2306-2309.]

4. TRIAL—FINDINGS—FAILURE TO MAKE NOT SHOWN.

Failure to find upon any issue of fact, in an action for damages, is not shown, in that the judgment being for \$40,000, while the findings show, not only \$40,000 damages on one transaction, but also \$11,700 on other transactions, there is nothing by which the sum awarded can be referred to any one or more of the particular transactions alleged.

5. APPEAL—REVIEW—SCOPE—MATTERS NOT NECESSARY TO DECISION.

On appeal from an order denying defendant a new trial on judgment for plaintiff in an action for damages, based on several transactions, the Supreme Court need only review findings and alleged errors material to one transaction, where, if the trial court's action in regard to that transaction was correct, it appears that the judgment would have been the same as it is, though the findings upon all the other transactions had been in defendant's favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3331.]

6. PRINCIPAL AND AGENT — EXECUTION OF AGENCY—FRAUD—PURCHASE OF PROPERTY—RIGHT TO RECOVER.

A company having directed its agent to purchase or contract to purchase property, and he having conspired to defraud the company by procuring title to be taken for \$90,000 by one who gave the company an option to purchase for \$150,000, \$20,000 being paid down, the company did not lose its right to recover from the agent by thereafter paying, with knowledge of the fraud, \$110,000 to close the purchase, the company not being bound to rescind nor to resort to an action to compel a conveyance for \$90,000.

7. SAME—MEASURE OF DAMAGES.

Where a company's agent for the purchase of certain property conspired to defraud it by procuring title to the property to be taken for \$90,000 by one who gave the company an option to purchase for \$150,000, the company could recover from the agent the difference between the price it was required to pay to complete the contract and acquire the property and the sum for which the agent and his confederates actually acquired the option.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 147.]

8. APPEAL—REVIEW—ORDER REFUSING NEW TRIAL.

On appeal by defendant, in an action for damages, from an order denying a new trial on judgment for plaintiff, he may not assert the defense of accord and satisfaction, nor of release by the release of a joint tort-feasor, since, so far as the facts upon which defendant relies are shown by the complaint as amended and the findings, the question of the sufficiency of the complaint and findings to support the judgment cannot be considered, and since neither defense was pleaded below, and there being no finding relative to the matter other than

the finding in accord with the allegations of the amendment to the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3476-3482.]

In Bank. Appeal from Superior Court, Shasta County; Charles M. Head, Judge.

Action by the Great Western Gold Company against James J. Chambers. From an order denying defendant a new trial on judgment for plaintiff, he appeals. Affirmed.

Milton S. Hamilton, for appellant. Bush & Perry, Sweeney & Sissons, and Rickel, Crocker & Tourtellot (Morrison, Cope & Brobeck, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal by defendant from an order denying his motion for a new trial. The complaint as originally filed was for an accounting, and for judgment for such amount as should be found due plaintiff thereon. It was alleged that defendant, as the agent and general manager of plaintiff in Shasta county, Cal., received large sums of money for the transaction of the business of plaintiff, and for the purpose of purchasing for plaintiff certain mining properties, and failed to account for the same, and converted a large portion thereof to his own use. Various transactions relative to the Vandevere group of mines, the Murray mine, and the Roan and Putney mines, whereby defendant improperly obtained from plaintiff and converted to his own use sums aggregating \$11,700, were alleged. It was further alleged that on or about September 20, 1902, defendant, while acting as the agent and trustee of plaintiff, was directed to proceed to Salt Lake City and purchase or procure for plaintiff a contract for certain mines in Shasta county known as the "Afterthought" for not exceeding \$150,000; that, acting under said instructions, defendant proceeded to Salt Lake City, and for the purpose of defrauding plaintiff in the matter of said purchase entered into an agreement and conspiracy with one Snyder and one Mitchell, whereby Snyder was to take the title to said mines from the owner, one Tarbet, for \$90,000, and Snyder was thereupon to give plaintiff an optional contract for the purchase for \$150,000; that plaintiff, without knowledge of said conspiracy, accepted the contract from Snyder at the suggestion of defendant, and paid thereon to Snyder \$20,000 as a first payment (\$10,000 of which was divided between defendant, Snyder, and Mitchell), the balance to be paid, \$90,000 on September 20, 1903, and \$40,000 on March 20, 1904. During the trial the complaint was amended by adding an allegation that thereafter plaintiff paid on said contract to Snyder the sum of \$110,000 in full payment and discharge of the same, making in all the sum of \$130,000 paid thereon, whereby there was lost to plaintiff and plaintiff was damaged by reason of said fraudulent agreement and conspiracy in the full sum of \$40,000. This allegation was apparently deemed denied. The trial court found in accord with the allegations of the complaint as thus

amended in regard to the Afterthought transaction, as well as in regard to the other transactions alleged, and, plaintiff waiving all claims except the right to recover \$40,000, rendered judgment against defendant for that sum.

This being simply an appeal from the order denying the motion for a new trial, some of the points made by learned counsel for appellant in their briefs cannot be considered. Upon an appeal from an order denying a new trial the appellate court is limited in its review of the action of the trial court to the grounds upon which such a motion may be based (Code Civ. Proc. § 657), and upon which the new trial was asked. It is well established that questions relating to the sufficiency of the complaint, rulings upon demurrers, and the sufficiency of the findings to support the judgment cannot be considered on such an appeal. *Swift v. Occidental M. Co.*, 141 Cal. 161, 74 Pac. 700; *Holmes v. Warren*, 145 Cal. 457, 78 Pac. 954; *Brownlee v. Reiner*, 147 Cal. 641, 82 Pac. 324; *Co. Bank v. Jack*, 148 Cal. 438, 83 Pac. 705, 113 Am. St. Rep. 285; *Wheeler v. Bolton*, 92 Cal. 167, 28 Pac. 558; *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186. The failure of the trial court to make a finding of fact upon a material issue renders the decision one against law, and error in overruling a motion for a new trial made on that ground may be reviewed on appeal from the order. *Swift v. Occidental M. Co.*, *supra*. There is, however, nothing in the record to indicate that any such failure was a ground of the motion made in the lower court. The notice of intention to move for a new trial was not incorporated in the statement or bill of exceptions, and it was not essential that it should be; but it is essential to our right to review the action of a trial court on motion for new trial that it should appear by the record that the ground for a new trial presented here was presented by the motion in the trial court. The record being otherwise silent upon the matter, this may be made to appear by proper specification of error in the statement or bill of exceptions (*Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706; *Williams v. Hawley*, 144 Cal. 90, 77 Pac. 762); but manifestly the mere general specifications that the court erred in rendering judgment for plaintiff and against defendant are not sufficient to constitute such a showing. Upon the record before us we cannot assume, for the purpose of reviewing the action of the trial court, that one of the grounds specified on the motion in the lower court was that the decision was against law. Regardless of what we have said upon this point, however, it is not pointed out by counsel wherein the trial court failed to make a finding upon any material issue. The point in this connection appears to be that the judgment being only for \$40,000, while the findings show, not only the \$40,000 damage arising from the Afterthought transaction, but also \$11,700 damage arising from the other transactions specifically alleged, there is noth-

ing by which the sum awarded can be made referable to any one or more of the particular transactions alleged. This clearly does not show a failure to find upon any issue of fact. Upon the record here we are therefore limited to a consideration of the contention that the evidence was insufficient to support the material findings of fact and the alleged errors of law committed by the trial court in ruling upon evidence. It is further clear that only those findings and alleged errors that are material to the Afterthought transaction need be considered here; for, if the action of the trial court in regard to that matter was free from error, it is apparent that the judgment would have been the same as it is, even though the findings upon all the other matters had been in favor of defendant. *Robinson v. Placerville, etc., R. R. Co.*, 65 Cal. 266, 3 Pac. 878; *White v. Douglass*, 71 Cal. 119, 11 Pac. 860.

There is ample support in the pleadings and evidence for the findings in accord with the allegations of the original complaint as to the Afterthought transaction, and also for the findings in accord with the allegations of the amendment relative to the subsequent payment by plaintiff of the further sum of \$110,000 in full payment of the amount due under the Snyder option, as reduced by stipulation of the parties. It is earnestly contended that the finding as to the damage resulting to plaintiff therefrom, which is as follows: "Whereby there was lost to said plaintiff, and plaintiff was damaged by reason of said fraudulent agreement and conspiracy and acts upon the part of said defendant in the full sum of \$40,000"—is not sustained by the evidence. This finding appears to have been attacked by proper specification of insufficiency of evidence to support it. The contention in this behalf is based on the fact alleged to have been shown by the evidence that all the money paid to Snyder by plaintiff on account of such transaction, except the \$20,000 paid at the time of the giving of the option, viz., \$110,000 was paid after plaintiff had obtained full knowledge of the fraudulent conspiracy between defendant, Snyder, and Mitchell, and it is also claimed that, although plaintiff, to obtain the property covered by the option, paid \$40,000 more than it would have paid if it had not been for the wrongful and fraudulent acts of its agent, if any injury was caused plaintiff in the matter, it was caused solely by the payment voluntarily made by plaintiff with full knowledge of all the facts. We are unable to see how defendant can be heard to assert that this loss was not caused by his wrongful acts. By reason of his willful and fraudulent breach of trust plaintiff had accepted an option to purchase for \$150,000 property which it desired to acquire, and for which it was willing to pay, if necessary, as much as that sum, when, as a matter of fact, the purchase price to the defendant was only \$90,000, and plaintiff, but for the fraudulent

acts of defendant in regard thereto, would have been given an option to acquire the property for a consideration of \$90,000. If by reason of such acts it paid more than \$90,000 for the property, it was necessarily damaged thereby to the extent of the difference between \$90,000 and the sum actually paid. Admittedly plaintiff, desiring to have the property, was not required to rescind upon discovery of the fraud. Nor was it required to resort to an action to compel a conveyance upon payment of \$90,000. Notwithstanding knowledge of the fraud on the part of plaintiff, the result of such action might be in some degree uncertain, and plaintiff was not required to take the chance of thus losing the opportunity of purchasing the property. It is not disputed that a party thus defrauded may upon discovery of the fraud complete his contract, and then maintain an action for the damages caused him thereby. Such damage in the case at bar, it appears very clear to us, was the amount of the difference between the price which plaintiff was required to pay to complete the contract and acquire the property and the sum for which defendant and his confederates actually acquired the option. See *King v. Wise*, 43 Cal. 628; *Calmon v. Sarraille*, 142 Cal. 642, 76 Pac. 486. It does not assist defendant in his contention that the evidence is insufficient to sustain the finding of \$40,000 damage that plaintiff obtained a reduction of \$20,000 on the original price from Snyder, thereby reducing the amount of damage from \$60,000 to \$40,000. By the contrivance of defendant, and for the purpose of enabling him to profit at the expense of his principal, the property which plaintiff desired to acquire had been placed within the control of Snyder, and plaintiff could not obtain the same without acceding to the demands of Snyder under the option given, except by resorting to an action against him to compel a conveyance, which might well turn out to be impracticable or without efficacy. This chance of losing the property it was not required to take. It had the clear right to pay Snyder the full amount of the \$130,000 that remained due on the option, and then maintain an action against the defendant for the \$60,000 loss which would thus have been caused, and the only effect of obtaining from Snyder a reduction of \$20,000 on the amount to be paid to obtain the property, so far as the amount of damage caused by defendant's acts was concerned, was to reduce the amount of damage by \$20,000 to defendant's benefit. It still remained that plaintiff was damaged by the acts of defendant in the sum of \$40,000.

It is urged that the acceptance by plaintiff of the proposition of Snyder to accept \$20,000 less than the amount originally named as the purchase price in the option, and the payment by it to Snyder of the \$110,000 thereunder, had the effect to release the defendant from all liability for damages "upon the principles governing accord and satisfaction,"

and that in any event defendant was released from all claim of damage by what is said to have been a release of Snyder, a joint tortfeasor. It is not necessary to discuss on its merits either of these points, for it is clear that neither is available to defendant on this appeal. So far as the facts upon which defendant relies in this behalf are shown by the complaint as amended and the findings of the trial court, it is only necessary to again state that the question of the sufficiency of the complaint and findings to support the judgment cannot be considered on an appeal from an order denying a new trial. Neither the defense of accord and satisfaction nor that of release, both of which are affirmative defenses, was pleaded by defendant in the lower court, and there is no finding of fact relative to the matter other than the finding in accord with the allegations of the amendment to the complaint which we have already set forth. Except as to the damage thereby found to have been suffered by plaintiff by reason of defendant's acts, this finding was not attacked by any specification of insufficiency of evidence to sustain it, and the evidence shows it to be in accord with the undisputed evidence given on the trial.

Only three alleged errors in rulings on evidence are pointed out in appellant's briefs. The first two rulings claimed to be erroneous could not by any possibility have affected the result as far as the Afterthought transaction was concerned, and it is unnecessary to determine whether they were technically wrong. The third ruling was one excluding certain documentary evidence offered by defendant. The evidence so offered was clearly immaterial and irrelevant to any issue in the case, and the ruling of the lower court was correct.

The order denying a new trial is affirmed.

We concur: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.; SLOSS, J.

153 Cal. 314

PEARSALL et al. v. HENRY et al. (S. F. 4355.)

(Supreme Court of California. Nov. 19, 1907.)

1. CONTRACTS—WRITTEN CONTRACTS—MODIFICATION BY PAROL—"EXECUTED AGREEMENT."

Under Civ. Code, § 1698, providing that a written contract may be altered by a contract in writing or by an executed oral agreement, and section 1661, declaring that an executed agreement is one the object of which is fully performed, an oral agreement altering a written contract is not enforceable, unless its terms have been fully performed by both parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1123.]

2. SAME — SUBSTITUTION OF PAROL AGREEMENT.

Where the parties to a written contract made an oral settlement of their differences due to disputes as to their rights under the contract, and the oral settlement imposed new obligations on the parties, and each, in consideration of the new promises, agreed to do things which he

was not bound to perform under the contract, the contract was abrogated, and the oral settlement took its place, and it was not affected by Civ. Code, § 1698, providing that a contract in writing may be altered only by a contract in writing or by an executed oral agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1123.]

3. SPECIFIC PERFORMANCE — PART PERFORMANCE OF PAROL CONTRACT WITHIN THE STATUTE OF FRAUDS.

An oral agreement bound plaintiff to convey to defendant land in one county, and bound defendant to convey to plaintiff an interest in land in another county. Plaintiff performed his part of the agreement. Held, that he could, notwithstanding the statute of frauds, compel performance by defendant, under the rule that, where there is an oral agreement by which each of the parties is to convey land to the other, the conveyance by one on the faith of the agreement is such part performance as will in equity take the case out of the operation of the statute, though he could not sue at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 120, 121.]

4. SAME—ACTS CONSTITUTING PART PERFORMANCE.

Acts to constitute a part performance of a parol contract, unenforceable under the statute of frauds, must have been done with a view to carry out the contract, and, when so done, the contract is enforceable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 124.]

5. SAME—QUESTION OF FACT.

Whether acts were done with a view to carry out a parol contract unenforceable under the statute of frauds, so as to constitute a part performance thereof, is a question of fact.

6. APPEAL — REVIEW — FINDINGS OF TRIAL COURT—CONCLUSIVENESS.

Where the evidence is conflicting, the findings of the trial court are conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

7. TRIAL—FINDINGS OF FACT—SUFFICIENCY.

Where the ultimate question was how much a party had expended in purchasing land, and the court found on sufficient evidence the amount expended, an error in a finding as to the price per acre was immaterial.

8. EVIDENCE — PAROL EVIDENCE — WRITTEN CONTRACTS—WANT OF CONSIDERATION.

Want of consideration for a contract in writing may, when properly pleaded, be shown by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1981-1989.]

9. SAME — PAROL CONTRACT SUPERSEDING WRITTEN CONTRACT—PROOF—ADMISSIBILITY.

Parol evidence of a contract superseding a contract in writing is competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2032.]

10. SAME—AMBIGUOUS CONTRACTS—EVIDENCE—ADMISSIBILITY.

Where a written contract is ambiguous, proof of the circumstances surrounding its execution and of what was said in regard to the ambiguous provisions is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2085-2101.]

11. APPEAL — HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

The erroneous admission of evidence, which does not support the claim of the successful party, does not justify a reversal on the appeal of the defeated party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

12. SAME—DISPOSITION OF CAUSE ON APPEAL.

Where the error in the findings of fact on one issue, arising from the insufficiency of the evidence to support it, does not affect the proper findings on other issues, the cause will be remanded for retrial on such issue alone.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by H. May Pearsall and another against James E. Henry and others, copartners under the firm name of J. E. Henry & Sons. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

Louis Titus, H. M. Wright, and Titus, Wright & Creed, for appellants. Campbell, Metson & Campbell and J. N. Gillett (Philip Mansfield, of counsel), for respondents.

SLOSS, J. This action was brought by Clarence E. and H. May Pearsall, husband and wife, against James E., George E., John H. and Charles B. Henry, copartners under the firm name of J. E. Henry & Sons. The complaint alleges that the plaintiff Clarence E. Pearsall during the months of February, March, and April, 1901, purchased a tract of redwood timber land in Del Norte county, in this state, and paid thereon as part of the purchase price and for securing the title the sum of \$39,009.61, \$6,400 of which belonged to his wife, H. May Pearsall; that the said Clarence E. Pearsall also expended as incidental and necessary expenses in purchasing said lands the further sum of \$5,000, or thereabouts. It is alleged that on or about the 23d day of April, 1901, the defendants promised and agreed with the plaintiffs that, if the plaintiffs would convey said lands to them, they, the defendants, would in the latter part of May, 1901, pay to plaintiffs the money they had paid upon such lands as aforesaid, and the moneys expended by Clarence E. Pearsall as expenses in obtaining the same. It is then averred that the plaintiffs, relying upon this promise, conveyed all of said lands to the defendants, but that said defendants have failed and refused to pay any part of said moneys to plaintiffs. The complaint sets forth an assignment by Clarence E. Pearsall to H. May Pearsall of all his right, title, and interest in and to said sums of money, and asks judgment against the defendants for the amounts so alleged to have been paid for securing the lands and for expenses.

The defendants answered, denying, among other things, the making of the alleged agreement, and denying that the lands had been conveyed to them pursuant to any such agreement. The position of the defendants is clearly set forth in their pleadings, which include, in addition to an answer, a counterclaim and a cross-complaint. They allege that the conveyance set forth in the complaint had been made pursuant to the terms of two written agreements between the defendants and the plaintiff Clarence E. Pearsall. The first of these bears date the 20th day of October, 1900,

and after reciting that the parties of the first part (the appellants herein) contemplate purchasing from the California Redwood Company a tract of land in the county of Humboldt containing 16,800 acres, or thereabouts, at the price of \$30 per acre, and that said California Redwood Company has promised to Pearsall a commission of 2½ per cent. on said price for making said sale, declares that the Henrys agree that, in the event of their purchasing the said tract of land from the California Redwood Company, they will sell to Pearsall at the price of \$40,000 an interest in the tract, bearing such relation to the whole tract as \$40,000 bears to the entire purchase price, less the commission. By this agreement Pearsall agrees to purchase said interest and that he "will, in addition, pay said parties of the first part any and all commission he may receive from the California Redwood Company." This agreement considered by itself had no reference to the lands mentioned in the complaint herein, but it was supplemented by the making of a second agreement dated February 8, 1901, which provides that, "in consideration of certain favors extended to the party of the first part (Pearsall) by the party of the second part (J. E. Henry & Sons) in the purchase of redwood timber lands in the county of Humboldt, the party of the first part hereby agrees to purchase for the party of the second part certain redwood timber lands in the county of Del Norte, in the state of California," in certain described townships and sections. The agreement goes on to recite that Pearsall has already secured options on the lands which the parties of the second part expect to purchase, and that papers in escrow are lodged in bank, and provides that Pearsall is to make out a list showing the above tracts of land on which he has options, together with the names of the owners and number of acres contained in each tract, and the price per acre which the several owners are to receive for their lands. On such tracts as the purchase price is \$15 per acre or under, Pearsall is authorized by J. E. Henry & Sons to purchase, paying for same the prices agreed upon between the present owners and Pearsall, but Pearsall is not to buy any of the tracts of land mentioned for a price exceeding \$15 per acre, without special instruction from the Henrys, "all deeds to be made in the names of the parties of the second part, who are to pay the prices at which the lands are now deeded in escrow." The Henrys agree to furnish Pearsall necessary funds to secure the different tracts. The parties of the second part further agree to pay the expenses of the party of the first part while he is engaged in securing the deeds provided for, said expenses not to exceed \$250. It is the purchase of the land in Del Norte county described in this agreement of February 8, 1901, that gives rise to the present controversy.

In the pleadings on the part of the defendants it is alleged that in December, 1900, they purchased the 16,800 acres of land in Hum-

Humboldt county mentioned in the agreement of October, 1900, and that Pearsall received as a commission for making such sale the sum of \$89,000. This is alleged to be far in excess of any sum paid by Pearsall for the lands purchased by him under the contract of February, 1901. By their counterclaim the defendants ask judgment against Pearsall for the excess, and by their cross-complaint they seek an accounting of the balance of commissions that may remain in Pearsall's hands. The cross-complaint also seeks to compel the conveyance of 320 acres of land claimed to be a part of the tract purchased by Pearsall for the Henrys, and by Pearsall conveyed to J. N. Gillett, who is made a party defendant to the cross-complaint. The answer to the cross-complaint does not deny the execution of the written instruments in question, but alleges that these instruments were executed by Pearsall without consideration; alleges that, after the making of these agreements, differences had arisen between Pearsall and the defendants regarding their rights and obligations arising out of their several contracts; and that subsequently Pearsall and the Henrys entered into a new agreement for the purpose of settling all of the matters in controversy; and that, by this new contract, it was agreed that the parties were to convey to the defendants all of the lands secured by Pearsall, and that the defendants should pay to the plaintiffs all sums of money paid by them for the purchase of lands in Del Norte county, and the expenses incurred in securing the same. The defendants also agreed, as is alleged, to waive all claims which they had for commissions received by Pearsall on the sale of the lands in Humboldt county purchased from the California Redwood Company, except $2\frac{3}{4}$ per cent. of the purchase price, which had heretofore been paid by Pearsall to the defendants. Plaintiffs allege that their conveyance of the land in Del Norte county was made in reliance upon this agreement. From this summary of the pleadings it will be seen that there is no controversy about the fact that plaintiffs did convey to defendants the land in Del Norte county. The real dispute is as to the agreement under which this conveyance was made; the defendants claiming that it was made by virtue of the written agreement above described, and the plaintiff contending that these written agreements were abrogated and superseded by a new and different agreement. More specifically, the difference between the parties relates to the commissions to be paid by Pearsall to the Henrys upon the sale of the lands in Humboldt county. If, as claimed by the plaintiffs, only $2\frac{3}{4}$ per cent. of the purchase price paid on the Humboldt transaction was to be turned over, defendants are largely indebted to the plaintiffs. On the other hand, if, as is contended by the defendants, Pearsall was bound to account to them for the total commission amounting to \$89,000, this amount was sufficient to repay him for all advances made in acquiring the Del Norte

lands, and to leave a large balance due from him to the defendants.

The findings and judgment were in favor of the plaintiffs. So far as concerns the conveyance of the Del Norte lands to defendants, the court finds that the written agreements of October 20, 1900, and February 8, 1901, respectively, were executed as alleged in the answer and cross-complaint; that between the 1st day of February, 1901, and the 23d day of April, 1901, the plaintiff Clarence E. Pearsall purchased in his own name, and partially paid for from his own funds, a tract of redwood timber land situated in Del Norte county, containing 8,115 acres; that he expended in purchasing said land the sums of \$4,650 for expenses, and \$39,009.61 on account of the purchase price, the cost of said land to him having been \$12.50 per acre, exclusive of expenses. It is found that Pearsall received \$89,000 as commissions on the sale of the 16,800 acres of Humboldt land, and that of this sum \$14,000 had been paid to defendants. It is further found that in the month of April, 1901, disputes arose between Pearsall and the defendants growing out of their written agreements; Pearsall claiming that the agreement of February 8, 1901, had been obtained from him by fraud, and the defendants claiming that they were entitled to the lands purchased by Pearsall at the exact price paid for the same, without allowing any commission or expenses, which claim was by said Pearsall denied, he claiming that the defendants were to pay \$15.20 per acre for said lands. The defendants also demanded that said lands be immediately deeded to them; Pearsall claiming that there should be no conveyance until he had been paid at the price of \$15.20 per acre. The finding as to the new agreement upon which this suit is founded is in the following words: "That upon the 23d day of April, 1901, plaintiff Clarence E. Pearsall, and the defendant James E. Henry, representing the firm of J. E. Henry & Sons, met in the city of Eureka, state of California, and made a full and complete verbal settlement of all accounts existing between them as follows: Said James E. Henry, for said J. E. Henry & Sons, agreed with said Pearsall that for and in consideration of said Pearsall waiving all claims and demands against defendants over and in excess of \$12.50 per acre upon the lands which had been purchased by him, to wit, the 8,115 acres in the county of Del Norte, state of California, and deeding said lands at once to defendants, that defendants would faithfully carry out the terms of the agreement of October 20, 1900, in relation to deeding said Pearsall the amount of said lands represented by his \$40,000 purchase as shown by said agreement; that defendants would waive any and all claims to any commissions under said agreement, save and except $2\frac{3}{4}$ per cent. which defendants had theretofore received, and would repay said Pearsall the entire amount of mon-

ey he had paid out of his own and his wife's funds in the purchase price of said 8,115 acres of land in Del Norte county aforesaid, and would repay said Pearsall any and all expenses he had incurred in the purchase of said lands, and that said defendants would pay said sums of money on or about the first day of June, 1901; that said Pearsall accepted the terms of said agreement and fully agreed thereto." The court found that Pearsall made the conveyance as provided in said agreement; that no part of the moneys paid by him for said lands or expenses incurred by him has been repaid; that he had transferred his claim against defendants to his coplaintiff, H. May Pearsall, and directed judgment in favor of H. May Pearsall for the sum of \$43,650.61, with interest, the total amounting, at the date of the findings, to \$51,876.95. Judgment for this amount and costs followed, and the defendants appeal from the judgment and from an order denying their motion for a new trial.

Many of the findings of the court are attacked as unsupported by the evidence. Before proceeding to the examination of these points, we shall consider the contention of the appellants that the findings, even if sustained by the evidence, do not support the judgment. The argument in this regard is based primarily upon the proposition that the alleged agreement of April 23, 1901, by virtue of which the parties settled all of their then existing differences, and agreed upon an immediate conveyance by Pearsall of the lands, was void and unenforceable because not in writing. The defendants urge that this oral agreement of April 23d was a mere modification or alteration of some of the terms of the agreements of October, 1900, and February, 1901; and since it was still executory was void under the provisions of section 1698 of the Civil Code. That section reads as follows: "A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise." According to section 1661 of the Civil Code an executed agreement is one "the object of which is fully performed. All others are executory." If the agreement of April 23, 1901, is to be regarded as a mere modification or alteration of the then existing agreements, it must be conceded that it was not executed within the meaning of section 1698, and is therefore not now enforceable. An oral agreement altering a written agreement is not executed unless its terms have been fully performed. Performance on the one side is not sufficient. There must be a complete execution of the obligations of both parties in order to bring the modification within the terms of the statute. *Henehan v. Hart*, 127 Cal. 657, 60 Pac. 426; *Thompson v. Gorner*, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 105; *Platt v. Butcher*, 112 Cal. 634, 44 Pac. 1060; *Mackenzie v. Hodgkin*, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209; *Harloe v.*

Lamble, 132 Cal. 133, 64 Pac. 88. But we think the agreement of April 23, 1901, as the same is found by the court, was not a modification or alteration of the written agreements, but was a new agreement superseding those then existing. The finding which has already been quoted at length does not indicate that the parties intended to alter one or more of the terms of the written agreements, leaving those agreements in other respects to remain in force. The idea conveyed by the finding is that these agreements were virtually abrogated, and that the new oral agreement was to take their place. It imposed new obligations upon the parties, and each, in consideration of new promises then made by the other, agreed to do acts which, according to his own contention, he was not then bound to perform. To such new agreement, substituted for an existing written agreement, section 1698 of the Civil Code has no application. *Stockton, etc., Works v. Glenn's Falls Ins. Co.*, 121 Cal. 167, 175, 53 Pac. 565. See, also, *Adler v. Friedman*, 16 Cal. 139.

But it is urged by appellants that, even if the agreement of April 23, 1901, is not to be treated as an unexecuted oral modification of a written agreement, it is still, as an oral agreement for the sale of real property, invalid under subdivision 5 of section 1973 of the Code of Civil Procedure. Unquestionably this agreement which provided for the conveyance by plaintiffs of the 8,000 odd acres of land in Del Norte county, and the transfer by defendants of an undivided interest in the lands in Humboldt county, was an agreement which, by the provisions of the statute of frauds, was required to be in writing. But where the plaintiffs have, as it is here found they have, fully executed the agreement on their side, are the defendants in a position to raise the objection that the contract was not in writing? While full performance of so much of the contract as would bring it within the statute of frauds will enable either party to sue upon the remaining stipulations (*Browne, Statute of Frauds* [5th Ed.] § 117), the statute will still prevent recovery when any stipulation which is itself required to be in writing remains unperformed. Here the contract as found required the defendants to convey an interest in the Humboldt lands. This stipulation being unperformed, and the contract being undoubtedly entire, the rule as just stated would make the bar of the statute applicable to any suit upon said contract. *Fuller v. Reed*, 38 Cal. 100. But this rule refers merely to the effect of the statute as a legal defense. Notwithstanding the applicability of the statute as a bar at law, there may still have been such part performance as will impel a court of equity to specifically enforce the contract. Where there is a verbal agreement under which each of the parties is to convey land to the other, it is generally held that a conveyance by one on

the faith of the agreement constitutes such part performance as will in equity take the case out of the operation of the statute. *Caldwell v. Carrington*, 9 Pet. (U. S.) 86, 9 L. Ed. 60; *McClure v. Otrich*, 118 Ill. 320, 8 N. E. 784; *Farwell v. Johnston*, 34 Mich. 342; *Baker v. Scott*, 2 Thomp. & C. (N. Y.) 606. See *Swain v. Burnette*, 89 Cal. 564, 569, 28 Pac. 1093. The case at bar is within the principle of these decisions, and the conveyance by plaintiffs therefore places them in a position to compel compliance by the defendants with the undertakings on their part.

It is further argued that the conveyance by plaintiffs cannot be treated as a part performance of the alleged oral agreement of April 23d upon the ground that acts claimed to constitute a part performance must clearly appear to have been done with a view to carrying out the oral contract relied upon. *Browne*, Statute of Frauds (5th Ed.) § 454; *Williams v. Morris*, 95 U. S. 456, 24 L. Ed. 360; *Blum v. Robertson*, 24 Cal. 142; *Foster v. Maginnis*, 89 Cal. 264, 26 Pac. 823. But whether or not the acts do so clearly appear to have been done is primarily a question of fact for the trial court, and the trial court here has found that the conveyance to the defendants was made pursuant to the oral agreement of April 23d. This is sufficient to meet the requirements of the rule. We are satisfied that, if the evidence sustains the findings of the court, those findings were properly held to result in the judgment entered. Are the findings sustained by the evidence? The principal attack is directed against the finding of the making of the oral agreement of April 23, 1901. The appellants make an elaborate argument with a view to showing that the conveyance by Pearsall was made in recognition of his obligations under the written agreement of February, 1901, and that no oral agreement, as claimed by the plaintiffs and found by the court, was in fact entered into. It is not to be denied that there are certain circumstances appearing in the record which lend support to this contention. Apart from the suspicion which must always attach to a claim that a formal agreement in writing has been superseded by an oral contract, much more favorable than the writing to the party who asserts the making of the new agreement, Pearsall's own testimony was greatly shaken by the production of letters in which he had made statements entirely at variance with his position at the trial. But his testimony as to the making of the agreement of April 23d was corroborated by several witnesses, and the degree of credit to be accorded to him, as to the other witnesses, was a question for the trial court. The witnesses for the plaintiffs testified that the agreement in question had been made. The witnesses for the defendants testified that it had not been. It was for the trial court to decide which set of witnesses was telling the truth. While it may be that the court reached the

wrong conclusion on this question of fact, its decision is conclusive in this court, if there was a substantial conflict of evidence, and it cannot be doubted that there was such conflict here. It is found that Pearsall had expended in purchasing the lands and securing the options the sum of \$4,650 as necessary and incidental expenses. The only testimony as to these expenses is that of Pearsall himself. Adding together all of the items testified to by him, the sum falls considerably short of the amount found by the court to have been expended by him. Indeed, the respondents make no attempt to point out any evidence which will sustain the finding that \$4,650 was so expended. The findings as to the amount paid out by Pearsall on account of the purchase price of the land are by no means satisfactory when measured by the evidence. The court made two findings relating to this item. Finding 8 is that Pearsall had paid upon the purchase price of the land the sum of \$39,009.61. Finding 9 declares that the actual cost of said lands to Pearsall had been the sum of \$12.50 per acre, exclusive of expenses. The record discloses absolutely no evidence in support of the latter finding. Nowhere in the testimony is there any suggestion of a price of \$12.50 per acre. Pearsall and those from whom he claims to have bought all say the price to him was \$12 per acre. But, since the ultimate and important question in this connection is how much Pearsall had expended in purchasing the land, an error in the finding as to the price per acre is of no consequence, if finding 8 that he had expended \$39,009.61 is supported by the evidence. We think the record does contain sufficient evidence to support this finding, although that evidence is not as clear as might be desired. Pearsall testified that he had bought and paid for the 8,115 acres at the rate of \$12 per acre. The amount so claimed to have been expended, after deducting advances made by the defendants and \$14,000 due them (according to Pearsall's contention) on account of commissions, left a sum greater than that found by the court to have been expended by Pearsall. While it is difficult, if not impossible, to ascertain from the record how the court arrived at the exact figure of \$39,009.61, there was some evidence, not directly contradicted, tending to show that that amount or more had been expended by Pearsall. The other findings, so far as they are material, are supported by sufficient evidence.

We come to the exceptions taken to the rulings of the court in sustaining and overruling objections to evidence. There are more than 100 of these exceptions, and they must necessarily be treated briefly. Many of them are based on the action of the court in admitting correspondence and evidence of conversations of the parties prior to the agreement of February 8, 1901. It is urged that this violated the rule that the execu-

tion of a written contract supersedes all negotiations preceding its execution. See Civ. Code, § 1625. But here the plaintiffs in their answer to the cross-complaint averred that the two written agreements relied on by the defendants had been executed by Pearsall without any consideration whatever. That want of consideration for the execution of a writing, when properly pleaded, may always be shown by parol proof, is elementary, and the testimony in question was relevant to the issue framed. Testimony of the oral agreement of April 23, 1901, was objected to on the ground that it was an oral unexecuted modification of a written agreement. That objections of this character were properly overruled follows from what has been said in discussing the sufficiency of the findings to support the judgment. If, as is shown in an earlier part of this opinion, the agreement of April 23, 1901, constituted, not a modification of the written agreements, but a new contract superseding them, oral evidence of such new contract was competent. Pearsall was allowed to testify to the conversations which took place between him and some of the defendants at the time of signing the contract of October 20, 1900. This conversation related to the provision for turning over the commissions to be received by him on the Humboldt sale, and the purpose of the testimony was to show that the understanding was that only 2½ per cent. of the purchase price, and not the entire commission, was to be accounted for. There was no error in this. The writing which recited that the commission was to be 2½ per cent., and then contained an agreement to pay over all commissions, was ambiguous. Whether by its terms Pearsall was to turn over only the 2½ per cent. stated to be the amount shown, or was to turn over all commissions, whatever might be their amount, was fairly open to doubt. To clear up this ambiguity which appeared, when it was shown that the commissions were in fact much more than 2½ per cent., it was proper to allow the plaintiffs to show the circumstances surrounding the execution of the writing, and all that was said in regard to these clauses. *Balfour v. Fresno Co.*, etc., 109 Cal. 221, 41 Pac. 876. Some of the testimony offered to show what money had been paid by Pearsall through a bank in Crescent City was immaterial because not directly connected with the transactions in dispute. But we cannot see that the admission of this evidence was in any substantial way prejudicial to appellants. The most that can be said is that it had no tendency to support the claim of Pearsall as to the amount expended by him in the purchase of the lands. If it had no such tendency, its admission was not a matter of sufficient importance to justify a reversal. The exceptions taken in connection with the testimony regarding Pearsall's expenses in acquiring the land need not be considered in view of

our conclusion that the evidence does not support the finding as to such expenses. On the whole case, we find no substantial error except that involved in the finding just mentioned. Since this does not affect the other issues, it will not require a retrial of the entire case. *Emerson v. Yosemite G. M. Co.*, 149 Cal. 50, 85 Pac. 122; *Robinson v. Muir* (Cal.) 90 Pac. 521.

The judgment and order are reversed, and the cause remanded, with directions to the trial court to retry the issues raised regarding the expenditures made by C. M. Pearsall on account of incidental expenses in purchasing the lands mentioned in the complaint, and to enter a judgment in favor of H. May Pearsall for the amount, if any, found to have been so expended, together with the amounts due by reason of the other findings.

We concur: SHAW, J.; ANGELLOTTI, J.

(153 Cal. 314)

PEARSALL et al. v. HENRY et al. (S. F. 4,355.)

(Supreme Court of California. April 1, 1908.
Rehearing Denied April 30, 1908.)

1. EVIDENCE — PAROL EVIDENCE AFFECTING WRITINGS.

Parol evidence is admissible to show a substitution of a new parol agreement for a prior written one; Civ. Code, § 1698, providing that a written contract may be "altered" by a contract in writing or by an executed oral agreement, and not otherwise, not being applicable.

2. FRAUDS, STATUTE OF—ORAL AGREEMENT TO TRANSFER LAND — ESTOPPEL — PART PERFORMANCE.

Where a party to an oral agreement to convey land conveys it, and the other parties accept it under the contract, they are estopped to raise the objection that the contract was not in writing as required by the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 287, 289.]

3. SAME.

The mere fact that an act relied upon as part performance of an oral contract within the statute of frauds was an act which the performing party was bound to do under a prior written agreement is not conclusive against the claim of part performance of the new oral agreement, as there is no hard and fast rule on that question, but it is one of fact for the determination of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 287, 289.]

4. SAME.

The rule as to the effect of part performance of an oral agreement invalid under the statute of frauds is based on equitable considerations, and, when it clearly appears that there has been such a performance by a party of his part of the agreement as to make it inequitable to allow the other party to repudiate it on the ground that it was not in writing, he will be estopped from doing so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 287, 289.]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Opinion in department affirmed, and judgment below modified and affirmed.

For departmental opinion, see 95 Pac. 154.

Louis Titus, H. M. Wright, and Titus, Wright & Creed, for appellants. Campbell, Metson & Campbell and J. N. Gillett (Philip Mansfield and Thomas H. Breeze, of counsel), for respondents.

PER CURIAM. A rehearing of this appeal was ordered after decision in department. Upon further consideration, we adhere to the department opinion. As stated therein, section 1698 of the Civil Code must be held to be inapplicable where the offer is to prove a substitution of a new agreement for the prior written agreement. This is very clearly shown in the opinion in *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786, where it was held that one sued upon a written agreement could show by parol evidence that a subsequent written agreement was executed upon the consideration and agreement between the parties that the former agreement should be canceled, and all claims of the plaintiff against the defendant thereunder waived. Speaking of such evidence, the court said: "Its purpose was to show that that agreement had been canceled by mutual consent, and had no longer any operative effect. Such evidence is as admissible as is oral testimony that the terms of a written agreement have been fully performed by the parties, or that the instrument evidencing such agreement has itself been canceled and destroyed by the concurrent act of both parties. In either case, the object and effect of such evidence is not to change any of the terms of the contract, but to show that the contract has no longer any existence, and therefore cannot be made the basis of an action. The objection that the written agreement could be altered only by an agreement in writing, or by an executed oral agreement (Civ. Code, § 1698), has no application to the facts offered to be shown. The offer was to show that the subsequent written agreement had been substituted for the original agreement, and the oral agreement of which proof was offered was the agreement to make this substitution. It was not an offer to prove an executory oral agreement, but an oral agreement that had been fully executed by the substitution. This, in effect, was an offer to prove a novation. *Farmers' N. G. Bank v. Stover*, 60 Cal. 387." See, also, *Adler v. Friedman*, 16 Cal. 138. It is true that to effect a substitution the new agreement must be valid in itself (*Adler v. Friedman*, supra), and, solely by reason of the statute of frauds, the new agreement was one that was required to be in writing in order to be valid. But the objection on this score is fully answered by what is said in the department opinion on the effect of the performance of Pearsall

of his part of the contract, the conveyance to the defendants of the Del Norte county lands. Having accepted such conveyance under the new contract (which is the effect of the findings of the trial court), the defendants are no longer in a position to raise the objection that such new contract was not in writing. We do not understand the authorities relied on by learned counsel for defendants to hold that the mere fact that the act relied on as part performance was something which the party performing had been obligated to do under a prior agreement is conclusive against the claim of part performance of the new oral agreement. Some of them say that, to constitute part performance, the acts relied on must be referable exclusively to the oral contract (see *Page on Contracts*, § 719), but, as we understand it, this means no more than that in the light of all the circumstances of the particular case such acts are so referable. There is no hard and fast rule under which the mere existence of a prior obligation to do the acts bars all inquiry on the subject. The rule as to the effect of part performance is based entirely on equitable considerations, and, when it is clearly and unequivocally made to appear that there has been a performance by a party of his part of an oral agreement required by the statute of frauds to be in writing, under such circumstances as to make it inequitable to allow the other party receiving the benefit thereof to repudiate it on the ground that it was not in writing, he is estopped from doing so. The question whether there has been a part performance of the oral agreement is necessarily one of fact to be determined by the trial court. If the testimony of plaintiffs' witnesses be taken as true, as to which the trial court was the sole judge, it affords unequivocal and satisfactory evidence of the particular oral agreement alleged by Pearsall, and showed acts of part performance referable exclusively, under all the circumstances, to such oral agreement. The findings of the trial court sufficiently show a consideration for the oral contract in the existence of the disputes between the parties and the settlement thereof, and there is sufficient evidence to sustain such findings.

In department it was held that the evidence was insufficient to support the finding as to the amount of incidental expense incurred by Pearsall in acquiring the Del Norte county lands, and for which, under the oral contract, he was entitled to reimbursement. The trial court found this amount to be \$4,650, and included such amount, with interest from July 1, 1901, in the judgment. The judgment of this court was that the judgment and order be reversed, with directions to the trial court to retry only the issues regarding the expenditures on account of such incidental expenses, and to enter judgment in favor of H. May Pearsall for the amount, if any, found to have been so expended, together with the amounts due by reason of the other

findings. Plaintiffs, for the purpose of obviating any further proceedings, have filed in this court their waiver of any further claim on account of such incidental expenses, and their consent that the judgment be modified by deducting therefrom the said amount of \$4,850, with interest thereon from July 1, 1901, leaving plaintiff H. May Pearsall entitled at the date of the judgment (April 22, 1904) to the sum of \$46,443.11, with interest from said date at the rate of 7 per cent. per annum, and costs of suit taxed at \$189.55. This obviates the necessity of a new trial.

The order denying the motion for a new trial is affirmed. The judgment is modified by inserting the amount of \$46,443.11 as the amount which plaintiff H. May Pearsall shall receive in lieu of the \$51,876.95 awarded, and, as so modified, said judgment is affirmed as of its original date. Defendants shall recover the costs of this appeal.

BEATTY, C. J. I dissent.

153 Cal. 347

PEKIN MIN. & MILL. CO. v. KENNEDY
et al. (Sac. 1,609.)

(Supreme Court of California. April 2, 1908.)

APPEAL—REVIEW OF FORMER DECISION.

On an application by one not a party to an action to review a decision of the Supreme Court rendered many years ago, which repeated the substance of certain findings of the trial court reflecting upon the integrity of petitioner, it is impossible for the court to attempt to amend or correct the findings of the trial court, and so impossible for it to afford him specific relief, though all the evidence on a full examination fully and completely exonerates the applicant.

In Bank. Action by the Pekin Mining & Milling Company against James Kennedy and others. Application by Frank B. Ogden for review of former decision of the Supreme Court of California as reported in 81 Cal. 357, 22 Pac. 679. Application denied.

McFARLAND, J. In 1889 this court handed down a decision in the above-entitled case, which will be found reported in 81 Cal. 357, 22 Pac. 679. In its opinion this court made reference to, and repeated the substance of, certain findings of the trial court, which findings reflected upon the fair dealing of Frank B. Ogden, petitioner herein. The gist of these findings was that the said Ogden improperly and in fraud of the rights of James Kennedy and others, defendants, represented at an execution sale of certain mining claims of the Oro Fino Mining Company, that the Oro Fino Mining Company was not the owner of the property, and, after the sale, wrote his name in the constable's certificate of sale under execution. In the answer of Kennedy and others in the above-entitled suit no charge of fraud was made against Ogden, and there was no intimation that he was to be charged with fraud. Nothing in the answer tended to give notice to any such

fraud was claimed. At the trial of the cause Ogden was called, testified, and went his way. Upon his examination neither his integrity nor the fairness of his acts was called in question. He never was informed during or after the trial of the cause that his testimony had been disputed, or his fair dealing questioned. He had no interest in the litigation, and the first knowledge that he acquired that the findings of the trial court in any way reflected upon him was from reading the reported decision of this court. Immediately upon becoming aware of this decision, the said Ogden himself presented the matter to the Bar Association of Alameda county, of which he was a member, with a request that an immediate investigation of his conduct be had. Such investigation was had, and resulted in his complete exoneration, and the Bar Association of Alameda county addressed a letter, early in the year 1890, to the justices of this court, declaring that, after examination, the said Ogden, who at that time had become a judge in the county, was about to request a hearing before this court of the matters touching his integrity, and asked that such hearing be granted him. The judges of the superior court of Alameda county, expressing from their own knowledge the highest opinion of the character of Judge Ogden, united with the Bar Association in this request. The request which was urged upon this court personally by Judge Ogden, and also by a committee of the Bar Association of Alameda county appointed for that purpose, was to the effect that this court should in some appropriate manner investigate the matter of the alleged fraud of Ogden, and report its conclusions thereon in some suitable way by footnote or appendix to the case of Pekin Mining & Milling Co. v. Kennedy, already reported. The justices of this court, each and all expressing willingness to do anything to subserve the ends of justice, pointed out the impossibility of adding such footnote to the volume because it was already in print, and suggested, moreover, that as the judgment of this court in the case had been a judgment ordering a new trial it would be possible for Judge Ogden, upon such new trial, to have the facts thoroughly investigated, and a finding in accordance with those facts declared by the trial court. Judge Ogden then immediately communicated with Marcus P. Bennett, Esq., who had been the attorney for the plaintiff in the litigation, urging him to press the case for retrial, and offering to bear all the cost and expenses attending such trial, for the sole purpose, so far as he was concerned, of presenting to the court all of the evidence upon the question of his alleged fraudulent practice. Judge Bennett replied that a new trial was impracticable, as the hostile interests had been consolidated and the case had passed from his management and control, concluding his letter by offering his assistance to do whatever he could "to remove the blot from your good name, which I

believe has been most unjustly attached to it."

Judge Ogden then requested Judge Bennett to confer with Judge Williams, who was the trial judge, and learn from him whether he would not be willing to take evidence and report upon this single matter, it being urged that he could do so without impairment of any of the rights under the decision, since his judgment had been reversed by the Supreme Court, and his finding of the fraudulent practice of Ogden was not within the issues of the case and in no way necessary to sustain the judgment. Judge Williams, in turn, could not see his way clear to try any portion of the case by piecemeal and declined to do so. Appeal was also made to George G. Blanchard, Esq., who had been the attorney for the defendants in the case, asking his aid that the matter might be thoroughly investigated and cleared up, and Mr. Blanchard wrote that he "exonerated Mr. Ogden from all imputation or wrong in the matter you refer to. * * * I am ready to do anything in my power to relieve Mr. Ogden in the matter you speak of. Judge Williams has gone out of office and of course can make no order in the case. Say to Mr. Ogden to prepare such a paper as will meet the facts of the case, and it shall be done with as he may suggest."

Being thus unable to obtain relief from any quarter, Judge Ogden was constrained to give over his attempts, and in this situation the matter rested until 1893. In that year Judge Ogden's name was under consideration by Governor Markham for appointment to the position of judge of the superior court of Alameda county. Confronted by the case in the eighty-first volume of our Reports, his excellency appointed a commission, composed of the three judges of the superior court of Alameda county, to take proofs on the matter and report their findings to him. Such proofs were taken, and the following findings were made:

"The transaction which bears most heavily against the said Ogden is found in the decision of the Supreme Court, expressed in this language: 'It had been agreed between Miller, Bargion, and Kennedy that the latter should bid off the property in his own name. But it had also been agreed between Miller and Frank B. Ogden, that said Ogden should attend the sale for the purpose of procuring the title to said mine to be taken in his (Ogden's) name. Ogden attended the sale, and it was agreed between him and Kennedy that, for the purpose of deterring bidders, Ogden should give public notice at the sale that the mine did not belong to said Oro Fino Corporation, but was the property of him (Ogden). Such notice was accordingly given, and the mine was bid in by Kennedy, as before stated, but another complication arose. Ogden volunteered his assistance to the justice of the peace to write out the certificate of sale, and inserted therein his own name as purchaser,

instead of that of Kennedy. This was not known to or discovered by the constable (Cline) or Kennedy.' Upon these matters we make the following findings: Said Ogden did attend the sale and give public notice that the mine did not belong to said Oro Fino Corporation, but was the property of him, Ogden. This notice was given in the belief, honestly entertained by said Ogden, that the title to said mine was in fact and in law in him, the said Ogden, under his deed from Schenck. This belief was at the time shared by Kennedy, Bargion, and Miller. There was no attempt to defraud the judgment creditor, Phelps, or prevent his obtaining from the sale the full amount of his judgment, and, in fact, the full amount of his judgment and costs was bid and the judgment creditor, Phelps, received all of the money from the sale of the property to which he was entitled under his judgment. It is true that Ogden volunteered his assistance to the justice to write out the certificate of sale, and inserted therein his own name as purchaser. It is not true that this was done without the knowledge of Kennedy or in fraud of Kennedy or Bargion, or in fraud of any person soever. We find that the said Ogden volunteered his services merely as penman. That he wrote his name in the certificate of sale because it was the understanding and agreement between Miller, Bargion, and Kennedy that he should do so. And here we proceed to a brief analysis of the testimony before us on this point:

"Manifestly there was no fraud and no impropriety in the said Ogden writing his name in said certificate, if in fact it was understood between Kennedy, Bargion, and Miller that the certificate should be issued in the name of Ogden as purchaser. Miller swears that it was the understanding between himself, Bargion, and Kennedy that the certificate should be taken in Ogden's name, and states the reasons therefor in his affidavit. Peter Bargion is now dead. His wife, however, makes affidavit to the high opinion which her husband always entertained of the character of the said Ogden, and her recollection that the certificate of purchase at the sale, under the Phelps judgment, should be taken in the name of Frank B. Ogden. The said Ogden testifies to like effect as Miller. In addition to this we have the evidence of Hon. Walter Van Dyke (now judge of the superior court of Los Angeles county, at that time attorney for said Miller), in the form of a letter addressed to said Ogden, bearing testimony to the honorable conduct and character of Ogden, and to the fact that the mine 'was sold under the Phelps claim, and was bid in by Ogden, Kennedy paying the money at the sale'—a payment understood, at the time, to be a payment on account of his indebtedness to Miller—which evidence is strongly corroborative of that of Ogden and Miller. We have next the testimony of George G. Graham, likewise in a letter, to the effect that he was present at the sale, and drove Ogden and Kennedy to the

mine. That at the sale Ogden stated, and the constable, Cline, announced, that the property was sold to Frank B. Ogden. That after the sale at the time Kennedy referred to the fact that the certificate was in the name of Frank B. Ogden. There is also the testimony of the justice of the peace, Tracy, taken upon the trial of the case, to the effect that Ogden wrote the certificate at his, the justice's, dictation, and that he, the justice, saw Ogden write his name in the certificate. And here it can scarcely be believed that if it was not by the justice at that time known to be the proper name therein to be inserted, he would have done as he testifies that he did, said nothing about it until a month or two thereafter. There is also the additional fact, undisputed by the evidence, that the said Ogden wrote the certificate in duplicate, each containing his own name, left them for the constable to sign, with instructions to the constable to file one for record, and it in fact was filed, and to deliver the other to Kennedy upon the payment by Kennedy of the money. One was actually filed for record and carried as matter of law, constructive notice to the world, of its contents, and the other was actually delivered to Kennedy long prior to July 1st, the date of his difference and trouble with said Miller. It is difficult to believe that any person would attempt the perpetration of so palpable a fraud, and one in its nature almost impossible to escape detection, and attempt the perpetration of such a fraud, the justice himself knowing that Ogden's name was written therein, the constable being called upon to sign them as his official act, one being placed of record, the other delivered to Kennedy himself. It is difficult, we say, to believe that under all these circumstances the fraud should have gone undetected, until nearly a month after the date of the beginning of the troubles between Kennedy and Miller.

"We are of the opinion that the more rational view is that the charge of fraud was simply an afterthought of defendant Kennedy. In this we are sustained by the opinion of Hon. Marcus P. Bennett, then attorney for plaintiff, now judge of the superior court of El Dorado county, who says in his letter above quoted, 'I contended for a very different finding, and argued the case on the theory of your entire innocence in taking the certificate in your own name, and supposed that the court would find in accordance with that theory, and was mortified and surprised that it did not.' Also the opinion of Hon. George C. Blanchard, found in his letter to A. A. Moore, above quoted, to the effect, that he exonerated Mr. Ogden 'from all imputation of wrong in the matter,' and that he had already willingly executed a declaration to that effect. As against all this testimony the charge of fraud has to be sustained, if sustained at all, upon the testimony of the single witness, Kennedy. And the proposition briefly stated is this: If Ogden wrote his name in the certifi-

cate of sale, without the knowledge and consent of Kennedy, he was guilty of a fraud. If he wrote his name in the certificate, with the knowledge and consent of Kennedy, he was entirely innocent of any fraud. Kennedy says this was done without his knowledge and consent. Giving to the testimony of Kennedy all the weight to which it is entitled, as the testimony of a single, credible witness, it is still greatly outweighed by all of the other testimony before us, which is entirely in favor of the account given by said Ogden.

"But is the testimony of Kennedy to be treated as the testimony of a credible witness? Assuredly not. No testimony impeaching Kennedy was before the trial court of El Dorado county, and little testimony in favor of Ogden was before the court; for, as has been hereinbefore set forth, it could not be determined by Ogden, and was in fact unknown to Ogden, that his integrity was to be questioned in that case. The answer of Kennedy, on file in the action, raises no such issue, and it was not to be supposed by Ogden or by the attorney for the plaintiff in that case, that his good name would be involved in the litigation. In illustration of this fact it may be noted that the Hon. Walter Van Dyke, who was familiar as an attorney and adviser with all of the matters, testified in the case by deposition. He could and would doubtless then, as he does now, bear witness to the good faith of Ogden in all of the transactions. But his deposition is silent upon the question. No interrogatories were put to him upon the subject of the certificate, because no one upon the plaintiff's side at that time knew that foul play would be charged in relation to the certificate. It is not for one moment to be supposed that had all of this evidence now before us been taken in the trial court the finding in question would have been made.

"In addition to that we have stated that Kennedy is not to be considered as a credible witness, and this is so because of the certified copies of papers now before us, and here marked as exhibits, it is proved that the said Kennedy had been convicted and sentenced in the state of New York for the crime of conspiracy committed as follows: 'The said Kennedy conspired with one Thomas and procured insurance upon the life of one Edward G. Burnham, a fictitious and nonexisting person, in the sum of \$10,000. Thereafter the said Kennedy procured a corpse, represented to the insurance companies that the corpse was the corpse of the said Burnham, caused the said corpse to be buried, and sought to collect the insurance. Also that said Kennedy fled to the state of California, from the state of New York, to escape meeting four several indictments preferred against him by the grand jury of the city of Buffalo in 1883 (the transactions here under consideration took place in 1884), accusing said Kennedy of forgery and false pretenses as set forth in Exhibit 6.' Also that the said

Kennedy was at that time a lawyer, and was after due process disbarred by the Supreme Court of Erie county, New York, for his wicked, corrupt, and felonious practices, and that his license to practice law was by said court canceled and revoked. Also that upon coming to this state the said Kennedy procured himself to be admitted to practice before the superior court of El Dorado county upon presentation of his said canceled certificate from the state of New York, and upon representation that the said certificate was in full force and effect, and upon testimony of his good moral character, furnished by the constable, Cline, who was a witness against said Ogden in the Pekin Mill & Mining Company suit. Thereafter the fact being made known to the judge of the superior court of El Dorado county, who was the same judge who tried the Pekin Mill & Mining Company's suit, and made the said finding against the said Ogden, supported largely, if not wholly, by the testimony of said Kennedy, the said Kennedy failing to appear before the court to explain his conduct in the premises was by the court ordered disbarred and forbidden to practice.

"As against this evidence of dishonesty of said Kennedy, there is before us abundant evidence of the highest kind and of the strongest nature in support of the character and reputation of the said Ogden for truth, honesty, and integrity; and, moreover, the judges of this court from long knowledge of and personal acquaintance with the said Ogden are themselves, and each of them, able to bear evidence, and do hereby bear evidence, that the said Ogden during all his life has borne and now deservedly bears the highest reputation for truth, honesty, and integrity, and is known and accredited in the community in which he resides as a man of the utmost rectitude in all the affairs of life.

"In conclusion, therefore, the judges of this court find that in none of the transactions mentioned or referred to in the Pekin Mill & Mining Company's suit was the said Ogden guilty of any fraud; but, to the contrary, his conduct throughout was entirely free from fraud, and characterized by the best motives."

The foregoing findings from the record before us are abundantly substantiated. Notwithstanding that the citizens of Alameda county have repeatedly expressed their conviction of Judge Ogden's integrity, by continuously and uninterruptedly electing him to the office of judge of the superior court, nevertheless the record of the case in the eighty-first volume of our Reports stands, and, unless corrected, will stand against him, his children, and his children's children as a monument of infamy. For this reason, and upon this showing, he asks this court to afford him relief.

The statements in 81 Cal., 22 Pac., were based, of course, exclusively upon the find-

ings made by the trial court. They were in no sense the result of an examination by this court, nor could they in any sense be construed as expressing the views of this court upon the matter. It is manifest that the exoneration of Judge Ogden upon the showing thus made is full and complete. This court also, from personal knowledge of Judge Ogden, joins in the expression of confidence embodied in the findings of the judges of the superior court of Alameda county. But, from the character and limits of the jurisdiction of this court, it is impossible for it to attempt to amend or correct the findings of the trial court, and, so, impossible for it to afford Judge Ogden this specific form of relief. However, the publication of the foregoing must suffice for his complete exoneration.

We concur: BEATTY, C. J.; HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.

7 Cal. App. 587

CARMICHAEL v. CAMPODONICO. (Civ. 398.)

(Court of Appeal, Third District, California. Feb. 22, 1908.)

PUBLIC LANDS—LAND ACTUALLY OCCUPIED—HOMESTEAD ENTRY.

Even though land belonged to the United States when the state conveyed it to plaintiff, yet he having inclosed, improved, cultivated, and been in the actual possession of it, it was not subject to entry under the United States homestead laws, so that notwithstanding defendant made such entry he was not authorized to go on the land and oust plaintiff, so that plaintiff may recover it by ejectment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 53.]

Appeal from Superior Court, Mariposa County; N. D. Arnot, Judge.

Action by J. Carmichael against E. Campodonico. Judgment for plaintiff. Defendant appeals. Affirmed.

J. A. Adair, for appellant. J. M. Corcoran, for respondent.

BURNETT, J. The complaint is in the usual form for an action in ejectment. The denials of the answer present a striking illustration of the "negative pregnant," but they were treated as putting in issue all the material allegations of the complaint. The affirmative averment upon which defendant relied is as follows: "All the land above mentioned was prior to and up to June, 1905, public land of the United States; that on the 10th day of June, 1905, this defendant entered as a homestead said 160 acres of land in the United States Land Office at Stockton, Cal.; that he now holds the land office receipt No. 7933, entitling this defendant to the lawful possession and occupancy of the last above-mentioned tract; that he now holds and occupies said premises entered as a homestead under and by virtue of the laws of the United States."

At the trial defendant admitted that a patent was issued by the state of California on November 9, 1871, to John Wilson; that the plaintiff deranged title from the said patentee by mesne conveyance; that the patentee and his successors in interest were in the actual and continued possession of said land from November 9, 1871, until the same was sold to plaintiff about five years ago. This was supplemented by the testimony of plaintiff that said land was inclosed by a substantial fence, and had improvements thereon and was used for agricultural purposes, and that it was in the actual possession of his tenant, one John Lord, who was ousted by defendant at the time of the latter's entry in June, 1905.

The foregoing facts justify the findings and judgment of the court below in favor of plaintiff. The case of *Gragg v. Cooper*, 150 Cal. 584, 89 Pac. 346, is decisive of the controversy here. It is there held, as stated in the syllabus: "Public land of the United States, actually occupied and possessed by one who has it inclosed by a substantial fence, and is using it for agricultural purposes, without other right, is not subject to entry by a qualified claimant under the homestead laws of the United States; and the process of obtaining from the officers of the United States a certificate of such entry and a receipt for fees paid, in pursuance of a declaration of his intention to settle upon the land as a homestead, filed with them, does not authorize him to go upon the land so possessed and oust the prior possessor, or to recover possession in an action against him."

We see no necessity to continue the discussion, as the other questions suggested by appellant are entirely immaterial. It is probably true that the state had no title to convey to Wilson, and that the premises in controversy are still a part of the public land of the United States; but defendant is in no position to litigate these questions in this proceeding, and the possession of plaintiff as aforesaid and his ouster by defendant constitute sufficient ground for the action of ejectment.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 568

**FERGUSON v. BOARD OF EDUCATION
OF SONOMA COUNTY et al. (Civ. 422.)**

(Court of Appeal, Third District, California.
Feb. 20, 1908. Rehearing Denied
April 20, 1908.)

1. MANDAMUS — PLEADING — SUFFICIENCY OF ANSWER.

In mandamus to compel a school board to issue to plaintiff a high school certificate to teach, and to set aside an order suspending such certificate, plaintiff alleged that he repeatedly demanded of the board and its members that they set aside the order suspending the certificate and issue to him his high school certificate. The answer denied that plaintiff did repeatedly demand or did at any of the times mentioned in the complaint demand of the board that they set aside the order suspending the plaintiff's cer-

tificate as alleged in the complaint, and further denied that the board or any of its members at any of the times mentioned in the complaint or at all refused wrongfully, or that they or any of them still continued to refuse, to issue to the plaintiff his certificate or to set aside the order suspending it. *Held*, that the averments in the complaint of the demand were sufficiently traversed by the answer to warrant the court in taking evidence upon that issue.

2. APPEAL—REVIEW—PRESUMPTIONS.

Where, in mandamus, the findings as to demand having been made upon defendants before suit supported the judgment, it would be presumed on appeal that the evidence as to demand supported the findings, and that the question was heard and determined by the court as though made an issue by the pleadings.

Appeal from Superior Court, Sonoma County; A. G. Burnett, Judge.

Mandamus by James Ferguson against the county board of education of Sonoma county and Minnie Coulter, superintendent of schools, to compel defendants to issue and deliver to petitioner a high school certificate. From a judgment denying the writ, plaintiff appeals. Affirmed.

S. V. Costello and Costello & Costello, for appellant. C. H. Pond and R. L. Thompson, for respondents.

CHIPMAN, P. J. Mandamus. Petitioner prayed for a writ directing defendants to issue and deliver to him a high school certificate. Defendants had the judgment, from which plaintiff appeals on the judgment roll alone.

It is alleged in the complaint that on August 1, 1901, there was duly issued to him a high school certificate by defendant board, which said certificate was to continue in force for the period of six years from its date; that pursuant to proceedings taken by said board on July 9, 1904, it wrongfully and unlawfully passed the following resolution: "Be it resolved that the certificate of the said James Ferguson (plaintiff) be and is hereby indefinitely suspended for unprofessional conduct and evident unfitness for teaching." It was alleged "that said plaintiff has repeatedly demanded of the said board of education, and of and from the said members thereof, first above named, that they set aside the said alleged order suspending said certificate, and issue and deliver to him his high school certificate, as aforesaid," and "that said board and said members still continue to refuse and fail to issue and deliver to said plaintiff his certificate or to revoke, annul, or set aside said alleged order of suspension of said certificate." The court found that plaintiff "never made demand upon the defendant the county board of education of the county of Sonoma, California, nor upon any of its members, to be reinstated as a regularly authorized teacher of said county, nor to revoke said order of said board of education indefinitely suspending the plaintiff's certificate as a teacher * * * nor to restore the plaintiff's said certificate to teach * * * prior to the com-

mencement of this action, nor at all." As conclusion of law the court found that no legal demand was made upon defendants "to reinstate the plaintiff's authority to teach * * * nor to revoke the order * * * suspending the teacher's certificate of the plaintiff * * * nor to restore plaintiff's said certificate * * * revoked by said board of education on the 9th day of July, 1904; that said demand is a necessary precedent to the maintaining of said action, and to the issuing of a writ of mandamus in said matter." The writ was therefore denied. The sole point made on the appeal is "that a demand is admitted upon the pleadings, and the findings do not therefore support the judgment."

By the answer the defendants "deny that the plaintiff did repeatedly demand, or did at any of the times mentioned in the amended complaint herein or at all demand, of the said board * * * that they set aside the said order or resolution indefinitely suspending the plaintiff's certificate as alleged therein; and further specifically deny that said board of education or any of the members thereof * * * at any of the times mentioned in said amended complaint, or at all, refused, wrongfully * * * or that they or any of them refused wrongfully * * * or at all, or that they or any of them still continue to refuse to issue or deliver to the plaintiff herein his said certificate, or to revoke or annul or set aside said order indefinitely suspending said certificate." The principal issue presented by the complaint was the validity of the board's action in suspending plaintiff's certificate, and the remedy he was asking was a revocation of this alleged order of suspension, the effect of which would have been to leave his certificate in force. But whether or not this would follow we think the averments of demand were sufficiently traversed to warrant the court in taking evidence upon that issue, and we must presume that the evidence so taken supported the findings. It is a rule of law that before making an application for the writ of mandamus demand must be made on the defendant to perform the act sought to be enforced by the writ. *Price v. Riverside L. & I. Co.*, 56 Cal. 431.

Respondents contend that under section 1088 of the Code of Civil Procedure it was incumbent upon appellant to allege and prove demand whether denied or not. Where default is made the section seems to uphold this view; and in *Jackson School District v. Cuthbert*, 134 Cal. 508, 66 Pac. 741, where the defendant failed to answer, it was said: "If the trial court cannot grant the relief on the pleadings, it would seem to follow that this court cannot reverse a judgment denying writ, unless it is made to appear that such showing was made before the lower court as would require the issuance of the writ." This decision seems to be in con-

flict with the decisions in *Pereria v. Wallace*, 129 Cal. 397, 62 Pac. 61, and *Hayward v. Pimental*, 107 Cal. 386, 40 Pac. 545. In the *Pereria* Case there was no answer; in the *Hayward* Case there was an answer. Section 1088 reads: "The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not." In the *Pereria* Case the court seems to have relied upon section 1094 of the Code of Civil Procedure, which reads: "If no answer be made, or if the answer raise no material issue of fact, the hearing must be before the court. If no answer be made, the case must be heard upon the papers of the applicant." As we think the issue of demand was sufficiently presented, and as the presumption is, in the absence of the evidence, that the findings were supported by the evidence, we prefer not to express an opinion upon the point suggested by respondents.

Furthermore, on the appeal from the judgment alone it must be presumed that the evidence supported the findings, and, as the latter support the judgment, we must presume that the question of fact as to the demand was heard and determined by the court as though made an issue by the pleadings.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

7 Cal. App. 606

MEEK v. SOUTHERN CALIFORNIA RY. CO. (Civ. 346.)

(Court of Appeal, Second District, California. Feb. 25, 1908.)

APPEAL—REVIEW—DENIAL OF NEW TRIAL—MOTION FOR INSUFFICIENT EVIDENCE.

The refusal of a motion for new trial, based on the ground that the evidence did not support the findings, cannot be reviewed; the statement for the motion not having advised the court which of the findings was claimed to be unsupported, and there being evidence to support one of them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1743.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Mae Meek against the Southern California Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Bernard Potter and Frank James, for appellant. T. J. Norton, E. E. Millikin, and E. W. Camp, for respondent.

ALLEN, P. J. Appeal by plaintiff from a judgment of the superior court of Los Angeles county in favor of defendant, and from an order denying a new trial. The action was by a passenger who had been ejected from a train by defendant's servants, without cause, and in a violent manner. The complaint stated facts sufficient to entitle plaintiff to general damages, and, in addition, set out certain facts entitling her to special dam-

ages. The answer denied the various allegations of the complaint, and by way of further defense pleaded an accord and satisfaction. The court found in favor of plaintiff upon each of the allegations of the complaint relating to general damages, but against plaintiff on her plea of special damages, and found in favor of defendant upon the plea of accord and satisfaction.

The findings are sufficient to support the judgment. The only specifications of error found in the statement on motion for a new trial are that "the plaintiff gave and duly served and filed her notice of intention to move for a new trial, upon the grounds that the evidence is insufficient to justify the findings and decision of the court; that the findings and decision of the court are against law." We cannot consider the statement on motion for a new trial to determine whether or not the evidence supports the findings and decision, for the reason that the statement contains no specifications of error, as provided by section 648 of the Code of Civil Procedure. That section provides that, "when the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." It is insisted by appellant that this section has no application when a single finding only is against the appellant, and all the other findings are in her favor. Under the record in this case it is unnecessary to pass upon this question, for, as a fact, there are two findings against appellant, and from the general specifications it is not possible to ascertain which finding is attacked. In *Swift v. Occidental Mining, etc., Co.*, 141 Cal. 168, 74 Pac. 700, it is said, in speaking of the rule established by the section referred to: "That the object of the rule requiring these specifications is, first, to shorten the statement of the evidence by excluding everything irrelevant to the specified fact; and, second, to notify the opposing party of the particular finding called in question, in order that he may see that the statement fairly and fully presents the evidence bearing upon that particular matter." The statement on motion for a new trial in the case at bar only purports to contain such evidence as is material to the case, which must be construed as a statement that it is all of the evidence material in connection with the findings specified as unwarranted. "The specifications should in some form distinguish each particular proposition of fact excepted to from all others found by the court." *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31; *De Molera v. Martin*, 120 Cal. 546, 52 Pac. 825. Treating the grounds of motion for new trial found in the statement as being specifications of error, the trial court was not advised, either when settling the statement or hearing the motion for new trial, as to what particular finding of fact the moving

party claimed was unsupported. It cannot be said that there was no evidence in support of either finding against plaintiff, for on the plea of special damages the finding is entirely warranted from the evidence. Hence the rule applying where there is an entire absence of evidence is not applicable here.

Judgment and order affirmed.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 580

WIENER v. H. GRAFF & CO. et al.
(Civ. 431.)

(Court of Appeal, Third District, California.
Feb. 20, 1908.)

1. LANDLORD AND TENANT—LEASE—RENEWAL—CONSTRUCTION—"SIGNIFY."

Where a lease entitled the lessees to a renewal, provided they signified their acceptance in writing to the lessor on or before September 1, 1904, such provision only required the lessees to make known, manifest, notify, or express in writing their acceptance or desire to continue the lease, such terms being synonymous with "signify," as used in the lease, any writing adequate for that purpose being sufficient to operate as an election to renew.

2. SAME—TIME.

Where a lease provided for a renewal on the same terms, if the lessees signified their acceptance in writing on or before September 1, 1904, it was incumbent on the lessees to give notice of their election to renew within the time specified, and on the giving of such notice they became entitled to hold for another term under the original lease and not under the notice, the lease being regarded as extended for the new term.

3. SAME—NOTICE—REQUISITES—SIGNATURE.

Where a lease provided for renewal on notice to the lessor, and within the time specified a member of the lessee firm forwarded to the lessor by registered mail a letter enclosed in one of the firm's business envelopes, with the firm name and address in the corner, reciting a description of the lease, and stating that H. Graff & Co., as the lessee firm, "elects to avail itself of the renewal privilege and requests the continuance of the lease for a new term," such notice was sufficient, though no signature was subscribed thereto.

Appeal from Superior Court Fresno County; H. Z. Austin, Judge.

Action by Selma S. Wiener against H. Graff & Co. and others. From a judgment for defendants, and from an order denying plaintiff's motion for a new trial, she appeals. Affirmed.

Frank H. Short and F. E. Cook, for appellant. H. H. Welsh, Bernhard & Sutherland, George Cosgrave, M. F. McCormick, and Crichton & St. John, for respondents.

CHIPMAN, P. J. This is an action to recover the possession of certain real property situated in the city of Fresno, alleged to be unlawfully withheld from plaintiff by defendants. Defendants claim possession under the provisions of a lease from the owner to H. Graff & Co. and by subleases by the latter.

It appears that the property in question

was the subject of a lease between the owner, one J. J. Konigshofer, as lessor, and H. Graff & Co., a copartnership, lessees, dated December 1, 1899, for the term of five years, from its date, at the yearly rental of \$1,500, payable monthly in advance, on the first day of each month, in equal monthly installments of \$125. The lease contained the following provision: "And it is hereby further agreed, that the parties of the second part (lessees) shall have the privilege of one year's additional lease on the same terms and at the same rental as heretofore, provided that they signify their acceptance in writing to the party of the first part (lessor) on or before September first, nineteen hundred four;" that the rental was paid at all times, as agreed in the lease, to W. T. Mattingly for the lessor, who appears to have been his agent to receive the rental, up to December 1, 1904, and was thereafter tendered, on the first of each month, to Mr. Mattingly but was refused, no reason for such refusal being given; that in June, 1904, H. Graff, a member of the firm of H. Graff & Co., forwarded in a letter by registered mail to Konigshofer at Alameda, Cal., inclosed in one of the firm's business envelopes "with the firm name and address in the corner," the following notice: "Fresno, Cal., June 7, 1904. J. J. Konigshofer: Take notice that H. Graff & Co., the lessee named in that certain indenture of lease made by you as lessor, to H. Graff & Co., as lessee, on December 1st, 1899, which said lease is recorded in Volume H. of Leases, page 133 et seq., thereof, Fresno County Records, and whereby the said lessor did lease to the said lessee that certain real property, situated in the county of Fresno, state of California, and described as follows, to wit: In the Wiener Block in the city of Fresno, county of Fresno, better described as the three stores nearest the alley in said block, said Wiener Block being on Tulare Street between I and J Sts., Fresno, Cal. And which said lease contains the following covenant: 'It is hereby further agreed that the parties of the second part shall have the privilege of one year's additional lease on the same terms and at the same rental as heretofore, provided that they signify their acceptance in writing to the party of the first part on or before September 1st, 1904,' does hereby elect to avail itself and accept the privilege contained in said covenant just described, and requests the continuance of said lease under the same terms as are now contained in said lease for the period of one year from and after the first day of December, 1904. ———."

No explanation is given why this acceptance happened not to be signed. It appears further that Mr. Graff "received back the registry card receipting for the letter," which was introduced in evidence "and is signed by Mr. Konigshofer receipting for the letter containing the notice forwarded by the witness and referred to in his testimony"; before

sending the notice Graff gave it to Mattingly who handed it back to Graff, and told him he would have to furnish it to Mr. Konigshofer, and gave him the latter's address at Alameda. It appeared that H. Graff & Co., was incorporated in 1901 and made an assignment to the corporation of the following property: "The stock of merchandise, furniture and fixtures, horses and wagons, certificates of stock, warehouse, all bills receivable and all indebtedness due, together with the good will of that business heretofore conducted by us in the city of Fresno * * * and known as the merchandise business of H. Graff & Company. It being the intention * * * to sell and convey * * * all their right, title and interest and ownership in and to the said copartnership business of H. Graff & Company and in and to all personal property of every kind and character owned and possessed by said partnership on this date." Whether this assignment carried with it the lease in question or was so intended does not appear otherwise than from the above description of the property assigned.

The contention of appellant is that the notice given by the lessees failed to meet the requirements of the lease which required that in the event of seeking a renewal thereof they should "signify their acceptance in writing to the party of the first part on or before September first, 1904"; that something more than giving notice was required; "that the writing itself in and of itself signify and prove the acceptance of the lease and its extension for the additional term," which it failed to do because not signed by the lessees. It is not disputed that if the notice or acceptance, which was in fact served upon the lessor in due time, had been signed by the lessees it would have effected its object and would have secured the additional term of one year. The sole question, therefore, would seem to be, was the notice ineffectual to accomplish this object? It seems to us that the phrase "provided that they (the lessees) signify their acceptance in writing to the party of the first part (the lessor)" means simply that the lessees were to make known, manifest, notify, or express in writing their acceptance or desire to continue the lease, for these terms are synonymous with the term "signify" as used in the lease. It is doubtless true that it was intended not only that the lessees should so make known or signify in writing their acceptance as to secure the privilege of the additional term, but also that the lessor could hold them to its performance; the acceptance, in short, should be mutually enforceable.

It is also true, we think, that the contract was one for the renewal of the lease and it was incumbent upon the lessees to give notice of the option within the time limited in the lease (*Shamp v. White*, 106 Cal. 220, 39 Pac. 537); and this they did. We think further that upon compliance with the condition as to giving notice the lessees would then be en-

titled to hold for the additional term under the original lease and not under the notice—the lease would then become a lease for both the original and extended terms. *Sheppard v. Rosenkrans*, 109 Wis. 58, 85 N. W. 199, 83 Am. St. Rep. 886.

Appellant cites several cases in support of her contention. *Klockenbaum v. Pierson*, 16 Cal. 373, was a case where the maker and indorser of a note were sued. On the day the note matured the notary left a notice at the residence of the indorser—who was absent at the time—describing the note and stating that it was protested by him for nonpayment, and that the holder looked to the indorser for payment. The court said: "This notice was without any signature of any kind, nor did it indicate in any way from whom it proceeded. It was ineffectual, therefore, to charge the indorser." There was nothing in the body of the notice or attached to it in any way to show by whom the notice was given. In *Marston v. Brashaw*, 18 Mich. 81, 100 Am. Dec. 152, it was held that the officer taking the acknowledgment of a deed must subscribe the certificate, and that his name written in the body of the certificate is not sufficient. Held similarly, also, as to the transcript of a justice's judgment, where the same was not signed, in *Bigelow v. Booth*, 39 Mich. 624. So held in *Clark v. Wilson*, 127 Ill. 449, 19 N. E. 860, 11 Am. St. Rep. 143, as to the certificate of a notary, the reason in part being that the statute required the officer to subscribe his name to the certificate. 4 *Encyclopedia of Law* (2d Ed.) 200, is cited to the effect that to constitute the signing of a bill or note the drawer's or maker's name must be written with intent to authenticate and give effect to the contract thereon; but at page 109 of the same volume it is stated that, apart from statutory requirements, the name need not be subscribed, and it is sufficient if it appear in any part of the instrument; thus, where it is declared that "I, J. S., promise to pay" is as good as "I promise to pay," signed "J. S." Note 2. The intent, then, is not alone shown by the instrument being subscribed by the party to be charged. See *Auzerais v. Naglee*, 74 Cal. 60, 69, 15 Pac. 371; *California Canneries Co. v. Scatena*, 117 Cal. 447, 49 Pac. 462. See, also, 25 *Ency. of Law*, p. 1065, where it is stated that in neither ordinary nor legal language is the word "sign" or "signature" confined to the writing of the name at the bottom of the paper. We are cited to *Hoffman v. Anthony*, 6 R. I. 282, 75 Am. Dec. 701, to the point that where a notice of mortgagee's sale was not signed it was held invalid. It appeared that the notice did not state who made the mortgage or to whom it was made; nor who advertised the sale; nor who was to conduct the sale, and, finally, no means were pointed out by which any one could ascertain the terms of the power to sell or the conditions upon which it might be exercised. Very properly the notice was

held to be insufficient. In *Thomas et al. v. Caldwell et al.*, 50 Ill. 138, the action was to recover for labor and material furnished in the erection of a church building under a written contract. One Short, with others, was sued upon this contract, and although his name appeared in the body of the contract he did not sign it, and it was held that he was not a party to the agreement, and it was error to render a decree against him for the payment of the money. To like effect, it is claimed, is *D'Argy v. Godefrol*, 1 Mart. (O. S.; La.) 75, but we have not been able to find this case. Obviously these were instances involving the binding force of contracts which at no stage had been signed by the parties sought to be charged. *Clemmons v. Brownfield*, 19 Mo. 118, is cited, but we find no such case in that volume. *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797, was an action in which the defendant, by way of cross-complaint, relied upon a contract to furnish certain building material. The court said: "It appears without conflict that it was the understanding and agreement between plaintiff and Downing that the proposed contract should be reduced to writing, and signed by both parties. This fact is made very clear by the evidence. The paper as drawn up was signed by Downing, but for some reason which does not appear never was signed by the plaintiff, Spinney. It, therefore, never became a binding or subsisting obligation upon either." The reason for this was "that the proposed contract contained reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other." In that case the intention was that the contract should be signed by both parties, but here there is no intention express or necessarily implied that the lessees should subscribe the acceptance before it should be a binding obligation, nor was the signature of the lessor necessary. The notice was to be in writing and sufficiently authenticated, but we do not think that such authentication could be manifested only by signing the paper at its bottom. It was addressed to the lessor and directed him to take notice that the lessee (naming the firm) "does hereby elect to avail itself and accept the privilege contained in said covenant just described (the notice identified the lease by stating its date and place of record and set forth the particular clause granting the option), and requests the continuance of said lease under the same terms as are now contained in said lease for the period of one year from and after the first day of December, 1904." On its face and in its body it appeared to have emanated from H. Graff & Co., the lessees, and the purpose of the notice is stated with clearness and precision. When it was delivered to and receipted for by the lessor he could not have doubted by whom it was sent nor the purpose intended in sending it. Notice, when required by statute has been held not the equiva-

lent of knowledge, but "notice of itself," said the court in *Williams v. Bergin*, 108 Cal. 166, 171, 41 Pac. 287, 288, "imports that the information given thereby comes from an authentic source, and is directed to some one who is to act or refrain from acting in consequence of the information contained in the notice." In *Michigan State Ins. Co. v. Soule*, 51 Mich. 312, 16 N. W. 662, the validity of a foreclosure sale was challenged on the ground, among others, that the notice of sale was not properly signed. The court held that as the statute did not require the party foreclosing to sign his name to the notice "it was sufficient if the name appeared therein." See, also, *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64, 75 Am. Dec. 681. It was held in *Evans et al. v. Backer et al.*, 101 N. Y. 289, 4 N. E. 516, that "the omission to indorse upon papers served or filed the post-office address or place of business of the attorney, as required by rule 2 of the Supreme Court is a mere irregularity, and entitles the party served either to return the paper, or move to set it aside; but he cannot, after receiving it without objection, safely disregard the function which the paper is designed to perform."

Respondent cites an English case quite in point. *Carleton v. Hobart*, 14 Wkly. Rep. 772. A lease contained a clause enabling the tenant "to surrender and deliver up the premises" at the end of every three years, he first giving the lessor "six calendar months' previous notice of his intention so to surrender the said premises." The notice given was as follows: "Notice to surrender. Sir. I hereby give you notice that I will surrender and deliver up to you, the quiet and peaceable possession of all that and those house and lands of Altavilla, which I hold from — as tenant. Dated the 22nd day of September, 1863. To John Parker Carleton, Esq., and all whom it may concern." The notice bore no signature. The action was for rent notwithstanding the surrender of the possession by the tenant and his placing a keeper in charge on the day noticed. "O'Hagan, J. There are two points in the case; first, was the notice sufficient under the terms of the contract? and, secondly, was everything done by the defendant necessary to determine his tenancy after the service of notice? On both points I agree with the majority of the court below. There is nothing about names or signatures in the proviso, and the question substantially is, whether, on the face of the notice, the parties, lands, dates, and so forth, are sufficiently set forth to convey the intention of the tenant to the landlord. The only question is as to the person from whom the notice purports to come, and though he is not specified by name, yet he calls himself the tenant of the lands of Altavilla, and the expression 'surrender' also shows that he regards the relation of landlord and tenant as subsisting between them. I think this conforms to the requirements of the deed. The parol evidence merely showed what is neces-

sary to show by parol in every case of notice — i. e., that the notice was served and understood." With him concurred four justices — one other dissenting. The notice in the case at bar is stronger in its facts than the case cited, for it clearly shows "from whom the notice purports to come." Nor can we see that a different rule would apply where the notice is intended to convey an intention to hold over than where the intention is to surrender the premises. Appellant would distinguish the two cases on the ground that in *Carleton v. Herbert* the question was as to what amounts to sufficient "written notice," while here the question is what is a sufficient "written acceptance." The view we take of the matter admits no such distinction. It is written notice of acceptance — i. e., notice of the lessee's intention to renew the lease, with which we are to deal as it was in the *Carleton* Case written notice of surrender; and, after all is said, it comes to this: What, under the circumstances, was sufficient "written notice"? With this notice in his possession, served in June, 1904, the lessor expressed no objection and made known no dissent until November 9, 1904, when he served notice on all of the defendants that the tenancy would expire on December 1st following, and requiring them to yield up possession. The lessees thereafter, regularly on the first of each month, tendered the rental, but it was refused, and this action was commenced January 28, 1905.

Just what point plaintiff relies upon in showing the incorporation of H. Graff & Co. and the assignment of the firm's partnership business to the corporation is not clear. It may have been to hold the corporation as subtenant with other defendants, and it is urged also in the argument to show that the notice was insufficient because the lessor could not determine from it whether it came from the partnership or from the corporation. The record states the fact of the incorporation, but does not state that plaintiff knew the fact or was in any way misled by it or acted upon it. We do not see that this feature of the case in any wise affects the principal question argued by appellant.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

7 Cal. App. 571

DAVIS v. BOARD OF SUP'RS OF MERCED COUNTY et al. (Civ. 424.)

(Court of Appeal, Third District, California. Feb. 20, 1908. Rehearing Denied by Supreme Court April 20, 1908.)

1. INTOXICATING LIQUORS—LIQUOR LICENSES—ORDINANCES—CONSTRUCTION.

Under an ordinance of a county providing that no saloon license within territory embraced in any election precinct shall be granted where the number of electors equal in number to a majority of the whole number in the precinct within one mile of the proposed place of business sign a protest, or where it appears that

the applicant is not a fit and proper person, etc., a protest against the issuance of a license signed by the requisite number of electors is alone sufficient to defeat an application for a license whether or not the applicant is a proper person.

2. SAME.

A county ordinance providing that no saloon license in territory embraced in any election precinct shall be granted by the board of supervisors where a designated number of electors sign a written protest, or where it appears that the applicant is not a fit person, etc., though construed to require the denial of an application on the filing of a protest signed by the requisite number of electors, irrespective of the question of whether or not the applicant is a fit person, is not invalid as allowing the electors to decide whether a license shall be granted, and thereby take the determination away from the board of supervisors.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Mandamus by M. Davis against the board of supervisors of Merced county and others to compel defendants to issue a retail liquor license. From a judgment denying the writ, plaintiff appeals. Affirmed.

John A. Wall, for appellant. H. S. Shaffer and Frank H. Farrar, for respondents.

CHIPMAN, P. J. This is an action for a writ of mandate commanding the defendants to issue to plaintiff a license to conduct a retail liquor saloon business in the town of Le Grand, Merced county, pursuant to Ordinance No. 107, duly made and passed by defendants. The writ was denied, and plaintiff appeals from the judgment.

Section 25 of Ordinance 107 is as follows: "No license shall be granted to carry on such business within the territory embraced in any election precinct in said county if a number of electors equal in number to a majority of the whole number of electors residing in said election precinct within one mile of the proposed place of business shall sign a written protest and file the same with the clerk of said board at or prior to the time of said hearing, or if, from any other cause, it shall appear to said board upon said hearing that said applicant is not a fit and proper person to be intrusted with such license to conduct such business, or if it shall appear that such application is not made in good faith, or that the proposed location of said business is objectionable, or that any rule of said board would be violated, or that any of the statements made in such application are willfully untrue, or for any other reason deemed by the board sufficient for such refusal, whether presented by protest filed with the clerk of said board or otherwise.

* * * If upon such hearing it shall appear to the said board that the applicant is a proper person to be intrusted with the conduct of such business, and the place designated in said application is a proper place for the carrying on said business, the board shall make an order approving said application and directing the clerk of said board to issue

to said applicant a permit to carry on said business."

Plaintiff filed his application with said board pursuant to said ordinance, which later came on duly to be heard, and was heard. Prior to the hearing there was filed with said board, and at said hearing was considered, the protest in writing of a majority of the whole number of electors residing in the election precinct within one mile of the proposed place of business of plaintiff. The board of supervisors made an order which, after certain recitals, reads as follows: "It appearing that a majority of the electors residing within one mile of the proposed place of business have signed the petition objecting to the granting of a license, it is unanimously ordered that the application of M. Davis (petitioner) be and the same is hereby denied."

The following stipulation was entered into at the trial: "It is stipulated and agreed that the averments, as a defense, contained in the answer of the defendants, particularly showing that the denial of the application of the plaintiff for a liquor license was solely and entirely by reason of the filing of the protest, designated as 'Exhibit A' in said answer, are true. It is admitted that the Commercial Hotel in the town of Le Grand would be a proper place for the conduct of a saloon business, provided a majority of the electors of Plainsburg precinct residing within one mile of said Commercial Hotel did not object to having any saloon in said town of Le Grand."

Appellant makes but two points: First, that the board of supervisors cannot, upon a protest alone, refuse the license, but that it must appear that the applicant is an unfit person, of which latter fact the protest is but evidentiary; secondly, that in granting or refusing a license the board acts in a judicial capacity, and cannot delegate its authority to any number of citizens.

1. Appellant's first point seems to rest upon a construction to be given the ordinance itself, which he contends does not give the board authority to refuse the license upon the fact alone that the protest mentioned in the ordinance has been filed. We cannot agree with appellant. It seems quite clear to our minds that the ordinance was intended to declare, and clearly does declare, that, where a majority of the electors in any election precinct residing within one mile of the proposed saloon sign and file a written protest against granting the license, no license shall be granted. This provision of the ordinance is not limited or restricted by the subsequent provisions, but the protest itself is sufficient to defeat the application regardless of the fact as to whether or not the applicant is "a fit and proper person to be intrusted with such license to conduct such business." It is but a form of limited local option. There is nothing in *Reed et al. v. Collins et al.*, 80 Pac. 973, in conflict with this view. No such ordi-

nance as we have here was involved in that case.

2. We are unable in the provision commented upon to discover any delegation of judicial power conferred by the ordinance upon the board of supervisors. Aside from this question, the power to enact the ordinance is not assailed, and we need not discuss its constitutionality upon any other ground. The point is that the giving of conclusive effect to the protest is equivalent to allowing the electors to decide, thus taking the determination away from the board. Appellant cites *In re Bickerstaff*, 70 Cal. 35, 11 Pac. 393, quoting as follows: "The condition only relates to the mode of applying for a license, not the power to issue it. Jurisdiction to issue is put in motion by the petition and certificate; and upon the petition fortified by the required certificate and report as evidence, the city council acts judicially in making the order." This was said with reference to an ordinance which required the petition to be accompanied by a certificate of five respectable citizens to the good moral character, sobriety, and suitableness of the applicant to keep and conduct a saloon. The court further said: "But the means prescribed for procuring the license constitute the law of the application to exercise the right to carry on the business, and it is necessary to comply with the law in order to enjoy the right, if the law is valid and reasonable. It was entirely competent for the city council, in passing the ordinance, to annex as a condition to granting a license to carry on business that an applicant for the license shall show himself a suitable person to carry on the business, and to provide that it shall be conducted in such a way that the business itself shall not threaten or become dangerous to the social order of the municipality." We see no essential difference in the two cases. In the case cited the license could not be granted unless a certain certificate of citizens attested the good moral character of the applicant, while here the license is not to be granted if a certain number of certain electors protest against it. In both cases the ordinance prescribes the condition on which the applicant may hope for the success of his application. In the one case his application is made to depend upon his obtaining a certificate of certain persons; in the other it will be denied if certain persons object.

Ex parte Christensen, 85 Cal. 208, 24 Pac. 747, involved an ordinance not unlike that in *Ex parte Bickerstaff*, *supra*, the supervisors being restrained from granting the license except upon the written consent of a majority of the board of police commissioners, or in case of their refusal, then upon the written recommendation of not less than 12 citizens of San Francisco owning real estate in the block or square in which said business of retail liquor dealer is to be carried on. The objection there made was that the license was made to depend upon the arbitrary will of the

board of police commissioners or of the property owners. The court said: "But whatever force this objection might have in reference to licenses to carry on the ordinary avocations of life, which are not supposed to have any injurious tendency, it has no force in the present case. It is well settled that the governing power may prohibit the manufacture and traffic in liquor altogether, provided only that it does not interfere with interstate commerce. See *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. And if the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases."

Let us suppose an ordinance requiring that a majority, instead of 12, as in the *Christensen Case*, of the electors in the election precinct first give their written consent before the board is empowered to grant the license; is there any essential difference in such a case from that where it is made unlawful for the board to grant the license if before the board has acted a majority of the electors file a written protest against granting the license? We see none. The law has prescribed the condition upon which the license may or may not issue, and the issuing of the license is but made to depend upon the condition prescribed by the law.

State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 813, arose under an act of the Legislature (Acts 1895, p. 248, c. 127), section 9 of which provided that, if a remonstrance in writing, signed by a majority of the legal voters of any township, shall be filed with the auditor of any county three days before any regular session of the board of commissioners against the granting of a license to any applicant for the sale of spirituous liquors within said township, it shall be unlawful thereafter for such board of commissioners to grant such license to such applicant therefor during the period of two years from the date of filing such remonstrance. Among other objections it was urged against this law that it delegated legislative powers to the county commissioners, and that it empowered a majority of the voters of a township to suspend the operation of general laws. In an elaborate opinion the act was sustained. The principle there discussed and decided is the same as in the present case, and meets our entire approval.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

7 Cal. App. 601

PEOPLE v. OLIVER. (Cr. 72.)

(Court of Appeal, Second District, California.
Feb. 25, 1908.)

1. CRIMINAL LAW — SENTENCE — LESS THAN MINIMUM — EFFECT.

A sentence of seven years' imprisonment on a conviction of grand larceny after a previous conviction of burglary is not void, though Pen.

Code, § 666, provides 10 years' imprisonment as minimum punishment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3282.]

2. SAME — APPEAL — DISPOSITION OF CASE — FAVORABLE ERROR.

A judgment of conviction will not be reversed on defendant's appeal for error in imposing a shorter term of imprisonment than the statute authorizes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3183.]

3. WITNESSES — ACCUSED PERSONS — FORMER CONVICTION.

Pen. Code, § 1025, providing that where one is accused of an offense and also of a previous conviction and pleads not guilty, and admits the previous conviction, the charge of such conviction must not be referred to on the trial, does not prevent the people asking accused on his cross-examination if he has ever been convicted of a felony; the section not being intended to prevent the people from impeaching accused's testimony by the rules applied to other witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1129-1132.]

4. CRIMINAL LAW—EXCLUSION OF PROSECUTING WITNESSES—DISCRETION.

The exclusion of witnesses for the prosecution at defendant's request is not an absolute right in all cases, but rests in the court's sound discretion, including the power to except one or more witnesses from the operation of an order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1549.]

5. SAME.

It is proper to permit an officer active in a prosecution to remain in the courtroom to advise the district attorney as to the facts, interest, character of witnesses, etc., though the prosecution's witnesses generally are excluded, and charges that such officer or witness has abused his privilege should be first brought to the knowledge of the trial court; suggestions of such abuse made for the first time in the appellate court not being subject to consideration in the absence of any showing in the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1551.]

6. SAME—REFUSAL OF INSTRUCTIONS—INVASION OF JURY'S PROVINCE.

An instruction singling out accused as a witness to call special attention to the weight and defects of his testimony, and to declare exclusive rules by which his testimony alone is to be considered, and in effect instructing the jury that, however unworthy of belief he might be, the jury must give some weight to his testimony, is properly refused, as conflicting with the rule that the jury are the exclusive judges of the weight of the testimony and the credibility of the witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1732-1743.]

7. SAME—INSTRUCTIONS COVERED.

Instructions covered by those given are properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

8. SAME — APPEAL—REVIEW — INSUFFICIENT PRESENTATION OF OBJECTIONS.

Rulings refusing instructions will not be reviewed where neither the record nor the briefs specify wherein the refusal was error.

9. SAME—APPEALABLE ORDERS.

An order denying a motion in arrest of judgment is not appealable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2591.]

10. SAME—CREDIBILITY OF WITNESSES.

The jury is the judge of the truthfulness of witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1719.]

11. SAME—FINDINGS—CONCLUSIVENESS.

The jury's findings are conclusive on appeal, where sustained by evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3076.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Harrison Oliver was convicted of grand larceny, and he appeals from the judgment and from orders denying a new trial overruling his motion in arrest of judgment. Judgment and order denying a new trial affirmed.

Henry H. Roser, J. C. Crouch, and M. C. Hester, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for respondent.

TAGGART, J. Defendant was informed against for the crime of grand larceny, and by the information also accused of a previous conviction of burglary. He confessed the previous conviction, and pleaded not guilty to the charge of grand larceny. Upon the trial of the offense charged, the jury returned a verdict of guilty, and the defendant was sentenced to imprisonment in the state prison for the term of seven years. He appeals from the judgment, from an order of the trial court denying his motion for a new trial, and from an order of that court overruling his motion in arrest of judgment.

The first point made on the appeal is that the sentence imposed (seven years) is less than the minimum term of imprisonment provided by the statute (Pen. Code, § 666) in cases of conviction of grand larceny after a previous conviction of burglary (ten years), and therefore void. As said in *In re Reed*, 143 Cal. 634, 77 Pac. 660, 101 Am. St. Rep. 138, such a judgment is not void. It is within and not in excess of the statute. *Ex parte Soto*, 88 Cal. 629, 28 Pac. 530. Even where the term imposed is in excess of the maximum fixed by the statute, it is merely erroneous, and, if the judgment be reversed for this reason, the appellate court will remand the cause with directions to proceed to judgment on the verdict. *People v. Riley*, 48 Cal. 549. The application of such a rule to the case at bar would result in inflicting a penalty upon the defendant for appealing from the erroneous action of the trial court. This is not the policy of the law, which appears to be that, where a defendant complains of an error in his own favor, such error will not be corrected to his detriment. For instance, where a verdict was set aside and a new trial granted by the trial court on the ground that the verdict was too favorable to the defendant, the Supreme Court reversed the order, and directed the trial court to proceed to pronounce judgment on the verdict rendered. *People v. Muhlner*, 115 Cal. 303, 47 Pac. 128. The court

applied to the case simply the rule that, the error committed not being to the prejudice of the defendant, he cannot complain of a determination of his case more favorable to him than the evidence warranted. *People v. Barnhart*, 59 Cal. 381; *People v. Maroney*, 109 Cal. 279, 41 Pac. 1097; Pen. Code, § 1404.

The defendant was a witness upon his own behalf, and the district attorney was permitted, against objection, to ask him on cross-examination if he had ever been convicted of a felony. This is assigned as error and a violation of the provisions of section 1025 of the Penal Code that, "in case the defendant pleads not guilty and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." The previous conviction charged in the information was a specific "burglary," while the question of the district attorney was addressed to a "felony" generally; so that it can hardly be said that the conviction which defendant admitted by his plea was necessarily the same felony referred to by the district attorney in his question. But, if it be conceded that this distinction cannot be drawn, it was not error to permit the question to be asked. Prior to the re-enactment of section 1025 in 1905, it was held that the direction in section 1093 that "the clerk in reading it (the indictment or information) shall omit therefrom all that relates to such previous conviction" did not make it error to ask this question of defendant upon cross-examination where he had offered himself as a witness in his own behalf. *People v. Arnold*, 116 Cal. 686, 48 Pac. 803. The reasons for that opinion, addressed to the distinction drawn between section 1093 of the Penal Code and section 2051 of the Code of Civil Procedure, appear equally applicable here upon a comparison of the latter section (section 2051, Code Civ. Proc.) with section 1025 of the Penal Code. Says the court: "The obvious purpose of this section [Pen. Code, 1093] was to give the defendant the benefit of withholding from the jury a knowledge of such prior conviction in all instances other than where, by the conduct of his own case, the production of such fact is rendered essential to a proper presentation of the case of the people. It was not designed thereby to change or affect the ordinary rules of evidence for the elucidation of truth, to which a defendant, like any other witness, subjects himself upon taking the witness stand. Under the rule established in this state, the defendant's character for truth, honesty, and integrity is in issue when he offers himself as a witness, and he thereupon becomes, as held in *People v. Hickman*, 113 Cal. 80, 86, 45 Pac. 175, 'subject to the same rules for testing his credibility before the jury, by impeachment or otherwise, as any other witness.'" It is clear that it was not the intention of the Legislature by the re-enactment of section 1025, any more than it was by the enactment of section 1323, to give to a de-

fendant the opportunity of making any statements upon his direct examination that he might choose, and preclude the prosecution from testing the truth or falsity of such statements, or to prevent the people from impeaching the defendant's testimony by the same rules applied to the testimony of other witnesses. *People v. Gallagher*, 100 Cal. 476, 35 Pac. 80; *People v. Bishop*, 134 Cal. 689, 66 Pac. 976; *People v. Buckley*, 143 Cal. 388, 77 Pac. 169.

The refusal of the trial court to exclude the witness Wright from the courtroom with the other witnesses, at the request of the defendant, was the exercise of a proper discretion upon the part of the court; no prejudice from its action being shown. The exclusion of the witnesses for prosecution at the request of defendant is not an absolute right in all cases, but rests in the sound discretion of the court (*People v. Sam Lung*, 70 Cal. 515, 11 Pac. 673; *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Garnett*, 29 Cal. 622), and this includes the power to specially except one or more witnesses from the operation of an order made for this purpose. It is the general practice, as observed by the court in ruling, to permit some officer, active in the prosecution of the case, to remain for the purpose of advising the district attorney as to the facts, the interest and character of witnesses, etc. Such a practice is proper, and charges that such officer or witness who has abused his privilege should be first brought to the knowledge of the trial court, that they may be corrected, if there be any ground for the charge. Suggestions of such abuse made for the first time in the appellate court cannot be considered in the absence of any showing in the record.

In presenting as error the court's refusal to give certain instructions requested by the defendant quite a number are mentioned, but no reasons are assigned or argument presented why the action of the court was error. One alone (No. 20) is specifically referred to. This instruction is open to the objection, so often before the court, that it singles out the defendant as a witness to call especial attention to the weight and defects of his testimony, and to declare exclusive rules by which his testimony alone is to be considered. It in effect, instructs the jury that, however unworthy of belief they may find the defendant, they must give some weight to his testimony. This is directly in conflict with the rule of evidence that the jury are the sole and exclusive judges of the weight of the testimony and the credibility of the witnesses, which was given in another instruction by the court. The refusal of this instruction was not error. *People v. Winters*, 125 Cal. 329, 57 Pac. 1067; *People v. Ross*, 134 Cal. 256, 66 Pac. 229; *People v. Monreal* (Cal. App.) 93 Pac. 385. Many of the other instructions refused were clearly duplicates of those given by the court, and some were open to the same objection as No. 20, and the court properly refused to give

these. If there is any reason why the action of the trial court in refusing to give the other instructions asked by defendant was error, it has neither been specified in the record nor presented in the briefs filed. Nothing being urged and no suggestion made why the trial court's action was erroneous, it is not necessary for us to consider these instructions.

The attempted appeal from the order denying defendant's motion in arrest of judgment is ineffective, as no such appeal is authorized by the Code or our system of practice. *People v. Lonnen*, 139 Cal. 635, 73 Pac. 586. No presentation of any matters which might be considered in connection with this ruling has been made upon the appeal from the judgment. The order denying the motion for a new trial is also assigned generally as error, without specification, other than that the evidence is insufficient to sustain the verdict and judgment. Under the latter head, it is contended that the evidence does not establish an exclusive possession of the stolen property by defendant, and that proof of possession is not alone sufficient to sustain a conviction of larceny. The latter proposition may be conceded as a question of law, but it has no application to the facts of the case at bar. The evidence for the people, if true, sustains the verdict in every respect. Its truthfulness was a question for the jury, and this court will not disturb their finding in this regard.

No prejudicial error appearing, the judgment and order denying motion for new trial are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 588

Ex parte FLOYD. (Cr. 128.)

(Court of Appeal, First District, California.
Feb. 21, 1908.)

1. CRIMINAL LAW—NATURE AND ELEMENTS OF CRIME—ATTEMPTS—DEFINITIONS—"ATTEMPT TO COMMIT CRIME."

An attempt to commit a crime is an endeavor carried beyond mere preparation, but falling short of execution of the ultimate design. It is an act immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he had the power of carrying his intention into execution, and would have done so but for some intervening cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 51.

For other definitions, see Words and Phrases, vol. 1, pp. 622-627.]

2. SAME—SOLICITATION AND PREPARATION.

The law recognizes an intention to commit a crime and an attempt to commit such crime. An intention not followed by an overt act cannot be punished, and there is also a distinction between an attempt to commit a crime and merely soliciting one to commit it, as there is between an attempt and mere preparation. Merely soliciting one to commit a crime is not a punishable crime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 21-28, 51.]

3. FORGERY — ATTEMPTS — SOLICITATION — CRIMINAL RESPONSIBILITY.

An agent for a tobacco company, without authority, authorized a publishing company to print a large number of certificates entitling the holder to one or more cigars, reading on its face, "Good for one, twelve and one-half cent cigar at any of our stores on the Pacific Coast. M. A. Gunst & Co." Nothing further was done by either party, and the publishing company did not intend to print any of the certificates without express authority from the tobacco company (M. A. Gunst & Co.). Held, that the facts did not show an attempt to commit the crime of forgery, but a mere solicitation.

Application by J. D. Floyd for habeas corpus to secure his release from custody under an order of a magistrate's court binding him over to answer to the charge of an attempt to commit forgery. Prisoner discharged.

Jas. P. Sweeney, for petitioner.

COOPER, P. J. On the 28th day of September, 1907, a complaint was filed in the police court of the city and county of San Francisco, charging the defendant with "Attempt to make, alter, forge and counterfeit a certain instrument and due bill for the payment of property, in the words and figures following, to wit: That the face of said instrument and due bill was figures, to wit: 'Good for one 12½c cigar at any of our stores on the Pacific Coast. M. A. Gunst & Co.'" An examination was held by a magistrate of said police court, and defendant was held to answer to the superior court for the crime of "attempt to commit forgery." He now applies to this court to be discharged upon the ground that the evidence taken before said magistrate does not show that any public offense has been committed.

The evidence is before us with the petition, and shows the facts to be as follows: The prisoner had for some time prior to May 31, 1907, been in the employ of M. A. Gunst & Co., dealers in cigars and tobacco in the city and county of San Francisco. About the 25th of September, 1907, he went to the place of business of one Lyons, a publisher, and after some conversation as to printing gave Lyons an order or request in writing as follows: "September 25, 1907. I hereby authorize the Pacific Goldsmith Publishing Co. to print 50,000 tickets like sample, to wit, 30,000 for five cigars ea, 12½ cent cigars; and 20,000 for one cigar each for 12½ cent cigars. Purchasing Agent for M. A. Gunst & Co. Price to be \$5 per thousand. [Signed] J. D. Floyd." Lyons took the order, and told the prisoner that he would see about it, and, if everything was correct, he would print the tickets as per the order. M. A. Gunst & Co. had not authorized the prisoner to have any such tickets printed. The above is all that was done either by the prisoner or by Lyons. Lyons did not commence to print the tickets, nor did he intend to do so without authority from M. A. Gunst & Co. Do the above facts show an attempt to commit the crime of forgery?

An attempt to commit a crime is an endeavor carried beyond mere preparation, but

falling short of execution of the ultimate design. It is an act immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he had the power of carrying his intention into execution, and would have done so but for some intervening cause. The law recognizes a distinction between an intention to commit a crime and an attempt to commit such crime. An intention followed by no overt act cannot be punished. There is also a distinction between an attempt to commit a crime, and merely soliciting one to commit it, as there is between an attempt and mere preparation. Mere soliciting one to commit an act which would constitute a crime, if committed, is not made criminal by our Penal Code. It was said by Blackburn, J., in the early case of *Regina v. Cheeseman*, *Leigh & C. 140*: "There is no doubt a difference between the preparation antecedent to the offense and the actual attempt; but, if the actual transaction is commenced which would have ended the crime if not interrupted, there is clearly an attempt to commit the crime." In the case of *People v. Murray*, *14 Cal. 159*, where the evidence disclosed declarations of the defendant of his intention to contract an incestuous marriage with his niece, his elopement with the niece for that avowed purpose, and his request to one of the witnesses to go for a magistrate to perform the ceremony, it was held that the acts fell short of an attempt to commit a crime. It was said by Field, J.: "It shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offense charged. Between preparations for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after the preparations are made." In *People v. Stites*, *75 Cal. 570, 17 Pac. 693*, the court said: "Mere intention to commit a specific crime does not itself amount to an attempt as that word is employed in the criminal law. There must in addition to the intent—the *mens rea*—be some act done toward the ultimate accomplishment of the proposed crime. But even such acts do not always of themselves amount to an attempt or to an offense of which human laws will take cognizance; for, if they be but acts of preparation, however elaborate, our municipal law would not assume to deal with them." In *People v. Compton*, *123 Cal. 403, 56 Pac. 44*, it was said by Henshaw, J., in discussing an erroneous instruction in a case where the defendant was charged with forgery: "The portion of the instruction above quoted is directed to the third class of acts; that is to say, to the attempt to pass. By it the jury was told that if one, having a forged instrument in his possession, knowing it to be forged, delivers it to another with intent to have it uttered, published and passed

as genuine, he is guilty of forgery. But such was not the common law, and such is not the law under our Code. In general, before an attempt to commit a crime can be made out, some overt act towards its commission other than a mere act of preparation for its commission must be established. * * * Now, the essence of the third class of forgeries is the attempt to injure an innocent person by foisting upon him a known false instrument. As is aptly said in *People v. Rathbun*, *21 Wend. (N. Y.) 509*, where the subject is learnedly and exhaustively considered: "Uttering implies two parties—the party acting, and the one acted upon. If it be by way of sale, there must be a vendee. If by pledge, there must be a pledgee. If by offer, there must be some person to hear the offer. If it simply declare its goodness, there must be some one addressed as reader or hearer." Therefore, if one deliver to his agent a false instrument with the design that the agent shall utter or pass it, the crime of uttering or attempting to pass is not complete until after some overt act done by the agent to this end, for until this shall come to pass, in contemplation of law, the paper is still within the control of the principal, and all the steps are but steps of preparation. Equally true is it that if A. and B. should conspire to commit a crime, and A. should deliver a forged instrument to B., by whom it was to be uttered, and B. should destroy the paper without attempting to pass it, the crime of uttering or attempting to pass would not have been committed, for there would have been no effort to foist it upon an innocent person, and, as has been said, if the uttering is by offer, the offer must be made to some one." Applying the reasoning in that case to the present, Lyons was but the agent, or rather, the person selected by the prisoner to do the thing the prisoner had in mind. The instrument or ticket that was to be forged or counterfeited or duplicated was still, in contemplation of law, in the possession and under the control of the prisoner. He could have gone to Lyons and countermanded the order, and taken back the ticket or instrument at any time. Lyons never set a type, procured paper or materials, or in any way or manner began the work of printing.

We therefore conclude that the acts of the prisoner amounted to nothing more than solicitation, and that an actual attempt to commit the crime, within the meaning of the law and as defined by the authorities, was not made. However wrongful may have been the intention of the prisoner, or however criminal may have been his motives, we cannot hold under the authorities that the mere preparation or solicitation, as disclosed by the evidence in this case was an attempt to commit the crime charged against the prisoner.

It is therefore ordered that he be discharged.

We concur: KERRIGAN, J.; HALL, J.

7 Cal. App. 392

BUHMAN et al. v. NICKELS & BROWN BROS. (Civ. 315.)

(Court of Appeal, Third District, California. Feb. 21, 1908.)

1. ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING.

Defendant leased property from executors under an agreement to surrender the premises when they were sold, upon 30 days' notice and payment to him of his actual expenses in putting in crops, etc., and the land was thereafter sold by the executors and due notice given to defendant to quit the land, which he refused to do, and also refused to furnish a statement of his expenses in putting in crops. Defendant appealed from the decree confirming the executors' sale of the premises, and the decree was affirmed on appeal, and thereafter this action for unlawful detainer was brought against defendant by the purchasers. *Held*, that defendant's contention that the perfecting of the appeal from the decree confirming the sale suspended further proceedings upon the order appealed from, and stayed the present action, was untenable, as at the time it set up this plea of abatement the appeal was not pending; it being essential that the matter in abatement exist at the time of the filing of the plea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 119-122.]

2. EVIDENCE — JUDICIAL NOTICE — JUDICIAL PROCEEDINGS—JUDGMENT CONFIRMING EXECUTORS' SALE.

The court will take judicial notice of a judgment confirming the order of sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 62-65.]

3. LANDLORD AND TENANT—RECOVERY OF POSSESSION BY LESSOR—UNLAWFUL DETAINER—DAMAGES.

Where defendant leased property under an agreement to surrender the land upon its sale by the lessors, and the land was sold and due notice given, but defendant wrongfully held over under an erroneous claim that it had the right to retain possession on the ground that a perfected appeal suspended the sale, the lease having been terminated by the notice, in an action by the purchasers for unlawful detainer, they were entitled, under Civ. Code, § 3334, providing that the detriment caused by the wrongful occupation of land, except in certain cases, is the value of the use of the property for the time occupied, to recover the value of the use of the property, and not merely treble the amount of the rent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 1249-1251.]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by J. J. Buhman, Jr., and others against Nickels & Brown Bros., a corporation. From a judgment for plaintiffs, defendants appeal. Affirmed.

See 82 Pac. 85.

Bell, York & Bell, for appellants. Webber & Rutherford, for respondents.

BURNETT, J. The action is unlawful detainer for the recovery of certain premises in the county of Napa and damages for the detention thereof. Before trial defendant surrendered to plaintiffs the possession of said premises, thereby leaving for determination as the sole issue to be tried, the question of damages for the use and occupation of said

land from March 7, 1903, to and including August 31, 1903, the latter being the date of said surrender.

From the complaint the following facts appear: On December 15, 1900, one Charles Robinson died testate in the county of Napa; his will was admitted to probate, and D. S. Kyser and E. W. Hottel were appointed executors thereof. On September 2, 1902, by an instrument in writing, said executors leased to defendant certain premises in said county known as the "Robinson ranch" for the term of one year, with the following proviso: "It is further mutually understood and agreed by the parties hereto that in case of a sale of the demised premises the second party will quit and surrender the said premises upon thirty days' notice, and the said first party will pay to the second party the actual cost or expense said second party may have been put to in putting any crop of hay or grain upon said premises." On the 15th day of October, 1902, pursuant to the terms of the will, the executors sold the property to plaintiffs, and upon the return of said sale and after notice given the sale was confirmed by order of the superior court December 30, 1902. In pursuance of said order the executors made and delivered a deed to plaintiffs on January 19, 1903. On February 4th following plaintiffs served upon defendant a written notice as provided in the lease, demanding the possession of said premises. On the 12th of February a demand was made upon defendant to furnish plaintiffs with a statement of the actual cost that defendant had incurred in putting in any crop on said premises. Defendant refused to deliver possession, and declined to furnish any statement of the said expense incurred by it. On March 6th plaintiff offered in writing to pay defendant the sum of \$4 per acre for every acre that defendant had put to grain, said amount being sufficient to cover the entire cost. "That said defendant unlawfully holds over and continues in possession of said premises after demand made, and after the expiration of the time specified and provided in said written lease." The monthly value of the rents and profits is \$500 per month. The only defense attempted to be set up in the answer filed February 21, 1903, which we are called upon to consider is that an appeal was taken by defendant to the Supreme Court from the order of the superior court confirming the sale of the property to plaintiffs, and "that said appeal from said order or decree confirming said alleged sale to plaintiffs was at the time of the filing of the complaint herein pending and undetermined in the Supreme Court, and said appeal was not determined until the 19th day of February, 1904 (and said alleged order or decree was during all of said time and until the said 19th day of February, 1904, duly stayed)." There was a further and supplemental answer to the effect that defendant surrendered possession on August 31, 1903,

but that is not involved in this appeal. A demurrer to the answer was sustained, and, defendant declining to amend, judgment was entered for plaintiffs for \$1,255, from which the appeal was taken.

Appellant urges two grounds for reversal, but they are so manifestly untenable as to require scarcely more than a mere statement of them. The first is stated as follows: "The perfecting of the appeal from the decree confirming the sale of the premises to respondents suspended all further proceedings upon the order or decree appealed from," and quite a number of decisions is cited to the effect that "where a suit is pending in the Supreme Court on appeal the judgment below is suspended for all purposes"; but the obvious reply is that at the time this answer was filed setting up this plea in abatement the appeal was not pending in the Supreme Court at all, but it had been decided against appellant, affirming the judgment below, and had been the final judgment in the case for two years. The answer discloses the time when the said judgment was rendered by the Supreme Court, but it is silent as to its character. The court, however, would take judicial notice of the judgment affirming the order of sale. *Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57; *Southern Pacific R. R. Co. v. Painter*, 113 Cal. 247, 45 Pac. 320. Hence, it having been finally adjudged at the time the answer was filed that plaintiffs were the owners of the property on and after January 19, 1903, and none of the allegations of the complaint having been denied, there was nothing for the court to do but to find for the plaintiffs for the value of the unlawful use of the property by defendant from March 7 to August 31, 1903. Under appellant's contention respondents could never maintain an action for the unlawful detention of the property for the reason that an appeal was taken from the judgment directing the conveyance of the property to plaintiffs. The vice of the position is found in the fact that appellant ignores the rule that "matter in abatement of the plaintiff's action must exist at the time of filing the plea. A plea of a pending suit is ineffectual unless the former suit is pending at the time the plea is filed." *California Sav. & L. Soc. v. Harris*, 111 Cal. 137, 43 Pac. 526. As we have seen, at the time the answer setting up the plea was filed, the other suit was not pending, but had been long since finally determined.

The other contention is equally without merit. It is asserted that respondents were entitled to recover only \$750, being treble the amount of the rent provided in the lease. This conclusion is based upon the erroneous view that respondents sought to recover under the lease. The lease had been terminated by the notice given, and defendant was unlawfully holding over under a claim that it had the right to retain possession by virtue

of a perfected appeal. Hence the action was for the value of the use of the property, as provided in section 3334 of the Civil Code. This value was alleged to be \$1,255, and this was not denied by the answer.

There is no merit in the appeal, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 577

RUNGE v. WILSON et al. (Civ. 426.)

(Court of Appeal, Third District, California.
Feb. 20, 1908.)

1. REPLEVIN—POSSESSION—NECESSITY.

An action brought under the claim and delivery statute asking for possession of the property and for recovery of its value, if possession could not be given, cannot be sustained against a defendant not in possession of the property at the time the action is commenced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 81.]

2. SALES—BONA FIDE PURCHASERS—TITLE.

A vendee of personal property claimed title through a bill of sale, but never had possession of the property which, on the death of the vendor, passed into his estate, and was sold for a valuable consideration under a power in the will, and the sale confirmed. *Held*, that the vendee could not recover the property as against the purchaser, who had no notice of the prior sale, since by Civ. Code, § 3440, a transfer of personal property not accompanied by a change of possession is fraudulent and void as against purchasers in good faith subsequent to the transfer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 673-675.]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Replevin by Constance Isabella Runge against Louisa Wilson, executrix, and another. From a judgment for defendants, and from the denial of a motion for a new trial, plaintiff appeals. Affirmed.

Webber & Rutherford, for appellant. F. E. Johnson, H. L. Johnson, and L. E. Johnson, for respondents.

CHIPMAN, P. J. This action is for the recovery of possession, or value, if delivery cannot be had, of certain personal property. The cause was tried by the court without a jury, and defendants had judgment, from which, and from the order denying her motion for a new trial, plaintiff appeals.

It appears that on October 31, 1905, one E. J. Wilson was the owner and in possession of certain personal property described in the complaint, and on that day executed a bill of sale thereof to plaintiff, but Wilson remained in possession, and plaintiff never had possession; on August 22, 1906, Wilson died testate while in possession of said property; by his will his wife, one of the defendants, was named as executrix, and she was duly appointed as such executrix on September 17, 1906; by the terms of the will she was given authority to sell the property of the

estate without any order of the court; on September 22, 1906, the executrix sold the property in dispute to defendant Heeter for a valuable consideration, who had at the time no knowledge of any claim of plaintiff upon the property nor does it appear that his codefendant, the executrix of Wilson's will, knew of the sale to plaintiff; the sale to defendant Heeter was confirmed by the court before demand made upon either of the defendants, and before the commencement of the action; defendant Heeter took immediate possession of the property upon purchase, and was in possession when the action was commenced; plaintiff made demand for possession upon both defendants prior to the commencement of the action, but was refused.

Appellant claims, and it is not disputed, that as between her and Wilson the sale was good and passed the title in the property to her, and the property could have been recovered from the grantor—citing *Francisco v. Aguirre*, 94 Cal. 180, 29 Pac. 495. She further contends that, no creditor complaining, Wilson's executrix was in no better position than her testate; that she had no greater title than her testate, and, having no title, could convey none, and none passed by confirmation of the sale to respondent Heeter—citing *Robinson v. Haas*, 40 Cal. 474.

Respondents' contention is: (1) That plaintiff cannot recover against respondent executrix because she was not in possession when the action was commenced—citing *Riclotto v. Clement*, 94 Cal. 107, 29 Pac. 414; *Richards v. Morey*, 133 Cal. 437, 65 Pac. 886. (2) Appellant cannot recover against the executrix, because the sale was not accompanied by an actual and continued change of possession, and the sale was therefore, as to the executrix, fraudulent and void—citing section 3440, Civ. Code; *Magraw v. McGlynn*, 26 Cal. 429; *Ex parte Smith*, 53 Cal. 208; *Francisco v. Aguirre*, 94 Cal. 185, 29 Pac. 495; dissenting opinion of the chief justice in *Murphy v. Clayton*, 114 Cal. 526, 46 Pac. 460. (3) Appellant cannot recover against defendant Heeter, because he was an innocent purchaser in good faith for value without notice, and also because the sale by Wilson was fraudulent and void as to Heeter—citing Civ. Code, § 3440; *Palmer v. Howard*, 72 Cal. 293, 13 Pac. 858, 1 Am. St. Rep. 60; *Stockton Sav., etc., Soc. v. Purvis*, 112 Cal. 236, 44 Pac. 561, 53 Am. St. Rep. 210; *Ruggles v. Cannedy*, 127 Cal. 297, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371.

1. This is the ordinary action in claim and delivery. The relief sought is possession of the property, or the alternative relief given by the statute, if possession cannot be had. Upon the complaint recovery for conversion against either of the defendants could not be justified. The distinction between replevin (our claim and delivery) and trover is clearly pointed out in *Riclotto v. Clement*, supra, and it was there held that, if the property was

not in the possession of the defendant at the commencement of the action, plaintiff could not recover. *Richards v. Morey*, supra. The judgment in favor of defendant executrix must therefore be sustained.

2. Appellant's title rests upon a bill of sale of personal property which appellant did not at the date of sale or ever afterwards take or have possession of, but which at all times to his death remained in the possession of the vendor. She testified that she never even saw the property. This property came into the possession of the executrix of the last will of the vendor as property belonging to his estate, and was by her sold in due course to defendant Heeter under a power given by the will, and the sale was confirmed by the court. The vendee, Heeter, was a purchaser in good faith for value subsequent to the sale to appellant, and without knowledge of plaintiff's claim, and is brought directly within the provisions of section 3440 of the Civil Code. *Ruggles v. Cannedy*, supra.

It is not necessary to decide the question suggested in respondents' second point, as the other two points are well taken.

Judgment and order affirmed.

We concur: BURNETT, J.; HART, J.

7 Cal. App. 599

McFARLAND v. MATTHAI et al. (Civ. 374.)
(Court of Appeal, Third District, California.
Feb. 22, 1908.)

1. EJECTMENT—RIGHT OF ACTION—GROUNDS.

The allegations essential to an action of ejectment in form are the estate of plaintiff, possession by defendant at the commencement of the action, and his wrongful withholding of the same, and where plaintiff was for many years prior to the commencement of the action, and at its commencement, the owner of premises and entitled to exclusive possession, and defendants had been, and were at that time, in possession of the premises and wrongfully withheld possession, plaintiff was entitled to recover, and a general demurrer was properly overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 155.]

2. SAME — PLEADING — "CROSS-COMPLAINT" — SUFFICIENCY—STATUTE.

In an action of ejectment, where defendants filed a purported cross-complaint, which did not relate to the land for the recovery of which the action was brought, it was not a "cross-complaint" within Code Civ. Proc. § 442, permitting defendant seeking affirmative relief against any party, relating to or depending upon the transaction upon which the action is brought, or affecting property to which the action relates, to file, with his answer, a cross-complaint, and hence a demurrer was properly sustained thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 198.

For other definitions, see Words and Phrases, vol. 2, p. 1761.]

3. APPEAL — APPEAL ON JUDGMENT ROLL — QUESTIONS REVIEWABLE.

In an action of ejectment, there being no bill of exceptions, and defendant having appealed on the judgment roll alone, statements in appellant's brief that the judgment below was procured through false testimony cannot be consid-

ered on appeal, as it will be presumed that the evidence is sufficient to support a finding upon which the judgment rests.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3673-3678.]

4. SAME—FINDINGS BY COURT—CONCLUSIVE-NESS.

Whether testimony is false must ordinarily be left exclusively to the determination of the trial court, and, when so determined, is usually conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by Abel McFarland against Louise Matthai and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Louise Matthai and Rose Matthai (Warn-er Temple, of counsel), for appellants. Theo. A. Bell and Bell, York & Bell, for respondents.

HART, J. Action in ejectment. The appeal is from the judgment, and is brought up on the judgment roll alone. The complaint is in the usual form in actions for the recovery of possession of real property. It alleges that the plaintiff for many years prior to the commencement of the action had been, and "he now is, the owner and entitled to the exclusive possession" of the premises in dispute, and that the "defendants have been and now are in possession of said premises," and "have wrongfully and unlawfully withheld, and do now wrongfully and unlawfully withhold, the possession of said premises and the whole thereof from plaintiff."

A general demurrer to the complaint was overruled by the court, and properly so. The essential allegations necessary to an action in ejectment in form are the estate of plaintiff, possession by defendants at the commencement of the action, and their wrongful withholding the same. *Haggin v. Kelly*, 136 Cal. 483, 69 Pac. 140; *Hihn Co. v. Fleckner*, 106 Cal. 97, 39 Pac. 214; *Hihn v. Mangenberg*, 89 Cal. 268, 26 Pac. 968; *Rego v. Van Pelt*, 65 Cal. 254, 3 Pac. 867; *Payne v. Treadwell*, 16 Cal. 246.

No error was made by the court in its order sustaining the demurrer to the alleged cross-complaint. The land concerning which complaint is made by defendants in their so-called "cross-complaint" is not the land referred to in plaintiff's complaint. The affirmative matters set out by defendants in no sense constituted a cross-complaint. See *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637; *Nelson v. O'Brien*, 139 Cal. 628, 73 Pac. 469; *Phillips v. Hagart*, 113 Cal. 554, 45 Pac. 843, 54 Am. St. Rep. 369; *Mining Co. v. Mining Co.*, 83 Cal. 589, 23 Pac. 1102. The affirmative relief sought by the purported cross-complaint does not relate to or depend upon "the contract or transaction upon which the action is brought," or does not affect "the property to which the action relates." Code Civ. Proc. § 442.

The statement in the brief of appellants to

the effect that the judgment was procured through false testimony cannot be considered here. There is no bill of exceptions, the appeal being from the judgment on the judgment roll alone. The presumption is that the evidence is sufficient to support the findings upon which the judgment rests. Besides, the question as to whether testimony is false or not is one which must ordinarily be left exclusively to the determination of the trial court, and, when so determined, is usually conclusive on appeal.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(12 Ariz. 99)

NATIONAL CASH REGISTER CO. v.
BRADBURY, County Recorder.

(Supreme Court of Arizona. March 27, 1908.)

ACKNOWLEDGMENT—UNACKNOWLEDGED INSTRUMENTS.

Rev. St. 1901, pars. 735, 737, provide that no instrument affecting real estate is of any validity against innocent purchasers, unless recorded, and that, to be lawfully recorded, it must be previously acknowledged. Paragraphs 748, 749, and 753, provide for the recording of the following instruments, duly acknowledged: "All deeds, mortgages, conveyances, deeds of trust, bonds for title, covenants, defeasances, or other instruments of writing concerning any lands or tenements, or goods and chattels or movable property of any description"—and that sales and other conveyances whatever of any lands, and all deeds of trust and mortgages, whatsoever, shall be void as to creditors unless acknowledged and filed with the recorder, but that the recording of such instruments duly acknowledged shall be notice to all persons of their existence. Rev. St. 1901, under the title "Mortgages," require instruments intended as mortgages or liens upon personalty, to be recorded in order to be operative against third persons where there is not an immediate and continued change of possession, but do not require them to be acknowledged. Rev. St. par. 2702, provides that no contract for the conditional sale of personal property shall be valid as against any one except the parties, and those having notice thereof, unless it is filed and recorded as chattel mortgages are filed and recorded. Rev. St. 1901, par. 1135, provides that the recorder "must upon the payment of his fees, record separately."

* * * (13) Such other writings as are by law required or permitted to be recorded." Held, that it was the county recorder's duty, under paragraphs 2702 and 1135, to file and record, on payment of his fees, an agreement for the conditional sale of personal property, even though it has not been acknowledged; paragraphs 735, 737, 748, 749, and 753, not excluding unacknowledged documents from record.

Appeal from District Court, Yavapai County; before Justice Richard E. Sloan.

Action by the National Cash Register Company to compel J. C. Bradbury, as county recorder, to record a conditional sale. From a judgment sustaining a demurrer to the petition and denying the writ, the petitioner appeals. Reversed and remanded.

Norris & Ross, for appellant. Robert E. Morrison and E. S. Clark, for appellee.

KENT, C. J. The appellant sold to one P. C. Armitage a certain cash register manufactured by it under an agreement, by the terms of which delivery of the article was to be made to Armitage, but the title thereto was not to pass until the purchase price was paid by him in full. The agreement was duly signed by the parties, and thereafter the appellant tendered the instrument to the county recorder, the appellee, for record, together with the fee prescribed by law for "filing and entering a minute of chattel mortgages deposited in his office." The recorder declined to receive or file for record the instrument, on the ground that the agreement was "not in proper form for record, as the signatures are not acknowledged." The appellant filed its petition in the district court, praying that a writ of mandamus issue to the appellee, commanding him to accept the instrument for filing and record in the same manner as chattel mortgages are by law required to be filed and recorded upon tendering the proper fee therefor. The appellee demurred to the petition on the ground that the instrument described therein and tendered for filing and recording was not acknowledged, and was therefore not entitled to either filing or recording in the county recorder's office. The matter came before the trial court the day before the beginning of this term, and was passed upon pro forma in order that a determination might be had by us without delay. The trial court sustained the demurrer, and denied the application for the writ, and the matter is before this court on appeal from such determination.

The sole question presented by this appeal is whether an agreement in writing for the sale of personal property by the terms of which the title is to remain in the vendor and the possession thereof in the vendee until the purchase price is paid, which has been duly subscribed by the parties thereto, but which has not been acknowledged, is such an instrument as by law the county recorder is bound to file and record when tendered his proper fee therefor. Our Code of 1901 provides that no instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration without notice, unless recorded in the office of the recorder, and that such instrument shall not be deemed lawfully recorded unless it has been previously acknowledged (paragraphs 735 and 737); and under the same title it is further provided: "The following instruments of writing, which have been acknowledged according to law, are authorized to be recorded, viz.: All deeds, mortgages, conveyances, deeds of trust, bonds for title, covenants, defeasances, or other instruments of writing concerning any lands and tenements, or goods and chattels or movable property of any description"—and, further, that all sales and other conveyances whatever of any lands, and all deeds of trust and mortgages

whatsoever, shall be void as to all creditors unless they shall be acknowledged and filed with the recorder to be recorded as required by law, and, further, that the record of any grant, deed, or instrument of writing authorized or required to be recorded, which shall have been duly acknowledged for record, and duly recorded in the proper county, shall be taken and held as notice to all persons of the existence of such grant, deed, or instrument. Rev. St. 1901, pars. 748, 749, 753. The foregoing provisions of our statutes are all found under the title "Conveyances." Under the title "Mortgages" in our Code, and in the chapter relating to chattel mortgages, we find various provisions respecting the filing and recording of instruments intended to operate as mortgages or liens upon personal property, which, in substance, require such instruments, or true copies thereof, to be filed for record, in order to render them operative as against third persons, where the property covered thereby is not to be accompanied by immediate delivery and continued change of possession. Such instruments are not required to be recorded at length, as in the case of deeds or real estate mortgages, but especial provision is made for the recording in such cases. None of the provisions of the Code relating to such instruments in terms require them to be acknowledged. Under the title of "Frauds and Fraudulent Conveyances," we find the following provision of our Code (paragraph 2702): "No contract for the loan or lease of any goods or chattels for a period of three months, and no contract for the sale of personal property by the terms of which the title is to remain in the vendor and the possession thereof in the vendee until the purchase price is paid or other conditions of sale complied with, shall be valid as against any other person than the parties thereto and those having notice thereof, unless such contract of sale or lease, as the case may be, is in writing, subscribed by the parties thereto, and the same, or a copy thereof, filed and recorded in the office of the county recorder where said property is situated, or some part thereof, in the same manner as chattel mortgages are by law required to be filed and recorded."

We do not construe the provisions of our statutes which we have quoted above as found under the title "Conveyances," as excluding from record all documents unless they be acknowledged. Whatever may be the rule with respect to chattel mortgages, or the requirements to be observed as to them, a document in terms a conditional sale, such as the instrument in question, is we think clearly entitled to be filed and recorded in the manner provided by said paragraph, when subscribed by the parties thereto, although the instrument be not acknowledged by them. We do not think the provisions found in the statutes relating to conveyances, though otherwise perhaps broad enough in their terms,

are to be construed as authorizing the recorder to refuse for filing and record instruments such as agreements for conditional sales, mechanics' liens, and other similar instruments, where the statutes relating thereto provide for such filing and record, but do not require such documents to be acknowledged. Furthermore, in the chapter of our Code relating to the duties of the recorder, we find specific authority for the recording of such instruments, as follows: "He [the recorder] must upon the payment of the fees for the same, record separately in large and well bound separate books. * * * (13) Such other writings as are by law required or permitted to be recorded." Rev. St. 1901, par. 1135. Since paragraph 2702 manifestly permits the recording of contracts of conditional sales subscribed by the parties, the instrument in question is within the provisions of paragraph 1135, subd. 13, supra, making it mandatory upon the recorder to record such contract. We think, therefore, that the instrument should have been received by the recorder for filing and recording as provided by paragraph 2702 of the Revised Statutes, and that the demurrer to the petition should have been overruled.

The judgment of the district court is reversed and the case remanded for further proceedings in conformity with this opinion.

DOAN, CAMPBELL, and NAVE, JJ., concur.

(12 Ariz. 55)

BUTTERFIELD et al. v. NOGALES COPPER CO. et al.

(Supreme Court of Arizona. March 27, 1908.)

1. VENDOR AND PURCHASER—TITLE OF VENDOR—RIGHT OF PURCHASER TO DISPUTE.

The rule that a purchaser under a contract to purchase may not dispute his vendor's title, nor purchase and assert against him an adverse title, applies to land which the purchaser agreed to purchase, and which is the subject-matter of the contract, but does not extend to land not within the agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 381-383.]

2. SAME.

Plaintiffs and a third person discovered and denounced under the laws of Mexico two mining claims, which were surveyed and monuments erected, and for which patents were issued. There was a variance between the ground conveyed by the patents and the ground intended to be denounced. Defendants contracted to purchase the claims, and, on discovering the variance, denounced claims covering the territory intended to be included by plaintiffs and the third person in their claims. Defendants were not guilty of actual fraud. *Held*, that defendants were not, because of the contract of purchase, estopped from acquiring title to the property adversely to plaintiffs, and equity could not impress on the property a trust in favor of plaintiffs.

3. APPEAL—FINDINGS—CONCLUSIVENESS.

A finding will not be disturbed where there is substantial evidence to support it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

4. VENDOR AND PURCHASER—CONTRACTS—POSSESSION BY PURCHASER.

Where no actual possession was taken by a purchaser in a contract to purchase mining claims not described by metes and bounds, the purchaser was not in constructive possession of the ground claimed by the vendor under his original location, and not included within the patents to the claims, as one may not be constructively in possession of property not falling within the description of some muniment of title held by him.

5. TRUSTS—CONSTRUCTIVE TRUST—EVIDENCE.

In a suit by a vendor of mining claims, claiming ground under his location not included in the patent of the claim, against the purchaser, to impress on the property within the location and outside of the patent a trust in his favor, evidence *held* to justify a finding that the purchaser was not guilty of fraud, and did not take possession under the contract of purchase of the ground as located, defeating a right to relief.

Error to District Court, Santa Cruz County; before Justice Doan.

Action by Mrs. F. L. Butterfield and others against the Nogales Copper Company and others. There was a judgment granting insufficient relief, and plaintiffs bring error. Affirmed.

See 80 Pac. 345.

Theodore H. Thomas and Selim M. Franklin, for plaintiffs in error. Eugene S. Ives, S. L. Pattee, and S. V. McClure, for defendants in error.

SLOAN, J. This case was before us at the January, 1905, term on appeal from a judgment of the lower court sustaining a demurrer and dismissing the action upon the ground that the district court was without jurisdiction to grant the relief prayed for, for the reason that the subject-matter of this relief was mining property situated in Mexico. We reversed the judgment of the court below, and remanded the case for further proceedings. 80 Pac. 345. The complaint in the action was amended by the plaintiffs by the bringing in of additional parties defendant, and by adding certain allegations with respect to the acquisition by said new parties of interests in the Mexican mines upon which the plaintiffs sought to impose the trust. In essentials the cause of action remains the same as in the original complaint. A trial upon the merits was had, and a personal judgment was rendered against the defendant W. F. Chenoweth. Judgment for the remaining defendants was entered, and the complaint was dismissed as to them. The defendant W. F. Chenoweth appealed from this judgment, and this appeal has been before us at this term.

Plaintiffs Mrs. F. L. Butterfield and Charles Dougherty have sued out this writ of error to review the general judgment independent of the appeal of Chenoweth. The errors assigned by plaintiffs in error relate almost wholly to the sufficiency of the evidence to sustain the findings of the court, and the insufficiency of the latter to sustain the judgment.

The court found the facts substantially as follows: That in May, 1898, the plaintiffs Mrs. F. L. Butterfield, Charles Dougherty, and one Manuel M. Maldonado discovered and denounced under the laws of Mexico two mining claims, one called the "Interprice" and the other called the "Margarita," the former being the northern extension, and the latter the southern extension, of the Zaragoza mining claim theretofore denounced by said Maldonado, and more particularly described as situate in the jurisdiction of the municipality of Cucurpe, district of Magdalena, state of Sonora, republic of Mexico; that immediately upon denouncing said mining claims said parties made application to the proper officers of the Mexican government for a survey and patent for the same; that in pursuance of said application a survey was made in June, 1898, of the said Zaragoza claim and of the said extensions thereof, and monuments erected by the surveyor making said survey at the corners of each of said claims, and that said survey of said three claims was made at one and the same time; that at the time of the discovery and location of said mining claims there was a large and strong vein of mineral cropping out in different places above the surface of the ground within the claims so denounced; that it was the purpose and intent of the plaintiffs and of said Maldonado to denounce the ground embracing this vein in a course from the initial corner monument of the Zaragoza claim approximately north 12 degrees west; that in June, 1899, letters patent were issued by the Mexican government conveying the Zaragoza mine to said Maldonado and others, and conveying the said Interprice and Margarita mining claims to plaintiff and said Maldonado in the proportion of an undivided one-third interest to each; that the said letters patent were received by said Maldonado and retained by him until delivered to defendant W. F. Chenoweth, as hereinafter set forth; that there is a variance between the ground conveyed by said letters patent and the ground intended to be denounced by Maldonado and the plaintiffs; that according to the course set forth in said letters patent the Zaragoza claim lay across instead of alongside the vein, and the said Interprice, as described in said letters patent, did not take in or cover any of said vein, but lay in an entirely different locality; that said variance between the said courses as called for and set forth in the patents, and the ground intended to be denounced, was not known to plaintiffs or either of them until long afterwards; that prior to the issuance of said patents, and subsequent to said survey, the plaintiffs, to wit, in July, 1898, visited the property with defendant Maldonado, and that Maldonado then pointed out to them the monuments on the ground purporting to mark the corners of said mining claims; that said monuments were then in place, and were believed by plaintiffs to correctly define the

boundaries and corners of said claims and to have been erected by the official surveyor at the time of the survey for patent, and that said Maldonado so informed them; that in October, 1899, defendants W. F. Chenoweth, H. K. Chenoweth, and R. N. McPherson entered into a copartnership agreement, by the terms of which McPherson was to find a mining property which the Chenoweths were to develop and each of said copartners to have a one-third interest therein; that in pursuance of said agreement in October, 1899, McPherson examined the Zaragoza claim and was shown by Maldonado the monuments defining the boundaries thereof, and that said vein ran lengthwise through the center of said claim as so monumented; that at that time said McPherson obtained a bond on the Zaragoza mine from said Maldonado in the name of W. P. Chenoweth and H. K. Chenoweth; that the latter thereupon advanced money to McPherson, who took charge of the same, and proceeded to work and develop the same; that at about the same time said W. F. Chenoweth entered into a purchase agreement with said Maldonado for his one-third interest in said Margarita and Interprice mining claims, and received from the latter the letters patent to said mining claims; that on the 15th day of October, 1899, said W. F. Chenoweth entered into an agreement with the plaintiffs for the purchase of their undivided two-thirds interest in the Interprice and Margarita claims, in which he agreed to pay \$500 in cash and the further sum of \$14,500 within one year from the date thereof, and to pay all government taxes on the property in advance "during the life of this option" and furnish a receipt for the same, and in which it was agreed that upon the payment of the last-mentioned sum at any time within the period of one year the plaintiffs were to make and deliver to said Chenoweth a deed to the property; that at the time of the execution of this agreement said W. F. Chenoweth had not met either of the plaintiffs, nor had he seen the property, and did not for more than a year thereafter meet said plaintiffs, nor for a considerable time thereafter visit said property; that subsequently said W. F. Chenoweth conveyed said Zaragoza mine to a corporation organized under the laws of Arizona named the "Nogales Mining Company," the principal owners of the stock of which were W. F. Chenoweth, H. K. Chenoweth, R. A. McPherson, and one Jesse R. Grant, each of said four persons owning substantially one-fourth of the stock of said company; that neither said Grant nor McPherson or H. K. Chenoweth at any time had any interest in said Interprice and Margarita claims, or in said purchase contract between W. F. Chenoweth and the plaintiffs; that said Nogales Mining Company entered into possession of the Zaragoza claim, and did certain development work on the same and upon certain territory it believed was embraced within its boundaries, but which as a matter

of fact was without the boundaries of said claim as patented, but that neither the said Nogales Mining Company nor any of the defendants W. F. Chenoweth, H. K. Chenoweth, Jesse R. Grant, or R. A. McPherson at any time entered into possession of or did any work upon any territory covered by either the Margarita or Interprice claims, or of any territory which would have been covered by said claims had the Zaragoza claim been surveyed so as to cover the vein as intended by the plaintiffs and Maldonado, and as indicated by the monuments shown to plaintiffs by Maldonado in July, 1898, as aforesaid; that subsequent to the issuance of said patents on the 3d day of November, 1899, one Romirez denounced a claim called the "Ocampo," which covered a large portion of the territory which had been intended by plaintiffs to have been covered by the Interprice claim, and a patent thereafterwards was issued by the republic of Mexico to said Romirez for said Ocampo claim; that subsequent to the denouncement of the Ocampo claim defendants H. K. Chenoweth and Jesse R. Grant discovered that the Zaragoza claim, as patented, did not cover the vein as had been represented by said Maldonado, and as indicated by the monuments on the ground pointed out to them by the said Maldonado, and that a large portion of the work that had been done, supposedly on the Zaragoza claim, was on vacant and unappropriated public domain; that thereafter, in January or February, 1900, said Grant and Chenoweth denounced four claims called, respectively the "Nogales," "Cerro Prieto," "Eliza," and "Grant," which covered the territory which had been intended by plaintiffs to have been included within the Interprice claim, and which covered the ground denounced by Romirez under the said Ocampo claim; that said locations were, in March, 1900, conveyed by said Grant and Chenoweth to a corporation organized under the laws of Mexico called the "Cerro Prieto Mining Company," and which corporation was made one of the defendants; that on the 19th day of April, 1900, W. F. Chenoweth denounced a claim called the "Santiago," and on the 23d day of July, 1900, a claim called the "Enrique," which included within their boundaries part of the mineral vein intended by the plaintiffs to have been covered by the Interprice claim; that in August, 1900, said W. F. Chenoweth conveyed said Santiago and Enrique claims to the said Cerro Prieto Mining Company, and that in August, 1904, he conveyed to one W. Z. Stewart, one of the defendants, the title to the Ocampo claim, which he had purchased from said Romirez; that in November, 1900, said W. F. Chenoweth notified the plaintiffs that he did not desire to purchase the said Margarita and Interprice claims for the reason that they were, in his opinion, valueless; that prior to said time said Chenoweth had paid the taxes due on said claims to the Mexican government; that neither said W. F. Chenoweth nor any of

the defendants advised or notified plaintiffs or either of them of the aforesaid variance between the courses of the survey as set forth in the patent papers to the Margarita and Interprice claims and the monuments pointed out to them by Maldonado as indicating the location of said mining claims upon the ground relative to the said mineral vein, and that the plaintiffs were in ignorance of said variance until a long time thereafter; that neither the said W. F. Chenoweth, H. K. Chenoweth, Jesse R. Grant, R. A. McPherson, the Cerro Prieto Mining Company, nor the Nogales Mining Company, or any or either of them, nor any one acting in behalf of them, or any or either of them, at any time removed any monument or monuments which had been set up upon the Margarita and Interprice claims, or either of them, nor did said persons, or any or either of them, at any time do or perpetrate any fraud upon the plaintiffs or either of them, or do or procure the same to be done any act tending to deprive the plaintiffs or either of them of their title to any territory whatever in the said district; that in the summer of 1901 the plaintiff Mrs. F. L. Butterfield first learned of the variance between the letters patent and the ground intended by her to be included within the boundaries of the Interprice and Margarita claims, and that the ground so intended to be located and denounced had been denounced and located by Romirez, Grant, Chenoweth, and others, and was claimed by the said Cerro Prieto Mining Company; that thereupon she began proceedings, first in Mexico, and subsequently in the United States, to protect such rights as she might have in the premises, and has continued to assert her said rights ever since; and that therefore she has not been guilty of laches in bringing this action.

It is further found that through various transactions the title to the property in question became vested in the Banco Del Oro Mining Company, a Mexican corporation, as a holding company for the Black Mountain Mining Company, an Arizona corporation, and both of said corporations have been made parties defendant by the amendment to the original complaint. The court further found that neither said W. F. Chenoweth nor his assigns paid, or offered to pay, the plaintiffs the \$14,500 agreed to be paid under his contract of purchase with plaintiffs; that the latter have not offered to refund the \$500 paid by said Chenoweth to them as the cash payment under said agreement, and have not offered or tendered any deed for said Interprice and Margarita claims, nor has Chenoweth made any demand for the same; that both parties to said agreement considered and treated it as an option.

As conclusions of law the court found: First, that the purchase agreement between W. F. Chenoweth and plaintiffs was not an option, but a contract to purchase, and still binding upon the parties thereto, and that

under said agreement plaintiffs are entitled to recover from defendant W. F. Chenoweth the said sum of \$14,500, with interest thereon at 6 per cent. per annum from October 15, 1900, and their costs of suit, conditioned upon the plaintiffs executing the deed called for in said agreement; that plaintiffs were not entitled to recover anything from the other defendants in the action, and that the plaintiffs have had at no time any interest, legal or equitable, in any territory embraced within the Nogales, Cerro Prieto, Grant, Eliza, Enrique, or Santiago claims. In accordance with the conclusions of law so found by the court judgment was entered.

In passing upon the sufficiency of the original complaint as sustaining the jurisdiction of the court over the subject-matter, we held, upon the first appeal, under the facts as pleaded, that the plaintiffs were entitled to relief if it be shown that under the agreement of purchase the defendants had gone into possession of the Interprice and Margarita mining claims, and, after taking possession of said claims, had fraudulently torn down and removed the original monuments marking the boundaries of said claims, and had set them up in another direction for the purpose of changing the location of said claims so as to exclude therefrom the vein or ledge intended to be located, and, having thus changed the monuments erected by plaintiffs and the boundaries of said mining claims, had denounced, under the mining laws of Mexico, the ground thus excluded from the Margarita and Interprice mining claims, and for themselves had obtained title to the ground thus denounced. We characterized such acts as fraud and misconduct of the grossest sort, and said that to permit the defendants to enjoy the fruits of such misconduct would be shocking to equity and good conscience. It is evident, however, from a cursory consideration of the findings of the court that no such case is established thereby, as it is directly and specifically found that none of the defendants changed or caused to be changed the original location of the Interprice and Margarita claims, or did any act of actual fraud in obtaining title to any ground in dispute.

Eliminating from the case, as we must, if the findings be sustained, any question of actual fraud, the right of plaintiffs to impress a trust upon the land or any of the land included within the Cerro Prieto, Grant, Eliza, Nogales, Santiago, and Enrique claims must rest, if at all, upon the application to the facts in the case of the general doctrine that a vendee under a contract to purchase may not dispute his vendor's title, nor purchase and assert against his vendor an adverse title. This rule applies to land which the vendee has agreed to purchase, and which is the subject-matter of his contract, and does not extend to land not within the agreement of the parties. Such must be the limitation

of the doctrine, for the vendee is such only as to land he has agreed to buy, and as to the title to other property of his vendor he is a stranger. From a consideration of the text-writers and of the reported cases, the broadest statement which can be made as to the application of the doctrine is this: A vendee sustains to his vendor such a relation as that he may not dispute his vendor's title nor purchase and assert against him an adverse title, first, where the land affected by such adverse title is by fair and reasonable construction included within the terms of the contract; and, second, where the land affected is not in terms included or excluded from the contract, but possession is taken by the vendee by virtue of such contract under the assumption of the parties that it is included therein. The findings do not furnish the basis of relief to the plaintiffs on the theory that Chenoweth or his assigns sustain such relation to the plaintiffs under the contract to purchase as would estop him or them from acquiring an independent title from the Mexican government and holding the property in dispute adversely to plaintiffs. No trust, therefore, of any kind under the facts as found should in equity be impressed upon the property in dispute in favor of the plaintiffs, and the trial court was, under such findings of fact, right in denying such relief.

It is argued by counsel for plaintiffs in error, first, that the evidence does not sustain the findings, but does sustain the allegations of the complaint, and does make out a case of fraud on the part of the Chenoweths, McPherson, and Grant in this, that it establishes that the Zaragoza, Margarita, and Interprice claims, as originally monumented and denounced, covered and included the vein of mineral, and that these monuments were subsequently removed or destroyed presumptively by said defendants; second, that advantage was taken by said defendants of their discovery of the variance between the description of the Margarita and the Interprice claims contained in the letters patent and the original locations, through their possession of the claims under the agreement to purchase, to denounce and obtain title to the ground in dispute.

As to the first contention, an examination of the evidence discloses that after the original denouncement by Maldonado of the Zaragoza, Margarita, and Interprice claims there were monuments along the course of the vein and on each side of it. It was admitted by the Chenoweths and by McPherson that they saw these monuments before the ground in controversy was located, and believed them to mark the boundaries of the first-named claims. The Chenoweths, McPherson, and Grant each denied having removed or destroyed, or caused to be removed or destroyed, any of these monuments. McPherson testified that under instructions from the Chenoweths, after the discovery of the variance between the patents and the assumed location

of the Margarita and Interprice claims, he erected new monuments to conform to the location of the claims as made in the patents. The inference that might be drawn from the latter fact is all that may be said to sustain the charge of the removal or destruction of the original monuments by the Chenoweths and their codefendants, or by any of them. Besides this, inasmuch as the patents had been issued before the latter had gone upon the ground, or had done anything in relation thereto, any motive on their part which would lead them to remove or destroy the original monuments is not readily apparent. Under our well-settled rule that a finding of fact will not be disturbed where there is substantial evidence to support it, the finding in this behalf must be sustained.

Upon the question as to whether the evidence sustains the findings that no possession was taken by W. F. Chenoweth or by any of his associates or assigns of the Margarita and Interprice claims under the agreement to purchase, we find that the testimony of W. F. Chenoweth sustains the finding, to the extent at least, that no actual possession was taken by him under said agreement. Furthermore he testified that none of the other defendants at any time acquired any interest in said claims, or in the agreement to purchase, and that the latter was taken in his own name, and for his individual interest. An inspection of the record casts some doubt upon the truthfulness of the latter statement, for it seems clear from the record that H. K. Chenoweth and R. A. McPherson understood that the purchase agreement was made for the benefit of a copartnership entered into prior thereto between them and W. F. Chenoweth. Still it was within the province of the trial court to determine this question of fact, and, as the evidence at best is conflicting, we may not disturb the finding. If no actual possession was taken by Chenoweth or by any of his codefendants under the agreement to purchase, certainly it may not be said that Chenoweth or any of his codefendants were ever in constructive possession of the ground claimed by plaintiffs under their original location, and not included within the patents to the Margarita and Interprice claims. The agreement to purchase contained no description by metes and bounds, and, as one may not be constructively in possession of property which does not fall within the description of some monument of title held by him, the case of plaintiffs in this regard must rest upon the actual possession of the ground in conflict by said defendants.

Regarding the evidence in its broadest aspect, and most favorably for the plaintiffs, it may appear as a proposition of morals that Chenoweth and those of his codefendants who were interested with him in the contract

of purchase were guilty of bad faith in failing to notify the plaintiffs promptly of their discovery of the variance between the patent papers and the assumed original locations of the Margarita and Interprice claims. It is quite another thing, however, to say that it was their legal duty arising from the contractual relations existing between the parties to the contract of purchase so to do. If, as a matter of fact, such variance was not due to any act of theirs, and they were not in the actual or constructive possession of the land in controversy under said contract of purchase, we are aware of no legal or equitable principle which would make it their duty to locate the ground for the benefit of the plaintiffs, or otherwise to preserve the same for the benefit of plaintiffs. The circumstances testified to by plaintiffs, as well as by W. F. Chenoweth, connected with the execution of the agreement to purchase, fail to establish any relation of trust or confidence between W. F. Chenoweth and plaintiffs other than that of a mere vendee. At the time of the agreement none of the parties to the same knew anything of the true location of the Margarita or Interprice claims either as originally monumented or as subsequently patented. No representations were made by any of the parties in relation thereto. Under the testimony no relief could have been had by Chenoweth from any obligation he may have been under by the terms of the contract on the ground of mistake as to the true location of the Margarita and Interprice claims. An examination of the whole evidence has shown us that the findings are sufficiently sustained in these respects, and support the conclusion of law made by the court that no trust can be impressed upon the property in dispute in favor of plaintiffs. This result renders unnecessary an examination as to the correctness of the findings in other respects. The same is true of the errors assigned relating to the admission of certain evidence, inasmuch as this evidence related to the subject of notice of the rights of plaintiffs to the present holders of the legal title to the mining ground in question.

The personal judgment against W. F. Chenoweth is not sought to be reviewed in this proceeding; and, as an appeal has been taken by Chenoweth and is now pending from said personal judgment, the general judgment will be affirmed save and except that part of it pertaining to said personal judgment against W. F. Chenoweth, which will stand, unless reversed or modified upon his appeal.

KENT, C. J., and CAMPBELL, J., concur.

NAVE, J., being disqualified in this case, took no part in its consideration or determination.

(12 Ariz. 69)

GRAND CANYON R. CO. v. TREAT, Treasurer, Etc., et al.

(Supreme Court of Arizona. March 27, 1908.)

1. TAXATION—EXEMPTIONS—STATUTORY PROVISIONS—CONSTRUCTION.

Section 8, Act No. 3, p. 6, 19th Leg., provides that nothing contained in the act shall be construed to give to any corporation created under it any exemption from taxation created by any existing or future exemption laws of the territory. *Held*, that the purport of the act was that a corporation created pursuant thereto should not be deemed to acquire by reason of any of the terms of the act an exemption from taxation, and further, that it should not be held that property acquired by it should be exempt from taxation because, by operation of an existing or subsequent exemption act, it was exempt under its former ownership, or because, by operation of such exemption act, its former owner was exempt, and it was not intended to prevent future Legislatures from expressly permitting a tax exemption to accompany the exempt property to a successor in interest, or to be availed of by the successor of an exempt owner.

2. SAME.

The same meaning must be given to the saving clause of section 2, Act No. 23, p. 66, 19th Leg., providing that a purchaser of a railroad sold by virtue of a judgment or decree of court shall be vested with all the property purchased, together with all rights and exemptions appertaining thereto, save and except only the exemption from taxation which now exists or may hereafter be given under existing or future exemption laws of the territory in reference to inducing the building of new roads.

3. SAME.

Act No. 68, p. 79, 20th Leg. (Act March 16, 1899), provides that for the purpose of inducing and encouraging the construction of railroads the capital stock, franchises, right of way, superstructures, and all other property used or necessary in the construction and operation of railroads to be conducted as common carriers, and whether owned or operated by a person or persons, association or railway corporation, their or its successors or assigns, shall be exempt from taxation for 10 years from the date of the passage of the act. *Held*, that such act perpetuated the exemption unto the successors of the original owner of a railroad constructed pursuant to the act.

4. SAME—"SUCCESSOR."

A corporation organized by purchasers at a mortgage foreclosure sale of a railroad constructed pursuant to Act No. 68, p. 79, 20th Leg., exempting such railroads and their "successors" from taxation, is the successor of the company commencing the construction of the railroad within the meaning of the act, so as to be entitled to the exemption provided for therein.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6747-6749; vol. 8, p. 7808.]

Appeal from District Court, Coconino County; before Justice Richard E. Sloan.

Action by the Grand Canyon Railroad Company against J. R. Treat, as treasurer and ex officio tax collector of the county of Coconino, to restrain the collection of certain taxes. From a judgment sustaining a demurrer to plaintiff's amended complaint, it appeals. Reversed and remanded, with instructions to overrule the demurrer.

The Santa Fé & Grand Canyon Railroad Company, theretofore duly incorporated under the laws of Arizona for the purpose and with the power, among others, of construct-

ing, maintaining, and operating a railroad from the town of Williams in Coconino county to the rim of the Grand Canyon of the Colorado river in Arizona, distant therefrom about 70 miles, for the carriage of passengers and freight as a common carrier, filed with the Secretary of the territory, on August 19, 1899, a written statement designating the general course and terminal points of the railroad which it proposed to construct. The entire line of said railroad was located upon the ground by a survey, and the location designated and fixed by the survey stakes were duly adopted as the definite line of location of said road by the board of directors of said company on October 7, 1899. Thereafter, and within six months after the written statement above mentioned was filed with the Secretary of the territory, the work of constructing said road was in good faith commenced on October 30, 1899, and a written statement setting forth the date and place of such construction was filed with the Secretary of the territory. Construction was diligently prosecuted thereafter, and before October 22, 1900, the company had completed 56.34 miles of the road, and on December 22, 1900, filed with said Secretary of the territory a plat of the road which it had thus constructed. All of these things, except the incorporation of the company, were done in compliance with Act No. 68, p. 79, of the Twentieth Legislative Assembly of the territory of Arizona, approved March 16, 1899, and entitled "An act to induce and encourage the construction of railroads within this territory." Thereafter in a suit brought for the foreclosure of a mortgage securing the corporate indebtedness of the company the district court of Coconino county, on June 8, 1901, issued a decree directing a special master to sell all of the property, rights, franchises, and privileges of the said company, including all exemptions from taxation owned or possessed by it, or which it or its assigns may hereafter acquire, own, or possess through or under the charter of said railroad company. Under this decree the special master on July 18, 1901, sold all of said property and other things above mentioned to E. D. Kenna, Byron L. Smith, and James H. Eckels, which sale was, on July 20, 1901, confirmed, and the property and things sold were thereupon delivered into the possession of the purchasers. Said purchasers, thereafter associating with themselves C. L. Sterry and T. J. Norton, organized the appellant corporation, the articles of incorporation of which were filed with the Secretary of the territory on August 10, 1901. Appellant was formed for the purpose and with the power, among others, to acquire, own, maintain, and operate the railroad sold as aforesaid, and to complete the construction of the same upon the route and right of way of the Santa Fé & Grand Canyon Railroad Company theretofore surveyed, and to acquire, own, use, and enjoy the franchises, rights, privileges, immunities, and exemptions acquired, held, and

enjoyed by that company. About August 16, 1901, a deed conveying all of the property, rights, privileges, franchises, and exemptions sold to and purchased by the said E. D. Ken- na, Byron L. Smith, and James H. Eckels at the sale under foreclosure above mentioned to the appellant herein, theretofore executed and delivered by the said purchasers, was placed of record on page 508, in Book 13 of Deeds, of the public records of Coconino county. Ap- pellant thereafter continued the construction of said railroad upon the location thereof which had been made by its predecessor, and completed the work on September 12, 1901. Thereafter, on November 8, 1901, the appel- lant filed with the Secretary of the territory a map showing the portion of said road con- structed during the year ending October 22, 1901, amounting to 10.07 miles. During the month of September, 1901, appellant located at its northern terminus an area of 20 acres for station grounds, and filed a map thereof with the Secretary of the Interior, which was, on August 18, 1905, duly approved by said Secretary. Appellant thereafter, in order to care for its passengers, erected upon said sta- tion grounds hotels and appurtenances, and has at all times since maintained on said grounds hotels, with electric and power plant to supply light, heat, and power for said ho- tels and its depot and other buildings as situ- ated on said station grounds, and used by it in its business. In the year 1906 the assessor of Coconino county and the board of equaliza- tion of the territory levied and assessed upon the aforesaid property of the appellant county and territorial taxes in the sum of \$11,975.63. Against this assessment the Grand Canyon Railway Company entered a formal protest before the territorial board of equalization, in which it claimed that it was organized and succeeded to the property of the Santa Fé & Grand Canyon Company under the provisions of, and by compliance with, the requirements of Act No. 3, p. 5, of the Session Laws of 1897; that the property taxed was entitled to exemption from taxation by virtue of the terms of section 1, Act No. 68, p. 79, of the Session Laws of 1899, whether in the owner- ship and possession of the Santa Fé & Grand Canyon Company, or of it (the Grand Canyon Railway Company), as the successor of the former corporation. Upon the refusal of the board of equalization to vacate or set aside the assessment and the listing of the tax for collection the Grand Canyon Railway Com- pany brought this action in the district court to restrain the collection of such taxes, on the ground that such property was exempt from taxation, and set forth in its complaint the facts as above stated; and, by amendment to said complaint, in addition thereto pleaded in extenso the certificate of incorporation of the said company. To the amended complaint the trial court sustained a general demurrer, without leave to amend, and entered judg- ment for the defendant in accordance there- with, from which judgment and ruling an ap-

peal has been taken to this court. The ap- pellant has presented its assignment of errors wherein it asserts that the court erred in sustaining the demurrer to appellant's amend- ed complaint, and that the court erred in awarding judgment upon such order in favor of appellees, for upon the facts stated in the amended complaint and admitted by the gen- eral demurrer thereto the property mention- ed in the amended complaint was and is ex- empt from taxation.

T. J. Norton, Paul Burks, and U. T. Clot- felter, for appellant. Henry F. Ashurst and E. M. Doe (E. S. Clark, Atty. Gen., of coun- sel), for appellees.

DOAN, J. This appeal is prosecuted upon the theory that section 1 of Act March 16, 1899, p. 79, No. 68, which provides "that for the purpose of inducing and encouraging the construction of railroads, other than street and electric railroads, within this territory, the capital stock, franchise, right of way, superstructures, betterments, telegraph lines, and all other real, personal and mixed prop- erty used or necessary in the construction and operation of railroads to be conducted as common carriers of freight and passenger, other than street and electric railroads, here- after constructed in accordance with the pro- visions of this act, and whether owned or operated by a person or persons, association or railway corporation, his, their or its suc- cessors or assigns, be and the same is here- by declared to be exempt from any and all manner of taxation for and during the period of ten years from and after the date of the passage of this act," established a valid ex- emption from taxation for the stock, fran- chises, right of way, superstructures, and all other real, personal, and mixed property used or necessary in the construction and operation of railroads constructed in accord- ance with the provisions of that act, whether owned and operated by the original associa- tions or corporations that constructed said roads and created or established such other property in compliance with the provisions of said act, or owned and operated by the successors of such associations or corpora- tions.

It is contended by the appellees that appel- lant, having acquired the property by virtue of the provisions of Act No. 3, p. 5, of the Nineteenth Legislative Assembly, is subject to the limitations of the said act, and that section 8, p. 6, thereof, which provides, "noth- ing in this act contained shall be deemed or construed to give to any corporation created under it any exemption from taxation creat- ed by any existing or future exemption laws of the territory of Arizona," prevents the ap- pellant from claiming for the property thus acquired any exemption from taxation. In determining the question whether upon the facts alleged in the amended complaint, and by the general demurrer thereto conceded,

the property upon which the tax was levied was and is exempt from taxation in the hands of the appellant, as the successor of the original owner, we first consider whether such exemption is the grant of Act No. 68, p. 79, of the Twentieth Legislature, or of Act No. 3, p. 5, of the Nineteenth Legislature; second, if the exemption is conferred by the grant of Act No. 68, p. 79, Laws 1890, independent of Act No. 3, p. 5, Laws 1897, is there, nevertheless, such a limitation placed upon the appellant corporation by the terms of either its certificate of incorporation or the law which authorizes its incorporation and its acquisition of this property (being Act No. 3, p. 5, *supra*) as will prevent that corporation from enjoying the exemption or prevent the property from being exempted from taxation by reason of said corporation being authorized by the enabling legislation contained in said Act No. 3, p. 5, Laws 1897, to succeed to such property and to hold and operate it? The language of Act No. 68, p. 79, Laws 1890, clearly establishes that the exemption claimed is granted by that act, and it necessarily follows that, unless there is such limitations placed upon the appellant corporation, either by its articles of incorporation, or by Act No. 3, p. 5, Laws 1897, as to prevent its availing itself of such exemption, the same is still in force. Exemptions from taxation so far as we have examined the cases cited are found to be divided into two classes: Exemptions of one class, by their terms, are personal, being such as have been by legislative enactment granted either directly to persons or corporations that are named in the acts thus granting them, or granted to such persons or corporations as may comply with the requirements of such legislative enactment, and thus bring themselves within the granting clause thereof, and by so doing make themselves the beneficiaries of such granting clause. Exemptions of the other class might be called "impersonal," and the grants thereof might be termed "legislation in rem," and are those cases in which the exemption is granted directly to the property in question, and in which the granting clause generally provides that the property of the classes designated, when acquired or created, in compliance with the provisions of such enabling legislation, should be exempt from taxation. This latter class of legislation can directly exempt from taxation such property while owned or controlled by the persons or corporations thus acquiring it or bringing it into existence, in which cases the exemption will cease when the property passes out of the ownership or control of those thus acquiring or creating it, or the legislative act may either provide that such exemption shall attach to the property after passing from the ownership and control of those who created it, in compliance with the terms of such beneficial legislation, into that of their successors or assigns, or may simply declare

that such property shall be exempt from taxation, without restricting the ownership or control, and leave it to the law to continue the exemption after transfer of title as an appurtenant to the property.

In regard to the acquisition by a successor of an exemption granted to a corporation personally (being the first class mentioned) the United States Supreme Court has said in a recent case: "The state by virtue of the same power which created the original contract of exemption, may, either by the same law or by subsequent laws, authorize or direct the transfer of the exemption to a successor in title. In that case the exemption is taken, not by reason of the inherent right of the original holder to assign it, but by the action of the state, authorizing or directing its transfer. As in determining whether a contract of exemption from a governmental power was granted, so in determining whether its transfer to another was authorized or directed, every doubt is resolved in favor of the continuance of the governmental power, and clear and unmistakable evidence of the intent to part with it is required." *Rochester Railway Co. v. Rochester*, 205 U. S. 236, 27 Sup. Ct. 469, 51 L. Ed. 784. The case at bar presents an instance in which the grant is not personal, but is made direct to the property. The territory, in Act No. 68, p. 79, Laws 1890, to induce the early building and construction of railroads, presumably for its benefit and advantage provided that the property, roadbed, franchises, right of way, superstructures, improvements, telegraph lines, and all other property used in the construction and operation of railroads as common carriers of freight and passengers thereafter constructed in compliance with the provisions of that act, should be exempt from taxation for the period of 10 years, whether owned or operated by a person, association, or railway corporation or its successors or assigns. It then required a certain statement to be filed with the Secretary within six months from that date; construction to be commenced within six months thereafter, and pursued under certain restrictions to completion. The compliance with these requirements by the predecessor of the appellant, and the construction of the road, and the creation by it of this property in accordance with the terms and conditions of that act, constituted a contract, by the terms of which this property was exempt from taxation for that term of years, and the United States Supreme Court, in a case very similar to this, has held, not only that such an exemption, when granted without words of limitation, attaches to the property as an appurtenant and goes to the purchaser, but that the sovereign power itself could not abrogate such a contract after its acceptance by a grantee by complying with the terms of the act. This was a case where the Delaware Indians prior to 1758 had claims upon large tracts of land in New Jersey. On the 9th of August, 1758, the representatives of the Indians proposed to the commissioner of

the government that the government should purchase a tract of land on which they might reside, in consideration of which they would release their claim to all other lands in New Jersey. In acceptance of this proposition the Legislature of New Jersey, on the 12th of August, 1758, passed an act that, among other provisions, authorized the purchase of lands for the Indians, restrained them from granting leases or making sales thereof, and enacted "that the lands to be purchased for the Indians aforesaid shall not hereafter be subject to any tax." Under this act lands were purchased and conveyed to the trustees of the Indians for their use. The Indians continued in possession of the lands thus conveyed to them until 1801, when the Legislature of New Jersey authorized a sale of their lands in that state. This act contains no expression in any manner respecting the privilege of exemption from taxation which was annexed to those lands by the act under which they were purchased and settled on by the Indians, nor does the deed conveying the said land to the purchaser thereof. In 1803 the land was sold under the last-recited act to George Painter and others. In October, 1804, the Legislature passed an act repealing that section of the act of August, 1758, which exempted the lands therein mentioned from taxes. The lands were then assessed and taxes demanded. The grantees of the land proceeded in the courts of New Jersey to test the validity of the repealing act, and from an adverse decision of the highest courts of the state the case was carried to the Supreme Court of the United States, which court, speaking through Chief Justice Marshall, said: "The question, then, is narrowed to the inquiry whether in the case stated a contract existed, and whether that contract is violated by the act of 1804. Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. * * *

The consideration agreed upon * * * is a tract of land with the privileges of exemption from taxation. * * * The privilege, though for the benefit of the Indians, is annexed by the terms which create it to the land itself, not to their persons. It is for their advantage that it should be annexed to the land because, in the event of a sale, on which alone the question could be material, the value would be enhanced by it. The land has been sold with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians. He stands, with respect to this land, in their place, and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it. It is therefore considered by the court that the said judgment be reversed and annulled,

and that the case be remanded to the said court of errors that judgment may be rendered therein annulling the assessment in the proceedings mentioned, so far as the same may respect the land in the said proceedings also mentioned." *State of New Jersey v. Wilson*, 7 Cranch, 164, 3 L. Ed. 303. This case is approved in *Gliven v. Wright*, 117 U. S. 648, 655, 6 Sup. Ct. 907, 910, 29 L. Ed. 1021, wherein the Supreme Court said: "We do not feel disposed to question the decision in *New Jersey v. Wilson*. It has been referred to and relied on in so many cases from the day of its rendition down to the present time that it would cause a shock to our constitutional jurisprudence to disturb it now." Both of these cases are again cited by the U. S. Supreme Court in *Jetton et al. v. University* (decided February 24, 1908) 28 Sup. Ct. 375, 52 L. Ed. —. In *New Jersey v. Wilson* and *Gliven v. Wright* neither the law authorizing the sale nor the deeds conveying the land said anything about exemption from taxes, while in the case at bar such exemption is specially named in the decree of the court ordering the sale and in the deed of conveyance, and the law under which the sale was made authorizes the acquisition under such sale of "the property sold, together with * * * any franchises, rights, privileges, and immunities of said corporation" whose property is thus sold. "The words 'rights, privileges, and immunities' when used in a statute of the kind under consideration, are certainly full and ample for the purpose of granting an exemption from taxation." *Phoenix F. & M. Ins. Co. v. Tenn.*, 161 U. S. 174, 16 Sup. Ct. 471, 40 L. Ed. 660. It will be noticed that the language of section 1, Act No. 68, p. 79, which created the original contract of exemption in this case, has authorized and directed, not the transfer, but the continuation, of exemption to the property while in the ownership and possession of a successor in title in plain and direct language, by saying that such property, "whether owned or operated by a person or persons, association or railway corporation, his, their or its successors or assigns, is hereby declared to be exempt from any and all manner of taxation," and has thereby fully met the qualifying expression contained in the latter part of the rule cited above for the transfer of exemptions personal to the grantee corporation, which states that "such transfer requires clear and unmistakable evidence of the intent to grant it."

This leaves for consideration only the question whether there is such limitation placed upon the appellant by its certificate of incorporation, or by the terms of Act No. 3, p. 5, Laws 1897, under which it was incorporated, as would deprive it of the power of claiming or enjoying this exemption. It is claimed by the appellees that "no corporation can receive by transfer from another an exemption which is inconsistent with its own charter or the laws of the state then applicable, even though under legislative authority

the exemption is transferred by words which clearly include it." We omit citations, as this is conceded to be the settled rule. The certificate of incorporation of the appellant, which constitutes its charter, provides for the formation of the corporation for these, among other purposes: "To acquire, own, and operate the aforesaid railroad; to acquire, own, use, and enjoy the railroad and appurtenances, franchises, rights, privileges, immunities, and exemptions, and all other properties acquired by such purchasers at said sale as heretofore recited." We find nothing elsewhere in the charter inconsistent with these provisions. We find nothing in the general laws of the territory inconsistent with the enjoyment by the appellant of this exemption, and nothing is cited by counsel, except Act No. 3, p. 5, Laws 1897, aforesaid. Upon examining Act No. 3, p. 5, of the Nineteenth Legislature, under the provisions of which the appellant was incorporated, we find that section 6 provides: "Such new corporation shall thereupon be vested with, and shall be entitled to exercise and enjoy all the rights, privileges, franchises, immunities and powers which belong to or could be exercised by the corporation whose property, or part of whose property was acquired by such purchasers, as aforesaid, and may acquire, own, operate and enjoy all or any part of the property and works of such corporation in the territory of Arizona, or elsewhere, and may conduct its business generally under and in the manner provided in the charter of such last mentioned corporation, or under the laws relating thereto, with such variations in manner or form of organization as such purchasers and their associates may deem necessary and set forth in such certificate." This language expressly vests such corporation with, and entitles it to exercise and enjoy, all the rights, privileges, franchises, immunities, and powers which belonged to or could be exercised by the corporation whose property was acquired by the purchasers who afterwards formed such corporation, and as the corporation, whose property was, in this instance, thus acquired, enjoyed among its privileges and immunities an exemption from taxation for the property in question, it would logically follow that by this section of the act the appellant corporation was vested with and entitled to enjoy the same immunities, which would include the exemption of this property from taxation, if the exemption had been granted as a personal immunity to the corporation, but, as in this instance, the exemption was granted directly to the property instead of the corporation, and by the terms of the granting clause the property was directly exempted from taxation, whether in the ownership and control of the former corporation, or of its successors or assigns, the language above quoted a fortiori expressly empowers the present corporation to hold the property in question exempt from taxation. It appears that, if the language vesting

in a new corporation contemplated by Act No. 3, p. 5, Laws 1897, the rights, powers, privileges, franchises, and immunities considered necessary and appropriate for its existence and operation had stopped here, section 8 would have had no place in the act, and would not have appeared. But after thus vesting the new corporation with the rights, privileges, franchises, immunities, and powers belonging to and exercised by the former corporation the act proceeded, in section 7, to further endow such corporation, in the following language: "Sec. 7. That such corporation shall be entitled to possess any and all rights, privileges, franchises, immunities and powers which are now given, or which may be hereafter given to any railroad company organized under the general laws of this territory." It will be seen that the language of section 7 thus goes beyond the investiture of the new corporation with the rights, powers, privileges, and immunities of the old corporation to which it was the successor, and declares that such new corporation shall, in addition thereto, be entitled to possess and enjoy "any and all rights, privileges, franchises, immunities and powers which are now given, or may be hereafter given to any railroad company organized under the general laws of this territory." The very broad and comprehensive grant thus expressed necessitates the limitation contained in section 8, without which it would have been possible for a corporation organized under the provisions of this act, not only to claim, assume, and exercise all the rights, privileges, powers, and immunities of its predecessor, but a corporation organized under this act that might acquire the property of a former corporation that would otherwise be subject to taxation in their hands, could, under the broader grant in section 7, claim an exemption from taxation, if any other railroad corporation organized under the general laws of the territory might have and be enjoying exemption from taxation under any of the exemption laws then in existence, or that might thereafter be enacted. The logical interpretation of the limitation contained in section 8 would read it as saying practically that "such new corporation shall, under the provisions of section 6, be vested with all the rights, privileges, powers, and immunities enjoyed by its predecessor without any limit to the same, except that they shall have been enjoyed by such predecessor, and shall likewise be vested with all additional rights, privileges, franchises, immunities, and powers that are now given or may be hereafter given to any railroad company organized under the general laws of this territory, and which may not have been possessed and enjoyed by the predecessor of such new corporation, save and except that such new corporation, having purchased property the exemption of which from taxation after change of ownership was not otherwise

provided for, cannot, by virtue of such grant of powers, privileges, and immunities, claim any immunity from taxation for the sole reason that some other railroad company organized under the laws of this territory may have and be enjoying such exemption, because in the latter instance such exemption from taxation, if enjoyed by such new corporation, must necessarily be thus enjoyed solely by reason of its having been given by the provisions of section 7 of this act."

Counsel have referred at length to the grants and limitations of Act No. 2, p. 4, and Act No. 28, p. 65, of the Nineteenth Legislature, but have at last agreed that these acts are not applicable in this case. Act No. 2, p. 4, as amended by Act No. 28, p. 65, Laws 1897, empowers territorial or federal corporations to acquire railroads sold under decree of court by direct purchase at foreclosure sale, and Act No. 3, p. 5, Laws 1897, authorizes such purchase by private persons, and the subsequent incorporation of such persons and their associates as a domestic corporation under the laws of this territory, which was the mode of procedure by the appellant. It is not necessary to notice the very interesting discussion that has been presented in the briefs as to the power of the corporation to assign or transfer the exemption to its successor, because that theory is applicable in the case of the other class of exemptions, termed above "personal exemptions." This being a direct grant of exemption to the property, and designated in plain and concise terms to run with the property when owned and controlled by the successors and assigns of the creator thereof, as well as when owned and controlled by such original owner, gives that question no place in this discussion.

The language of Act No. 68, p. 79, Laws 1899, clearly granting the exemption from taxation to the property when owned by the successor of the original corporation, and there appearing nothing in the charter of the appellant, or the law under which it was incorporated and authorized to acquire this property, to deprive it of the benefit of such exemption, but both such charter and law empowering in express terms the appellant to receive and enjoy the benefit of such exemption, the district court erred in sustaining the demurrer to the complaint, and in rendering judgment upon such order against the plaintiff.

The judgment of the lower court is reversed, and the case remanded, with instructions to the district court to overrule the demurrer to the complaint, and take such further proceedings as are not inconsistent with this opinion.

NAVE, J. I concur substantially in the foregoing opinion. To my conception the purport of section 8, Act No. 3, p. 6, Laws 1897, is that a corporation created pursuant to that act should not be deemed to acquire,

by reason of any of its terms, an exemption from taxation, and, further, that it should not be held that property acquired by it should be exempt from taxation merely because, by operation of an existing or subsequent exemption act, it was exempt under its former ownership, or because, by operation of such exemption act, its former owner was exempt. I take it that Act No. 3, p. 5, Laws 1897, was not intended (it could not be operative if it were intended) to prevent future Legislatures from expressly permitting a tax exemption to accompany the exempt property to a successor in interest, or to be availed of by the successor to an exempt owner. By unequivocal terms the exemption from taxation created by Act No. 68, p. 79, Laws 1899, is perpetuated during the period of exemption unto the successors of the original owner. There can be no question that the appellant is the successor of the Santa Fé & Grand Canon Railroad Company, despite the fact that it has acquired its property by the intermediate course of judicial foreclosure sale to natural persons who subsequently organized it. *I. & G. N. Ry. Co. v. Smith Co.*, 65 Tex. 25. I do not feel clear that Act No. 28, p. 65, Laws 1897, referred to in the concluding portion of the opinion, is without bearing upon Act No. 3, p. 5, Laws 1897; but, in my judgment, the saving clause concluding section 2, Act No. 28, p. 66, Laws 1897, has the same purport as section 8, Act No. 3, p. 6, Laws 1897.

CAMPBELL, J., concurs.

KENT, C. J. I concur in the result. I concur in the views expressed by Mr. Justice NAVE. I do not understand them to be at variance with the views expressed by Mr. Justice DOAN on the same points. I concur also substantially in the views expressed by Mr. Justice DOAN; but I am not fully in accord with some distinctions made by him in his opinion, or his reasons for such distinctions. On these points it is not desirable to elaborate the reason for my nonassent.

(12 Ariz. 84)

WESTERN ARIZONA RY. CO. v. DENNIS,
Treasurer, etc., et al.

(Supreme Court of Arizona. March 27, 1908.)

Appeal from District Court, Mohave County; before Justice Richard E. Sloan.

Action by the Western Arizona Railway Company against Foster S. Dennis, treasurer and ex officio tax collector of the county of Mohave, and the county of Mohave, to restrain the collection of certain taxes. From a judgment sustaining a demurrer to plaintiff's complaint, it appeals. Reversed, with directions to overrule the demurrer.

T. J. Norton, U. T. Clotfelter, and Paul Burks, for appellant. Fred W. Morrison, Dist. Atty., and E. S. Clark, Atty. Gen., for appellees.

DOAN, J. The appeal in this case presents the same questions that we have determined in the case of the Grand Canyon Railway Company, a Corporation, Appellant, v. J. R. Treat, as Treasurer and Ex Officio Tax Collector of the County of Coconino, Territory of Arizona, and the County of Coconino, Territory of Arizona, a Municipal Corporation, Appellees (presented and decided at the present term of this court) 95 Pac. 187, and upon the authority of that case the judgment of the lower court in this case is reversed, with directions to the District Court to overrule the demurrer to the complaint.

KENT, C. J., and CAMPBELL and NAVE, JJ., concur.

RUSH v. OREGON POWER CO.

(Supreme Court of Oregon. April 28, 1908.)

1. MASTER AND SERVANT—INJURY TO SERVANT—ACTIONS—EVIDENCE.

The complaint in an action for injuries to a brakeman while uncoupling cars, which alleges negligence in placing in the train without inspection cars on which there were defective brakes, is not supported by evidence of the mere happening of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 955.]

2. SAME—DUTY OF MASTER TO FURNISH SAFE APPLIANCES.

An employer must exercise diligence to furnish to its employes reasonably safe appliances, and, in the absence of any notice thereof, the employes may assume that the duty has been discharged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171-174.]

3. SAME.

A railroad company must keep its appliances in safe condition, and must cause as frequent and thorough inspection of its instrumentalities as can be done consistently with the conduct of its business for the purpose of discovering defects that may occur from accidental causes or wear or decay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 235-242.]

4. SAME.

In an action for injuries to a brakeman while uncoupling cars, the evidence showed that the coupling of a car was defective because the chain thereof was too short, that the chain had been repaired, and that the mending of it had made it too short. The day before the injury the car with the defective chain was brought into the yard where inspection was expected to be made. Held, that the railroad had notice of the defect, since the defect was patent and discoverable by the exercise of ordinary diligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 243-251.]

5. SAME—CONTRIBUTORY NEGLIGENCE.

Whether a brakeman injured while uncoupling cars was guilty of contributory negligence held, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

6. SAME.

A servant who unnecessarily adopts a dangerous method of performing the labor required of him generally assumes the resulting danger, but his choice of a customary method of doing the work is not ordinarily negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 559-566.]

95 P.—13

7. SAME—NONSUIT—WHEN AUTHORIZED.

Where, in an action for injuries to a brakeman while uncoupling cars, the jury could have found that a chain attached to a coupler was too short and insufficient; that, if the railroad had exercised reasonable care in inspecting the chain after it had been repaired, the defect would have been discovered; that the injuries could reasonably have been foreseen or guarded against; and that the brakeman had no knowledge of the imperfection—it was error to grant a nonsuit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010-1031.]

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by Mark Rush against the Oregon Power Company. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

This is a suit by Mark Rush against the Oregon Power Company, a corporation, to recover damages for a personal injury suffered by the plaintiff while engaged as a brakeman in the employ of the defendant. The negligence stated in the complaint is the failure of the defendant to inspect two freight cars, the brakes of which, it is alleged, were out of order and so defective that they would not hold when the cars were loaded, and also the heedless putting into a train, without examination, other cars on which were defective couplings with short and inadequate chain connections, which imperfections were known to the defendant, or, by the exercise of reasonable care on its part, might have been known by it, but to the plaintiff were unknown, who, in attempting to uncouple the latter cars January 29, 1906, lost his right arm, particularly setting forth the facts and circumstances whereby the injury was sustained. The answer denies the negligence alleged, and avers that the hurt of which the plaintiff complains resulted from his own negligence and that of a fellow workman, and also that the plaintiff assumed the risk. The reply put in issue the allegations of new matter in the answer, and, the cause coming on for trial, a nonsuit was given on motion of the defendant when the plaintiff had introduced his evidence and rested. From this judgment, he appeals.

Joel M. Long, for appellant. Ralph W. Wilbur, for respondent.

MOORE, J. (after stating the facts as above). It is contended by plaintiff's counsel that an error was committed in granting the nonsuit. The consideration of this question necessitates an examination of the testimony relating to the place, cause, and circumstances attending the injury. It appears that the defendant owns a standard-gauge railroad which is built from Portland to other places, and operates on its lines by electricity cars for transporting passengers and freight, and maintains in such city a power house, to which extends from its main line a spur, and that other side tracks form at that place a yard where motors and cars are inspected.

The plaintiff is an experienced brakeman, and at the time of his injury was employed as such by the defendant. The head brakeman, or conductor, as he is sometimes called, who was employed to switch cars in the Portland yard, did not report for duty January 29, 1906, whereupon the yardmaster ordered the plaintiff to perform that service, and directed him to go with a motor to the power house and remove therefrom some empty cars, and to place therein two cars loaded with cordwood. At the place indicated the main track of the railroad extends nearly south, and a side track branches to the west. The loaded cars were "kicked" back on the main line south of the switch, where they were left in charge of a person who set the brakes to hold them in position. The plaintiff, having removed from the power house five empty flat cars forming a train which was coupled at the north end to the motor, was passing over the switch that connects the main line and the side track, when the loaded cars, notwithstanding the friction of their brakes, rolled north, and the corner of the forward car struck the third empty car from the motor at a point about four feet south of its coupling, causing the latter car to be slightly lifted from the track on the side where the collision occurred. The plaintiff, desiring to clear the track for a passenger car that was about due, went to the west side of the second car from the motor to uncouple that car, intending to move the disengaged part of the train to the north, so as to place a pole against it and the corner of the loaded car, which he expected to force back on the main line, and hold with the brakes until he could recouple the train, move it out of the way, and then return with the motor for the loaded cars; but he was unable to uncouple this car from the west side. He then attempted to separate the train from the opposite side, and went, for that purpose, to the corner of the empty car north of the point where it had been struck. This car had a Tower automatic coupler with a knuckle, which, when closed, was held in place by a pawl to which was attached a short iron rod with an eye at each end, connected at the top with a chain that extended upward and was fastened to an iron arm. This arm reached back to the center of the car's end, to which it was attached, and at this point was bent at a right angle horizontally, so as to extend along the framework of the car to a point near the corner, where it was again bent and turned downward, making a lever, the lifting of which raised the pawl and released the knuckle, thus avoiding the necessity of a person going between the cars to couple or uncouple them. The Tower coupler has a spring in the draw-head that keeps the pawl in position, and prevents it from being raised until the cars are forced together, releasing the tension, when the lever can be raised and the knuckle opened. The plaintiff, standing

on the east side of the track, grasped with his right hand the lever at the corner of the third car, and gave with his left hand a signal to force the train slowly to the south, so as to slacken the strain, and the motorman, obeying the token, pushed the cars in that direction, but the plaintiff, being unable to raise the lever or to release his hand therefrom, was pulled the intervening distance of about four feet until his body struck the corner of the loaded car, behind which his arm was drawn and injured, necessitating amputation at the shoulder. A small model of the Tower coupler was introduced in evidence, and has been sent up as an exhibit. An examination of this model shows that the upper eye of the iron rod or pin which is fastened to the pawl has connected therewith two links of a miniature chain and a tiny clevis that complete the connection with the iron arm which forms a part of the lever. A chain containing three constituent parts above the draw-head, namely, two links and a clevis, of relative proportions to that of the pattern before us, is of such length that, when the iron arm commences to raise the pawl, the lower end of the lever by which it is operated stands out at a sufficient angle from the corner of the car as to prevent one's hand from being caught by any counter pressure on the lever. As the chain is shortened, however, the lower end of the lever is necessarily brought down closer to the car, and, if sufficiently reduced, will strike the framework.

The plaintiff, as a witness in his own behalf, testified that it was necessary to force the cars back from six inches to two feet, so that the train could be uncoupled; that the chain on the Tower coupler at the north end of the third car, as it then stood on the track, had been repaired and consisted of only two constituent parts, one of which was a short, round, cold-shut link; that when he took hold of the lever, and gave the signal slowly to slacken the tension, the movement of the train caused the lever to tighten and caught his hand so that he could not withdraw it, and that such retention could not have occurred if the chain had been of the regulation length; that, when the train was started, he partially stumbled, and was unable, with his left hand, to give a signal to check the motion, but when his arm was struck he hollowed and the motorman halted; and that in the few seconds after his hand was caught, and before his arm was injured, he for the first time noticed the defect in the chain. The plaintiff further testified that the empty cars which he tried to uncouple must have been brought into the yard the day before he was injured; that, upon the arrival of a train at such place, the cars are supposed to be inspected, and, when no "Bad order" tag appears on them, they are supposed to be in good condition, and that no mark of that kind was displayed on the car mentioned; that the distance of about four

feet between the corner of such car and the corner of the car causing the collision afforded ample space for uncoupling, and, if his hand had not been caught in the lever, he could have separated the train on the east side as well as from the opposite edge; and that, when he first tried to uncouple the car from the west side, he could see that the collision was tipping the empty cars off the track towards him, and for that reason he went to the east side to disconnect the train.

A. A. Benjamin testified that on the day of the injury he was employed by the defendant as a brakeman in the yard, and was stationed by the plaintiff on the loaded cars when they were "kicked" back on the main line, and that he set the brakes on these cars as hard as he could, but the friction was insufficient to retain them where they were left, and they rolled north, and collided with the empty cars that were then being moved over the switch.

The testimony fails to disclose any particular defect in the brakes on the loaded cars. As the mere happening of an accident is ordinarily insufficient to establish carelessness (*Duntley v. Inman*, 42 Or. 334, 70 Pac. 529, 59 L. R. A. 785), that part of the complaint which alleges negligence in placing in the train, without inspection, cars upon which were defective brakes, will not receive any attention. It was incumbent upon the defendant to exercise diligence to furnish to its servants reasonably safe appliances, and, in the absence of any notice thereof, the plaintiff had the right to assume that this duty had been fully discharged by the master. *Johnston v. Oregon Short Line Ry. Co.*, 23 Or. 94, 31 Pac. 283; *Geldard v. Marshall*, 43 Or. 438, 73 Pac. 330; *Texas & Pac. Ry. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188. To promote the safety of its servants, a railroad company is obliged to keep its appliances in good and safe condition, and to cause as frequent and thorough inspection of its instrumentalities as can be done consistently with the conduct of its business, for the purpose of discovering any defects that may occur from accidental causes, the general effect of wear, or the progress of decay. *Miller v. Southern Pac. Co.*, 20 Or. 285, 26 Pac. 70. "The duty of a master," says a text-writer, "to furnish reasonably safe premises, machinery, tools, and appliances with or about which his servants are to work necessarily implies and includes the duty of making a reasonable inspection of such premises, machinery, tools, and appliances after they have become defective and have been repaired, to the end of seeing that the reparation makes them reasonably safe and sufficient." 4 *Thomp. Law Corp.* § 3788. The use of the cold-shut link tends to show that the chain had been repaired, and the mending had made it too short. The day prior to the injury the car having the defective chain was brought into the yard where inspection was expected to have been made. The defendant was thus

afforded an opportunity, at the proper place, to examine the repairs that had been made, and, if that duty had been discharged, it would have discovered that the chain was too short. The defect in the chain was patent, and might have been discovered by the defendant by the exercise of reasonable and ordinary diligence, in which case notice of the imperfection will be presumed. 7 *Am. & Eng. Ency. Law* (2d Ed.) 1056; 6 *Cur. Law*, 545; *Belt Ry. Co. v. Confrey*, 111 Ill. App. 473; *Doyle v. Hawkins*, 34 Ind. App. 514, 73 N. E. 200. The plaintiff having testified that the train should have been moved from six inches to two feet, in order to relieve the tension on the springs in the draw-heads, the space of four feet in which he was required to uncouple before a collision with the loaded car could have occurred was not so short that the court could as a matter of law determine that it afforded conclusive evidence of contributory negligence so as to take the cause from the jury. So, too, the fact that the empty cars were lifted from the east track by the collision, and the possibility of their being overturned to the west, on which side the plaintiff first tried to uncouple, thereby inducing him, as he testified, to undertake a separation of the train from the other side, is not such evidence of contributory negligence, in view of the danger of the empty cars being thrown off the track to the west, to afford evidence of contributory negligence.

It is generally held that a servant who unnecessarily adopts a dangerous method of performing the labor required of him assumes the resulting danger. 6 *Cur. Law*, 578. His choice of a customary method of doing such work, however, is not ordinarily regarded as negligent. *Id.* 584. The plaintiff, on cross-examination, in explaining his reason for going to the east side of the train to detach the cars, after his effort to uncouple the train on the west side had failed, said: "Well, the cars would not pull out. They were contact here on these corners, so the wheels started to raise off of the track on this flat car; so I didn't want to put them any farther. So I come over this car here, and had plenty of space here to pull this lever over and uncouple them here and back up, and I was on the right side, as any railroad man, to go and get the pole out of the door of the motor." It is fairly to be inferred from the latter part of the declaration quoted that the plaintiff chose the customary method of performing the service required under the conditions then existing. Believing that the jury might reasonably have found from the testimony given that the chain attached to the coupler was too short; that it was insufficient for the strains that ordinarily might be expected; that, if the defendant had exercised reasonable care in inspecting its condition after having been repaired, the defect would have been discovered, and the injuries could reasonably have been foreseen and guarded against; and that the plaintiff had

no knowledge of the imperfection—an error was committed in granting the nonsuit.

The judgment will therefore be reversed, and the cause remanded for a new trial.

MILLEN v. PACIFIC BRIDGE CO.

(Supreme Court of Oregon. April 28, 1908.)

1. MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action for the death of plaintiff's intestate while excavating a tunnel for a sewer, the question as to whether deceased was guilty of contributory negligence in digging into the face of the embankment *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

2. SAME—PLACES FOR WORK—CARE REQUIRED.

While a master is under an absolute duty to exercise reasonable care to provide his servants with a reasonably safe place in which to work, he is not an insurer of the servants' safety, and his duty is fulfilled when he exercises such reasonable care for their safety, and it is presumed that he has discharged his duty in that respect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 172-174.]

3. SAME—WAYS USED IN WORK—TUNNELS.

Where a servant is employed in a mine, quarry, tunnel, etc., the master must use reasonable care to make his place of work as reasonably safe as the nature of the work permits; but, if it is the workman's duty to shore up or make the place safe as the work progresses, the master's duty is fulfilled when he furnishes suitable material for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 177, 202, 209.]

4. SAME—RISKS ASSUMED BY SERVANT—KNOWLEDGE BY SERVANT—APPRECIATION OF RISK—"ASSUMPTION OF RISK."

The doctrine of "assumption of risk" is wholly dependent on the servant's knowledge, actual or constructive, of the danger incident to his employment, and where he knows, or should reasonably know, the risks to which he is exposed, he will as a rule be held to assume them, but where he does not know, or knowing, does not appreciate, such risks, and his ignorance or nonappreciation is not due to want of care on his part, he does not assume the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

For other definitions, see Words and Phrases, vol. 1, pp. 589, 591; vol. 8, pp. 7584, 7585.]

5. SAME—KNOWLEDGE OF FACTS—APPRECIATION OF RISK—NECESSITY.

There is a difference between knowledge by the servant of the surrounding circumstances and an appreciation of the risks resulting therefrom, and a servant may know the facts, but be wholly ignorant of the risk involved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

6. SAME—OBVIOUS RISKS—"OPEN VISIBLE RISK."

An "open visible risk" is such a one as would instantly appeal to the senses of an intelligent person familiar with the business, and about which there can be no difference of opinion in the minds of intelligent persons; and it is not required that the servant make close scrutiny into all the details of the instrumentalities with which he deals to determine the risk involved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 610-624.]

7. SAME—ACTIONS—QUESTION FOR JURY—ASSUMPTION OF RISK.

In an action for the death of plaintiff's intestate while excavating a tunnel for a sewer by the sides and top of the tunnel caving in and falling on him, whether deceased had such knowledge of the facts and appreciation of the danger involved in the work of excavating as would constitute an assumption of the risks thereof by him *held*, under the circumstances, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1068-1088.]

8. SAME—PLEADING—NEGLIGENCE OF FELLOW SERVANT.

In an action by a servant against the master for injuries received, the defense that plaintiff's injury was the result of negligence of a fellow servant is an affirmative defense, and must be specially pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 844-848, 858.]

Appeal from Circuit Court, Multnomah County; Arthur L. Frazer, Judge.

Action by John O. Millen against the Pacific Bridge Company. From a judgment for plaintiff and an order denying a motion for a nonsuit, defendant appeals. *Affirmed*.

This action was brought by John O. Millen, as administrator of the estate of John H. Larsen, deceased, against the Pacific Bridge Company, a corporation, to recover damages for its alleged negligence by which Larsen was so injured that he died on April 22, 1906, at Portland, Or. The defendant was engaged in the construction of an extensive sewer for the city of Portland, and had completed two sections thereof, which approached each other at right angles at the intersection of East Seventh and Thompson streets. At this point the trench for the sewer was about 28 feet deep and 7 feet 3 inches in width. To construct that part of the sewer which had been completed at the time of the accident defendant, with machinery and appliances, had dug an open trench, but found this method impracticable to connect the two sections thereof at the street corner, thereby leaving an uncompleted section about 17 feet long through which a tunnel was to be dug to make the connection. It is alleged in the complaint that on April 20, 1906, Larsen was in the employ of defendant who instructed him to assist in the completion thereof, and that defendant carelessly failed and neglected to provide the tunnel with timbers or other appliances so that the same would not cave, and carelessly and negligently failed to make it a safe place for Larsen to work; that defendant well knew that the tunnel was a dangerous place in which to work, and that it was liable at any time to cave upon decedent; that Larsen did not know that the tunnel was a dangerous place in which to work, or that it was liable to cave and injure him; that while decedent was carefully performing his duties and digging the tunnel, as instructed and directed by defendant, and without any fault or negligence on his part contributing thereto, and by reason of the carelessness and negligence of defendant, the

tunnel caved upon Larsen, so severely injuring him that he died soon thereafter. The answer admits the employment, injury, and death of plaintiff's intestate, but denies the alleged negligence of defendant. Two affirmative defenses are also set up, consisting, first, of contributory negligence on part of decedent; and, second, of assumption of risk by him. The substance of these defenses is that the trench for the sewer at the point where the tunnel was to begin was to be about 27 feet deep, and had been excavated to a depth of about 19 feet, leaving about 8 feet of soil to be removed at that point to reach the bottom of the excavation for the tunnel, and that the earth forming the banks of the trench would stand perpendicularly and in its natural condition without lateral support, but was liable to cave, if undermined, all of which, it is alleged, plaintiff's intestate knew; that Larsen was employed with others to remove the earth in the bottom of the uncompleted trench preparatory to the construction of the tunnel, and was ordered not to dig into the face of the bank into which the tunnel was to be constructed, but in violation of his instruction, and contrary to his duty, under his employment, deceased proceeded to dig into and undermine the face of the bank, causing a quantity of earth to cave, fall upon, and injure him, which is the same injury complained of; that on April 20, 1906, decedent entered into the employment of defendant with full knowledge of all the surroundings as alleged, and of all the dangers and hazards incident to said employment at the place and time, and of the work he was required to do, and assumed all the risks and hazards thereof. The reply consisted of a general denial of the averments of the answer. The cause came on for trial before a jury, and at the conclusion of plaintiff's case defendant moved for a nonsuit, which the court denied, and, after putting in its evidence, defendant requested the court to instruct the jury to return a verdict in its favor upon the ground of insufficiency of evidence to support a verdict in favor of plaintiff, which request the court denied. Upon the rendition of a verdict for plaintiff and judgment thereon defendant prosecuted this appeal, assigning as errors the denial by the court of its motion for a nonsuit and the refusal of the requested instruction.

Rufus Mallory, for appellant. W. E. Farrell, for respondent.

SLATER, C. (after stating the facts as above). The averment of the complaint is that plaintiff's intestate was, on April 20, 1906, in the employ of defendant. The particular services he was to perform for defendant are not stated, but it is alleged generally that he was instructed to assist in completing the sewer between East Seventh street and Thompson street. The answer admits that the relationship of master and servant existed between defendant and plaintiff's intestate on

April 20, 1906, but denies the alleged instruction to assist in the completion of the sewer between those streets, and affirmatively alleges that on that day "plaintiff's intestate with other employes was engaged by defendant to remove said remaining bank of dirt to the depth of 27 feet, and said deceased and other employes engaged at the same work were directed in digging said remaining body of earth to carry the face of the embankment where said tunnel was to be located down perpendicular, and not to disturb the face of the standing bank." Hence there is an issue as to the scope of the employment, which must be determined before other matters can be considered. The bill of exceptions recites that "it is stipulated and agreed between the parties hereto that the testimony offered by the plaintiff in support of the issues on his part tending to show * * * that on the 19th day of April, 1906, the deceased, J. H. Larsen, was employed by the defendant to work shoveling dirt in the ditch for the sewer at a point just east of Seventh street at Thompson street; * * * that plaintiff introduced witnesses who testified that the deceased and his fellow workmen had orders from Mr. O'Neil, superintendent for the defendant, who had charge of the work and the direction of the men employed, to commence digging the tunnel into the face of the embankment on the east side of Seventh street, he (O'Neil) having first indicated on the face of the embankment where the tunnel was to be dug." This evidence is undoubtedly sufficient to support the issue on plaintiff's part as to the scope of the employment, and that the injury was received by Larsen while he was in the performance of the duties of his employment in a place directed by the defendant for him to work. And upon the issue of contributory negligence this evidence is sufficient to take the case to the jury.

Defendant's main contention, however, is that plaintiff's intestate assumed all the risks incident to the employment, and all extraordinary dangers and hazards of which he had knowledge and appreciated; while plaintiff rests his case wholly upon the rule of law which requires an employer to use reasonable care and diligence to provide his employes with a reasonably safe place in which to work. There is no controversy over the rule that it is the personal and absolute duty of the master to exercise reasonable care and caution to provide his servants with a reasonably safe place to work; but it is urged by defendant that the master is not an insurer of the safety of the servant, and therefore is not bound to furnish an appliance or machinery or a place that is absolutely safe, and that his duty in this regard is discharged when he exercises reasonable care and caution to that end, and the presumption is that he has discharged his duty. This may be conceded to be the law. *Duntley v. Inman*, 42 Or. 334, 70 Pac. 529, 59 L. R. A. 785. And where a servant is employed to work in a

mine, quarry, tunnel, pit, trench, or other excavation the master owes the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work admits. Where, however, it is the duty of the workmen to shore up or otherwise make safe the place as the work progresses, the master's duty is fulfilled when he furnishes them with suitable materials for the purpose. 26 Cyc. 1119. The evidence discloses that Larsen, plaintiff's intestate, was employed by defendant on the 19th of April as a common laborer to shovel dirt and assist in that capacity to dig a trench for the construction of a sewer. At that time the trench on Thompson street lacked about 8 feet of being completed. On the 20th he assisted in digging out a portion of this eight feet of earth. At different places, and wherever needed, defendant had previously shored up and protected with timber the banks or walls of this trench to prevent it from falling or caving upon its employes while they were engaged at work therein. This had been done by one of its servants employed for that particular duty, and was not required to be done by those engaged to dig and shovel dirt. But no supports or timbers had been placed across the perpendicular wall or bank at the end of this open trench where the tunnel was to begin, excepting one brace which had been placed about 3 feet from the top of the bank, but slightly removed from it; the intention being to put lagging or planks behind it to hold the earth in place, but this was not done. On the next day, when Larsen returned to work, he and another employe were directed to begin digging into the face of this bank. They had been working about three hours when a quantity of earth broke off the face of the bank just above and at the entrance of the tunnel, fell on Larsen, and so injured him that he soon thereafter died. The testimony is conflicting as to how far into the bank the tunnel had been excavated when the accident occurred, but it is stated by some witnesses for plaintiff that its extreme depth was six feet. All agree that it was six feet high and six feet wide, presumably the intended dimensions of the tunnel when completed. At the time of receiving the injury Larsen could not have been entirely within the tunnel, but was just at the entrance thereof, for the body of falling earth came from the northeast corner of the "face" or entrance thereof, and, according to the testimony of J. S. Reagan, defendant's witness, the bulk of it came from the bank above the entrance and extended from the surface of the ground down to the roof of the tunnel. The place where Larsen was put to work had been created by defendant before it employed him, and that it was a dangerous place the casualty establishes. There is evidence that the defendant knew, or was bound to know, of the imminence of that danger. It is contended by defendant, however, that the danger was so apparent, open, and manifest

that a person of ordinary intelligence could observe and appreciate it, and that Larsen, when he first entered the trench, then about 25 or 26 feet deep, must have seen that the end thereof was not shored, and that to dig into the base of a perpendicular bank of that height and undermine it would cause the unsupported part above to fall upon and injure him; that this danger was so apparent and obvious to him that the law will not permit him to deny knowledge of the ordinary and universal law of nature—the law of gravity.

The doctrine of assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knows, or in the exercise of reasonable and ordinary care should know, the risks to which he is exposed, he will as a rule be held to have assumed them; but where he either does not know, or knowing, does not appreciate, such risks, and his ignorance or nonappreciation is not due to negligence or want of due care on his part, there is no assumption of risk. 26 Cyc. 1196; *Roth v. N. P. L. Co.*, 18 Or. 205, 22 Pac. 842; *Carlson v. Oregon Short Line Ry. Co.*, 21 Or. 450, 28 Pac. 497; *Wagner v. Portland*, 40 Or. 389, 60 Pac. 985, 67 Pac. 300; *Geldard v. Marshall*, 43 Or. 438, 73 Pac. 330. Larsen entered the employment of the defendant as an ordinary laborer to dig and shovel dirt in the bottom of a trench. He did not thereby impliedly represent to the defendant that he had any knowledge or skill in digging a tunnel or constructing a sewer. The evidence shows that he was a cement worker, and had little skill in handling a pick and shovel, or, as stated by one witness, "he handled a shovel like a green hand." When told by the master to begin digging into the bank for a tunnel, he must have seen that it was 25 feet high, and that no protection against its falling or caving had been made by his employer. But there is a difference between knowledge of the surrounding circumstances and appreciation of a risk. *Roth v. Northern Pacific Lumbering Co.*, supra. In that case it is said that "one may know the facts, and yet not understand the risk; or, as Mr. Justice Byles observed: 'A servant knowing the facts may be utterly ignorant of the risks.' *Clark v. Holmes*, 7 Hurl. & N. 937. For, after all, Mr. Justice Hallet said: 'It is not so much a question whether the party injured has knowledge of all the facts in his situation, but whether he is aware of the danger that threatens him. What avails it to him that all the facts are known, if he cannot make the deduction that peril arises from the relation of the facts? The peril may be a fact in itself of which he should be informed.'" The evidence shows that at the place where the tunnel was to be dug the earth was composed of clay and loam which, when not undermined, would ordinarily stand at a perpendicular height of 28 feet. But the defendant knew that it had been necessary in some places to shore up the sides of the

sewer trench to prevent it from caving upon its employes, and it had expended a large sum of money in doing so. It also knew that a day or two before this accident occurred a dangerous crack had appeared on Seventh street close to the bank of the trench at the opposite end of this strip of ground 17 feet long, which was to be tunneled. And after Larsen went to work defendant's superintendent, O'Neill, came into the trench and marked upon the wall or end thereof where the tunnel was to be dug, and told one Barnes, a co-employe, to put the men to work at that place. Barnes testifies that after Larsen had gone to work he had a talk with O'Neill about the kind of ground they were to tunnel. The conversation given is as follows: "I said I thought the dirt was rotten and would not stand. He said he thought it would. I didn't know anything about the crack on the Seventh street end. The dirt on the Seventh street end and on Thompson street was apparently the same." From plaintiff's testimony it appears that in the evening of the day before, or two days before, the accident happened, O'Neill had observed a serious crack in the street at or near the opposite end of this section which was to be tunneled, and for that reason refused to allow the night shift to work that night, but sent them home. But there is no evidence that Larsen knew anything of this. One J. S. Reagan testifies in defendant's behalf that he worked for defendant upon the Seventh street end of the sewer. He says: "We ran up against a straight cut on the Seventh street side, perpendicular, and went down. We then completed the sewer and put in this tunnel about 2 feet on the Seventh street side. We put it underground there, the tunnel, two feet. No accident nor sign of any falling at this time." O'Neill, according to his own testimony, had had wide experience in mining, bridging and sewer building; that this sewer ran along various streets and that a tunnel had to be constructed where the sewer started from the Willamette river; this tunnel ran through sand and had to be supported with timbers; that at Seventh and Thompson streets the earth was sandy loam, which would stand when cut perpendicular, but was liable to cave if undermined; that the only caves that had occurred during the work were caused by the proximity of water mains or rain or water wetting the bank. He described the means employed to timber or shore the sides of the trench; that Larsen was employed at his own request, on the day before he was injured, and was placed at work with other men to remove dirt out of the ditch on the Thompson street side of Seventh street; that on the morning of April 20, Larsen, with two other employes, was placed at work near the face of the embankment where the tunnel was to be constructed, and a mark was placed across the face of the embankment showing where the top of the tunnel was to be; that Larsen and his fellow workmen

were instructed to clear the dirt away at the sides, near the embankment, for the purpose of placing timbers there, perpendicularly, to cut the tunnel; that he gave no orders for the men to begin digging into the embankment. He also testifies that he has no recollection of the crack spoken of by a witness for plaintiff, and gives as his reason, for not carrying on the work at night, it looked like rain and he sent the men home.

Can it be said, as a matter of law, that the circumstances related in this record show conclusively that the extraordinary risk and danger of this bank caving was so obvious to an ordinarily intelligent person that it would be perceived and appreciated at once? Mr. Chief Justice Moore, in *Johnston v. O. S. L. & W. N. Ry. Co.*, 23 Or. 95-105, 31 Pac. 283, 286, has defined such a risk as follows: "An open, visible risk is such a one as would in an instant appeal to the senses of an intelligent person. *Wood, Mas. & Ser.* 763. It is so patent that it would be instantly recognized by a person familiar with the business. It is a risk about which there can be no difference of opinion in the minds of intelligent persons accustomed to the service. It is not expected that the servant will make close scrutiny into all the details of the instrumentalities with which he deals. His employment forbids that he should thus spend his time." The disastrous result shows that the work which Larsen was directed to perform and was performing was highly dangerous, and indicates that before attempting it precautions should have been taken to prevent the earth caving. The record shows quite clearly that defendant's superintendent knew it was dangerous, but we are not able to say that the facts show conclusively that Larsen knew the facts or appreciated the danger. The question whether it would be safe to dig a tunnel into the particular bank in question depends upon something else besides the height of the bank, and it not being timbered or shored, but rather upon the cohesiveness of the soil and other collateral facts. It was not a danger so patent that it would be involuntarily recognized by one inexperienced and unfamiliar with the business, as is plainly shown by the testimony of Barnes, who says that O'Neill thought the tunnel could safely be dug without timbering, while he did not.

Now it is contended by defendant that, although Larsen may have been directed to commence digging the tunnel, he must have known that to dig into and undermine this bank would cause the unsupported earth to fall and injure him; that his danger was so apparent and obvious to him that the law will not permit him to say that he did not appreciate the danger, because that would permit him to deny knowledge of the ordinary and universal law of nature—the law of gravity. It has been held in some cases that, if one removes the foundation from a bank of earth composed of sand, gravel, and clay, it is liable to fall, and he will not be heard to say that

he did not appreciate the danger. The cases cited in support of this contention are such as involve injury received in a slope of a gravel pit, where the very object of the employment was to loosen the material of the bank so that the law of gravitation may operate and precipitate it to the bottom of the pit. This is usually accomplished by undermining for a considerable distance at and along the base of the bank, and after a time, either with assistance or by itself, according to the cohesiveness of the material, the bank falls. In such case the laborer expects it to fall. That is the object sought by the expenditure of his labor. In most, if not all, these cases the injured party had either previous experience in that kind of work, or had worked at the place of injury sufficiently long to acquaint himself with the risks and dangers incident to that class of work. Of such are *Christianson v. Rio Grande Western Ry. Co.*, 27 Utah, 132, 74 Pac. 876, 101 Am. St. Rep. 945; *Olson v. McMullen*, 34 Minn. 94, 24 N. W. 318; *Swanson v. Great N. Ry. Co.*, 68 Minn. 184, 70 N. W. 978; *Simmons v. Chicago & T. R. R. Co.*, 110 Ill. 340; *Griffin v. Ohio & Miss. Ry. Co.*, 124 Ind. 326, 24 N. E. 888. But the risks and danger of driving a tunnel through material of the same character would depend upon a different state of facts, and would not necessarily be the same. The respective sides of a tunnel as the result of an arched roof mutually afford some support to each other. Whether the roof of a tunnel, which is 6 feet wide and 6 feet high, will remain firm and be safe, or will fall when the tunnel is driven into a bank of clay and loam, which will stand at a perpendicular height of 28 feet, depends upon the cohesive power of the soil, the saturation of the soil by water, and the length of time it may have been exposed to the action of the air. *Fulger v. Bothe*, 43 Mo. App. 44. Under such circumstances it was a question for the jury and not a matter of law for the court to say whether or not *Larsen* had such knowledge of the facts and appreciation of the danger as would constitute an assumption of the risk by him. *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 63 Pac. 191; *Coan v. City of Marlborough*, 164 Mass. 206, 41 N. E. 238; *City of Ft. Wayne v. Christie*, 156 Ind. 172, 59 N. E. 385; *Chiapini v. Fitzgerald*, 191 Mass. 598, 77 N. E. 1030; *Van Steenburgh v. Thornton*, 58 N. J. Law, 160, 33 Atl. 380; *Kieley v. Buehler-Cooney Const. Co.*, 121 Mo. App. 58, 97 S. W. 998; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447-459, 44 N. E. 876, 879. In the last case cited it is said: "Even if the servant has some knowledge of the attendant danger, his right of recovery will not be defeated, if, in obeying the order, he acts with the degree of prudence which an ordinarily prudent man would exercise under the circumstances. When the master orders the servant to perform his work, the latter has a right to assume that the former, with his superior knowledge of the facts, would not expose him to

unnecessary perils. The servant has a right to rest upon the assurance that there is no danger which is implied by such an order. The master and servant are not altogether upon a footing of equality. The primary duty of the latter is obedience, and he cannot be charged with negligence in obeying an order of the master unless he acts recklessly in so obeying. Whether he acted thus recklessly in obeying his master's order, or whether he acted as a reasonably prudent person should act, are questions of fact to be determined by the jury." This last proposition is met by defendant with the argument that *O'Neill* who, it is testified on plaintiff's behalf, gave the order to *Larsen* to begin the digging of the tunnel, was a fellow servant, and therefore defendant would not be liable for the result of obeying the order. But whether he was or not cannot now be considered, because there is no basis for it in the answer. The defense that the injury was the result of the negligence of a fellow servant is an affirmative defense, and must be pleaded in order to be of avail. *Duff v. Willamette Steel Works*, 45 Or. 479, 78 Pac. 363, 668.

No error was committed by the court in denying the motion for a nonsuit, or in refusing the requested instruction.

WILLIAMS et al. v. ALTNOW et al.

(Supreme Court of Oregon. April 28, 1908.)

1. WATERS AND WATER COURSES—USE FOR IRRIGATION—UNAUTHORIZED USES—REMEDY—EQUITABLE RELIEF.

In an action to restrain the maintenance of a dam and a reservoir and the diversion by an upper riparian owner on a nonnavigable stream of water used for irrigation purposes, the proof showed that prior to the construction of the dam and reservoir there was no controversy between the upper and lower riparian owners over the water, and also that all the riparian owners had all the water they needed, but that the dam and reservoir cut off the flow of water for about 10 or 15 days while the reservoir was being filled, during which time the lower owners were deprived of the use of water when it was needed by them. The construction of the dam was not only for the purpose of impounding water for the use on the land upon which it had been used by a prior appropriation, but was also for the purpose of reaching high bench land which could not be otherwise irrigated, and for which the owner of the dam was not entitled to use the water because of intervening appropriations by lower riparian owners. *Held*, that the construction of the dam and impounding of the water, together with the assertion by the owner of the dam of the right to use it on the bench land, was a threatened injury to the lower riparian owners which, with the fact that it caused an actual shortage of the water received by them, was sufficient to entitle them to resort to equity for relief, and to have the rights of each of them as well as the rights of the owner of the dam adjudicated.

2. SAME—PARTIES.

In an action to restrain the maintenance of a dam and reservoir brought to settle the rights of different riparian owners in the water of a nonnavigable stream, the fact that some of the parties plaintiffs were not shown to have been injured by the maintenance of the dam, and that some of the parties defendant had not interfered

with plaintiffs' rights, did not affect the right to maintain the action, since it was necessary, in order to determine the rights of the parties, which involved the entire water of the stream, that all the parties having rights therein should be made parties, and it was immaterial whether they were made plaintiffs or defendants.

8. SAME—APPROPRIATION OF WATER RIGHTS—EXTENT.

Section 1 of the desert land act (Act March 3, 1877, c. 107, 19 Stat. 377 [U. S. Comp. St. 1901, p. 1548]) provides that a claimant's right to water for irrigation and reclamation must depend upon a bona fide prior appropriation, but does not require that the appropriation should be from one stream or source of supply, or deny to a settler the right to use on his claim water to which he has a bona fide right by prior appropriation from any source. An owner of land consisting of two tracts, one of which was his brother's pre-emption, which had been transferred to him, and the other a claim taken by him under the desert land act, made an appropriation prior to appropriation by any other person of certain water of a stream, the head of which was on his brother's pre-emption. *Held*, that the appropriation entitled the appropriator to a sufficient amount of water to irrigate the land to which the appropriation was intended to be applied at the time of the appropriation, whether it was on the desert land claim or the pre-emption, and hence it was error to confine his rights by the appropriation to the pre-emption.

4. SAME—SUBSEQUENT APPROPRIATIONS—EFFECT.

A person who, with intent to put water to some beneficial use, diverts it from a stream or other natural source of supply, and makes an application thereof within a reasonable time, has a prior right to use a sufficient quantity of water so diverted to supply his needs not to exceed the amount of his appropriation superior to the right of subsequent appropriators.

5. SAME—DIVERSION OF WATER—CHANGE OF POINT OF DIVERSION—CHANGE OF PLACE OF USE.

A prior appropriator of water for a beneficial use from a stream or other natural source of supply may change the point of diversion or the place of use so long as it does not prejudice the rights of subsequent claimants.

6. SAME—RIGHTS OF SUBSEQUENT APPROPRIATOR.

After the needs of a prior appropriator of water for a beneficial use as measured by his original appropriation have been supplied, or when the water is not actually required or used by him, it is at the disposal of other and subsequent appropriators according to their respective rights, and the prior appropriator must permit it to flow down to them as it is wont to flow.

7. SAME—RIPARIAN PROPRIETOR—RIGHTS.

Every riparian proprietor on a nonnavigable stream is entitled to a reasonable use of the water of the stream flowing through his land, and after the natural wants of all the other riparian proprietors have been supplied he may use their corresponding rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 33-37.]

8. SAME—PRIORITIES BETWEEN—EFFECT OF PLACE OF LOCATION—EFFECT OF DATE OF ACQUIRING TITLE.

There is no priority between the rights of riparian proprietors to the use of water of a nonnavigable stream, but their rights are equal, regardless of location on the stream, or the date of acquiring their title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 33-37.]

9. SAME—RIGHTS IN NONNAVIGABLE STREAMS.

A riparian owner has no title to the water of a nonnavigable stream flowing over his land,

but only the right to use it while it is passing his place, which right is subordinate to a corresponding right in all the other riparian proprietors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 32.]

10. SAME—DETERMINATION OF NATURE AND EXTENT OF RIGHT.

The nature and extent of the right of a riparian proprietor to the water of a stream for irrigation cannot be measured by any definite or fixed rule, nor can the amount of water which he is entitled to use for that purpose ordinarily be definitely determined; it being necessarily a varying quantity depending upon the use by other proprietors, and whether its use by him will be an injury to them.

11. SAME—RIGHTS OF APPROPRIATORS.

An appropriator from a stream flowing through his premises has not the right to the use of a surplus for irrigation as against subsequent claimants.

12. SAME—RIGHTS OF RIPARIAN PROPRIETORS—ELECTION—NECESSITY.

While the doctrines of prior appropriation and riparian rights are not so antagonistic that they may not exist in the same locality, a settler upon a nonnavigable stream has an election either to rely upon his rights as riparian proprietor or to make an appropriation of the water if it is free and subject to appropriation, and claim as an appropriator, but he cannot do both.

13. SAME—DECREE—REQUIREMENTS OF.

In an action by lower riparian owners of a nonnavigable stream against an upper owner to restrain the maintenance of a dam and reservoir and the diversion and impounding of water to the injury of plaintiffs, the evidence showed that plaintiffs were entitled to equitable relief against the impounding of the water in the reservoir, but did not show that the dam could not be maintained and operated in such a manner as not to injure the plaintiffs. *Held*, that a decree would be rendered restraining defendant from using any water from the reservoir in violation of the rights of other riparian owners when it was needed by them, but would not require the removal of the dam.

Appeal from Circuit Court, Harney County; George E. Davis, Judge.

Action by S. S. Williams and others against William Altnow and others. From a judgment for plaintiffs, defendants appeal. Modified.

This is a controversy between the settlers in Otis valley over the waters of Otis creek and its tributaries. Otis creek arises in the Blue Mountains, flows in a general southerly direction for a distance of 10 to 15 miles, and discharges into the Malheur river. Warm Springs creek and Cottonwood creek are tributaries of Otis creek from the east. The former discharges into the main stream about three miles from its mouth, and the latter about a mile and a half farther up. Plaintiff Pacific Live Stock Company owns 400 acres of land at the junction of Otis creek with the Malheur river, about 140 acres of which lies north of the river, and the remainder south. Plaintiff Marks is the owner of 320 acres lying east of the property of the live stock company. Plaintiff Williams is the owner of 400 acres north of that belonging to the live stock company, and extending up Otis creek about one and a quarter miles, and plaintiff Stewart is the owner

of 160 acres situated above that of Williams. Defendant Stallard owns 480 acres, 320 of which lies in 40-acre tracts along Otis creek, extending from the mouth of Cottonwood creek down to about three quarters of a mile below the mouth of Warm Springs creek. Defendant Robbins owns 80 acres east of the lower part of Stallard's land, and defendant Altnow is the owner of 400 acres at the head of Warm Springs creek, about a mile and a half above its mouth. Warm Springs creek is the outflow of perennial springs on Altnow's land, which furnishes a continuous flow of several hundred inches, and is the principal supply for irrigation after the 15th of June of each year, as Otis creek and its tributaries above the mouth of Warm Springs creek become dry about that time. All the land belonging to the several parties is arid and requires irrigation for cultivation. Otis creek or its tributaries flow through some part of the land belonging to each of the parties to this litigation except Marks, and his land is on the Malheur river a short distance below the mouth of Otis creek. Prior to 1903 there was water enough for the use of all the parties, and there had been no controversy between them concerning their respective rights; but in that year defendant Altnow constructed a dam 775 feet long and 20 feet high across the channel of Warm Springs creek just below the springs from which it receives its supply, thereby creating a reservoir 17 acres in area, and with a capacity of 170 acre feet for the purpose of impounding water to be used in irrigating lands belonging to him on the opposite side of the creek from where he had been previously using water. Plaintiffs, insisting that the construction of this dam, the impounding of water, and the threatened use thereof will interfere with their rights, brought this suit to enjoin and restrain him from maintaining such dam, or interfering with their use of the water, making Stallard and Robbins parties.

The complaint alleges that plaintiffs and their respective grantors and predecessors in interest have been the owners and in possession of the lands now owned by them since the 1st day of June, 1883, and have ever since that time had the lands inclosed and in cultivation, and that such lands are all riparian to Otis creek; that July 10, 1883, while Otis creek and its tributaries was a public stream flowing through the public lands of the United States, and the waters thereof free and unappropriated, the grantors and predecessors in interest of plaintiffs Williams, Marks, and the live stock company entered upon the channels of the stream at a point on the public domain above their lands, erected a dam, and constructed a ditch of sufficient capacity to convey 400 inches of water for the purpose of irrigating the lands belonging to them, and have ever since, by means of such ditch, diverted water to the

full extent of their appropriation to and upon their lands for irrigation, stock, and domestic purposes; that in the month of July, 1883, the grantors and predecessors in interest of plaintiffs Williams and Stewart, for the purpose of securing water to irrigate their lands, entered upon the channel of the creek above the dam referred to, constructed another dam, and dug a ditch to, across, and over their lands, and appropriated through such ditch 150 inches of water, which they have ever since used for irrigation, stock, and domestic purposes; that the two appropriations referred to were prior in time and superior in right to any and all appropriations of defendants or either of them, and to the right of any and all other persons whatsoever; that during the last five years, and particularly during the years 1902-03, defendants, at different points above the intake of the two ditches referred to, have entered upon the channels of the creek and its tributaries, placed dams and obstructions therein, and by means of ditches have turned out the water naturally flowing therein, while plaintiffs needed the same for irrigation, to their damage and in violation of their rights as prior appropriators. A decree was prayed for establishing plaintiffs' prior and superior right to 400 inches of water through the ditch first constructed, and 150 inches through the second ditch; that defendants be perpetually enjoined from diverting any water from the creek or its tributaries until the amount of plaintiffs' appropriation shall have been first supplied; and that they be required to remove their dams and obstructions from the creek and its tributaries, and to permit a continuous flow of water down the stream to the extent and in amount sufficient to supply plaintiffs' rights.

Defendant Altnow answered, denying the allegations of the complaint, and alleging affirmatively that Warm Springs creek flows through his lands, which have been in the ownership and possession of himself and predecessors in interest since the 25th of September, 1883, and the waters thereof have since that time been used for irrigation, stock, and domestic purposes by right of riparian ownership; that early in the summer of 1883 he built a dam across the creek upon his land, and by means of ditches diverted all the water therefrom and used the same for irrigation, stock, and domestic purposes, and that at the time of his appropriation the stream was wholly upon government land, and none of the waters thereof had been appropriated, or were being, or had been, used by any other person; that it requires the use of 300 inches of water under six-inch pressure during the irrigation season to properly irrigate the lands belonging to him and for domestic and stock use; that he has so used the water continuously during the whole of each irrigation season, and has had actual, open, and adverse possession and use of such

water and springs, and of the whole thereof, since that date; that at the time he constructed the first dam across the stream and began to use the water he was unable, financially, to construct such dam and ditches as were really necessary in order to make the most effective use of the waters, and during the last few years he has constructed a larger dam across the stream, and, by means of ditches connected the same with his system of irrigation at an expense of about \$3,000. He further alleges that in the years 1884-85 he and one John Robertson constructed a dam across Cottonwood creek, and from thence a ditch to and upon the land owned by him, and thereby diverted about 600 inches of water under six-inch pressure, two-thirds of which belonged to him and which he has continuously used for irrigation purposes. Defendant Stallard for his answer alleges that for more than 15 years last past he has been the owner and in possession of certain described land riparian to Otis and Warm Springs creeks, and 320 acres thereof has been subject of private ownership since the 8th day of October, 1883; that in 1885 his predecessors in interest built a dam across Warm Springs creek some distance above his land, and by means of a ditch diverted 150 inches of water, which was conveyed to and upon his land and used for necessary irrigation, stock, and domestic purposes, and has been continuously used each and every irrigation season since the date of diversion; that in 1887 he constructed another dam across Otis creek and diverted 100 inches of water, which he has ever since used for irrigation purposes. The separate answer of Robbins alleges that for more than 15 years last past he and his predecessors in interest have been the owners and in possession of certain lands through which Warm Springs creek flows; that in the year 1885 his predecessor in interest constructed a dam in Warm Springs creek some distance above his lands, and by means of a ditch diverted about 200 inches of water, 50 of which was then and ever since have been used in the irrigation of his land, and was diverted for that purpose.

The reply put in issue the new matter of their answers, and for further defense avers that Altnow ought not be permitted to plead that he is riparian proprietor on Warm Springs creek as to 240 acres of land owned by him, for he acquired title thereto through the desert land act of March 3, 1877, c. 107, § 1. 19 Stat. 377 (U. S. Comp. St. 1901, p. 1548), and claimed water from Cottonwood creek for the reclamation thereof.

After the testimony had been taken the court below made findings of fact and conclusions of law to the effect that defendant Altnow was the first appropriator, and is prior in right to a quantity of water from Warm Springs creek equal to a flow of $1\frac{1}{4}$ second feet or 75 inches, which he is entitled to use for the irrigation of his lands at all

times, provided he uses it in such a manner as not to reduce the flow of water at the head of plaintiffs' ditches to an amount less than it would be if he used it in irrigation of the lands heretofore irrigated on the east side of the creek; that plaintiffs Williams, Marks, and the live stock company have second right to the use of water through the Duncan ditch, on the east side of Otis creek, to the extent of 150 inches, measured under six-inch pressure, miner's measurement, or $3\frac{3}{4}$ second feet; that plaintiffs S. B. Stewart and S. S. Williams are third in time and right to the extent of 50 inches or $1\frac{1}{4}$ second feet of the waters at the head of their ditch; that defendants Stallard and Robbins are equal in point of time and diversion, and are fourth in right to the waters of the creek to the extent of 150 inches or $3\frac{3}{4}$ second feet, miner's measurement; that after the appropriations above specified have been supplied, defendant Altnow is entitled to all the remainder of the waters in the stream, which he may use in any manner he may choose, except that he must not impound and let it go in sufficient quantities to injure the lower proprietors; and that none of the parties are entitled to complain of the appropriations and use of the waters of the stream by others prior to May 15th of each year. A decree was entered accordingly, from which all parties appeal.

Lionel R. Webster and Robert Shaw, for appellants. W. H. Brooke and John L. Rand, for respondents.

BEAN, C. J. (after stating the facts as above). Plaintiffs' claim to the waters of Otis creek is based upon appropriations through two ditches, one known and designated in the record as the "Stewart ditch," taken out on the west side of the creek near the south line of defendant Stallard's land and below the mouth of Warm Springs creek, and the other, the "Duncan ditch," taken out lower on the east side. The Stewart ditch is about $1\frac{1}{2}$ miles long, and supplies water for irrigating the lands of plaintiff Stewart, and part of the land belonging to plaintiff Williams. The Duncan ditch is $3\frac{1}{2}$ miles long, and land belonging to plaintiffs Williams, Marks, and the live stock company are under it. Defendant Altnow claims a right to the waters of the Warm Springs creek prior in time to that of the plaintiffs by reason of an appropriation alleged to have been made in 1883, and as riparian proprietor.

Before considering the legal rights involved, it is important to ascertain the date of settlement and title of the parties and their predecessors in interest, the time of the construction of the several ditches, and the amount of land under each ditch which is entitled to water therefrom for irrigation.

Stewart's Land. The land owned by plaintiff Stewart, which is nearest the head of the Stewart ditch, was occupied by one Prime in 1883. Prime died a short time thereafter, and

on October 29, 1884, his widow filed on the same as a homestead, alleging settlement October 15th of that year. In 1887 she relinquished her filing, sold her improvements, including all water rights, to plaintiff Stewart, who filed on the land as a soldier's homestead, and afterward obtained title.

Williams' Land. The 160 acres adjoining the Stewart farm on the south were settled upon by Albert Gittings and F. M. Gibler, and the north half thereof was filed on by Gittings as a timber culture claim April 18, 1885, and the south half by Gibler January 27th of the same year. Both these filings were subsequently relinquished, and the land filed on February 26, 1895, by James A. Gittings, who also relinquished his filing, and it was again filed on April 18, 1898, by Hyrum Williams, as a homestead, and patent was issued to him, and he afterwards deeded it to the present plaintiff Williams. South of the Gibler and Gittings tract is 160 acres filed upon by N. E. Duncan as a homestead May 29, 1884, patented to him November 2, 1891, and thereafter sold to H. A. Williams, father of the present plaintiff. East of the Duncan homestead is 80 acres, filed on by Duncan as a timber culture claim on September 24, 1885. He subsequently relinquished this filing, and on October 13, 1896, it was filed on as a homestead by plaintiff Williams, and patent subsequently issued to him.

Pacific Live Stock Company's Land. South of the Duncan claim is 160 acres, filed on as a pre-emption by Albert Elliott December 12, 1883; alleged settlement October 1st of that year. The land was subsequently patented to Elliott, and by him conveyed to the live stock company. West of the Elliott tract are 120 acres, filed on by plaintiff Stewart as a pre-emption August 24, 1884, and subsequently deeded by him to the live stock company.

Marks' Land. Plaintiff Marks owns 320 acres east of that belonging to the live stock company. Of this 160 acres were filed on by Madison Elliott as a pre-emption December 12, 1883; alleging settlement October 1, of that year. The land was subsequently patented to Elliott, and by him conveyed to Marks. On the remaining 160 acres 80 were filed on by Madison Elliott as timber culture claim October 6, 1884. The filing was subsequently relinquished by Elliott, and the land, together with the additional 80 acres, was filed on by Kenyon as a homestead January 30, 1891, and subsequently patented to him and conveyed to Marks.

Altnow's Land. Defendant Altnow is the owner of 400 acres at the head of Warm Springs creek, some miles above the head of the Stewart and Duncan ditches. 240 acres of this land were filed on by him as a desert land claim September 25, 1883, and final proof made September 10, 1886. The remaining 160 acres were settled on by his brother John Altnow September 1, 1883, as a pre-emption, and filed on September 25th,

and final proof made January 7, 1884. He afterwards received patent to the same, and conveyed to his brother, the defendant.

Stallard's Land. Defendant Stallard owns 480 acres above the head of the Stewart and Duncan ditches and below the land of his codefendant Altnow. 160 acres of this were filed on by him as a pre-emption October 1883, but changed to a homestead in October, 1885. 160 acres of the remainder were filed on by W. J. South as a homestead on May 28, 1888, and subsequently patented to South and conveyed by him to Stallard. The remainder was filed on by Thomas Delaney as a pre-emption October 25, 1883, and by him subsequently conveyed to Stallard.

Robbins' Land. Defendant Robbins owns 80 acres east of the lower part of Stallard's property, which were filed on as a pre-emption by Taylor on December 19, 1888, and subsequently patented to Taylor, and by him conveyed to Robbins.

Stewart's Ditch. On July 23, 1883, William Prime, who occupied the land now owned by plaintiff Stewart, filed and had recorded in the county records a notice, claiming 300 inches of water for irrigation purposes, to be taken out near the head of the present Stewart ditch. In October of that year Gibler settled on a tract of land below Prime, and Stewart settled two miles farther down on land now owned by the live stock company. They both testify that when they came to the country they saw Prime's water notice posted on a stake in the stream at the proposed point of diversion, and 12 or 15 feet of ditch had been dug. In the following spring Gittings, Gibler, and Stewart joined with Prime in the completion of the ditch, and the water was turned in and used by them that season for irrigation. The ditch, as originally constructed, was $1\frac{1}{2}$ or 2 miles long. Raleigh Stewart says it was 3 feet wide and $1\frac{1}{2}$ feet deep, and Gibler, that it was 3 feet wide and 2 or $2\frac{1}{2}$ feet deep. Defendant Stallard, who has known the ditch from the time it was constructed, says it would carry as much water when first built as it now does, and Mr. Fox, a civil engineer, who measured it just before the commencement of this suit testifies that the present capacity is 3.24 second feet or 162 inches. Water was used through this ditch by Prime, Gibler, Gittings, and Stewart to irrigate garden and small fields of grain on their respective places in 1884, and the area of irrigable ground has been increased by them and their successors in interest from year to year since the construction of the ditch, except on Stewart's pre-emption, and no water has been used on it through the ditch since the live stock company acquired title thereto in 1887. The evidence is not clear as to the amount of land in cultivation under the ditch at the time this suit was commenced, or the quantity of water necessary for its successful irrigation. The court below found that $1\frac{1}{4}$ second feet or 50 inches were

sufficient for that purpose, and this is probably as near the fact as can be ascertained from the evidence.

Duncan's Ditch. Duncan's notice of an intention to appropriate 400 inches of water for irrigation purposes was dated August 25, 1883, and filed August 30th of that year; but the plaintiffs claim that actual work was commenced on the ditch early in July preceding, while defendants contend that the first work was done in 1884, and the ditch was not completed until later. Upon this point the evidence is in much confusion, and consists principally of the testimony of witnesses concerning events which happened many years ago. It is therefore difficult to arrive at a satisfactory conclusion. Madison Elliott testifies that he settled on a tract of land now owned by plaintiff Marks in 1883, and helped dig the Duncan ditch; that the survey for the ditch was begun the 10th of July, 1883, and work commenced by the 15th of that month, and that about two months' work for two men was done that year; that the ditch was completed to the Duncan place the next year, and water turned into it for irrigation purposes, and was entirely completed the succeeding year; that it was the intention of the parties constructing the ditch to appropriate water for the irrigation of all the land now under the ditch; that the principal reason the witness has for remembering the date is that his child died on the 17th of July, 1883, and he first heard about it while he was working on the ditch. Gibler testifies that he came to the valley in October, 1883, looking for land, and that Duncan told him that there was a piece of land adjoining his which he could take up; that witness asked about water, and Duncan said he had a ditch already commenced on which he and the Elliotts had done some work, and if agreeable to them he (Gibler) could have an interest in it; that Gittings had 80 acres just above the land settled on by witness, and it was understood that he also was to have a one-fifth interest in the ditch and the water flowing in it, and that Gittings did the work for himself and witness; that they constructed the ditch in 1884 to the Elliotts' land, and they (Elliotts) raised a small crop and garden that year; that he (witness) used no water through the ditch for irrigation until 1885, when he irrigated 13 or 14 acres; and that he sold out in 1894 or 1895, and had at that time 15 or 16 acres in cultivation. Plaintiff Stewart came to the valley in either September or October, 1883, and settled upon the land near the mouth of Otis creek. The first work he saw done on the Duncan ditch was in 1884, in June or July, and it was completed to the Duncan place in 1885. Raleigh and Charley Stewart first noticed the Duncan ditch in 1884, and in August of that year saw Elliott and Duncan at work on it. At that time they had between a quarter and half a mile dug, but no water had been turned in. Defendant Stallard testifies that he came to Otis valley

in 1883, and has lived there ever since; that Duncan did not move on his place to reside permanently until June or July, 1884, but built a small cabin the fall before; that the survey of the Duncan ditch was made in August or September, 1884, and some work done on it that year, but no water turned in; that the ditch was completed to the Duncan place in 1885, and to the Elliott place in 1887, and the first crops raised by Duncan were in 1886. W. Allen says that in 1885 he was driving a band of stock through the country and camped on Otis creek below the Duncan place, and there was no ditch there at that time, and he had to bring his stock back to the creek for water. Mrs. Gittings says that she lived in the house or cabin built by Duncan during the winter of 1883-84, and until the fall of 1884, and no work had been done on the ditch that fall at the head, and that Duncan boarded with her while he was working on the ditch. John Stemler testifies that he worked on this ditch about a quarter of a mile below the head 14 days in April, 1885, and produced a memorandum book in which he had account of his work, and that at that time there was no ditch below the point where he was working, and no water had been turned into the ditch. There were other witnesses who testified that the ditch was not begun until late in the summer of 1884, and was not completed or water turned in until the next year. Allen, Robertson, Stallard, Mrs. Gittings, and South testified positively that the ditch was not begun until that time. Madison Elliott and Gibler are the only witnesses who testify that the work was commenced in 1883. Elliott says it was begun that year and finished to the Duncan place the next. The relation of these events one to the other is no doubt correct, but Mrs. Gittings, Stallard, Stemler, and others testify that the ditch did not reach the Duncan place until 1885, and it is quite probable that Elliott is mistaken one year in his dates. Gibler testifies that after he came to the country he asked Duncan about water, and Duncan told him he had commenced the construction of a ditch, and that if the Elliotts did not object he (Gibler) might have an interest therein, if he would help complete it. He is not very definite as to the date of this conversation, and in view of the fact that Duncan did not begin to reside on his land until the summer of 1884, and the further fact that Gibler's first use of the water was in 1885, it is quite reasonable that the conversation alluded to occurred in the fall of 1884, at which time all the witnesses agree that Duncan's ditch had been commenced. Upon the whole testimony we are of the opinion that the court below was right in finding that the Duncan ditch was not begun until 1884. It had a capacity at the time of its construction of 10 second feet, but has since widened and deepened by erosion until its present capacity is 17.4 second feet. The ditch was constructed and water diverted through it by Duncan,

Gibler, Gittings, and the two Elliotts for the purpose of irrigation, and Elliott testified that it was the intention of the parties to irrigate all the land now under the ditch. The court below found that by due diligence and within a reasonable time the original appropriators and their successors in interest had in cultivation only a sufficient quantity of land to require the use of $3\frac{3}{4}$ second feet and limited the rights of the owners of the ditch to that quantity. This conclusion was reached on the ground that at the time of the appropriation the appropriators had no intention of using the water on the Duncan timber claim, the Gibler and Gittings land, or the Madison Elliott timber culture. Gibler and Gittings assisted in the construction of the ditch, and it was understood by the parties that they should each have a one-fifth interest therein, and in 1885 water was used from it to irrigate part of their land, and no reason is suggested why such land should now be excluded. The Duncan and Elliott timber culture claims were not filed on for some time after the parties had made their filings on their pre-emption claims; but Elliott says it was the intention to use the water for irrigating all the land now under the ditch, and the ditch, as constructed, passed through both these claims, and it seems to us that there is a clear manifestation of an intention to use the water intended to be appropriated in irrigating land under the ditch on the timber claims. The appropriation was made in 1884, and from that time until 1903 water has been used through the ditch by the appropriators and their successors in interest, without objection, for the purpose of irrigating land on such claims, and before they should be deprived of the right to do so it ought clearly to appear that the water has been put to a use not originally contemplated, or more has been used than is necessary for the purpose for which it was appropriated. At the time of the appropriation Elliott was the only party interested in the ditch who had filed on any land. The filings of all the others were made subsequent thereto, and therefore the dates of such filings are not conclusive evidence of the purpose and intent of the parties making the appropriation. The amount of water to which the owners of the Duncan ditch are entitled should, we think, be increased from that allowed by the court below to an amount sufficient to irrigate the land under the ditch on the Gibler and Gittings claim and the Duncan and Elliott timber claim. No accurate measurement of the area of the cultivated land under the ditch seems to have been made, and no very definite estimate is given by any of the witnesses, but, as near as we can ascertain from the testimony, the amount should be increased 50 inches or $1\frac{1}{4}$ second feet.

Altnow Appropriation. Defendant Altnow owns 400 acres of land at the head of Warm Springs creek, and above the intake of the Stewarf and Duncan ditches. 160 acres of this were filed on as a pre-emption by his

brother John Altnow in September, 1883, and after final proof it was conveyed to defendant. The remaining 240 acres were filed on the same day by defendant under the desert land act, and title subsequently acquired by him. Warm Springs creek has its principal source of supply in a group of perpetual springs near the north line of the John Altnow pre-emption, and flows southwesterly through such pre-emption, and then diagonally through the desert claim of defendant. Defendant's house is on the John Altnow pre-emption. Near the house are two or three small springs, which form a reservoir or pond, from which a stream runs into the main stream a short distance below its head. The stage road, the principal thoroughfare of the country, runs practically north and south along the east side of defendant's land, and between it and the creek is a level tract which has been reduced to a state of cultivation, and is irrigated by water from the creek. The land on the west side of the stream is high bench land, and cannot be reached with water from the stream, except by raising it 20 or 30 feet by means of a dam. In the spring of 1883 defendant occupied the land afterwards taken by his brother as a pre-emption, and in July of that year built a small dam in the creek at the junction of the main stream and the one leading from the springs near his house, and constructed a ditch 2 or 3 feet wide and perhaps 12 or 14 inches deep, through which he turned water onto the land between the stream and the stage road to wash out the alkali and prepare it for cultivation. About the time he commenced work on the dam and ditch, or perhaps a short time afterwards, he filed for record in the county clerk's office a notice of an intention to appropriate 400 inches of water, to be taken out at or near the junction of the two channels referred to, for irrigation purposes. No crops were raised in 1883, but the water diverted was used to render the land fit for cultivation, and the next year a small area was actually cultivated. The capacity of the ditch and the amount of water diverted is difficult to ascertain from the testimony. Mr. Altnow says he took out all the water and distributed it over the land, intending to use it on both the Altnow pre-emption and his desert claim, and has since so used it. Mr. Allen, who seems to have been somewhat familiar with the situation, says that the defendant took out all the water he could. Mr. Drake, who assisted in building the dam and ditch, testifies that they turned out all the water from the stream into a slough, and that it ran back into the creek 200 rods below the dam, and he never saw defendant use any of the water; that afterwards the ditch was extended by some person, he does not remember whom. Mr. Fredericks testifies that in the fall of 1883 he and John Altnow worked on the ditch and dam, and "fixed it so it would hold all the water, and built the dam higher, and made it as tight as we could, and

tried to get all the water out of the stream"; that the ditch where he worked was 8 or 10 rods long, and took the water out on the land between the creek and the stage road, and it was used for irrigating the natural grasses and preparing the land for future use; that he did not remember how much land was under the ditch, and did not pay any particular attention to it at the time, but there were about 80 acres under it in hay, timothy, alfalfa, and different kinds of grain; that there is another ditch on the same side higher up, and that it reaches the land not covered by the lower ditch; that he (witness) worked the same fall on another dam in the creek, 200 rods above the first, to raise the water so it could be taken out by a ditch and into the reservoir near the house. John Robertson says that he saw Altnow using water out of the ditch in July or August, 1883; that he was taking it out of a ditch at the lower fork of the stream, and spreading it out over some alkali land; that in the spring of 1884 Altnow constructed a dam or reservoir near the house, and has taken a ditch from it, carrying water on to his land; that he was using the water to irrigate about 125 acres in 1883, and which has since been extended to 160 or 170 acres; and that he has been irrigating that amount for 12 or 14 years. It thus appears that Mr. Altnow initiated an appropriation in July, 1883, but at that time did not own the land upon which he proposed to apply the water, nor does it appear that he at any time intended to acquire title to the land subsequently filed on by his brother; but the purpose of the appropriation in the beginning was to irrigate the land below the head of the ditch on the east side of the stream and lying between the creek and the stage road, and the first use made of the water was to wash out the alkali and prepare the land for cultivation. During the first year the water was used on a small part of the land, but work was continued and increased from year to year until practically all the land on the Altnow pre-emption and desert claim under the ditches has been put into a state of cultivation. Mr. Altnow says that there are now about 190 acres being irrigated from the water thus appropriated. Mr. Robertson places the amount from 160 to 170 acres, and Mr. Albert Altnow at about 150; but none of the witnesses segregate the land on the desert land claim, irrigated from the ditch, from that on the pre-emption. The evidence indicates that the acreage of irrigable land was increased from year to year until 15 or 16 years ago, when it was all reduced to a state of cultivation, and there had been no increase in the amount of water used up to 1903, when defendant constructed the reservoir and a ditch leading therefrom for the purpose of using the water on the bench land west of the stream. The court below held, as we understand it, that the right to use the water, appropriated by him was confined to the amount necessary to

the beneficial use on the John Altnow pre-emption claim, being 1½ second feet.

Stallard's and Robbins' Rights. All of defendant Stallard's land, except 160 acres, is situated on Otis creek above the mouth of Warm Springs creek, and is not affected by this controversy. It is admitted that as long as there is any water running in Otis creek above the mouth of Warm Springs creek there is enough for the use of all parties. It is only after Otis creek above that point becomes dry in the early summer that there is a shortage of water. The 160 acres referred to were filed on by Stallard as a homestead in October, 1885, and in that year he took out a ditch from Warm Springs creek above his land, and diverted water for the irrigation of 120 acres, and has continued since to so use it. But his use did not in any way interfere with the rights of the plaintiffs until after the defendant Altnow constructed his dam at the head of the stream in 1903. In 1885 Robbins took out a ditch from Warm Springs creek with which he has since irrigated about 30 acres of land, but his use has not interfered with the rights of plaintiffs.

Having thus ascertained the priority of the respective parties as nearly as we can from the evidence, it remains to consider briefly the legal questions involved. It is claimed at the outset that plaintiffs' complaint should be dismissed because there is no proof that their rights have been interfered with at any time. The evidence shows that prior to the year 1903 there was no controversy between the settlers in Otis Valley over the water of Otis creek and the tributaries thereof, but in that year defendant Altnow completed the construction of his dam at the head of Warm Springs creek, cut off the flow of water for about 10 or 15 days, while the reservoir was being filled, during which time plaintiffs were deprived of the use of the water when it was needed by them. Mr. Patterson, who was in charge of the irrigation for plaintiff Williams, says that there was about half enough water in the Duncan ditch in that season to irrigate the land under it, and this shortage was caused by the Altnow dam. The construction of this dam was not only for the purpose of impounding the water for use on the east side of Otis creek where it had been used since the date of the original appropriation in 1883, but was for the purpose of reaching the high bench land on the west side of the creek which could not otherwise be irrigated. The construction of the dam and impounding of the water, together with the assertion of the right to use it on the bench land, was a threatened injury to the plaintiffs, and, together with the actual fact that there was a shortage of water in 1903, caused, as the witnesses testify, by the dam, is clearly sufficient to entitle plaintiffs to resort to a court of equity for relief, and to have the rights of all parties claiming an interest in the water of the stream adjudicated and determined.

ed. It is true the evidence shows that there has been no shortage in the Stewart ditch, and that perhaps some of the defendants had not interfered with plaintiffs' rights; but since it was necessary for them to bring a suit against defendant Altnow to have their respective rights determined, and which necessarily involved the entire water of the stream, it is proper that the owners of the Stewart ditch and the other parties claiming rights in the stream should be made parties, and it is immaterial whether they joined as plaintiffs or defendants.

It is next insisted by defendant Altnow that the court below erred in finding that he only had a right to $1\frac{1}{2}$ second feet or 75 inches of water as prior appropriator. This conclusion seems to have been based on the theory that he was not entitled to use the water or any part of it for irrigating land on his desert claim, but that his rights were confined to his land under the ditch on the John Altnow pre-emption. In this we think the court erred. Whether Altnow's appropriation dates from July, 1883, the time the initial steps were taken, or from September of that year, when his brother John filed on the pre-emption, is immaterial. In either event it is prior in time and right to the appropriations made through the Stewart and Duncan ditches, and to the rights of defendants Stallard and Robbins, and gave to Altnow and his predecessor in interest a prior right to a sufficient amount of water to irrigate the land to which it was intended to be applied at the time of the appropriation, whether it was on the desert land claim or the pre-emption. By the desert land act a claimant's right to water for irrigation and reclamation must depend upon a bona fide prior appropriation (section 1, Act March 3, 1887, c. 107, 19 Stat. 377 [U. S. Comp. St. 1901, p. 1548] 6 Fed. St. Ann. p. 393), but there is nothing in the act which requires that the appropriation should be from one stream or source of supply, or which denies a settler the right to use on such claim water to which he has a bona fide right by prior appropriation from any source. The land on defendant Altnow's desert claim which he irrigates with water taken from the stream on the pre-emption claim of his brother is not under the ditch from Cottonwood creek, and cannot be reached by it. We think it clear, therefore, that Altnow is entitled to the first right to water sufficient to irrigate the land belonging to him on the east side of the stream and under the ditches, whether on the pre-emption or desert claim. And as there seems to be no substantial controversy about the number of acres so irrigated, or the quantity of water necessary for an acre, we conclude that the amount of water to which he is entitled, when necessary for irrigation purposes, is $3\frac{3}{4}$ second feet, or 150 inches. But he has the right to use the water only when necessary, and cannot be permitted to obstruct or retard the natural

flow of the stream when the water is not so needed by means of dams, reservoirs, or other obstructions to the injury of the lower proprietors. One who, with an intention to put water to some beneficial use, existing or contemplated, diverts it from a stream or other natural source of supply, and makes an application thereof within a reasonable time, has a prior right to use a sufficient quantity of water so diverted to supply his needs, not to exceed the amount of his appropriation, superior to the right of subsequent appropriators, locators, or grantees, and he may change the point of diversion or the place of use so long as it does not prejudice the rights of subsequent claimants, *Bolter v. Garrett*, 44 Or. 304, 75 Pac. 142; *McCall v. Porter*, 42 Or. 49, 70 Pac. 820, 71 Pac. 976; *Long on Irrigation*, § 50. But when his needs, as measured by his original appropriation, have been supplied, or, when the water is not actually required or used by him, it is at the disposition of others, according to their respective rights, and he must permit it to flow down to them as it is wont to flow. *Nevada Ditch Co. v. Bennett* 30 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777; *Bolter v. Garrett*, 44 Or. 304, 75 Pac. 142; *Gardner v. Wright* (Or.) 91 Pac. 286; *Mann v. Parker*, 48 Or. 321, 86 Pac. 598; *Mattis v. Hosmer*, 37 Or. 523, 62 Pac. 17, 632.

It is claimed that defendant Altnow is entitled to the use of water from Warm Springs creek by right of prior appropriator to the extent of his original appropriation, and to the surplus water in such stream, if any, as riparian proprietor, because the filing of his predecessor in interest was the first one made on the stream. There are several reasons why this position cannot be sustained. In the first place, in the opinion of the writer, it is doubtful whether the owner of land through which a nonnavigable stream flows can claim the right as riparian proprietor to use the waters thereof for irrigation as against subsequent appropriators on the stream below him. And, again, it is a serious question whether the desert land act does not abolish the so-called modified doctrine of riparian rights, which gives to riparian proprietors the right to use water for irrigation as to all lands through which nonnavigable streams flow, the title to which has been acquired from the government of the United States since the passage of that act. It declares that all surplus waters over and above that appropriated by the desert land claimant, "together with the waters of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights." The government of the United States, as the primary owner of the soil, undoubtedly has the right to make such provisions concerning the waters of nonnavigable streams thereon, as it deem-

ed proper, and it is at least a debatable question whether, by the language quoted, Congress did not intend to recognize and assent to the appropriation of such waters in contravention to the common-law doctrine of riparian rights as to persons subsequently acquiring title from the United States. *United States v. Rio Grande Irr. Co.*, 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136. But it is not necessary to decide either of the questions suggested at this time. Defendant Altnow, if he is entitled to use any part of the waters of Warm Springs creek as riparian proprietor, has no right thereto superior to the other parties to this litigation. Otis creek flows through the land of all of them, and their rights, as riparian proprietors, to the use of the waters, are equal, and one is not superior to the other. Every riparian proprietor is entitled to a reasonable use of the water of a nonnavigable stream flowing through his land, and, after the natural wants of all the other riparian proprietors have been supplied he may use their corresponding rights. *Jones v. Conn.*, 39 Or. 30, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634. But in this respect the rights of all the riparian proprietors are equal, regardless of location on the stream, or date of acquiring title. There can be no priority of rights as between riparian proprietors. The right of the first settler is not superior to that of the last. No one riparian proprietor can use the water for irrigation to the prejudice or injury of the correlative rights of the others above or below him on the stream, unless he has some prior right to divert it or title to some exclusive enjoyment. A riparian proprietor has no title to the water flowing over his land, but only the right to use it while it is passing his place, and this right is subordinate to a corresponding right in all the other proprietors. One proprietor cannot unreasonably detain or give the water another direction, or use it in any way to the injury of the others. It necessarily follows, therefore, that the nature and extent of the right of a riparian proprietor to the water of a stream for irrigation cannot be measured by any definite or fixed rule, nor can the amount of water to which he is entitled to use for that purpose ordinarily be definitely ascertained or determined, although this may perhaps be done in exceptional cases. It is necessarily a varying quantity, depending upon the use by other proprietors, and whether it is an injury to them. Each case must be decided, as it arises, upon its own particular facts and circumstances. This disposes of the position that defendants Stallard and Robbins have some superior claim to the waters of the stream because of the priority of their filings. There is another reason why defendant Altnow cannot assert the right to the use of the surplus water of the stream as riparian proprietor. It is the settled law in this state that an appropriator of water from a stream flowing through his premises has not the right as riparian proprietor to the

use of the surplus for irrigation, as against subsequent claimants. *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678; *North Powder Milling Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223; *Brown v. Baker*, 39 Or. 70, 65 Pac. 799, 66 Pac. 193. While the doctrine of prior appropriation and riparian rights are not so antagonistic that they may not exist in the same locality (*Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647), a settler upon a nonnavigable stream has an election either to rely upon his rights as riparian proprietor or to make an appropriation of the water if it is free and subject to appropriation, and claim as an appropriator, but he cannot do both.

There is considerable evidence in the record upon the question as to whether the permanent maintenance of the dam and reservoir by the defendant will necessarily be an injury to the plaintiffs; but we think the proof is not sufficiently clear upon this point to justify a decree requiring him to remove the dam. It is probable that it may be maintained and operated in such a manner as not to injure the plaintiffs, and, if so, defendant is entitled to use it; but he will be enjoined from using any water from the reservoir formed above the dam on the high or bench land west of the creek, when it is needed by plaintiffs or other parties on the stream below him.

A decree will be entered in accordance with this opinion.

KING, C., having been of counsel below, did not sit in this case.

DOUST v. ROCKY MOUNTAIN BELL TELEPHONE CO. et al.

(Supreme Court of Idaho. April 28, 1908.)

1. APPEAL—MOTION FOR NEW TRIAL—STATEMENT—CERTIFICATION.

Where numerous amendments have been allowed to a proposed statement on motion for a new trial, the statement should not be certified by the judge until the proposed statement and all amendments allowed have been engrossed.

2. SAME—TRANSCRIPT.

On an appeal from an order, it must appear that the transcript contains all of the papers, records, and other documents used by the trial judge or court on the hearing of such motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2639-2644.]

3. SAME—NOTICE—ADVERSE PARTIES.

Where a joint judgment is rendered against two defendants, and one of them appeals and the other does not, the notice of appeal must be served on the latter, under the provisions of section 4808, Rev. St. 1887; he being an adverse party within the provisions of said section.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2136-2139.]

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; R. T. Morgan, Judge.

Action by Edwin Doust against the Rocky Mountain Bell Telephone Company and E. S.

Crane. Judgment for plaintiff, and, from an order denying a new trial, defendant telephone company appeals. Appeal dismissed.

H. P. Knight and Sanders & Flynn, for appellant. Chas. L. Heitman and Ezra R. Whitla, for respondent.

SULLIVAN, J. This action was brought by the respondent against the Rocky Mountain Bell Telephone Company and E. S. Crane to recover on a check issued by the telephone company to the said E. S. Crane for the sum of \$846.65. Judgment was entered against the telephone company and said Crane for the sum of \$893.50, with interest thereon from the date of the judgment. An appeal from the judgment and the order denying a new trial was taken by the telephone company, in which the said Crane did not join, and no notice of the appeal was served on him.

Counsel for respondent move to dismiss the appeal on the ground that no notice of appeal had been served on the defendant Crane, and that no sufficient record or transcript on appeal has ever been made, served, or filed by the appellant; that the transcript does not show that the alleged statement on motion for a new trial was properly certified by the judge who tried said action; that the transcript on appeal does not contain a sufficient or any certificate showing that it contains all of the records and papers submitted to and used by the district judge in passing on the motion for a new trial. It appears from the transcript that numerous amendments were offered to the proposed statement on motion for a new trial, and the certificate of the judge shows that the amendments were allowed, and the statement settled "and ordered to be engrossed" by the trial judge. This court has repeatedly held that, where numerous amendments have been offered to a proposed statement on motion for a new trial, the amendments as allowed in connection with the proposed statement must be engrossed before it is settled as a complete record. *Pence v. Lemp*, 4 Idaho, 526, 43 Pac. 75; *Hattabaugh v. Vollmer*, 5 Idaho, 23, 46 Pac. 831; *Crowley v. Croesus G. & C. M. Co.*, 12 Idaho, 530, 86 Pac. 536; 2 *Spelling on New Trial and App. Procedure*, § 447. There is not a proper certificate to the transcript showing that it contains all of the papers, records and files used by the trial judge in passing upon the motion for a new trial. The transcript, on an appeal from the order denying a new trial, must contain all of the records and papers considered by the judge in passing upon such motion. In *Steve v. Bonners Ferry Lumber Co.* (Idaho) 92 Pac. 363, the court, in passing upon the question now under consideration, said: "Under the provisions of sections 4443, 4820, and 4821 of the Revised Statutes of 1887, it is essential that one who appeals from an order granting or denying a motion for a new trial should furnish the appellate court with a proper certificate identifying the papers, records, files, and other

matter presented to and used by the trial judge upon the hearing and consideration of such motion, and, upon failure on the part of the appellant to furnish such certificate, his appeal from the order granting or refusing the motion will be dismissed."

It is also contended that the appeal should be dismissed for the reason that the notice of appeal was not served on the defendant Crane. The transcript shows that the telephone company and said Crane were sued jointly and a joint judgment was rendered against them for over \$800. That being true, a reversal or modification of this judgment would adversely affect said Crane. He is therefore an adverse party. In order to give this court jurisdiction of the case on appeal, it is necessary that the transcript should show that the notice of appeal has been served on each and every of the adverse parties, and, unless the record shows proper service of the notice of appeal, the appeal will be dismissed on motion. *Anderson v. Knott*, 1 Idaho, 626; *Tootle v. French*, 3 Idaho, 1, 25 Pac. 1091; *Adams v. McPherson*, 3 Idaho, 718, 34 Pac. 1095; *Moe v. Harger*, 10 Idaho, 194, 77 Pac. 645. This court has held in numerous cases that all parties against whom a joint judgment has been rendered are adverse parties, and that the notice of appeal must be served upon each of them in order to give this court jurisdiction. *Jones v. Quantrell*, 2 Idaho (Hasb.) 153, 9 Pac. 418; *Coffin v. Edgington*, 2 Idaho (Hasb.) 627, 23 Pac. 80; *Lydon v. Godard*, 5 Idaho, 607, 51 Pac. 459; *Lewiston Nat. Bank v. Tefft*, 6 Idaho, 104, 53 Pac. 271; *Titman v. Alamance Min. Co.*, 9 Idaho, 240, 74 Pac. 529; *Baker v. Drews*, 9 Idaho, 276, 74 Pac. 1130; *Nelson Bennett v. Twin Falls Land & Water Co.* (Idaho) 92 Pac. 980.

The motion must therefore be sustained on the ground that the transcript fails to contain the proper certificate, and that no notice of appeal was served on one of the adverse parties. The appeal is therefore dismissed, with costs in favor of the respondent.

AILSHIE, C. J., and STEWART, J., concur.

PYRAMID LAND & STOCK CO. v. PIERCE et al. (No. 1,715.)

(Supreme Court of Nevada. April 23, 1908.)

1. TRESPASS—FEEDING ANIMALS—ACTIONS FOR DAMAGES—EXCESSIVE DAMAGES.

In an action for damages resulting from defendants' sheep grazing over about 360 acres of plaintiff's land in February, 1906, where it appeared that plaintiff's cattle were on the land in March, and his sheep lambled and fed there in April, and that the feed was as good as usual 90 days after the trespass, a verdict for \$600 was excessive.

2. SAME—STATUTORY PROVISIONS.

Act Feb. 18, 1893 (Laws 1893, p. 30, c. 31) § 1, provides that it shall be unlawful for any person to herd or graze live stock on the land of another without his consent. Section 2 provides that such live stock shall be liable for

all damage done while being so herded or grazed, together with costs and reasonable fees, and gives the owner of the land a lien on the stock to secure any judgment recovered for the damage done. Section 4 repeals an act to prevent trespass upon real estate by live stock and other matters relating thereto approved March 15, 1889 (Laws 1889, p. 129, c. 120). Laws 1903, p. 47, c. 28, prohibits herding sheep on the land of another or within one mile of a bona fide home or ranch house. Section 2 makes the owner of the sheep or his agent liable for any resulting damages. It contains no repealing clause, and makes no provision for attorney's fees or lien. *Held*, that Laws 1903, p. 47, c. 28, did not repeal Act Feb. 18, 1893 (Laws 1893, p. 30, c. 31), by implication.

3. SAME.

The clause of the act of February 18, 1893 (Laws 1893, p. 30, c. 31), providing for an attorney's fee in favor of the party recovering damages against one unlawfully herding or grazing stock on his land is a proper police regulation and is constitutional.

Appeal from Second Judicial District Court. Washoe County.

Action by the Pyramid Land & Stock Company, a corporation, against George Pierce and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Jas. T. Boyd and A. N. Salisbury, for appellants. Cheney Massey and Price, for respondent.

TALBOT, C. J. In the complaint it is alleged that plaintiff is the owner of certain subdivisions of land aggregating 440 acres and consisting in part of what is commonly known as the Cottonwood Ranch in Washoe county, and also the owner of 80 acres at another place; that on or about the 24th day of February, 1906, and thereafter to the time of the making of the complaint, which was verified on March 7, 1906, the defendants wrongfully and unlawfully caused to be herded and grazed about 5,000 head of sheep upon this land without the consent of the plaintiff, by reason whereof the grasses, herbage, and browse growing thereon were eaten up and destroyed and tramped out so as to render the land valueless for grazing purposes during the year 1906 and to the plaintiff's damage in the sum of \$1,000. These and other allegations of the complaint were denied. After the trial, which commenced on the 28th day of May, 1906, judgment was rendered in favor of the plaintiff for \$600 damages and for an attorney's fee and costs, and declaring these amounts to be a lien upon the live stock or sheep described in the complaint. From the judgment and an order denying a motion for new trial the defendants have appealed. On their behalf it is claimed that the damages are excessive; that the court improperly made the amount of the judgment a lien upon the sheep when the complaint did not allege or ask for anything by way of lien; that an attorney's fee was improperly allowed; that the act of 1893 (Laws 1893, p. 30, c. 31), providing for such a fee in cases where the plaintiff recovers damages for live stock

herded or grazed upon his lands and for a lien on the live stock in such actions, has been superseded and repealed by the act of 1903 (Laws 1903, p. 47, c. 28), regarding the herding of sheep, which does not provide for any such fee or lien, and that the provision directing the recovery of a fee in the former act is unconstitutional and void.

The contention of the appellant that the damages are excessive seems to be well taken. For the plaintiff there was testimony to the effect that one acre of the land would have supported one cow or steer for the month of March if the feed had not been destroyed by the sheep, and that the price of pasturing cattle on inclosed lands was \$1.50 a head per month. If this be granted, still the evidence does not warrant so large an amount of damages as was allowed. It is clear from uncontradicted testimony that a large portion of the 440 acres designated as constituting in part the Cottonwood ranch was fenced, and that the sheep did not go upon any of the land within the inclosure nor to the south of it, but only upon outside lands below, or northerly or northwesterly from the fields. The number of acres of this outside and lower land upon which the sheep trespassed is not definitely shown, nor is it required or expected so to be, but the inference from the evidence is that they crossed and grazed upon the greater part of eight 40's. They were also upon one 40 of the separate 80 acres.

The testimony indicates that the two bands of sheep of about 2,000 each belonging to the defendants crossed the lands below the ranch belonging to the plaintiff about the 23d of February, camped there overnight, one band passing on three or four miles the next day, and that the other band camped for about a week from a quarter to a half mile north of the fence, and then moved on and camped for another week about a mile and a half south of the house, although this is not shown to have been upon the lands of the plaintiff, but apparently they grazed upon the plaintiff's lands and the public domain adjacent during that period; that the grass was starting, and that it was storming during that time; that the feed consisting of bunch and buffalo grass, weeds and sage brush would not be destroyed so it would not appear again by being fed over by the sheep, and that it would grow again if there were storms and moisture. A witness stated that the band which remained was delayed by the storm. It was also shown by witnesses who had been placed upon the stand by the plaintiff that the plaintiff's cattle had grazed upon these lands in March, and that the plaintiff's sheep had lambed and fed there in April, and by one of plaintiff's leading witnesses it was stated that the storms continued late that spring, that the feed had not dried up, and was as good as usual at the time of the trial—90 days after the trespass. Under these circumstances and

especially considering that the defendants' sheep were upon the lands at so early in the year, even for grass, the allegation in the complaint that the feed was destroyed for that year, or even for the whole month of March as contended, is not supported by the evidence. Plaintiff introduced testimony on the trial claiming it had sustained special damages by reason of being without hay for its cattle and having extra need for any feed on these lands, but there is no allegation in the complaint to support any such special damage.

Section 1 of the act of February 18, 1893 (Laws 1893, p. 30, c. 31; Comp. Laws, §§ 780 to 783, inclusive), which is claimed by appellants to have been superseded and repealed and to be unconstitutional in certain respects, provides that it shall be unlawful for any person to herd or graze live stock upon the lands of another without the consent of the owner.

Section 2 provides: "The live stock which is herded or grazed upon the lands of another, contrary to the provisions of the first section of this act, shall be liable for all damages done by said live stock while being unlawfully herded or grazed on the lands of another, as aforesaid, together with costs of suit and reasonable counsel fees, to be fixed by the court trying an action therefor, and said live stock may be seized and held by writ of attachment issued in the same manner provided by the general laws of the state of Nevada, as security for the payment of any judgment which may be recovered by the owner or owners of said lands for damages incurred by reason of a violation of any of the provisions of this act, and the claim and lien of a judgment or attachment in such an action shall be superior to any claim or demand which arose subsequent to the commencement of said action."

Section 4 provides: "An act entitled 'An act to prevent trespass upon real estate by live stock, and other matters relating thereto,' approved March 15, 1889, is hereby repealed."

Section 1 of the later act (Laws 1903, p. 47, c. 28) provides: "It is not lawful for any person owning or having charge of sheep, to herd the same, or permit them to be herded, on the land or possessory claims of other persons, or to herd the same or permit them to graze within one mile of the bona fide home or bona fide ranch house; provided, that nothing in this act shall be so construed as to prevent sheep being driven along any public highway, or as near thereto, as may be necessary therefor; provided, further, that the word highway as used herein shall be so construed as to permit the driving of sheep herded closely together, steadily, quickly and continuously by the most direct passable route from one range to another, but in no case shall this last provision be construed so as to conflict with the former provisions of this section; provided, that

nothing in this act shall prevent the owner from herding or grazing on his own land."

Section 2 makes the owner or agent of the owner of the sheep violating its provisions liable to the parties injured for damages. The act of 1903 contains no repealing clause and no reference to the former act, and makes no provision for an attorney's fee or lien. Under these circumstances it cannot be held to repeal the former. Repeals by implication are not favored, and there is nothing to suggest that any repeal was intended. The act of 1903 covers new and additional matter by making it unlawful to herd or permit sheep to graze within one mile of a bona fide home or ranchhouse regardless of the ownership of the land, while the former act makes it unlawful to herd or graze live stock upon the lands of other persons, and provides for damages, attorney's fees, and a lien against parties infringing its provisions whether within one mile of a home or ranchhouse, or more distant.

The complaint and the evidence bring this action within the act of 1893 aimed against herding live stock upon the lands of another, and it does not appear that the plaintiff sought by its allegation or proof to bring the case within the statute of 1903. We conclude that the act of 1893, including its provisions in relation to damages, attorney's fees and liens, has not been repealed. If the plaintiff could not proceed under that act it and other owners could not recover damages caused by the herding of sheep on lands more than one mile from a home or ranchhouse as they would be limited to this distance by the act of 1903. The act of 1893 being in force, and the complaint asking for general relief and defendant being in court, the amount of the judgment was properly found to be a lien on the sheep.

Objection was made in the trial court and embodied in the specifications of error that there is no authority in law to award attorney's fees in this case. It was claimed there that the provision for such a fee had been repealed, and opposing counsel have filed briefs in this court regarding the constitutionality of the statute providing for such a fee. We are not aware of any decision regarding the validity of a similar statute. Concerning the constitutionality of acts in different states providing for attorneys' fees, the greatest diversity of opinion prevails among the courts, a number of which have divided or reversed themselves regarding this question. As bearing by analogy and elucidating the fundamental principles which ought to govern the validity of our enactment, it is instructive to consider some of these cases. In *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280, it was held that a statute allowing an attorney's fee in actions to foreclose mechanics' liens was not unconstitutional. There was an extended dissenting opinion. In *Helena Co. v. Wells*, 16 Mont. 65, 40 Pac. 78, it was said that, without expressing any view as to

how the court would consider the question were it a new one, they were of the opinion that it should be regarded as *stare decisis*. In *Title Guarantee Co. v. Wrenn*, 35 Or. 70, 56 Pac. 271, 76 Am. St. Rep. 454, it was said: "It will be observed that the attorney's fees provided for in the act are not fixed and determined nor imposed strictly as a penalty, but rather in the nature of costs, for which the amount is to be determined by the court, and is therefore in our opinion not obnoxious to the Constitution. See *Griffith v. Maxwell*, 19 Wash. 614, 54 Pac. 33; *Wortman v. Kleinschmidt*, 12 Mont. 316, 330, 30 Pac. 280; *Jewell v. McKay*, 82 Cal. 144, 152, 23 Pac. 139; *Helena Supply Co. v. Wells*, 16 Mont. 65, 69, 40 Pac. 78." In *Griffith v. Maxwell*, 20 Wash. 412, 55 Pac. 571, the court said: "It is stated in the argument that the learned trial court based its decision upon the case of *Jolliffe v. Brown*, 14 Wash. 156, 44 Pac. 149, 53 Am. St. Rep. 868, in which it was held that the provision for an attorney's fee in an act of the Legislature there considered could not be sustained, as it was contrary to the spirit of the Constitution of the state." But that case was distinguished from cases like the one now under consideration in *Ivall v. Willis*, 17 Wash. 645, 50 Pac. 467, which was a lien case, and in which the provision for an attorney's fee was held valid by this court. In the opinion in that case this court said: "While it is true there is some conflict of authority upon the validity of such a statute, we think the later authorities have one trend; and that is to maintain such a provision in statutes similar to our lien laws." Such provisions have been upheld by the courts of California with great unanimity, and the same rule obtains in Montana. *Hicks v. Murray*, 43 Cal. 521; *Quale v. Moon*, 48 Cal. 478; *Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 16 Pac. 325; *McIntyre v. Trautner*, 78 Cal. 449, 21 Pac. 15; *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280."

But in the latest California decision on the subject which has come to our notice (*Builders' Supply Co. v. O'Connor*, 88 Pac. 982), the Supreme Court of the state, after reviewing a number of cases, held that a provision allowing an attorney's fee to the successful claimant in an action to foreclose a mechanic's lien was unconstitutional. A similar view was taken in *Davidson v. Jennings*, 27 Colo. 187, 60 Pac. 354, 48 L. R. A. 340, 83 Am. St. Rep. 49; *Brubaker v. Bennett*, 19 Utah, 408, 57 Pac. 170. In *Openshaw v. Halpin*, 24 Utah, 430, 68 Pac. 138, 91 Am. St. Rep. 796, a statute providing that a mortgagee failing to cancel a mortgage should be liable for an attorney's fee was held to be void, and in *Railroad Co. v. Moss*, 60 Miss. 641, an act providing that whenever an appeal was taken from the judgment of any court in an action for damages brought by a citizen of the state against a corporation a reasonable attorney's fee should be assessed

by the court was held to be so discriminating in its nature as to appear manifestly unconstitutional. In *Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006, an act directing judgment for an attorney's fee on the foreclosure of liens on logs was declared invalid; but in *Ivall v. Willis*, 17 Wash. 645, 50 Pac. 468, a similar act was held not to be unconstitutional in any sense, but permissible upon the same theory that costs are allowed. In *Durkee v. City of Janesville*, 28 Wis. 464, 9 Am. Rep. 500, the provision in the charter that no costs should be recovered against the city in an action to set aside a tax assessment or to prevent the collection of taxes was held to be void. In *Williams v. Sapleha* (Tex. Civ. App.) 59 S. W. 947, a Texas statute requiring the appointment of an attorney for a nonresident cited by publication who does not appear and the payment of a reasonable compensation to be taxed as costs is declared to be valid. In *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 41 N. E. 263, 29 L. R. A. 387, the court held invalid an act providing that if the plaintiff in any action for wages recover the sum claimed by him in the bill of particulars an attorney's fee should be included as costs. But in *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491, a statute was upheld which directed that whenever a mechanic, artisan, miner, laborer, servant, or employé should recover for wages and had made demand in writing it should be the duty of the court to allow the plaintiff a reasonable attorney's fee.

In the opinion of the Supreme Court of the United States in *Ry. Co. v. Ellis*, hereinafter cited, it is stated that statutes have been sustained giving special protection to the claims of laborers and mechanics. In *R. R. Co. v. Dey*, 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. Rep. 477, a statute authorizing attorneys' fees upon recovery against a railroad company for violating an act regulating rates was held not to infringe the constitutional provision as to equality. In *Missouri Pacific Ry. Co. v. Merrill*, 40 Kan. 409, 19 Pac. 793, an attorney's fee was allowed in a suit for damages by fire caused by the railroad.

Although there was formerly some conflict and one or two cases taking an emphatic, opposite view (*Williamson v. Liverpool Co.* [C. C.] 105 Fed. 31; *Phenix Ins. Co. v. Schwartz*, 115 Ga. 113, 41 S. E. 240, 57 L. R. A. 752, 90 Am. St. Rep. 98), it seems to be now well settled that statutes providing for attorneys' fees upon recovery upon life and fire insurance policies are valid and enforceable. *British America Co. v. Bradford*, 60 Kan. 82, 55 Pac. 335; *Union Central Life Ins. Co. v. Chowning*, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504; *Merchants' Life Ass'n Co. v. Yoakum*, 98 Fed. 251, 39 C. C. A. 56; *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 355, 23 Sup. Ct. 126, 47 L. Ed. 204; *Mutual Life Co. v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L.

Ed. 922; *Farmers' & Merchants' Ins. Co. v. Dobney*, 189 U. S. 302, 23 Sup. Ct. 565, 47 L. Ed. 821. These were based upon the theory that the policy holders or beneficiaries are entitled to special protection under the police power.

Enactments authorizing the recovery of attorneys' fees in suits for damages for stock killed by railroads have been held valid in some states and unconstitutional in others. *Ry. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619; *Jolliffe v. Brown*, 14 Wash. 155, 44 Pac. 149, 53 Am. St. Rep. 868; *Lafferty v. Ry. Co.*, 71 Mich. 35, 38 N. W. 660; *R. R. Co. v. Morris*, 65 Ala. 193. In *Dow v. Beidelman*, 49 Ark. 455, 5 S. W. 718, the court said: "And such laws have been held to fall within the police power of the state. Here the damages are given by way of punishment to the company for its negligence in failing to build the fence. *Thorpe v. R. & B. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625; *Mo. Pac. Ry. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; *Johnson v. Chicago & R. Co.*, 29 Minn. 425, 13 N. W. 673. An attorney's fee may be included as a part of the penalty imposed for noncompliance with the duty imposed without rendering the statute obnoxious to the objection of being partial and unequal legislation. *P. D. & E. Ry. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619; *K. P. Ry. Co. v. Yanz*, 16 Kan. 583; *Missouri Pac. Ry. Co. v. Abney*, 30 Kan. 41, 1 Pac. 385." In *R. R. v. Crider*, 91 Tenn. 504, 19 S. W. 618, it was stated: "We have been cited to two cases which are supposed to support the contention of the learned counsel that the imposition of the reasonable fee of an attorney is invalid, as partial legislation. *Railroad v. Williams*, 49 Ark. 492, 5 S. W. 883; *Wilder v. Railroad*, 70 Mich. 382, 38 N. W. 289. * * * The view we have taken, that such added liability was but the imposition of additional damages and was a valid exercise of the police power, was never considered. Acts similar to our own in respect to this feature have been sustained by reasoning more satisfactory to us. *Railroad v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619; *Railroad v. Mower*, 16 Kan. 573; *Railroad v. Shirley*, 20 Kan. 660; *Railroad v. Abney*, 30 Kan. 41, 1 Pac. 385." In order to conform to the decision of the Supreme Court of the United States in *Ry. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, the Supreme Court of Missouri in *Paddock v. Mo. Pac. Ry. Co.*, 155 Mo. 537, 56 S. W. 453, reversed its former holding in *Perkins v. R. R.*, 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426, wherein they had followed the rule in Illinois instead of the opposite one in Michigan.

A Texas statute which had been sustained by the courts of that state, and which provided that any person having a valid claim, not exceeding \$50, for personal services rendered or labor done or for damages or for overcharges on freight, or claims for stock

killed or injured by the train of any railway company, and that if such claim were not paid within 30 days after presentation the claimant should be entitled to recover the amount of the claim and all costs of suit, and a reasonable attorney's fee not to exceed \$10, was held by the Supreme Court of the United States in *Gulf, C. & S. F. Ry. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, to deny the equal protection of the laws guaranteed by the fourteenth amendment. The Chief Justice and two of the justices dissented. Stripping the case of technical distinctions and looking to the facts and result *Ellis*, the owner of the colt killed by the railroad company, was not allowed an attorney's fee of \$10 upon his recovery of damages for the killing of the colt by the railroad, on the theory that the allowance of such a fee would deny to the company the equal protection of the laws. But in *R. R. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909, it was held that under the Kansas statute a party obtaining judgment for damage by fire caused by a railroad company could recover an attorney's fee, the same justice writing the decision in both cases, and four of the nine justices joining in an elaborate dissenting opinion. The conclusion of the court was based on the theory that the legislation was within the police power of the state, and partly that under the conditions prevailing there fires set by the negligence of the railroad companies to the grass on the prairies might spread for long distances and do great damage. In the decision it was said: "Many cases have been before this court involving the power of state Legislatures to impose special duties or liabilities upon individuals and corporations, or classes of them, and while the principles of separation between those cases which have been adjudged to be within the power of the Legislature and those beyond its power are not difficult of comprehension or statement, yet their application often becomes very troublesome, especially when a case is near to the dividing line. * * * The equal protection of the law which is guaranteed by the fourteenth amendment does not forbid classification. That has been asserted in the strongest language. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. In that case, after in general terms declaring that the fourteenth amendment designed to secure the equal protection of the laws, the court added (pages 31 and 32 of 113 U. S., pages 359, 360 of 5 Sup. Ct. [28 L. Ed. 923]): 'But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations, to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having

these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment. This declaration has, in various language, been often repeated, and the power of classification upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished. * * * It is also a maxim of constitutional law that a Legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the Legislature was one in the enactment of which it has transgressed its power. On the other hand, it is also true that the equal protection guaranteed by the Constitution forbids the Legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. * * * It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public."

It is also well settled in this state that the Legislature may make laws which apply only to certain classes if there is a reasonable basis for the classification. Citations of many cases indicating diversity of opinion regarding the validity of enactments providing for attorney's fees may be found in the cases we have cited, and in *Louisville Safety Vault & Trust Co. v. Louisville & N. R. Co.*, 14 L. R. A. 586, 9 Fed. Stat. Ann. 554, and *Farmers' & Mechanics' Ins. Co. v. Dobney*, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. Ed. 821. It has very generally been held and may be conceded that the Legislature may make laws regarding matters within the police power and provide penalties for their enforcement, and that instead of providing for a fine to be paid to the state may enact that extra damages or an attorney's fee in the nature of a penalty may be recovered by the injured party. *Mo. Pac. Ry. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463. In *Wallace v. Mayor and City of Reno*, 27 Nev. 71, 73 Pac. 531, 63 L. R. A. 337, 103 Am. St. Rep.

747, and in *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47, we held that the people, and through them the Legislature, had supreme power in all matters of government, where not restricted by constitutional limitations; and, adopting the language of the Supreme Court of the United States, we said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals." Notwithstanding any conflict in the decisions we have cited relating more directly to attorney's fees, it is apparent that our statute providing for the recovery of such fees by the owner of land upon which sheep are herded may be properly considered as not unconstitutional if the herding and grazing of sheep and live stock on the ranges are of great importance and essential to the welfare of the state.

Upon the coming of the white man our hills and valleys were covered with large quantities of feed suitable for sustaining and fattening domestic animals. To this day by far the greater part of the area of the state is valuable only for the grazing of live stock. There are large quantities of weeds and browse which cattle do not eat, but which sheep prefer. While the industries of the state were in their infancy large bands of cattle were driven here from Texas and other places and turned on the ranges, where they thrived upon the public domain, and during earlier years had sufficient forage in the open to sustain them summer and winter, and they increased and consumed the feed which became less plentiful. Homesteaders and settlers grew more numerous, and gradually came to occupy the more desirable portions of the land where water could be obtained for irrigation. Later than cattle sheep were brought into the state in large numbers and increased, until the raising of wool and the production of mutton has assumed large dimensions. It is the custom to herd sheep in bands of 2,000 or more, some men having one or a few bands and others many bands; some not being residents or citizens and owning little or no real estate and others having ranches and large amounts of land, but all dependent upon the ranges. As the number of settlers increased both the cattle and sheep became more numerous, the grasses were eaten down or tramped out, and the feed became more scarce and conflicts arose. Horses and cattle were and still are allowed to roam at will upon the public domain, and the owners of unfenced land cannot recover for the grasses they eat or destroy. We have no law requiring that they be kept within inclosures. The growers of live stock have the benefit of the forage which makes fat and in turn brings wealth. Naturally the owners of

both cattle and sheep desire to have their animals thrive upon the best feed. The man with a small farm, work horses, and a few cows is partly dependent upon the range adjacent to his ranch. One or more bands of sheep closely herded, eating the grass to the ground, and tramping with their sharp feet could soon destroy or greatly injure the feed near the ranches and convenient for horses and cattle. Sometimes the sheep were herded almost to the door and fields of the rancher, and when the feed had been eaten there it was easy for them to move on to other parts of the ranges and secure new forage which the rancher could not so well do with his cattle and horses. Many of the sheep are grazed hundreds of miles between their summer and winter ranges. Quarrels and assaults arose resulting in the killing of some of the stockmen, and necessitating expensive criminal investigations and trials. Not only did the homesteader and settler and the owners of sheep and others in whatever branch of stock growing engaged, who had open lands, need protection, but the increase of cattle, homes, and taxable property was being retarded. Under these circumstances it would seem that the raising of cattle and sheep and the production of beef and mutton for the table and of wool for clothing are of such great importance not only to those directly engaged in these profitable and extensive industries, but to the public in general, and that their protection and encouragement are so desirable and so essential to the welfare of the state as to justify their regulation by the Legislature.

The terms of the first statute, passed in 1889, against trespass by sheep and which was repealed by the one of 1893 under which this action was brought, as well as the one of 1903, indicate that they were enacted as police regulations. The former act made it unlawful for any person to herd or knowingly graze any live stock upon the lands of another without the consent of the owner, but required the boundaries of the land to be so marked that its extent or limits could be readily seen and easily traced, and that all taxes thereon had been paid, and declared that any person violating its provisions should be guilty of a misdemeanor, and on conviction be fined not to exceed \$500, and also provided that live stock herded or knowingly grazed on the lands of another contrary to the provisions of the act should be liable for double damages, together with costs of suit and reasonable counsel fees, and that the judgment should be a superior lien on the live stock. The Supreme Court of the United States, affirming the decisions of the Idaho courts, held valid an act of that state making it unlawful for any person owning, or having charge of sheep to herd the same on the land or possessory claims of other persons, or to permit them to graze within two miles of a dwelling house of the owner of such claim, and providing for the recovery of damages. It was said that the police power of the state

is not confined to the suppression of what is offensive, disorderly, or unsanitary, but embraces regulations designed to promote the public convenience or the general prosperity. The court arrived at the conclusion that the owner of the sheep was not deprived of his property without due process of law, and that no arbitrary or unreasonable discrimination against the sheep industry was made by that statute. *Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499.

In *C., B. & Q. Ry. Co. v. Ill.*, 200 U. S. 561, 26 Sup. Ct. 347, 50 L. Ed. 596, the Supreme Court of the United States quoted with approval the statement of the Supreme Court of Illinois that "where lands are valuable for cultivation, and the country depends so much upon agriculture, the public welfare demands that the land shall be drained, and that, in the absence of any constitutional provision in relation to such laws, they have been sustained upon high authority as the exercise of the police power." We do not wish to be understood as determining the validity of statutes providing for attorneys' fees in any kind of cases except the one before us, nor as adopting any of the decisions cited further than they establish that such fees as penalties may be imposed when the statute is within the police power, and the opinions of the Idaho courts and of the Supreme Court of the United States holding that the Idaho statute making damages recoverable for herding sheep on the public domain within two miles of a dwelling house is within that power.

If the principles promulgated in these cases are sound, as we believe and as generally conceded, it follows that the provision in our statute for an attorney's fee in favor of the party recovering damages is a proper police regulation intending to prevent trespass, tortious acts, and breaches of the peace, to encourage settlement and home building, to protect important industries, to increase population and taxable property, to decrease crime and the expense of criminal trials, and consequently to promote the welfare of the state, and therefore that the statute was properly enacted by the Legislature and is not in conflict with the fourteenth amendment nor with section 21 of article 4, or any other provision of the state Constitution. If the question were uncertain, doubts regarding the validity of the act would be resolved in its favor as often held by this and other courts.

If within 15 days from the publication of this decision the respondent files its consent in this court that the judgment be modified so as to reduce the amount of damages to be recovered from \$600 to \$400, the district court will be directed to modify the judgment accordingly, and, as so modified, it will stand affirmed.

If such consent is not so filed, the case will be remanded for a new trial.

NORCROSS and SWEENEY, JJ., concur.

HUBBARD v. TERRITORY.

(Supreme Court of Oklahoma. April 14, 1908.)

CRIMINAL LAW—INFORMATION—AMENDMENT.

An information charging defendant with imputing to a female a want of chastity, under an act approved March 13, 1905 (Sess. Laws 1905, p. 196, c. 13), cannot be so amended, after acquittal, as to charge defendant with lascivious language in a public place, under Wilson's Rev. & Ann. St. Okl. 1903, § 1959, without being sworn to as provided in section 1883 of said statute.

(Syllabus by the Court.)

Error from Probate Court, Grant County; A. C. Glenn, Judge.

A. E. Hubbard was convicted of crime, and brings error. Reversed.

On July 24, 1905, there was filed in this cause in the probate court of Grant county, Oklahoma Territory, the following information:

"Territory of Oklahoma v. Bert Hubbard.
"Information.

"I, the undersigned, county attorney of said county, in the name, by the authority, and on behalf of the territory of Oklahoma, give information that on the 22d day of July, A. D. 1905, in said county of Grant and territory of Oklahoma, one Bert Hubbard did then and there unlawfully, willfully, falsely, maliciously, and wantonly impute to a certain female, then and there a resident of Oklahoma territory, a want of chastity, by the use of the following language, to wit: '* * * (meaning Mona M. Godfrey) and he can't help it'—contrary to the form of the statute in such cases made and provided and against the peace and dignity of the territory of Oklahoma. F. G. Walling, County Attorney.

"Territory of Oklahoma, County of Grant—ss.:

"I do solemnly swear that I have read the above and foregoing information, and the statements therein contained are true.

"John Needels.

"Subscribed and sworn to before me this 24th day of July, 1905.

"[Seal]

A. C. Glenn.

"I have examined the facts in this case and recommend that a warrant issue.

"F. G. Walling, Co. Atty."

On the same day a warrant of arrest was duly issued for the defendant. On September 16, 1905, defendant appeared in court and waived arraignment and was released on bond. On November 15, 1905, he filed a demurrer to the information, which was overruled, to which he excepted, pleaded not guilty, waived a jury, and was tried by the court. Upon all the evidence submitted on both sides the court found the defendant not guilty of imputing a want of chastity to a female, as charged in the information, but found him guilty of using obscene language in a public place; and thereupon the court per-

mitted the prosecution to amend the information to charge the offense of using obscene language in a public place by writing into the said information as filed the words: "Said language being uttered and made in a public place in said county, to wit, in the town of Nashville, on the public streets of said town, in the presence of a great many persons"—to all of which amendment and alteration of the original information, and as to the finding defendant guilty of using obscene language in a public place, the said defendant objected and excepted, which objections and exceptions were overruled by the court. The defendant then asked to be discharged, which was by the court denied and refused, to which the defendant excepted. The court thereupon offered to permit said cause to be continued to give the defendant opportunity to offer further testimony, and to reopen the case and hear evidence on behalf of defendant in rebuttal of said charge, which defendant said he did not desire to do, or have the cause reopened, or offer further testimony, but insisted on being discharged under the finding by the court. Thereafter defendant duly filed a motion for a new trial, which was overruled by the court, to which ruling defendant excepted, and filed his motion in arrest of judgment, which was overruled by the court, to which ruling defendant also duly excepted, whereupon the court sentenced him to serve a term of 10 days in the county jail and to pay a fine and the costs of this action, in all \$90.05, to which the defendant objected and excepted, and has brought his case for review to this court on petition in error and case-made.

Sam P. Ridings, for plaintiff in error.
Charles West, Atty. Gen., and W. C. Reeves, Asst. Atty. Gen., for the State.

TURNER, J. (after stating the facts as above). Plaintiff in error insists, among other assignments of error, that "the court erred in permitting defendant in error to amend the information after the case was closed and to charge another distinct offense." The offense charged in the information, before amendment, is defined in an act approved March 13, 1905 (Sess. Laws 1905, p. 196, c. 13), which reads: Section 1: "If any person shall orally or otherwise, falsely and maliciously or falsely and wantonly impute to any female in this territory, married or unmarried, a want of chastity, he shall be deemed guilty of slander, and upon conviction shall be fined not less than twenty-five dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than ninety days, or by both such fine and imprisonment." Said information, as amended, charges a wholly different offense, which is defined in Wilson's Rev. & Ann. St. Okl. 1903, § 1959, which reads: "If any person shall utter or speak any obscene or lascivious language or word in any public place, or

in the presence of females, or in the presence of children under ten years of age, he shall be deemed guilty of a misdemeanor, and upon conviction thereof before any justice of the peace of this territory, he shall be liable to a fine of not more than one hundred dollars, or imprisonment for not more than thirty days, or both, at the discretion of said justice."

Under the very liberal practice laid down in section 1883 of said statutes, the trial court was authorized to permit the amendment complained of by complying with that statute, which reads: "All criminal actions prosecuted in the probate court shall be brought in the same manner as similar actions in the justice courts; or shall be upon information of the county attorney based upon a sworn complaint and shall be under his direction and control; and warrants shall issue the same as in the justice courts: Provided, if any complaint or information be adjudged defective or insufficient it may be amended to any extent and sworn to until it is sufficient, and if the evidence fails to prove the crime charged, but tends to prove any other crime the information may be amended to charge the crime which the evidence tends to prove; and if that be a felony the trial shall be suspended and the accused shall be proceeded against by preliminary examination and bound over or discharged as the court shall deem just under the evidence. If the information or complaint be amended, the court shall see that the defendant is not prejudiced thereby and if justice requires it shall grant to the accused time to prepare his defense to the information or complaint as amended." But the court was not authorized to permit said amendment unless the information was afterwards sworn to, as provided in that section. It appears from the record that the information, after amendment, was not sworn to or based upon any sworn statement whatever.

The conviction of this defendant under this amended information was therefore erroneous, and the judgment of the lower court must be reversed; and it is so ordered. All the Justices concur.

(20 Okl. 576)

UNITED STATES FIDELITY & GUARANTY CO. v. SHIRK et al.

(Supreme Court of Oklahoma. April 13, 1908.)

1. PRINCIPAL AND AGENT—AUTHORITY.

One who, by his conduct, has led an innocent party to rely upon the appearance of another's authority to act for him, will not be heard to deny the agency to that party's prejudice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 254-261.]

2. SAME—RATIFICATION.

One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies the act, and takes it as his own, with all its burdens, as well as all its benefits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 644-655.]

3. SAME—KNOWLEDGE OF AGENT.

The law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority, or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 685-688.]

(Syllabus by the Court.)

Error from the United States Court for the Northern District of the Indian Territory; William R. Lawrence, Judge.

Action by John C. Shirk and Martha Goodwin against the United States Fidelity & Guaranty Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Wilson and Davis and W. S. Stanfield, for plaintiff in error. W. H. Kornegay, for defendants in error.

KANE, J. This was an action commenced by the defendants in error, plaintiffs below, who, for convenience, will hereafter be called the plaintiffs, against the United States Fidelity and Guaranty Company, plaintiff in error, defendant below, who will hereafter, for convenience, be called the defendant, to recover on a redelivery bond given in a certain replevin suit, wherein John C. Shirk et al. were plaintiffs and Jeff Davis was defendant. When the property in controversy was taken under the writ of replevin, Jeff Davis as principal gave a redelivery bond with, as is contended by the plaintiffs, the United States Fidelity & Guaranty Company as surety. The plaintiffs in the replevin suit prevailed, and, being unable to recover possession of the property replevied or the value thereof from the principal, Jeff Davis, commenced this case to recover on the redelivery bond. The cause was tried to a jury in the court below which resulted in a verdict for the plaintiffs, and a judgment thereon was duly rendered. The defendant appealed from the judgment of the court below, assigning as grounds for reversal various errors.

The main question, though, argued in the brief, has to do with the signing of the redelivery bond. The defendant contends that it had two joint agents at Vinita authorized to execute and deliver indemnity bonds; that these agents were acting under a written power of attorney dated the 31st day of May, 1899, whereby defendant did "constitute and appoint O. D. Neville and James B. Burckhalter, of the city of Vinita, Cherokee Nation, Indian Territory, to be its true and lawful attorneys in and for the Northern judicial district of the Indian Territory, for the following purposes, to wit: To sign its name as surety to and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds, and undertakings given or required in any judicial ac-

tion or proceeding brought or pending within the aforesaid district of the said territory. It being the intention of this power of attorney to fully authorize and empower the said O. D. Neville and James B. Burckhalter to sign the name of said company and affix its corporate seal as surety to any or all of said stipulations, bonds, and undertakings, and thereby to lawfully bind it as fully and to all intents and purposes as if done by the duly authorized officers of said company with the seal of said company thereto affixed, and the said company hereby ratifies and confirms all and whatsoever the said O. D. Neville and James B. Burckhalter may lawfully do in the premises by virtue of these presents." It is admitted by counsel for defendant in their brief that the redelivery bond was signed by the United States Fidelity & Guaranty Company by O. D. Neville, who was at that time one of two joint agents under the power of attorney, but they insist that O. D. Neville and James B. Burckhalter were jointly authorized to sign for the company, and the signature of the company by Neville alone was not binding.

The redelivery bond was lost, and could not be produced at the trial of the cause below, and secondary evidence was introduced to prove the contents thereof, as well as the form of the signature. Plaintiff also sought to establish the agency of Neville by oral evidence. The written power of attorney from which we quote above, and another written instrument executed on the 11th day of May, 1899, appointing Neville general agent of the defendant, were identified by Neville on cross-examination by counsel for defendant and by him introduced in evidence. The written instrument last referred to had the following clause: "This is to certify that O. D. Neville, of Vinita, in the state of Indian Territory, the duly authorized agent of the above company, with full power to solicit and receive proposals for such fidelity, official contract, and judicial bonds as may be written by said company in the Indian Territory, to receive the premiums thereon and to issue such bonds of such company as are signed by the president, or first or second vice presidents and secretary or assistant secretary and sealed with the corporate seal, subject to all the rules and regulations, and to such instructions as may from time to time be given him by said company. Nothing herein contained shall in any way restrict or abridge the authority granted said O. D. Neville under the power of attorney given by this company to sign bonds." Mr. Neville, in his testimony, seemed to be in doubt as to which authorization he was acting under when he executed the bond in this case, but he stated that he usually signed the bonds executed under his agency by signing the name of his principal by himself as agent, and that Mr. Burckhalter occasionally signed also. He was not sure whether Mr. Burckhalter sign-

ed the bond in this case with him; but he states that he thought he did. This evidence of Mr. Neville was all that was adduced at the trial upon which the defendant bases its claim that Mr. Neville signed the bond alone. Mr. Neville, though, was sure that the redelivery bond was executed, and the premium therefor collected and forwarded to the defendant at its home office. Mr. Neville and other witnesses testified that the defendant never made any complaint as to the form of the signature to the bond, or raised any objections to its validity until after the judgment was rendered against Jeff Davis for a return of the property retained by him in the replevin suit, and the defendant discovered that Davis could not return the property or its value. Evidence was also introduced by the plaintiff tending to show that Mr. Neville, at the time he was agent for the defendant under the same appointment as when he executed the bond in this case, signed the name of the defendant to several other indemnity bonds without having Mr. Burckhalter join in the execution, and the defendant accepted the premiums without questioning the form of the signature. The introduction of this class of evidence was objected to by defendant, and is one of the grounds of error assigned. We think there was no error in admitting this evidence under the circumstances of this case. The nature of the agency did not necessarily require a written authorization; and, if it could be shown that the principal and agent themselves voluntarily abandoned the strict terms of the written appointment, it would be a hard rule to permit the principal to allow its agents to execute indemnity bonds without regard to the form of their appointment, and receive the premiums therefor as long as there was no loss, but upon a loss occurring insist on the exact letter of their compact. "A large portion of the transactions of the modern business world is carried on by simple and informal means. A word or a look or gesture often suffices to give assent to great undertakings, or to set in motion the complicated machinery of commerce. Little often is said or written, but that little carries with it a train of legal consequences no less certain and definite than if the whole were included in the spoken or written words. This being so, good faith is strenuously insisted upon, and one who by his conduct has led an innocent party to rely upon the appearance of another's authority to act for him will not be heard to deny the agency to that party's prejudice. Hence it is that in many cases the existence of an agency is implied or presumed from the words or conduct of the parties." *Mechem on Agency*, § 83. Besides, this evidence was admissible to show the construction the principal and agent put upon their own contract of appointment. It is somewhat unusual to insist that the actual manual act of signing the name of a principal to a written instru-

ment must be done by two persons where the agency is joint, in order to give effect to the instrument. No case is called to our attention where, under the facts existing here, such an omission is held to be fatal to the validity of a contract thus executed, nor have we been able to find one. Hence we would be loath to give this contract of appointment such a construction as would destroy the validity of the redelivery bond when the principal and agent in cases where no loss occurred have not done so. It is apparent from the evidence that the construction put by Neville on his authority during the time he was acting as agent of the defendant was that he had the power to execute bonds with or without the signature of Burckhalter; and that the company ratified such acts, and received premiums for all bonds executed by Neville alone without question, is also apparent.

In the case of the District of Columbia v. Gallaher, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526, Mr. Justice Matthews, speaking for the Supreme Court of the United States, says: "We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract." It is a rule of universal application that: "He who would avail himself of the advantages arising from the act of another in his behalf must also assume the responsibilities. If the principal has knowingly appropriated and enjoyed the fruits and benefits of an agent's act he will not afterwards be heard to say that the act was unauthorized. One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies the act, and takes it as his own with all its burdens, as well as all its benefits. He may not take the benefits and reject the burdens, but he must either accept them or reject them as a whole." *Mechem on Agency*, § 148. To avoid the force of the above rule, counsel for defendant insists that the defendant had no notice that Mr. Neville was signing its name to bonds without Mr. Burckhalter joining. This contention, though, cannot be upheld. The evidence shows that Mr. Neville signed practically all the bonds executed while he was acting under the same appointment in force at the time he executed the bond sued on herein without Mr. Burckhalter joining in the signatures. Indeed, this was the rule rather than the exception, so it cannot now be said with any degree of reason that the defendant had no notice of the manner its agent was executing these bonds. The execution of such instruments being within the scope of the agency, "the law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within

the scope of his authority, or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it, provided, however, that such notice or knowledge will not be imputed (1) where it is such as it is the agent's duty not to disclose; and (2) where the agent's relations to the subject-matter, or his previous conduct, render it certain that he will not disclose it; and (3) where the person claiming the benefit of the notice or those whom he represents colluded with the agent to cheat or defraud the principal." *Mechem on Agency*, § 721. There is no evidence in the record tending to show that this case falls within the exceptions to the rule stated by Mr. Mechem.

It was not error for the court to refuse to grant the motion of defendant for a peremptory instruction to return a verdict in its favor. While there seems to be no particular dispute on the facts except as to the agency of Mr. Neville, we think the court below adopted the proper practice in submitting the conflicting evidence on this point to the jury. There being evidence reasonably tending to support the verdict, it will not be disturbed. The instructions given by the court state the law applicable to the correct theory of the case with substantial accuracy. The instructions asked by the defendant and which the court refused to give were all predicated upon the theory that the iron-clad terms of the written power of attorney absolutely precluded the plaintiffs from recovering and excluded the theory of estoppel, or the ratification of the agent's acts by the principal. If the court had adopted this theory, a peremptory instruction would have been all that was necessary, and the only one that would have been proper. We believe this theory was untenable, and the instructions were properly refused.

From a careful review of the proceedings had in the court below, we are convinced that there was no error justifying a reversal of the judgment.

It is therefore affirmed. All the Justices concur.

(20 Okl. 763)

GILLESPIE et al. v. FIRST NAT. BANK OF KINGFISHER.

(Supreme Court of Oklahoma. April 14, 1908.)

1. BILLS AND NOTES—ACTIONS—EVIDENCE.

The plaintiff in an action upon a negotiable promissory note by introducing in evidence the note and indorsement of the payee thereon in blank prima facie establishes his case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1800.]

2. EVIDENCE—STATEMENTS OF AGENT—RES GESTÆ.

Statements made by the cashier of a bank in conversations with one of the makers of a promissory note made 18 months and 4 years after the assignment of the note to the bank and after suit had been instituted thereon as to

how the bank held the note are not admissible as part of the *res gestae* when it is not shown that the cashier acted for the bank in the transaction by which the note was assigned to it, and when there was no transaction pending at the time of the conversations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 351-361.]

8. ABATEMENT—DEATH OF JOINT DEFENDANT.

When, in an action upon a joint and several promissory note against the makers thereof, it is developed by the evidence, during the trial, that one of the defendants has died since the action was filed and service had, the action abates only as to the deceased defendant, and, upon verdict returned against all the defendants, the court may render judgment against the surviving defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 322-329.]

(Syllabus by the Court.)

Error from District Court, Blaine County; M. C. Garber, Judge.

Action by the First National Bank of Kingfisher against Ed Gillespie and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Woolman & Ferguson, for plaintiffs in error. Matthew John Kane, for defendant in error.

HAYES, J. This action was begun in the district court of Blaine county, on the 8th day of September, 1903, by the First National Bank of Kingfisher, as plaintiff, against Ed Gillespie, Charles Hatje, Geo. C. Boland, and A. A. McGregor, as defendants. The action is on a promissory note alleged by plaintiff in its complaint to have been executed by defendants on January 2, 1902, for the sum of \$1,000, payable on or before June 1, 1902, to the order of E. J. Kelly. Plaintiff alleges that it became the owner of said note for a valuable consideration before maturity; that said note was assigned to it by E. J. Kelly without recourse. Defendants in their answer to the plaintiff's complaint make a general denial of each and all the allegations thereof except such as are admitted by them in their answer. They admit that they signed and delivered the note to E. J. Kelly, and say that the consideration for the same was a contract or agreement by and between them and E. J. Kelly to the effect that E. J. Kelly represented to them that he had full power and authority to sell to them the right to locate townsites on the Enid & Anadarko Railway between Geary, Okl., and Anadarko, Okl., and that he would convey to the defendants the necessary information as to where said townsites were to be located, and give them complete and exclusive control over the same and convey such information to them that they might proceed to purchase lands at such places as might be designated for towns, and that in consideration of said agreement they, in addition to executing to E. J. Kelly the note sued upon, agreed to pay to him 25 per cent. of the net profits of the sales of property for said townsites. They allege

that E. J. Kelly failed to carry out his contract with them, and did not notify them of the location of the towns as agreed, but that he proceeded to locate said towns himself and sell the same and appropriate the proceeds thereof. They further specifically deny that the plaintiff is the owner of the note for value, and allege that it is using its name in said proceeding for and on behalf of E. J. Kelly, and they further allege that plaintiff claims that it is holding said note as collateral security to secure another note for the sum of \$2,500 executed to plaintiff by Kelly Bros., a partnership of which E. J. Kelly is a member, and allege that the plaintiff had formerly held other securities to secure the payment of said \$2,500 note of Kelly Bros., and that a portion of the other securities had been surrendered by plaintiff without notice to or consent of the defendants; that if the plaintiff had retained all the securities they would have been sufficient to have fully paid said note of \$2,500, and that by surrendering said securities without the consent of defendants or notice to them they have been damaged.

Plaintiff introduced in evidence, without objection by the defendants, the note sued upon, with the indorsement thereon: "Without recourse on me. E. J. Kelly, April 7, 1902." Without introducing further evidence plaintiff rested its case. After the defendants had offered evidence in support of their answer, plaintiff demurred to the same, which was sustained by the court, and thereupon moved the court to instruct the jury to return a verdict for the plaintiff which instruction was given, and the jury returned a verdict in favor of the plaintiff for the amount of the note. Defendants make 27 assignments of error in their petition, but in their brief they have discussed only matters involved in three of said assignments of error, and the court will therefore treat the other assignments of error as having been abandoned by them.

The note sued upon was a negotiable instrument. The production in evidence of the note indorsed in blank *prima facie* established its case. 1 Daniel on Negotiable Instruments, par. 812; 8 Cyc. 229; Winfield Bank v. Bettie McWilliams, 9 Okl. 493, 60 Pac. 229; Seymour Price et al. v. Winnebago National Bank, 14 Okl. 268, 79 Pac. 105. The evidence of defendants establishes that the consideration for which the note was executed by them was substantially as set forth in their answer, but there was neither any allegation by them in their answer nor any proof that plaintiff had notice of such facts before it became the owner of the note, or notice that such consideration had failed in whole or in part. There is no allegation or proof of mala fides of plaintiff. There is no evidence that the execution of the note by defendants was illegally or fraudulently obtained, but the evidence is to the effect that Kelly, the payee in the note, refused to carry out his

contract. Proof by defendants that the note was executed without consideration by them, or that the consideration, originally valid, had subsequently failed, was not sufficient to shift the burden of proof upon the plaintiff to show that it was a bona fide holder for value. 1 Daniel on Negotiable Instruments, par. 814.

George C. Boland, one of the defendants, testified that he went to plaintiff's place of business on the 24th day of October, 1903, which was after the institution of this suit, to converse with the officers of the bank about the note in controversy. He testified that at the time of this visit George Newer, the cashier of the bank, stated to him that the note sued upon in this action was held by the bank as collateral security to secure the payment of a note for the sum of \$2,500, dated the 15th day of September, 1903, signed by E. J. Kelly and his brother, T. B. Kelly. He testified that he visited the bank a second time on the 15th day of January, 1906, and that he again had a conversation with Newer, the cashier of the bank, and he testified that he was permitted by Newer to examine the books of the bank; that he formerly had been an assistant cashier of a bank for five years and was acquainted with the system of bookkeeping in banks. The defendants offered to prove by him what entries he found upon the books of the bank relative to the \$2,500 note to secure the payment of which they claimed the note in controversy was assigned to the bank as collateral. They offered to prove by him that the entries on the books of the bank showed that said note had been paid. Upon objection by plaintiff to this testimony, the court refused to permit Boland to testify as to the same. Defendants also offered to prove that Newer, the cashier, stated to Boland at this time that the note for \$2,500, dated September 15, 1903, executed by the two Kelly brothers, for the securing of which the note in this action was assigned by E. J. Kelly to the bank. It is of the action of the court in rejecting all this evidence that plaintiffs in error complain. It is insisted by them that this evidence was competent for the purpose of showing that the bank was not the owner for a valuable consideration of the note at the time of the trial. Defendant in error insists that this evidence offered by defendants is the declaration of an agent of plaintiff as to past transactions, and cannot be binding upon plaintiff. It is the theory of plaintiffs in error that such statements were made by the cashier in the transaction of business within the scope of his authority, made at the time of such transaction, and was part of the *res gestæ* and competent as evidence. The assignment of the note bears date April 7, 1902, and there being no proof to the contrary it will be presumed that the assignment of the note was made to the bank on that date. 8 Cyc. 232.

The first conversation had between witness Boland and Newer, the cashier of the

bank, was had in October, 1903, 18 months after the assignment of the note to plaintiff. His testimony is that at that time he asked the cashier to permit him to see the note which the cashier did, and that he asked him (the cashier) how he held the note, and the answer of the cashier was that it was held as collateral to the \$2,500 note, which answer was withdrawn from the jury by the court. His second visit to the bank was in January, 1906, nearly four years after the assignment of the note to the bank, and he offered to testify that in this conversation the cashier told him that the \$2,500 note of the two Kelly brothers, for the security of which it is claimed by the defendants the note in controversy was collateral, had been paid. The court excluded this testimony. It is the contention of plaintiffs in error that the same should have been admitted as a part of the *res gestæ*. The *res gestæ* in this action was the fact of the assignment of the note sued upon by E. J. Kelly to the defendant in error, and the nature of such assignment. There is no evidence whatever in the record that this transaction occurred between Kelly and Newer, as cashier of the bank, or that Newer had anything whatever to do with the transaction by which the bank became the assignee and holder of the note. Declarations and admissions of the officers and agents of a corporation may be proved against the corporation as part of the *res gestæ* when the same are made during the agency of such officer or agent making such declarations or admissions, and when the same are in regard to a transaction depending at the very time, but they cannot be admitted if made as a narrative of a past act subsequent to the transaction. Abbott's Trial Evidence, 55; 1 Greenleaf on Evidence, 172; Zane on Banks & Banking, 169. There is no evidence in this case of any transaction pending at the time of the conversations of Boland with Newer. Boland stated that on the first visit to the bank he told Newer his business, and that he wanted to see the note, referring to the note sued upon, but the evidence does not disclose what his business was, and it is the contention of counsel for the plaintiffs in error that the visits of Boland to the bank were for the purpose of seeking an inspection of the instrument upon which suit was brought, as authorized by section 4555 of Wilson's Rev. & Ann. St. 1903. Clearly, then, the transaction, if it can be said to be a transaction at all, between Boland and Newer was not one pertaining to the assignment of the note to the plaintiff, and any statement made by Newer at such time about the transaction that occurred 18 months prior thereto, and in which it is not shown that Newer acted as agent for the bank, cannot be said to be a part of the *res gestæ* of the transaction by which the bank became the owner of the note. Entries made upon the books of the bank showing how the note sued upon was held by the bank would

have been competent evidence, but it was not competent for Boland to testify as to what entries he saw upon the books at the time he visited the bank when no effort was made to show that the books themselves, which were the best evidence, could not be obtained and offered in evidence.

Our attention has been called to the case of *Bank of Monroe v. Field et al.*, 2 Hill (N. Y.) 445, as supporting the theory of defendants in this case. The facts in that case, which was an action upon a promissory note made by defendants to the bank, were that one of the defendants was requested by the president of the bank to pay the note in question. The defendant, so requested, called at the bank and explained to the president of the bank that he had paid the note to him. The president of the bank and this defendant made an examination of the books of the bank, and upon such examination, the president of the bank admitted that the note had been paid to him, and that he had accounted to the bank for it. The court held that the admission of the president of the bank was admissible as part of the *res gestæ*, but in that case the declarations of the officer were made by him while he was acting in the discharge of his duty in endeavoring to collect the note committed to him for that purpose, and at a time when he had examined the records of his principal and spoke with full knowledge of the facts disclosed by the books of his principal. In the case at bar there was no transaction between the witness Boland and Newer, the cashier of the bank, at the time of the conversations. The interest of the bank in the note sued upon was determined by its contract with Kelly, which had occurred long prior to these conversations. The defendant Boland was seeking information relative to his note, and any information given by the cashier as to how the bank acquired said note, when it is not shown that the transaction by which the bank acquired the note was made by Newer as cashier of the bank, and when it appears that this conversation took place at a time far remote from the time the bank acquired the note, and the statements made by the cashier were no part of the transaction, were no part of the *res gestæ*, but were conversations about a past transaction which would not be binding upon the bank. *Franklin Bank v. Steward*, 37 Me. 519; *Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515; *First National Bank of Canton v. North*, 6 Dak. 139, 41 N. W. 736, 50 N. W. 621; *Hazleton v. Union National Bank of Columbus*, 32 Wis. 34; *Larue v. St. Anthony & D. Elv. Co.*, 3 S. D. 637, 54 N. W. 806. *First National Bank of Xenia v. Daniel M. Stewart et al.*, 114 U. S. 224, 5 Sup. Ct. 845, 29 L. Ed. 101, has been cited by the plaintiffs in error as supporting their contention in this case. In that case the declarations of the

cashier of the bank, introduced in evidence, were declarations made by him in conversations with the witness at two different times. The second of which conversations occurred some two months after the principal transaction, but the Supreme Court of the United States, in holding that the declarations made in the second conversation were admissible, states that the second conversation was part of a treaty between the witness and the cashier of the bank commenced on the former date some two months prior thereto. The conversations between the cashier of the plaintiff in this case and the defendant Boland were no part of any treaty or dealing between the defendants and the bank. Suit had already been instituted upon the note, and the only purpose of defendant Boland's visits to the bank at the time the conversations occurred, as contended by counsel, was for the purpose of obtaining information as to the records of the bank under the provisions of the statutes. Neither the cashier of the bank nor any of the other officers or agents thereof were called by defendants to establish how the bank became the owner and holder of the note, and there being no evidence in the record to rebut the presumption created by plaintiff's evidence that it was the owner of the note, and that the same had been assigned to it for value before maturity, the court did not err in directing the jury to return a verdict for the plaintiff.

The note sued upon in this case is a joint and several note. During the progress of the trial, it developed that A. A. McGregor, one of the defendants, had died since the institution of the suit. The jury, upon the direction of the court, returned a verdict as to all the defendants. On motion for a new trial, the court overruled the motion, and entered judgment against all the defendants except A. A. McGregor. Plaintiffs in error contend that this action of the court was error; that the plaintiff, having elected to sue all the defendants jointly, and the action not having been revived as to the defendant A. A. McGregor, the action of the court in directing a verdict against the defendants, not excepting the defendant McGregor, was error which the court could not correct by rendering judgment against all the defendants except A. A. McGregor. This contention is without merit. The death of one of several defendants sued jointly on a contract abates only the action as to him, and the action continues against the surviving defendants. 5 Ency. Plead. & Prac. 837, and the authorities there cited. An order made by the court subsequent to the death of A. A. McGregor affecting him was to the extent that the same affects A. A. McGregor or his estate as if made before the action had been revived—was void. The court was without jurisdiction to enter a judgment against defendant A. A. McGregor, and his action in refusing to do

so in no way prejudiced the rights of the other defendants.

The judgment of the lower court is affirmed.

WILLIAMS, C. J., and DUNN and TURNER, JJ., concurring. KANE, J., disqualified, not sitting.

FOSTER LUMBER CO. v. ARKANSAS VALLEY & W. RY. CO.

(Supreme Court of Oklahoma. April 13, 1908.)

1. EMINENT DOMAIN—INJURIES TO PROPERTY—RIGHT OF ACTION.

One who owns the equitable title to real property and is in possession of same may maintain an action for permanent injuries thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 789.]

2. SAME—RAILROADS IN STREET.

An abutting property owner whose means of access to his property has been cut off or materially interrupted by the building of a railway track upon the street in front of said property may recover damages therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 282-290.]

(Syllabus by the Court.)

Error from District Court, Noble County.

Action by the Foster Lumber Company against the Arkansas Valley & Western Railway Company. Judgment for defendant and plaintiff brings error. Reversed and remanded.

This action was brought by the plaintiff in error as plaintiff in the district court of Noble county, Oklahoma Territory, against defendant in error as defendant, seeking to recover damages alleged to have been sustained by plaintiff in error on account of the construction of a railway by the defendant in error upon one of the streets in the city of Perry. Plaintiff alleges in its petition that it is the owner of two certain lots in the city of Perry fronting upon A street, a public street in said city, and that about the 1st day of October, 1903, the defendant, without the consent of plaintiff, erected a large fill immediately in front of the plaintiff's property, and built in front of said property a steam railway track a distance of about 20 feet from the curb line of plaintiff's property, thereby greatly obstructing the means of ingress and egress to and from said lots and rendering them unfit for business purposes, and that, on account of such obstruction, said property of the plaintiff was diminished and depreciated in value in the total sum of \$3,000. A second cause of action was alleged in plaintiff's complaint, but, as same appears to have been abandoned by plaintiff in the trial of the case, we do not consider it necessary to make further reference to same. Defendant filed its answer, and denied that plaintiff was the owner of the lots at the time said railway was built by it, and at the time said damages alleged to have been sustained by plaintiff occurred, and further aver-

red that it had obtained from the city of Perry a grant, granting to it the right to use and occupy certain of the parks, streets, and alleys in the city of Perry; that A street is one of the streets, the use of which for railway purposes had been granted to it by the city of Perry, and that it erected railway tracks, roadbeds, and switches complained of in plaintiff's petition on said street by virtue of and under the authority conferred and granted to it under the ordinance of the city of Perry granting it the right to build upon said street a railway. Plaintiff introduced evidence to sustain the allegations of its complaint, and rested its case. Thereupon defendant demurred to the plaintiff's evidence, which was sustained, and judgment rendered for defendant. A further statement of facts will appear in the opinion of the court.

H. B. Martin and D. M. Tibbetts, for plaintiff in error. James B. Diggs and Flynn & Ames, for defendant in error.

HAYES, J. (after stating the facts as above). Plaintiff introduced in evidence in support of its allegation of ownership of said lots a deed from Timothy McGrath, Amos B. Fitts, and Fred L. Bailey, as trustees for the townsite of Perry, Okla., to Thomas S. Foster, of date the 2d day of April, 1895, conveying to the said Thos. S. Foster lots 7 and 8, in block 46, in the city of Perry, and being the lots involved in this action, and further introduced in evidence a deed of date the 25th day of July, 1896, from Thos. S. Foster, conveying said lots to Benj. B. Foster. The deposition of Benj. B. Foster was then read in evidence, by which it was proved that about the time of the opening of the townsite of Perry said Thos. S. Foster and Benj. B. Foster, as a partnership, were engaged in the lumber business in the city of Perry; that said partnership occupied said lots as a lumber yard during the existence of the partnership; that later there was organized the Foster Lumber Company, a corporation, to whom was sold all the property and assets including the real estate of the partnership theretofore composed of Thos. S. Foster and Benj. B. Foster; that from the time of the opening of the townsite of Perry said lots had been occupied either by the partnership or by the plaintiff in this action; that while the deed to said lots was taken in the name of Thos. S. Foster, who afterwards conveyed the same to Benj. B. Foster, the purchase price of same was paid out of the funds of the partnership, and that said lots never, in fact, belonged to either of the Fosters, but was at all times the property of the partnership, and that, when the assets of said partnership were sold to the Foster Lumber Company, plaintiff in error, said lots were sold to and became the property of said Foster Lumber Company, but that no deed of conveyance was ever executed by Benj. B. Foster to the plaintiff; that the Foster Lumber Company paid for all the

improvements on the lots, which amounted to something over \$1,000, and that said company had paid the taxes thereon. To the introduction of this testimony defendant objected. The court at the time sustained the objection as to part of same, and, later upon motion of defendant, struck out all that part of the deposition that tended to prove that plaintiff was the owner of said lots, and that, while the legal title to the same was in Benj. B. Foster at the time the alleged damages were sustained and at the time of the trial, he had no interest whatever in said lots; that he had never occupied or been in possession of the same; and that said lots had been paid for by plaintiff, and had been occupied by it as a lumber yard for a number of years.

To the action of the court rejecting said evidence, plaintiff in error makes his first assignment of error. The question presented by this assignment of error resolves itself into the proposition whether an action for damages to real property may be maintained by the holder of the equitable title. If it cannot, then said evidence was incompetent. The evidence offered by plaintiff and excluded by the court tended to prove that Benj. B. Foster held at the time of the trial and at the time of the alleged injuries involved in this action the legal title to said lots as the trustee in resulting trust for the benefit of the plaintiff. It is contended by defendant in error that this action, being for the recovery of permanent injuries or damages to the freehold, cannot be maintained by any other person than the one holding the legal title to the property injured. Sutherland on Damages, § 1012, says: "Damages in this action [referring to an action for trespass] may be such as are appropriate to the tenure by which the plaintiff holds, and such as result from the injury suffered. Possession alone will entitle him to recover damages for any injury solely affecting it. If he seeks to recover for the future, he must show that his title gives him an interest in the damages claimed, and he can recover none except such as affect his own right, unless he holds in such relation to the other parties interested that his recovery will bar their claim." In the case of *Hueston v. Mississippi & Rum River Boom Co.*, 76 Minn. 251, 79 N. W. 92, the plaintiff sought to recover damages resulting to a certain mill and lands adjacent thereto by reason of the defendant's having built on an island in the Mississippi river a short distance below plaintiff's lands a boom for the purpose of catching logs, thereby causing the river to overflow plaintiff's land, and to break into his mill, and to greatly injure his land and mill. The evidence developed that the plaintiff occupied the land at the time the injury was suffered as the vendee under an executory contract of sale. Defendant denied plaintiff's right of recovery on the ground that plaintiff did not possess the legal title to the property injured, and con-

tended that the right of recovery for same, if any, was in his vendor. The court held that plaintiff could recover both for the injuries to the land and to the mill, and, commenting upon same, said: "The general rule is that damages in an action for trespass upon real property may be such as are appropriate to the tenure by which the plaintiff holds. Possession alone will entitle him to recover damages for any injury solely affecting it. If he seeks to recover for the future, he must show that his title gives him an interest in the damages claimed, and he can recover none except such as affect his own right, unless he holds in such relation to other parties interested that his recovery will bar their claim. In this case the injury is wholly to plaintiff. He will have to pay to his vendor the full contract price, notwithstanding that the premises may have been depreciated in value by the trespass. * * * Whether he could in equity impound the damages recovered in this action if the injury to the premises was so great as to leave them inadequate security for the unpaid instalments of purchase money it is unnecessary now to inquire."

It was held in *McKenzie v. Railroad Company*, 27 W. Va. 306, that the plaintiff who held the equitable title to certain real estate could maintain an action for damages thereto with or without her husband, in whom was the legal title, joining in the action. The rule announced in that case was adopted by the same court in the case of *Clay et ux. v. City of St. Albans*, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883, in which case the court holds that, where a conveyance of land has been made to a trustee for the benefit of the wife of another person by which she is permitted to have the possession and use of said land, although she is vested with only an equitable title, she and her husband or she alone may maintain an action for trespass to both possession and the inheritance. In *Railroad Co. v. Charles C. Ingalls*, 15 Neb. 123, 16 N. W. 762, the plaintiff in the court below sought to recover damages from the defendant for building its road, for use as a railway, upon a public road a portion of which was on plaintiff's land, thereby imposing additional burdens upon the land of plaintiff. It developed in the progress of the trial that the legal title to the property at the time of the alleged injury was in another person than the plaintiff; that plaintiff occupied the same under a contract for purchase, and was at said time in default of payment on his contract; and that his contract, under which he held and was in possession of said land, was subject to forfeiture. The vendor, in whom the legal title existed, however, had not taken advantage of the default. The defendant in the court below insisted that no recovery could be had because defendant in error had not the legal title at the time the injury occurred, and did not have the legal title at the time of the trial. The court held in that case that defendant

in error was entitled to recover; that, at most, there was a defect of parties; and that, no objection having been raised by the pleadings to such defect of parties, the same was waived. The same rule was adopted by the Supreme Court of Nebraska in *Omaha & R. V. Ry. Co. v. Brown*, 29 Neb. 513, 46 N. W. 46, in which case the court said: "It would be very strange, indeed, if the purchaser of real estate who in equity is treated as the owner should be powerless to protect his rights in case his real estate, held under a valid contract, was injured; but such is not the law." And the same court in *Gartner v. Chicago, Rock Island & Pacific Ry. Co.*, 71 Neb. 444, 98 N. W. 1052, held that one who is in possession of real estate under a contract with the owner for the purchase thereof has sufficient title to maintain an action for damages to the land. That a person holding the equitable estate in land may maintain an action for injury to the freehold has been held in the following cases: *Miller v. Zufall*, 113 Pa. 317, 6 Atl. 350; *Cleveland v. Grand Trunk Ry. Co.*, 42 Vt. 449; *Rood v. New York & Erie R. Co.*, 18 Barb. (N. Y.) 80; *Russell v. Meyer*, 7 N. D. 355, 75 N. W. 262, 47 L. R. A. 637; *Chouteau v. Boughton*, 100 Mo. 406, 13 S. W. 877.

The facts offered to be proved by that part of the deposition of Benj. B. Foster excluded by the court would have established that Benj. B. Foster had the naked legal title to said lots as a trustee in resulting trust in favor of the plaintiff in this action. Plaintiff was in possession, and had been ever since it was organized as a corporation, and had paid the purchase price of said lots, paid for the improvements thereon, and paid the taxes. Benj. B. Foster had never been in possession. Whatever injury occurred to said property resulting in the depreciation in the value thereof was the loss of the plaintiff. Whatever increase in the value of the same might occur would be the gain of the plaintiff. The plaintiff is the real party in interest, and in equity would be regarded as the owner of the lots, and a judgment in its favor in this case could be pleaded by defendant in an action against it by the said Benj. B. Foster upon proof of the facts offered to be proved by the plaintiff as a bar to a recovery by Benj. B. Foster. While it would have been better practice to have made the person holding the legal title a party to the suit, not having done so does not defeat the right of recovery of the plaintiff in this action, and the action of the court in rejecting said evidence was error.

The evidence introduced by plaintiff established that its lots fronted on A street, in the city of Perry, and that the same had been occupied and used as a lumber yard by plaintiff for several years; that the defendant had built upon A street in front of said lots its main line of railway and four switch tracks; that the nearest track of said railway was 10 feet from the door of the building on plaintiff's lots. The evidence further establishes

that said lots are located on a corner; that on the south side of same is Seventh street, but that said street is not passable on account of there being a creek across same, over which there is no bridge; that the space between plaintiff's property and the nearest railroad track was not sufficient for teams to go in and out. There is no evidence in the record disclosing what right defendant had to build its railway track upon A street, or whether any permission had been granted it by the city of Perry to build the same upon said street; but it appears from the record that the case was tried in the court below upon the theory that authority had been obtained from the city of Perry by the defendant to construct its railroad upon said street, and such is the theory of the case as presented by the briefs of both parties filed in this court, and we shall therefore consider the case upon the theory upon which it was tried in the court below and as presented in the briefs of the parties.

It is contended by plaintiff that defendant, by constructing its tracks of railway, the nearest of which is within 10 feet of plaintiff's property, has greatly obstructed and injured its means of ingress and egress to and from its said lots, and has rendered the same unfit for business purposes, and for the purposes for which plaintiff was using them, and that, on account of such obstruction to plaintiff's means of ingress and egress to and from its lots, the same have been greatly diminished and depreciated in value, and that such acts of defendant constitute a "taking" of plaintiff's property. Plaintiff has, by virtue of its ownership of said lots, an interest in street A on which said lots abut, and a right therein common with the public to pass over the same as a public highway. In addition thereto, it has a special right in said street not common to the public, to wit, the right of ingress and egress over the same to and from its lots. The decisions of the courts made under statute or constitutional provision to the effect that the complaining party can recover only where there is a "taking of private property for public use" are nearly uniform on the question that, where the injury complained of by the abutting property owner is one that is common to the general public, such injury is *damnum absque injuria*. The decisions of the courts, however, are by no means uniform upon what constitutes a "taking" of property in cases similar to the one at bar, but we believe the weight of the better authorities, if not the greater in number, is that such a "taking" may result without conversion of the property or any part thereof, as under statutes and constitutional provisions which provide that private property shall not be taken for public use without compensation. Some of the courts have held that, where no conversion of the property is made, there must be a physical injury to the same, or a physical invasion thereof before a right of recovery exists.

Chicago, Burlington & Quincy Ry. Co. v. Patrick McGinnis, 79 Ill. 269.

The Supreme Court of the United States in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557, held that it is not necessary that property should be taken in the narrow sense of the word to bring the case within the protection of a statute or a constitutional provision that private property cannot be taken for public use without compensation. The court held in that case that there may be such a serious interruption to the common and necessary use of property as will be equivalent to a "taking." In that case the interruption to the common and necessary use of the property complained of was that the defendant had built a dam across a river which formed the outlet of a lake by which dam the waters of the lake were raised so high as to overflow the land of plaintiff, and to tear up his trees and grass by the roots, and wash them, with his hay thereon away, and to choke up the ditches on the land, and to saturate some of his land with water, and to dirty and injure other parts thereof by leaving thereon deposits of sand. The facts in that case do not establish a "taking" of the property in the narrow sense of the word. The injury sustained for which a recovery was sought in that action was a physical injury to the land. But we do not understand the court in holding that a recovery could be had therefor to limit the injury for which a recovery may be had to a physical injury where there is a "taking" of the property in the narrow sense of the word. On the other hand, the reasoning of the court in that case is that the test by which it may be determined whether there has been a "taking" is not the manner in which the injury was done, but whether one's common and necessary use of his property has been seriously interrupted. Plaintiff in the case at bar, by virtue of its ownership of said lots, had the right of access over A street to the same. Such right is one peculiar to itself, in which the general public has no interest, and exists in the nature of an incorporeal hereditament attached to said lots, and is a valuable property right, one that, under some circumstances, may constitute the greater element of value of the abutting property, and is one that cannot be taken away or materially impaired without compensation. *Elliott on Railroads*, par. 1085. In *Reining et al. v. New York & Lackawanna Ry. Co.*, 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133, a case in which the plaintiff had built a railroad upon a street several feet high, with perpendicular walls, leaving a space of only about eight or nine feet for carriageway between said walls and the plaintiff's property, the New York Court of Appeals held that the owner's right of ingress and egress to and from such abutting property had been substantially closed against them for ordinary street purposes, and that they were entitled to recover. The right of the abutting property owner to access over

the street adjacent to his property as an appurtenance to his property and to have such access protected from material obstruction has been recognized by many of the courts, and it has been held by such courts that an obstruction that materially injures or deprives the abutting property owner of ingress and egress to and from his property over the street is a "taking" of his property, for which recovery may be had. *Newport & Cincinnati Bridge Co. v. Foote*, 72 Ky. 265; *Parrot v. Cincinnati, Hamilton & Dayton Ry. Co.*, 10 Ohio St. 625 (in this latter case the obstruction was 20 feet from plaintiff's property); *Protzman v. Indianapolis & Cincinnati Ry. Co.*, 9 Ind. 467, 68 Am. Dec. 650, C. B. U. P. Ry. Co. v. Twine, 23 Kan. 585, 33 Am. Rep. 203; *Central Branch Union Pacific Ry. Co. v. Andrews*, 26 Kan. 702; *Chicago, Kansas & Western Ry. Co. v. Union Inv. Co.*, 51 Kan. 600, 33 Pac. 378; *Ft. Scott, Wichita & Western Ry. Co. v. Hugh Fox*, 42 Kan. 490, 22 Pac. 583; *Street Ry. Co. v. Cumminsville*, 14 Ohio St. 524; *Weatherford v. Commonwealth*, 73 Ky. 106; *Adams v. Chicago, B. & N. Ry. Co.*, 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644; *Lamm v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 45 Minn. 73, 47 N. W. 455, 10 L. R. A. 268; *Abendroth v. Manhattan Ry. Co.*, 122 N. Y. 1, 25 N. E. 496, 11 L. R. A. 634, 19 Am. St. Rep. 461. The Supreme Court of the Territory of Oklahoma in the case of *Scrutchfield v. Choctaw, Oklahoma & Western Ry. Co.*, 18 Okl. 308, 88 Pac. 1048, 9 L. R. A. (N. S.) 496, recognizes, we think, the correct rule of law governing in cases similar to the case at bar. In the syllabus of that opinion the court says: "The location and operation of a railroad upon a public highway may occasion incidental inconvenience and injury to an abutting landowner, but until it cuts off or materially interrupts his means of access to his property, or imposes some additional burden on his soil, his injury is the same in kind as that suffered by the community in general, and he cannot recover in an action therefor." Mr. Justice Gillette, who delivered the opinion of the court, further said in the opinion: "Every person has the same interest and right in a public street or thoroughfare that any other person has, except that property owners have a special right of ingress and egress to their property from the street, which right may not be taken from them without just compensation, because this is an injury peculiar to the particular property owners so affected." If the evidence in this case fairly tended to show that the construction of defendant's railroad tracks in the street in front of plaintiff's property was such as to cut off or materially interrupt plaintiff's means of access to its property, such acts of the defendant amounted to a "taking" of plaintiff's property, for which defendant would be liable. The evidence establishes that the nearest track of the railway lies within 10 feet of plaintiff's property line, and, while there is no evi-

dence as to the width of the sidewalk next to the property of plaintiff nearest the railway track, there is evidence that the space between said track and the property of plaintiff is too narrow for teams to go in and out. Since there was some evidence that plaintiff's means of ingress and egress to and from its property over A street had been materially interrupted, it was for the jury to find whether such right of plaintiff had been materially impaired.

It is suggested by defendant in error that the lumber company has a means of access to its property over Seventh street adjoining its property on the south. The decisions of the courts upon the right of the abutting property owner to recover where his access is obstructed on one street, but where he has a means of access from another street, are not uniform. Some courts have held both ways upon this proposition. In the case of *Kansas, Nebraska & Dakota Ry. Co. v. John Cuykendall*, 42 Kan. 234, 21 Pac. 1051, 16 Am. St. Rep. 479, the Supreme Court of Kansas held that where the abutting property owner's ingress and egress was obstructed on one street, but he had a means of access from another street, there was no right of recovery. In this opinion all the justices concurred. In the case of *Ft. Scott, Wichita & Western Ry. Co. v. Hugh Fox*, 42 Kan. 490, 22 Pac. 583, the same court held, all the justices concurring, that an abutting property owner is entitled to recover his damages for the permanent appropriation of the street in front of his property, although it is accessible from another street. We can see no reason that will justify the taking of one's special property right in one street because he may have a special property right in another street. If the plaintiff's property in this case is situated upon a corner of the block, and therefore adjacent to two streets, he has a right of ingress and egress to and from said property over both streets; and he who obstructs this access from one street and deprives the owner of the property of such property right cannot relieve himself of liability by pleading that the owner of the property may reach his property from another direction. The accessibility of one's property may in some instances constitute a great part of its value, and to permit a material impairment of his access would result in the destruction of a great part of the value of his property, and his property is therefore as effectually taken as if a physical invasion was made thereon and a physical injury done thereto.

There is some evidence tending reasonably to establish the material averments alleged in plaintiff's cause of action, and, if plaintiff had been permitted to prove its ownership of the property, there was sufficient evidence to go to the jury, and the cause will be reversed and remanded.

WILLIAMS, C. J., and DUNN, TURNER, and KANE, JJ., concurring.

WETTERMARK v. ROARK.

(Supreme Court of Oklahoma. April 13, 1908.

APPEAL.—TO CIRCUIT COURT—FILING TRANSCRIPT.

In an appeal from an inferior court to the circuit court it is the duty of the appellant to see that the transcript is filed as required, and, if he fails to do so, the circuit court may, in its discretion, dismiss or affirm for failure to prosecute the appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2744-2747.]

(Syllabus by the Court.)

Appeal from the United States Court for the Southern District of the Indian Territory; J. T. Dickerson, Judge.

Action by J. W. Roark against L. W. Wettermark. Judgment for plaintiff, and defendant appeals. Affirmed.

Robert T. Jones, for appellant. Claude Weaver, for appellee.

KANE, J. This was an action in replevin commenced by the appellee, plaintiff below, in the mayor's court at Pauls Valley for the purpose of recovering from the appellant, defendant below, certain personal property. The record shows that judgment in the replevin suit was rendered in favor of the plaintiff on the 2d day of October, 1902, and that the defendant sought to appeal from this judgment to the United States court at Pauls Valley, and in pursuance thereof, on the 5th day of November, 1902, filed in said circuit court certain papers, purporting to be the proceedings had in said cause in the mayor's court. On the 8th day of February, 1906, the plaintiff filed in said circuit court a motion to dismiss the defendant's appeal, assigning in this motion various grounds therefor, the substance of which may be concisely stated as follows: "First. The defendant below failed to prosecute his appeal within the time and manner provided by the statutes. Second. There being no certified transcript from the trial court, and no certificate of any sort, to identify the papers filed or connect said papers with the court appealed from, the United States court at Pauls Valley was without jurisdiction, and therefore compelled to dismiss the cause for lack of jurisdiction." The defendant admitted the lack of the certificate or authentication by the mayor of the transcript, and on the 15th day of February, 1906, filed a motion praying the court below to issue a rule requiring the mayor to bring before the court a complete transcript of the record, which motion was overruled. The court then sustained the motion to dismiss the appeal, and the case is now here on error from the order of the court refusing to require the mayor to supply a perfect transcript, and the order sustaining the motion to dismiss the appeal.

The record before us shows that the judgment was rendered in the mayor's court on the 2d day of October, 1902, and the appeal bond and transcript were filed in the circuit

court on the 5th day of November, 1902; a period of more than 30 days elapsing between the rendition of the judgment and the filing of the appeal in the circuit court. The 5th day of November was the fourth day of the first term of the circuit court after the rendition of the judgment. Section 2819, Ann. St. Ind. T. 1899, provides that "on or before the first day of the circuit court next after the appeal shall have been allowed, the justice shall file in the office of the clerk of such court a transcript of all the entries made in his docket relating to the cause, together with all the process and all the papers relating to such suit." Construing the above section, which is the same as section 4139 of Mansfield's Digest of Statutes in force in the Indian Territory prior to statehood, the Supreme Court of Arkansas holds that, "in an appeal from an inferior court to the circuit court, it is the duty of the appellant to see that the transcript is filed as required, and, if he fails to do so, the circuit court may, in its discretion, dismiss or affirm for failure to prosecute the appeal." *Smith v. Allen*, 31 Ark. 268; *McGehee v. Carroll*, 31 Ark. 550; *Hughes v. Wheat*, 32 Ark. 292. It seems from the above cases, construing the law in force in the Indian Territory at the time this case was tried, that it was within the discretion of the trial court to dismiss the appeal or affirm the judgment when the transcript of all the entries made in his docket relating to the cause are not filed in the office of the clerk of the circuit court within the time prescribed by law. We are not prepared to say that dismissing the appeal in this case was an abuse of discretion on the part of the court below.

Counsel for appellant is in error in his contention that he was entitled as a matter of right to a rule on the mayor requiring him to authenticate the transcript. *Baker v. Calvert & Thompson*, 16 Ark. 487, was a case where an order was issued to the justice trying the cause to certify a perfect record of the proceedings of his court to the circuit court. The justice failed to respond to the rule, and, after repeated efforts on the part of the appellant to have the appeal perfected, all of which failed, and without having taken any steps to compel the justice to respond to the rule, the circuit court assumed jurisdiction of the case, and rendered judgment against the appellant. This was held to be error. *Walker, J.*, speaking for the court, says: "That court could render no judgment until after it had acquired jurisdiction of it as an appeal case; and the jurisdiction of the court was only retained upon the suggestion of a diminution of record for the purpose of compelling the justice to send up the judgment and appeal, if in fact, as suggested, such was the fact. The circuit court, therefore, should in its discretion either have compelled the justice to respond to the rule, or have dismissed the proceedings for want of jurisdiction." It would seem

from the above case that the court below might in its discretion have granted the rule or dismissed the appeal. We cannot say that adopting the latter course was an abuse of discretion. Besides, we are strongly of the opinion that, in the absence of a certificate or authentication of any kind to the transcript, the circuit court was entirely without jurisdiction to entertain the appeal. The record shows, at the end of what purports to be the transcript, the following notations only:

"The defendant in open court gave notice of appeal. H. A. Campbell, Mayor."

"And thereafter in due time made affidavit for appeal and gave bond as required by law. H. A. Campbell, Mayor."

Indorsed:

"No. 1,639. Filed in open court, Nov. 5, 1902. C. M. Campbell, Clerk, by S. W. Wootton, Deputy."

"In the United States Court for the Southern District of the Indian Territory, at Pauls Valley. No. 1,639. J. W. Roark, Plaintiff, v. L. W. Wettermark, Defendant."

The case of *Moffett-West Drug Company v. Byrd*, 1 Ind. T. 131, 38 S. W. 667, seems to be exactly in point, and decisive of the case at bar. *Lewis, J.*, speaking for the court in the *Byrd Case*, supra, says: "Various entries and orders purporting to have been made in the commissioner's court appear in the record brought to this court upon appeal, but nowhere in such record is there a transcript of the proceedings had before the commissioner certified by him. In the absence of such a transcript so certified by the commissioner, the jurisdiction of the United States court for the Northern district of the Indian Territory to try this cause, and to render judgment upon appeal, is not shown, and consequently the jurisdiction of this court cannot be invoked. *Wise v. Yell*, 7 Ark. 11; *Watts v. Hill*, 7 Ark. 203. The appeal is dismissed."

Finding no substantial error in the proceedings of the court below, the judgment is affirmed. All the Justices concur.

FREEMAN v. BOARD OF MEDICAL EXAMINERS FOR SOUTHERN DISTRICT OF INDIAN TERRITORY.

(Supreme Court of Oklahoma. April 13, 1908.)
APPEAL—REVIEW—ABSTRACT QUESTIONS.

The Supreme Court will not decide abstract or hypothetical cases disconnected from the granting of actual relief, or from the determination of which no practical relief can follow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3331-3341.]

(Syllabus by the Court.)

Appeal from the United States Court for the Southern District of the Indian Territory, at Chickasha; J. T. Dickerson, Judge.

R. W. Freeman, a practicing physician, brought certiorari to review the revocation of his license by the Board of Medical Ex-

aminers for the Southern District of the Indian Territory. Writ of certiorari was dismissed, and Freeman appeals. Dismissed.

William Stacey, for appellant.

KANE, J. The appellant, R. W. Freeman, of the city of Chickasha, was duly licensed to practice medicine by the Medical Board for the Southern District of the Indian Territory, on the 12th day of August, 1904. On the 21st day of November, 1905, he was served with a citation to appear before said board on the 25th day of November, 1905, and show cause why his license to practice medicine should not be revoked for "unprofessional and dishonorable conduct." At said time and place the appellant appeared, and proceedings were had, and an order thereupon made by said board revoking appellant's license. The appellant thereupon filed his petition in the United States District Court at Chickasha, praying for a writ of certiorari to remove said cause to said United States District Court. On the 12th day of December, 1905, the writ was granted. On the same day, as shown by the affidavit of William Stacey, counsel for appellant, he served the writ upon W. L. Peters, the secretary of the Board of Medical Examiners, and on J. C. McNeese, president of said board. The secretary was served by delivering him a copy of the order, and the president by sending him a true copy of the writ by registered letter. No return whatever was ever made to the writ by any member of the board. On the 12th day of April, 1906, counsel for appellee moved the court that the writ of certiorari be quashed and held for naught, for the following reasons: "(1) That the court was without jurisdiction to grant the writ; (2) that the petition heretofore filed by petitioner did not allege facts sufficient to entitle petitioner to the writ of certiorari or relief asked for; (3) that the writ issued in said cause, and the return thereof, was irregular, illegal, and void." On the 23d day of April, 1906, the court below sustained the motion, and quashed, dismissed, superseded, and annulled the writ of certiorari theretofore issued. From this ruling of the court the appellant prosecuted his writ of error to the Court of Appeals of the Indian Territory; and, the same being undisposed of on the admission of the territory of Oklahoma and Indian Territory into the Union as the state of Oklahoma, it was transferred to this court under the terms of the Schedule and Enabling Act.

At the time the proceedings of which the appellant complains were had the Board of Medical Examiners for the Southern District of the Indian Territory was a board created under the laws of the United States, which laws also defined its powers. Since the proceedings were had before the board Indian Territory and Oklahoma Territory have been erected into the state of Oklahoma. There is no provision in the Constitution of the state

of Oklahoma continuing in office the Board of Medical Examiners for the Southern District of the Indian Territory, nor is there a provision providing a successor for such board. Upon the record as it stands before us the only relief this court could possibly give would be to reverse the order of the court below, and order it to reissue its writ of certiorari. As the board before which the proceedings complained of was had has gone out of existence by operation of law, leaving no successor against whom the writ could run, such a holding would be futile, as no practical relief could follow. This court in several cases decided this term of court, but not yet reported, has held: "The Supreme Court will not decide abstract or hypothetical cases disconnected from the granting of actual relief, or from the determination of which no practical relief can follow." We believe this is a salutary rule. The reason for it is well stated in *Kidd v. Morrison*, 62 N. C. 38. This case involved the title to a slave, which at the time it was commenced was a proper subject of barter and trade. When it came on to be heard in the Supreme Court of North Carolina in 1866, after the Emancipation Proclamation, Pearson, C. J., in his opinion, says: "That question is now gone. It has passed away by the political death of the slave as completely as if he had died a natural death. There being no longer any subject-matter of controversy, the question arises whether the court will hear the cause, and make a decree that can only serve to dispose of the costs. To say nothing of the labor and consumption of time in wading through a mass of depositions and weighing the learned arguments which the hearing would elicit, the court does not consider itself at liberty to go into a hearing, for the reason that there is nothing now before it but a mere hypothetical case, and any declaration of principle set out in the decree would be entitled to, and would receive, no more consideration than mere dicta."

We are therefore of the opinion that this cause ought to be dismissed without prejudice. It is so ordered. All the Justices concurring.

CLEVENGER v. LEWIS.

(Supreme Court of Oklahoma. April 15, 1908.)

1. SALE—WARRANTY OF TITLE.

A sale of personalty in the vendor's possession implies a warranty as to the entire title, protecting against partial defects, liens, charges, and incumbrances by which the title transferred is rendered anything less than full, perfect, and unincumbered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 749.]

2. SAME—ACTION ON WARRANTY.

When there is an outstanding mortgage, and the mortgagee obtains possession of the property by writ of replevin, the vendee is not required to await the final adjudication of the

mortgagee's claim before beginning action upon the implied warranty; but, in such event, the burden would be upon the vendee to prove a valid pre-existing mortgage in such mortgagor before he could recover on such warranty.

(Syllabus by the Court.)

Error from Probate Court, Canadian County; J. J. Phelps, Judge.

Action by Warren H. Lewis against O. M. Clevenger. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

On the 25th day of September, 1905, Warren H. Lewis, as plaintiff, commenced this action in the probate court of Canadian county, Okl. T., against O. M. Clevenger, as defendant. Said action was based upon a certain promissory note in hæc verba:

"\$239.81. Calumet, O. T., Aug. 28th, 1903.

"On the 1st day of January, 1904, for value received, I promise to pay C. W. Lewis or order two hundred thirty-nine $\frac{81}{100}$ dollars, with interest at the rate of 10 per cent. per annum, payable annually. Payable at Calumet, O. T. And it is agreed that, if the interest or principal is not paid when due, it shall bear interest at the rate of eight per cent. per annum, and the whole sum shall become due and payable at the option of the holder if the interest be not paid within thirty days after due. It is also stipulated that, should proceedings be commenced to enforce the collection of this note by law, a reasonable amount shall be allowed as an attorney fee, and the same shall be taxed as costs in the cause. The amount of this note being less than three hundred dollars, I hereby consent and agree that a justice of the peace shall have full and complete jurisdiction thereof in case suit is brought.

"O. M. Clevenger.

Indorsed: "Nov. 3, 1903. Pay to order of Warren H. Lewis. C. W. Lewis."

On November 9, 1905, defendant filed his first amended answer. On the 11th day of November, 1905, A. Balrd, as assignee of C. W. Lewis, filed his interplea, alleging that he was the duly qualified and acting assignee of C. W. Lewis, under a general assignment for the benefit of creditors made on the 5th day of September, 1903, and that the said assignee was and is the owner of said note and deed evidenced thereby described in plaintiff's petition, and that the alleged sale and indorsement of the same to the plaintiff was without consideration, and not bona fide; that the said sale, indorsement, and delivery of said note was made in contemplation of said general assignment and judgment by said defendant, and so made in order to place the same out of the reach of the creditors of said C. W. Lewis. Wherefore said interpleader asked that he be adjudged to be the owner of said note. Thereafter, on the 13th day of November, 1905, the said plaintiff moved the said court to strike the said interplea from the files, for the reason that the said assignee

did not show any interest in the subject-matter of the litigation. The record does not show that said motion to strike said interplea from the file was ever acted upon. Thereafter, on the same day, to wit, the 13th day of November, 1905, the plaintiff filed a motion to require defendant to make his amended answer more definite and certain. And thereafter on the 18th day of November, 1905, the defendant filed his second amended answer, wherein he, except as thereafter expressly admitted, denied all and singular all of the allegations in plaintiff's petition. Further, said defendant admitted the execution of the note sued on, and further alleged that about May, 1902, C. W. Lewis, heretofore referred to as the original payee in said note, was in the possession of and claimed to be the owner of 63 head of Aberdeen-Angus cattle, which were described in a certain chattel mortgage, executed on the 9th day of January, 1902, to secure the sum of \$2,048.38 by the said C. W. Lewis to a firm named Allen-Dudley & Co. A copy of said mortgage was attached and marked "Exhibit A." The same was filed for record on the 11th day of January, 1902.

Defendant further alleged in said answer that said C. W. Lewis then and there represented and stated to him that he was the absolute owner of said cattle, and that they were free and clear of all incumbrances, and that he had a good and valid right to sell and convey the same, and solicited said defendant to purchase an undivided one-half interest therein for the sum of \$1,945.15, to be paid by a promissory note bearing interest at the rate of 8 per cent. per annum and due one year after date, and that the defendant relied upon the statements and representations of said C. W. Lewis, believing same to be true, and without any knowledge whatever of said incumbrance, and relying upon the representation of said C. W. Lewis that he was the absolute owner of said cattle, and had a good and lawful right to sell and convey the same, and that said cattle were free from all incumbrance, said defendant was induced to and did execute and deliver to the said C. W. Lewis his promissory note for the sum of \$1,945.15, dated May 28, 1902, payable one year after date, with interest at the rate of 8 per cent. per annum, the consideration for said note being an undivided one-half interest in said cattle.

The defendant further alleged that he spent large sums of money in caring for said cattle, a portion of which sum so expended by the defendant was evidenced by a promissory note executed to the said C. W. Lewis, dated April 28, 1903, in the sum of \$666.02; that thereafter the defendant purchased of said C. W. Lewis an undivided one-half interest in a certain number of head of horses, and executed in payment thereof to the said C. W. Lewis his promissory note, wherein he agreed to pay to said C. W. Lewis the sum of \$600

on demand, with interest at the rate of 10 per cent. thereon; that no demand was made by said C. W. Lewis, or any other holder thereof, until the 28th day of August, 1903, on which date the said C. W. Lewis renewed and extended the same by surrendering up the old notes and taking in lieu thereof defendant's two promissory notes, one for the sum of \$1,945.15, dated on the 1st day of June, 1904, bearing interest at the rate of 8 per cent. per annum, and another for the sum of \$686.02, due on the 1st day of June, 1904, bearing 10 per cent. interest, and at the time, and as a part of the same transaction, at the request of the said Lewis, the defendant, to cover the accumulated and earned interest on said notes, executed to the said Lewis the promissory note upon which this action is based, and the sole and only consideration moving from said C. W. Lewis to said defendant was the accumulated interest on said notes as aforesaid.

Defendant further alleged: That at all times said C. W. Lewis was a resident of the state of Iowa. That on the 5th day of September, 1903, the said C. W. Lewis became insolvent, and in the said state of Iowa executed a general deed of assignment for the benefit of his creditors, wherein he assigned to one A. Baird all of his property, real and personal, situated in said state and in the territory of Oklahoma, in trust for the benefit of all his creditors in accordance with and as approved by the laws of the said state of Iowa. That said assignee under said deed came into possession of said notes, and took the possession of, and assumed the management and control of all of, the real and personal property of said C. W. Lewis save and except the note upon which this action is based. That thereafter the said Allen-Dudley & Co., of Omaha, Neb., began in the district court of Canadian county an action in replevin against the defendant and said assignee to recover possession of said 63 head of cattle under and by virtue of said mortgage heretofore referred to, and in said action obtained the possession of said cattle. Thereafter, in the month of July, 1904, the said Baird, as assignee, Allen-Dudley & Co., and this defendant, settled and adjusted said matters hereinbefore mentioned, and the said Baird obtained the possession of said cattle, together with all their increase, and sold the same at public sale, and paid off and discharged from the proceeds of said sale the mortgage indebtedness due the said Allen-Dudley & Co., and paid off and discharged from the proceeds of said sale said mortgage debt, and agreed with the defendant, in consideration of the defendant making no opposition to said sale, nor any opposition to the application of the proceeds thereof, to surrender and deliver to the defendant all the notes and obligations of the defendant to said C. W. Lewis. That the defendant received no part of the proceeds of said sale nor derived any benefit therefrom.

Defendant further alleged that he had no actual knowledge or no actual notice of the existence of said mortgage on said cattle until the service of the writ of replevin in said action; that the said C. W. Lewis parted with nothing, and the defendant received nothing for the execution of the notes mentioned and described in plaintiff's petition; that the defendant derived no benefit from the possession of said cattle, nor from the increase thereof, but was damaged and injured thereby, losing the money expended by him for feed, caring for said cattle for a period of nearly two years, as well as his time and labor in caring for the same, and that the defendant would not have purchased said cattle had he known of the existence of said chattel mortgage, and had he not been deceived by the said C. W. Lewis as aforesaid; further, that the consideration for the execution of said note has wholly failed.

The defendant further alleged that the said C. W. Lewis was indebted to him in the sum of \$1,000, and was so indebted to him in said sum on the 3d day of November, 1903, the date on which the plaintiff alleged he became the owner of the note sued on; that from and after the 28th day of May, 1902, the said C. W. Lewis and said defendant voluntarily associated themselves together as general partners under the firm name and style of Lewis & Clevenger.

Defendant further alleged that when the said notes mentioned and described in said chattel mortgage became due the said Allen-Dudley & Co. extended the same by permitting the said C. W. Lewis to execute a new and additional chattel mortgage to cover the identical cattle, and same was held as collateral to the original security. Defendant set out the copy of the agreement between the said assignee and himself by which said assignee obligated himself to interplead for said note. Said parties have been referred to herein as they appear in the court below.

On September 1, 1905, plaintiff filed reply to the second amended answer, denying every material allegation therein contained; and thereafter, on the same date, plaintiff moved for judgment against the defendant on the pleadings therein filed; and thereafter, on the 11th day of January, 1906, motion for judgment on the pleadings was taken up and argued before the court, and the court rendered judgment thereon in favor of the plaintiff; to which action of the court the defendant duly saved his exceptions, and the action is now properly before this court on petition in error.

J. W. Clark and William H. Criley, for plaintiff in error. Blake, Blake & Lowe, for defendant in error.

WILLIAMS, C. J. (after stating the facts as above). The note upon which this action is based, containing a provision for a reasonable attorney's fee if collected by suit, is not negotiable. *Randolph v. Hudson*, 12 Okl.

517, 74 Pac. 947; *Cotton et al. v. Deere Plow Co.*, 14 Okl. 605, 78 Pac. 321. A sale of property in the vendor's possession implies a warranty of title. 2 Benjamin on Sales (Corbin's Ed.) p. 829, and authorities cited under footnote 18; 2 Mechem on Sales, § 1302, and authorities cited under footnote No. 3. "The warranty of title which is implied is a warranty as to the whole title, and it, therefore, protects against partial defects, liens, charges, and incumbrances by which the title transferred is rendered anything less than full, perfect, and unincumbered." 2 Mechem on Sales, § 1304; *Hodges v. Wilkinson*, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545; *Dresser v. Ainsworth*, 9 Barb. (N. Y.) 619; *Hall v. Aitkin*, 25 Neb. 380, 41 N. W. 192; *Close v. Crossland*, 47 Minn. 500, 50 N. W. 604; *Electro-Dynamic Co. v. The Electron*, 74 Fed. 689, 21 C. C. A. 12, 45 U. S. App. 16.

In the case of *Hodges v. Wilkinson*, supra, it is said: "It necessarily follows that it was sufficient for the plaintiff to show that Wahab had title to the horse in controversy by virtue of the mortgage when Wilkinson sold to the former, and that the horse had been seized and the possession of him acquired by Wilkinson by virtue of the warrant in the claim and delivery proceeding brought against the plaintiff. Upon principle it was no more necessary for Hodges to waive the recovery of Wahab in the pending action than it would have been to prosecute an unsuccessful suit against Wahab, had the latter acquired the possession by bridling the horse while it was straying in the public highway, and without objection from any person." *Coble v. Wellborn*, 18 N. C. 388. The court further says: "If Hodges had actually surrendered the horse to Wahab on demand, or if he agreed to give no trouble if claim and delivery proceedings were instituted, still he had the burden on him of showing the title in Wahab, with the advantage to the defendant of having the opportunity to meet and contradict, if he could, the testimony offered to prove title in him, which he could not have done in the suit already instituted against Hodges. * * * If Hodges offered testimony sufficient to satisfy the jury that Wahab had paramount title, then Wilkinson, by implication at least, must have falsely warranted the title to the horse, and would have no ground of complaint if Hodges had surrendered possession to the true owner on being convinced of his right, and even with the assurance from Wahab that he would not insist on his rights in case the plaintiff should fail to recover in this action. The plaintiff, in order to show paramount title as well as possession in Wahab, offered a chattle mortgage dated May 9, 1885, executed by W. H. Green to Harriet Cohen, which had been regularly registered and proven in Hyde county. After objection the court admitted the chattel mortgage, except the writing on the margin of it purporting to be an assignment

of the mortgage by Harriet Cohen, which plaintiff proposed to prove subsequently."

We conclude that a warranty of title is implied in the sale of chattels in the actual or constructive possession of the vendor to a vendee buying in good faith, honestly believing he is obtaining a clear title to the same. Further, when there is an outstanding mortgage title, lien, or incumbrance, and the mortgagee obtains or demands possession of such property, the vendee is not required to force the party setting up such adverse claim, lien, incumbrance, or title to reduce the same to final judgment or adjudication in a court of proper jurisdiction before bringing action upon the implied warranty, in which event the burden would be upon such vendee to prove a superior title, lien, or incumbrance in another in such action against the vendor. In this record, whilst the defendant's answer is not as clear and specific as it might have been, yet, without renewing the motion to make the second amended petition more definite and certain, judgment should not have been rendered for plaintiff on the pleadings.

The records show that the lower court never passed on the motion to strike the interplea from the files. The interplea alleges that the said assignee of the estate of C. W. Lewis is the equitable owner of said note, and entitled to convert the same to the use of said estate for the benefit of the creditors thereof. The legal title is in the plaintiff. Where the intervener voluntarily appears and asks to intervene and have his rights determined in said cause, it is certainly within the power of the court to permit it. This jurisdiction ought always to be exercised to the ends of the furtherance of justice. At common law the remedy would have been by suit in equity to set aside the transfer of said note and injunction to restrain the plaintiff from proceeding to final judgment until the action for the cancellation of such assignment had been finally determined. Section 4239, *Wilson's Rev. & Ann. St.* 1903; *Goodrich v. Williamson et al.*, 10 Okl. 588, 63 Pac. 974; 2 Beach, *Equity Jurisprudence*, § 883.

Since the assignee reserved no exceptions to the action of the court below, and has not joined in the prosecution of this appeal, this cause could not be reversed on that ground; but for the error in rendering judgment on the pleadings in favor of the plaintiff this cause is reversed and remanded for a new trial. All the Justices concurring.

(20 Okl. 776)

BREWER et al. v. RUST.

(Supreme Court of Oklahoma. April 14, 1908.)

INTEREST—RATE OF INTEREST.

The 8 per cent. rate of interest prescribed by the proviso to section 8 of Act Cong. Feb. 18, 1901 (31 Stat. 795, c. 379), entitled "An act to put in force in the Indian Territory certain pro-

visions of laws of Arkansas relating to corporations, and to make said provisions applicable to said territory," is restricted to banks or trust companies organized under the laws of Arkansas or any other state, authorized by section 8 to transact business in the Indian Territory; and said proviso did not provide a general interest law for the Indian Territory, or repeal or modify chapter 109, Mansf. Dig. (chapter 50, Ind. T. Ann. St. 1899).

(Syllabus by the Court.)

Appeal from the United States Court for the Western District of the Indian Territory at Muskogee. William B. Lawrence, Judge.

Action by J. Rust against Louisa L. Brewer and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Raymond, Maxey and Runyan, for appellants.

KANE, J. This was a suit brought by the appellee, plaintiff below, against the appellants, defendants below, upon a promissory note, and to foreclose a mortgage given to secure payment of the note. There was no defense to the note or mortgage except the fact, which was admitted, that the rate of interest to be paid by the terms of the note was in excess of 8 per cent. per annum, to wit, 10 per cent. per annum. As stated by counsel for appellants in their brief, the sole question in this case is whether, on the 12th day of February, 1904 (the day the note was executed), it was lawful for plaintiff to contract for a greater rate of interest than 8 per cent. per annum for money loaned, and if contracting for a greater rate, to wit, the rate of 10 per cent. per annum, had the effect to make void the contract as to both principal and interest. After issues joined the cause was referred to Charles A. Cook, Esq., as special master in chancery, to take testimony and report his findings of fact and conclusions of law. In due time the master reported, and recommended that a decree be entered in favor of the plaintiff. Exceptions were filed by the defendants to the findings of the master, which the court overruled, but did not sustain the master in toto, but held that the plaintiff should only forfeit all interest above the legal rate of 6 per cent. per annum, and rendered judgment and decree accordingly. The defendants took the case here by writ of error.

There is no brief in behalf of the appellee, but the master supported his report fully and ably by decisions which were of great assistance to this court, and led us to the same conclusion reached therein.

It is contended by counsel for the appellants that section 8 of an act of Congress passed on the 18th day of February, 1901 (31 Stat. 795), changed the maximum rate of interest that could be contracted for under chapter 109, Mansf. Dig. (Ind. T. Ann. St. 1899, c. 50), which was in force in the Indian Territory prior to the time the first-men-

tioned act was passed, from 10 per cent. to 8 per cent. per annum, and left in force the forfeiture clauses for usury, as provided in chapter 109, modified to read: All contracts for a greater rate of interest than 8 per cent. per annum shall be void as to principal and interest.

Chapter 109, Mansf. Dig., was extended over the Indian Territory by the act of Congress of May 2, 1890 (26 Stat. 94, § 31). The sections of said chapter relating to interest are in the following language:

"Sec. 4732 (§ 3043). All contracts for a greater rate of interest than 10 per cent. per annum shall be void as to principal and interest and the general assembly shall prohibit the same by law; but when no rate of interest is agreed upon, the rate shall be six per cent. per annum.

"Sec. 4733 (§ 3044). The parties to any contract, whether the same be under seal or not, may agree in writing for the payment of interest not exceeding ten per cent. per annum on money due or to become due.

"Sec. 4734 (§ 3045). No person or corporation shall directly or indirectly take or receive in money, goods, things in action or any other valuable thing, any greater sum or value for the loan or forbearance of money or goods, things in action, or any other valuable thing, than is in section 4733 prescribed.

"Sec. 4735 (§ 3046). All bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatever, whereupon or whereby there shall be reserved, taken or secured, or agreed to be taken or reserved, any greater sum or greater value for the loan or forbearance of any money, goods, things in action, or any other valuable thing, than is prescribed in this act, shall be void.

"Sec. 4736 (§ 3047). It shall be lawful for all parties loaning money in this state to reserve, or discount, interest upon any commercial paper, mortgages or other securities, at any rate of interest agreed upon by the parties, said rate of interest not to exceed ten per cent. per annum, whether such paper or securities for principal or interest be payable in this state, or in any other state, kingdom or country."

The other act of Congress wherein the subject of interest is mentioned is section 8 above referred to. The act of which section 8, supra, is a part, was passed on the 18th day of February, 1901, and is entitled "An act to put in force in the Indian Territory certain provisions of laws of Arkansas relating to corporations, and to make said provisions applicable to said territory." The sections preceding and following section 8 relate specifically to corporations, and section 8 up to the proviso, to be construed here, relates to banks and trust companies organized under the laws of Arkansas or any other state.

Section 8 provides: "That any bank or

trust company now or hereafter organized under the laws of Arkansas or any other state may transact such business in the Indian Territory as is authorized by its charter, and that is not inconsistent with the laws in force in the Indian Territory, and may loan money and contract for the payment of the same at a rate of interest not to exceed the sum of eight per centum per annum and a like rate for a period less than a year: Provided, that the lawful interest in said territory shall be six per centum when no rate of interest is agreed upon, but in no case shall the interest exceed eight per centum per annum."

This brings us squarely to the question in this case: Is the law regulating interest as prescribed by chapter 109 of Mansfield's Digest repealed or modified by section 8 of the act of 1901, so that after its passage the maximum rate of interest that could be legally contracted for in the Indian Territory was 8 per cent. per annum, and that contracts for a greater rate of interest than 8 per cent. per annum would thereafter be void as to principal and interest? In order to determine whether there is such repugnancy between these two acts that one repeals or modifies the other, it will be necessary to have a clear understanding of the meaning of both, and the purposes for which they were passed. There is no repealing clause in connection with the later act, and, if the older act or any part thereof was repealed by the later, it must be by implication. "There being no express repeal of the older by the later statute, the law does not favor it by mere implication; but the repeal must be necessary, and, if it arises out of repugnancy between the two, the later abrogates the older only to the extent that it is inconsistent and irreconcilable." *Slimonton v. Lanier*, 71 N. C. 498; *Wood v. United States*, 16 Pet. (U. S.) 342, 10 L. Ed. 987. It will be observed that the older statute relates to "money and interest," and the later to "corporations and regulation of same." It will be advisable to keep this fact in view in applying the rules of statutory construction to them. "It is, however, necessary to the implication of a repeal that the objects of the two statutes are the same, in the absence of any repealing clause. If they are not, both statutes will stand, though they may refer to the same subject." *United States v. Claflin*, 97 U. S. 553, 24 L. Ed. 1082, 1085. *Lewis' Sutherland Stat. Const. § 347*, says: "It is indispensable to a correct understanding of a statute to inquire, first, what is the subject of it? What object is intended to be accomplished by it? When the subject-matter is once clearly ascertained and its general intent, a key is found to all its intricacies."

The first part of section 8 is clear and unambiguous, and has relation to banks or trust companies organized or to be organized under the laws of Arkansas or any other state. Such institutions prior to the act of

1901, of which section 8 is a part, were not permitted to do business in the Indian Territory. Section 8 provides that they may transact such business in the Indian Territory as is authorized by their charters, and that is not inconsistent with the laws in force in the Indian Territory, and may loan money and contract for the payment of the same at a rate of interest not to exceed the sum of 8 per cent. per annum, and a like rate for a period less than a year. Then follows the proviso that counsel for appellants claim enacts a new law on the general subject of interest, and modifies the forfeiture clauses of chapter 109, Mansfield's Digest. The words of the proviso are: "Provided that the lawful interest for said territory shall be six per cent. when no rate of interest is agreed upon, but in no case shall the interest exceed eight per cent. per annum." This proviso must be construed in connection with the enacting clause, as well as the part of the act which immediately precedes it. "A proviso or exception in a statute relates to the paragraph or distinct portion of the enactment which immediately precedes it, unless the contrary intention is clearly apparent from the statute." *Leader P. Co. v. Nicholas*, 6 Okl. 302, 50 Pac. 1001. "A proviso is something ingrafted upon a preceding enactment generally introduced by the word 'provided.'" *De Graff v. Went*, 164 Ill. 485, 45 N. E. 1075. "The word 'provided' means 'on condition.'" *De Vitt v. Kaufman Co.*, 27 Tex. Civ. App. 332, 66 S. W. 224. "'Provided' is the appropriate word for creating a condition precedent." *Robertson v. Caw*, 3 Barb. (N. Y.) 410. "The office of a proviso is to repeal or restrict the general language preceding it, not to enlarge the enacting clause." *Com. v. Charity Hosp.*, 199 Pa. 119, 48 Atl. 906; *Patterson v. Winn*, 24 U. S. 380, 6 L. Ed. 500; *Van Reipen v. Jersey City*, 58 N. J. Law, 262, 33 Atl. 740; *State v. Browne*, 56 Minn. 269, 57 N. W. 659. "A proviso in a statute is to be strictly construed. It takes no case out of the enacting clause which is not fairly within the terms of the proviso." *In re Matthews* (D. C.) 109 Fed. 603. "In short, a proviso covers special exceptions only out of the enacting clause, and those who set up any such exceptions must establish same as being within the words, as well as within the reason thereof." *McRae v. Holcomb*, 46 Ark. 306.

Keeping in mind the rules of construction and the functions of a proviso, to contend that section 8 was intended to cover the general subject of interest, and to that extent repeal chapter 109, Mansfield's Digest, would be unwarranted by any of the well-known rules of interpretation of statutes, as well as violative of the rules of grammar. "Provided," as we find it in section 8, is used in its conjunctive sense, and means "on condition" or "with the understanding," and has relation to the terms upon which the banks and trust companies mentioned in the preceding

part of the section are authorized to transact business in the Indian Territory. *Nix v. Gilmer*, 5 Okl. 740, 50 Pac. 131, is a case precisely in point on the question we are now discussing. It is provided by paragraph 3, § 4510, *Wilson's Rev. & Ann. St.* 1903 of Oklahoma, that husband or wife shall be incompetent to testify for or against each other. It was claimed by counsel in the *Nix* Case, supra, that this portion of the act was repealed by section 29, c. 41, p. 201, *Sess. Laws* 1895, and that the husband or wife of a party to a civil action was a competent witness for such party. The part of the act it was claimed repealed the former act reads as follows: "Provided, however, that neither husband nor wife shall in any case be a witness against the other except in a criminal prosecution for a crime committed one against the other, but they may in all cases be witnesses for each other, and shall be subject to cross-examination as other witnesses, and shall in no event on a criminal trial be permitted to disclose communications made by one to the other, except on a trial of an offense committed by one against the other." Mr. Justice Keaton, speaking for the court, says: "While the provision just quoted seems to be quite general in its application, yet, as it is contained in the chapter on criminal procedure, and does not purport to repeal or amend said section 335 of the Civil Code, we hold that it does not necessarily do so by implication, but applies solely to criminal actions."

It seems clear, from reason as well as authority, that no other conclusion can be reached than that the 8 per cent. rate of interest prescribed by the proviso to section 8 of the act of Congress, 1901, entitled "An act to put in force in the Indian Territory certain provisions of laws of Arkansas relating to corporations, and to make said provisions applicable to said territory," is restricted to banks or trust companies organized under the laws of Arkansas or any other state authorized by section 8 to transact business in the Indian Territory; and said proviso does not provide a general interest law for the Indian Territory or repeal or modify chapter 109, *Mansfield's Digest*.

We are not called upon to hold that Congress intended to hide a general law of such far-reaching consequence to the business world in an obscure proviso unless such intention is clearly apparent from the whole act, and in this case it is not; but, on the contrary, all the rules formulated to guide the judgment of courts in the interpretation of statutes lead us to a contrary conclusion.

The power of Congress to thus discriminate against foreign corporations is undoubted, but that question is not in this case. It is our duty now to construe section 8 and chapter 109 according to the well-settled rules of interpretation, and, if possible, give them the effect they were intended by Congress to have. The construction above adopted harmonizes section 8 with the balance of the act

of which it is a part, and with chapter 109, *Mansfield's Digest*. It also avoids the forfeiture of the contract which argues in its favor to the conscience of the court: "Forfeitures are not favored in the law. Courts always incline against them." *Marshall v. Vicksburg*, 15 Wall. (U. S.) 148, 21 L. Ed. 121. "When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred." *Farmers' etc., Nat. Bk. v. Dearing*, 91 U. S. 35, 23 L. Ed. 196.

Counsel for appellants state in their brief that their case is based entirely upon the theory that section 8 of the act of Congress changed the maximum rate of interest that can be contracted for from 10 per cent. per annum to 8 per cent. per annum, but left the penalty for usury the same as provided by section 4732, *Mansfield's Digest*, with the exception that the maximum rate to work a forfeiture should be 8 per cent. per annum instead of 10 per cent. per annum. They admit that, if their contention is not true, the transaction was valid, and the case should be affirmed.

As we cannot agree with the learned counsel on this proposition of law, and as appellee expresses no dissatisfaction with the judgment rendered, it follows that the judgment of the court below must be affirmed.

DUNN and TURNER, JJ., concurring.
WILLIAMS, C. J., and HAYES, J., concurring in the conclusion reached, but not in all the reasoning.

BRACKEN v. STONE et al.

(Supreme Court of Oklahoma. April 13, 1908.)

INJUNCTION—THREATENED TRESPASS—IRREPARABLE INJURY.

A petition in an application for a restraining order, which seeks to enjoin an alleged threatened trespass, such as could be fully compensated in money damages, and which concludes "to the irreparable damage of this plaintiff," but which fails to state that defendants are insolvent, is fatally defective, and a temporary injunction issued thereon was properly dissolved on motion supported by affidavits showing the solvency of the defendants.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 27, *Injunction*, §§ 15-17, 235-238.]

(Syllabus by the Court.)

Error from District Court, Kingfisher County; C. F. Irwin, Judge.

Action by John D. Bracken against Ira G. Stone and others. From an order dissolving an injunction, plaintiff brings error. Affirmed.

On March 10, 1906, John D. Bracken, plaintiff in error, plaintiff below, commenced this action in the district court of Kingfisher county, Okl. T., by filing his amended petition, as follows: "Comes now the above-named plaintiff and alleges: That plaintiff is in possession of and entitled to the quiet

and peaceable possession of lot 4, block 36, in that part of the city of Kingfisher, Okl. T., formerly known as Lisbon, and the owner of a certain frame building thereon, and the defendants have agreed and conspired together to injure and damage this plaintiff by entering upon said lot and committing waste thereon, and breaking and removing and carrying away the building on said lot without any legal process, and without the consent of the plaintiff, and without any authority or right whatsoever, and will at once commit said trespass and waste, and take, injure, and carry away said building, unless restrained by the court, to the irreparable damage of this plaintiff. Wherefore, plaintiff prays that defendants and each of them, their marshals, agents, servants, and employes, may be perpetually enjoined from entering upon said lot, or touching, breaking, removing, or in any way interfering with the plaintiff's said property, or any part thereof; and that in the meantime a temporary order may be issued enjoining the defendants as aforesaid and their deputies, marshals, agents, or employes, and for such further and other relief as the nature of the case may require.

"W. F. Jacobs and D. K. Cunningham,
"Attys. for Plaintiff."

"I, John D. Bracken, being duly sworn, make oath and say that I have read the above and foregoing petition and know the contents thereof, and that the several allegations contained therein are true.

"John D. Bracken.

"Subscribed and sworn to before me this 10th day of March, 1906.

"[Seal.] E. M. Hegler, Clerk."

At the same time, in support of said petition, plaintiff filed an affidavit reciting substantially as set forth in the petition. On the same day, on presentation thereof to Honorable John M. Graham, probate judge of that county, he issued the following order:

"Now on this 10th day of March, 1906, the above-named plaintiff making application before me for an order enjoined above-named defendants and each of them, and it appearing to me that plaintiff has filed his petition for injunction in the district court, and that the judge of said district court is absent from said county, and for good cause shown, the said order asked for is hereby granted, and the defendants are hereby ordered to be, and are hereby, enjoined from in any way entering upon lot 4 in block 36 in that part of the city of Kingfisher, Okl. T., formerly known as Lisbon, or committing any waste thereon, and abstain from taking, entering, or removing the frame building thereon from said lot or any part thereof or in any way interfering with the plaintiff, or any of his contractors, agents, servants, or employes, until further order of this court. Let this order of injunction issue upon plaintiff giving two

hundred dollar bond, to be approved by the clerk of the district court.

"[Seal.] John M. Graham, Probate Judge."

The bond was afterwards duly filed and approved, and proper process issued; and thereafter, on the 12th day of March, 1906, the above-named defendants and each of them duly appeared and filed in the above-entitled cause a motion, and afterwards a supplemental motion, to dissolve said temporary injunction, and at the same time filed certain affidavits in support thereof.

On March 17, 1906, the cause came on to be heard before Honorable C. F. Irwin, judge of the district court of the county of Kingfisher, at chambers, in the city of El Reno. Upon the motions of the defendants to dissolve said temporary injunction, and after hearing arguments of the attorneys on both sides, the court sustained the motion to dissolve, but further ordered, in substance, that the cause remain in effect upon proper bond, and case-made being filed by defendants, and the case prosecuted on appeal with due diligence to this court, which was done; and plaintiff now asks that the order vacating the temporary injunction aforesaid be vacated and set aside, and that said injunction be allowed to remain in full force and effect until said cause is finally heard upon the merits in the district court.

D. K. Cunningham and F. W. Jacobs, for plaintiff in error. John T. Bradley and John T. Bradley, Jr., for defendants in error.

TURNER, J. (after stating the facts as above). The first ground of the motion to dissolve in the lower court is "that the petition in said cause does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendants." The first question, then, is, did the court err in sustaining this contention, which is in the nature of a general demurrer to the petition? 10 Enc. Pl. & Pr. p. 1046, says: "On a motion to dissolve the injunction for the want of equity in the bill, facts which are well pleaded in the bill are to be taken as true the same as upon a demurrer"—citing authorities.

It is urged that the petition fails to "allege any irreparable injury or damage, or show that any irreparable injury or damage is threatened. It does not allege or show that the injury or threatened injury is not susceptible of adequate compensation in damages. It does not allege that the defendants or any of them are insolvent. * * * It is elementary that all these allegations are essential to entitle plaintiff to a temporary injunction. While the complaint concludes "to the irreparable damage of the plaintiff," this is not sufficient. 10 Enc. Pl. & Pr. p. 954, says: "A general allegation that the acts apprehended will be irreparable, untended by such a statement of facts as en-

ables the court to see that such will be the result, is insufficient. The pleader must not content himself with a mere averment of his conclusions, but must show how the irreparable injury apprehended is to arise by giving a full and detailed statement of the facts and circumstances, the nature and condition of his property, etc., so as to enable the court to determine the necessity for an injunction."

The threatened trespass sought to be enjoined cannot be shown to be irreparable, unless coupled with the allegations of the insolvency of the defendants, and the absence of it renders the complaint fatally defective. 10 Enc. Pl. & Pr. p. 956, says: "It frequently happens that the insolvency of the defendant is a material fact, which should be charged in order to show that the injury will be irreparable, especially where an injunction is sought against breach of contract, a nuisance, a trespass, or a waste; and such an allegation is all the more important when the damages are capable of estimation, because if the damages can be assessed by a jury, and the defendant is solvent, the remedy at law is necessarily adequate." But to put the matter of solvency of defendants beyond question, and to show that such they were, and that the injury, if inflicted, would not be irreparable, and for which plaintiff would have an adequate remedy at law, defendants filed affidavits showing the undoubted solvency of each of them, and, in substance, that they were the mayor, city council, and marshal of the city of Kingfisher, and, as such, were acting in the premises under and by virtue of certain ordinances of said city which provide, among other things, that it should be unlawful for any person to construct or remove to a location within a certain part of said city called the "fire limits" such a building as is the one in controversy; that plaintiff had violated these ordinances with reference to the building in question; and that by resolution of the city council it was ordered by the mayor and city council that the same be forthwith removed therefrom and out of the fire limits as established by said ordinances, and that the city marshal was duly ordered to remove said building accordingly.

Marshall v. Homier, 13 Okl. 264, 74 Pac. 368, is directly in point. In that case the court said: "Upon the motion to dissolve the temporary injunction affidavits and oral testimony were heard by the judge, and are incorporated in the record. The evidence shows clearly that the defendants are solvent, and are amply able to answer in damages in any sum that could be recovered by the plaintiffs, and the action being one for which the injury complained of by plaintiffs can be fully compensated in damages, the order of the judge dissolving the temporary injunction was clearly right. Where the alleged contemplated injury is such as can be fully compensated in money damages, and the defend-

ants are wholly and unquestionably solvent and responsible, a temporary injunction should not be granted; and, where a temporary injunction is granted upon proper motion, it should be dissolved, and the plaintiff left to his remedy by an action for damages, which under the circumstances is adequate. It is well settled that an injunction should not be granted or allowed where there is a full and adequate remedy at law."

It is unnecessary to consider the other grounds upon which the court sustained the motion. It follows that the court did not err in vacating the temporary injunction, and its action in so doing is therefore affirmed. All the Justices concur.

(20 Okl. 185)

CAMPBELL et al. v. SHERMAN.

(Supreme Court of Oklahoma. April 18, 1908.)

1. APPEAL—FINDINGS OF REFEREE—REVIEW.

Where a cause is referred to a referee to find and report the facts and conclusions of law to the court, and no bill of exceptions is allowed and signed by the referee preserving the evidence, this court cannot consider the question of the sufficiency of the evidence to support the findings of the referee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2433, 2911.]

2. SAME—PRESUMPTIONS.

Where the findings of a referee are substantially predicated upon the issues joined by the pleadings, it must be presumed by this court, in the absence of the evidence from the record, that there was sufficient testimony introduced at the trial to warrant the findings.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; B. F. Burwell, Judge.

Action by A. O. Campbell and Emily Culbertson against N. S. Sherman. Judgment for defendant, and plaintiffs bring error. Modified.

R. M. Campbell, for plaintiffs in error. Shartel, Keaton & Wells, for defendant in error.

KANE, J. This was a suit by the plaintiffs in error, plaintiffs below, against the defendant in error, defendant below, to recover on an account for material furnished for the construction of a certain building situated on lots 17 and 18 in block 5, in Oklahoma City, and to foreclose a mechanic's lien on said building. The cause was, by agreement of parties, tried before a referee appointed by the court below to try both law and facts. The evidence taken at the trial was not preserved and made a part of the record by proper bill of exceptions allowed and signed by the referee. It has been held by the Supreme Court of the territory of Oklahoma in at least three cases—Howe v. City of Hobart, 18 Okl. 243, 90 Pac. 431, Iralsen v. Stang, 18 Okl. 423, 90 Pac. 446, and Block v. Pearson (not yet reported in Okl. reports) 91 Pac. 715—and by the Supreme Court of the state of Oklahoma in one case—Wichita Mining & Improvement Con-

pany v. Hale et al. (not yet officially reported) 94 Pac. 530—that “where a cause is referred to a referee to find and report the facts and conclusions of law to the court, and no bill of exceptions is allowed and signed by the referee preserving the evidence, this court cannot consider the question of the sufficiency of the evidence to support the findings of the referee.”

With the evidence omitted from the record, there is only one question raised by the plaintiffs in error that may properly be reviewed here. The point thus made involves a discrepancy, apparent upon the face of the report, between certain findings of fact and conclusions of the referee, whereby the judgment against the plaintiffs in error was rendered for \$121.22 more than it should have been. It is clear that this was a mere oversight. The defendant in error admits that it was, and that the judgment below should be reduced by this sum. There seems to have been no offer by the defendant in error to remit this amount in the court below, but as it is one of the errors the plaintiffs in error complain of, and as it was not corrected below, we believe the judgment of the court below should be modified by deducting therefrom the sum of \$121.22, and that the costs of taking the case to this court should be taxed to the defendant in error.

We cannot agree with counsel for plaintiffs in error that his fourth assignment of error raises a question that can be reviewed without reference to the evidence. The referee states that the findings attacked by this assignment were based upon what appeared generally in the case, as well as upon the pleadings. In the absence of the evidence from the record, it must be presumed that there was sufficient evidence adduced at the trial to support the finding of fact. Where the findings of fact of a referee are substantially predicated upon the issues joined by the pleadings, it must be presumed by this court, in the absence of the evidence from the record, that there was sufficient testimony introduced at the trial to warrant the findings. *Wichita Min. & Imp. Co. v. Hale et al.*, supra.

It is therefore ordered that the judgment of the court below be modified to conform to the views herein expressed, and that the costs of taking the case to this court be taxed to the defendant in error. All the Justices concurring.

MASONER et al. v. BELL.

(Supreme Court of Oklahoma. April 13, 1908.)

1 APPEAL—REVIEW—BILL OF EXCEPTIONS.

Where a motion to require plaintiff to make his complaint more definite and certain is not preserved in the bill of exceptions, this court cannot review the action of the trial court in passing upon such motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2359–2362.]

2. SALES—PASSING TITLE—DELIVERY—ACTION FOR VALUE.

Where there is a sale of goods to be paid for in cash on delivery, payment and delivery are concurrent acts. In such case payment is a condition precedent to passing title to the vendee, and if on delivery of the goods payment is refused, and the same are appropriated by him to his own use, an action against him for the value will lie by the vendor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 496, 529–551.]

(Syllabus by the Court.)

Error from the United States Court in the Indian Territory, Southern District; Hosea Townsend, United States District Judge.

Action by Lizzie Bell against John Masoner and others. Judgment for plaintiff, and defendants bring error. Affirmed.

On December 1, 1899, defendant in error, Lizzie Bell, hereafter called plaintiff, brought suit before the United States Commissioner at Pauls Valley against plaintiffs in error John Masoner and Sam Garvin, hereafter called defendants, and recovered judgment against them in conversion for one bale of cotton in the sum of \$34.25. They appealed, and on March 26, 1902, on trial anew in the United States Court in the Indian Territory, Southern District, at the same place, plaintiff again recovered judgment for \$39.55 and costs. On March 29, 1902, defendants filed a motion for a new trial, which was overruled by the court and exceptions duly noted, and on May 27, 1902, filed their bill of exceptions and prosecuted a writ of error to the United States Court of Appeals in the Indian Territory, and the case is now before us as successor of that court.

To maintain the issues on her part plaintiff introduced in evidence a chattel mortgage made by defendant Masoner to her on April 26, 1899, on “my entire crop of corn and cotton on the Jones farm,” to secure a promissory note of that date for \$78.23, due from him to her October 15, 1899, with interest at 10 per cent. per annum from date, also introduced in evidence and proved to be unpaid. She also proved that after one bale of the cotton covered by the mortgage had been baled her husband, as her agent, and Masoner, the mortgagor, went to the gin where it was, and while there mutually agreed that Mr. Goss, who was in charge of the gin, should send the bale to Pauls Valley and sell it and bring the money back for plaintiff, who was to apply it to the mortgage debt; that pursuant to this understanding Goss, about October 7, 1899, acting through S. H. Long, turned the bale over to him with instructions to take it to Pauls Valley, “sell it, and bring the money back to him.” Long took the cotton, together with another bale, conveyed them to Pauls Valley, sold them to defendant Garvin, and testified: “* * * I was fixing to put the money in my pocketbook, and when I reached over for the other money for the other bale Mr. Lowe was sitting there and Mr. Garvin was sitting

to his left a little. Mr. Lowe turned round and said to Mr. Garvin: 'Don't John Masoner owe us something here?' Mr. Garvin says: 'Yes; just keep that.' And then Mr. Lowe reached over and got it, and I told them at the time I didn't want to get into any trouble over this cotton business, and Mr. Garvin spoke up and says, 'I will see that you get in no trouble,' and wrote a little note for me to carry back to Mr. Goss, and I carried it back to him." The note is as follows: "S. J. Garvin, General Merchandise Cotton and Grain Buyer. Pauls Valley, Ind. Ter. Oct. 7, 1899. Received of S. H. Long thirty-four and 25-100 dollars, on account of John Masoner, being the proceeds of one bale of cotton, No. 495—6.92½. S. J. Garvin, by L." Garvin paid nothing for the cotton. The bale weighed 495 pounds, and was worth 6.92½, in all \$34.25. Shortly thereafter the witness Howard went to Garvin with the brands of the cotton, and told him plaintiff had a mortgage on it, and made demand of it for plaintiff, and threatened suit if the same was not returned. Garvin told him to sue. Witness hunted for the bale in Garvin's cotton yard, but could not find it. The husband of plaintiff, still acting as her agent, "phoned" Garvin that his wife had a mortgage on the cotton, but did not get any satisfaction about it. He then saw Garvin about it, who told him he would not pay for the cotton, and that plaintiff would have to sue for it if she got anything. He also went to the cotton yard, but could not find the cotton. These are undisputed facts in the case, which went to the jury on evidence adduced by plaintiff alone, and the instructions of the court.

W. A. Ledbetter, S. T. Bledsoe, and J. B. Thompson, for plaintiffs in error. Johnson & Rennie, for defendant in error.

TURNER, J. (after stating the facts as above). The first assignment of error herein is that the court erred in overruling the motion of the defendants to require plaintiff to make her complaint more definite and certain; but as the motion is not brought into the record by being set forth in the bill of exceptions, or its overruling assigned as error in the motion for a new trial, we cannot consider it. 3 Enc. Pl. & Pr. 392, and cases cited; *Fisher v. United States*, 1 Okl. 252, 31 Pac. 195; *Swope v. Smith*, 1 Okl. 283, 33 Pac. 504; *Lake Erie R. R. Co. v. Clark*, 7 Ind. App. 155, 34 N. E. 587, 52 Am. St. Rep. 442.

The next assignment of error is that the court erred in refusing to instruct the jury as follows: "The court erred in refusing to instruct the jury, at the request of the defendants: 'We want to request the court to instruct the jury that, if they should find that the plaintiff in this action had authorized the sale of the cotton—Goss, I believe, is the party's name—had authorized Goss to make a sale of the property, and Goss, in pursuance

of that authority, had sent the cotton down here to be sold, and the same was sold to Sam Garvin, the fact that the money was not surrendered in accordance with any agreement had with the plaintiff in the case would not relieve her from her consent given to the sale. And her consent would entitle the defendants to a verdict in the case.'" This instruction, in effect, would have told the jury that the consent of the plaintiff to the sale was the only thing necessary to pass the title of this property to Garvin under the circumstances, and that it did not matter whether he paid for it or not; that this action would not lie. In support of this contention they cite abundance of authority to show that: "In an action for conversion by the mortgagee of the mortgaged chattel the defendant may show that he bought it from the mortgagor, and that the mortgagee assented by parole to the sale." *Jones on Chattel Mortgages* (4th Ed.) § 465; *Cobbey on Chattel Mortgages*, § 637; *New England Mortgage Security Co. v. Great Western Elevator Co.*, 6 N. D. 407, 71 N. W. 130; *Benedict v. Farlow*, 1 Ind. App. 160, 27 N. E. 307. This proposition of law is undoubtedly sound where there has been a sale, but the undisputed facts in this case show that there was no sale. Long, the agent of both the mortgagor and the mortgagee, was certainly authorized to make a sale of this bale of cotton, but he was only authorized to make a cash sale. And in his own language he was only authorized to "sell it and bring the money back to him [Goss]." The fact that the purchase money was set apart by Garvin, and afterwards, and before Long could accept it, was withdrawn, shows conclusively that such only was intended when the cotton was delivered to Garvin. The question of law then arises, does the title to property sold and delivered for cash pass to the purchaser until the cash is paid? We think not.

In *Frazier v. Railroad*, 104 Mo. App. 359, 78 S. W. 679, the court said: "It is a legal principle generally recognized that when no express provision is made for time of payment, a sale of personalty is presumed by law to be a cash transaction, and the delivery of the property and the payment of the purchase price are concurrent, and the buyer is not entitled to demand nor to receive delivery or possession of the goods, the subject of the contract, without proffer of the purchase price, or its actual payment. In the absence of other arrangement, express or implied, concerning the time of payment of the price and providing for future payment, or where the parties remain entirely silent respecting it, the rule is clearly established that the sale is made impliedly for cash, and title to the property does not pass to the vendee until payment or tender of payment has been made. The payment of the purchase price becomes a condition precedent by legal implication, and, except in the event of waiver by the vendor, title does not vest in the buyer until after performance of such condition. Those

principles are upheld and asserted by an unbroken line of decisions of the appellate courts of this state, as well as by the treatises of the most eminent writers upon the subject. Tiedeman, Sales, § 93; 1 Benjamin, Sales (4th Ed.) 318, 345; Southwestern, etc., Co. v. Stanard, 44 Mo. 71, 100 Am. Dec. 255; Hall et al. v. Railroad, 50 Mo. App. 179; Stresovich v. Kesting, 63 Mo. App. 57."

In *Hillmer v. Hills*, 138 Cal. 139, 70 Pac. 1061, the court said: "If Stewart had intended that the sale should be on credit, he would have given his clerk directions to inclose the bill of lading with the invoice to plaintiff. But one conclusion can be drawn from this act in instructing that the bill be withheld to accompany the draft. 'Terms cash' was distinctly stated in the body of the invoice forwarded by Stewart, and there can be no question that Stewart intended to make the sale one of 'cash on delivery.' Such being the clear intention of the parties to the transaction, it is plain, as a matter of law, that no title in the goods could pass to plaintiff until they had paid the 'cash' for the goods. This was a 'cash' sale, as distinguished from a sale on credit, and that the title to the goods as well as the right of possession remained in Stewart until the cash should be paid is settled law, as will clearly be illustrated by an examination of the following citations: *Sanborn v. Shipherd*, 59 Minn. 144, 60 N. W. 1089; *Blackwood v. Cutting Packing Co.*, 76 Cal. 215, 18 Pac. 248, 9 Am. St. Rep. 199; *Ranish v. Kirschbraun*, 107 Cal. 660, 40 Pac. 1045."

In *Drake v. Scott*, 136 Ala. 261, 262, 33 South. 874, 96 Am. St. Rep. 25, the court say: "Where there is a sale of goods to be paid for in cash on delivery, payment and delivery are concurrent acts. In such case payment is a condition precedent to passing title to the vendee. If delivery is made without demanding payment, or under circumstances showing no expectation of immediate payment, the condition is waived, and the title passes; but if the goods are put into the possession of the buyer, on the understanding or agreement that he will pay for them immediately, and he fails or refuses to do so, the seller may recover the goods." *Shines v. Steiner*, 76 Ala. 458; *Harmon v. Goetter*, 87 Ala. 325, 6 South. 93; *Benjamin on Sales* (6th Ed.) §§ 1, 320, and note 4, p. 298.

It follows that as there was no sale of the property in controversy to Garvin, and that he refused to surrender the same to plaintiff on demand, but converted it to his own use, that this action would lie; and that the court did not err in refusing to give the requested instruction.

The fourth assignment of error is to a part of the charge wherein is recited facts about which there was no controversy, and in which we see no error.

The fifth assignment of error is that the court erred in charging the jury as follows: "The court will instruct you that if this was the property of the plaintiff in this case, that

she had a mortgage upon this property, that Mr. Garvin and Mr. Masoner, or either of them, or both of them together, could not take the proceeds of the cotton that belonged to the plaintiff in this case." Defendants contend that by this, in effect, the court instructed the jury to return a verdict in favor of the plaintiff. Admitting such to have been the force and effect of the charge, we do not think the court erred in so charging. The evidence was undisputed, and not conflicting. It clearly showed a conversion of the property on the part of Garvin; that while, as defendants contended affirmatively, there was a waiver of lien on the part of the mortgagor and mortgagee on the property in controversy, yet there was no sale of it to Garvin, as they further contended. 6 Enc. Pl. & Pr. 686, says: "Where there is no sufficient evidence of a fact essential to plaintiff's case, or the defendant's affirmative defense, a verdict should be directed"—citing authorities. Hence the court did not err in so charging or refusing to instruct peremptorily for the defendant, according to their second assignment of error, and the judgment of the lower court must be affirmed, unless the judgment is contrary to the law or the evidence, as is next contended.

Upon this point we have no doubt as to Garvin, but the same might not have been said as to Masoner but for the fact that, after wrongfully receiving, without objection, the benefit of the credit for the cotton in question on the books of Garvin, he made common defense with him in this cause, and set up in his answer a waiver of lien on behalf of plaintiff, and seeks to defeat a recovery herein on the ground that the title to the property passed to Garvin by virtue of his alleged purchase. We are inclined to think the evidence in the case sufficient to show him a tort-feasor jointly liable in the case with Garvin. Cooley on Torts (3d Ed.) 244, says: "All who aid, advise, command, or countenance the commission of a tort by another, or who approve of it after it is done, are liable, if done for their benefit, in the same manner as if they had done the act with their own hands. * * *"

The judgment of the lower court is affirmed. All the Justices concur.

(20 Okl. 635)

BURKHALTER v. SMITH.

(Supreme Court of Oklahoma. April 13, 1908.)

APPEAL—REVIEW—ABSTRACT QUESTIONS.

The Supreme Court will not decide abstract or hypothetical cases disconnected from the granting of actual relief, or from the determination of which no practical result can follow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3331-3341.]

(Syllabus by the Court.)

Error from District Court, Caddo County; F. E. Gillette, Judge.

Application of S. H. Smith for a liquor license. F. F. Burkhalter filed a remonstrance, and from an order granting the license Burkhalter brings error. Dismissed.

September 25, 1905, S. H. Smith filed in the office of the county clerk of Caddo county, Okla., a petition praying that he be granted a license to sell intoxicating liquors at retail in the town of Verden, in said county. On the 13th day of October, 1905, F. F. Burkhalter filed a remonstrance against the granting and issuance of said license. The hearing of the same was set for November 6, 1905. The evidence was taken before the board of county commissioners which, on November 7, 1905, ordered the county clerk to issue said license. From this action the remonstrator filed his appeal to the judge of the district court who, after considering the case, and on April 11, 1906, sustained the action of the board of county commissioners, and directed the license to issue as prayed for. The case is now before us on petition in error.

A. J. Morris and Wm. McFayden, for plaintiff in error. Glitsch, Morgan & Glitsch, for defendant in error.

DUNN, J. (after stating the facts as above). This court at this term had identically the same question as is presented in this case before it in the case of *P. F. Harman v. L. C. Burt*, 94 Pac. 528, in which it said: "Since this case has been filed the territory of Oklahoma has been admitted as a state, and under the terms of its Constitution the sale of intoxicating liquors as provided for under the statutes of the territory of Oklahoma is no longer lawful. Under these circumstances a decision of this case by this court on its merits would not avail anything to either of the parties litigant. Should the court sustain the contention of the applicant, no license could be issued to him, and the remonstrants who seek to prevent the issuance of such license find complete relief under section 9 of the Constitution, as compiled by Bunn, which provides that: 'The manufacture, sale, barter, giving away, or otherwise furnishing—intoxicating liquors—is prohibited—until the people of the state shall otherwise provide by amendment of this Constitution and proper state legislation.' Under circumstances of this character appellate courts have uniformly declined to consider the merits of a controversy which has become purely hypothetical, and from a decision of which no practical results could follow."

This statement is entirely applicable to the case at bar. The case is accordingly dismissed. All the Justices concurring.

GARDNER v. KIME.

(Supreme Court of Oklahoma. April 14, 1908.)

1. FORCIBLE ENTRY AND DETAINER—NOTICE TO QUIT.

A plaintiff cannot maintain an action of forcible entry and detainer if the three days' notice to leave the premises, prescribed by section 5089, Wilson's Rev. & Ann. St. 1903, of Okla-

homa, is not given, and the plaintiff, to obtain judgment in such a case, must affirmatively show the service of the notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forcible Entry and Detainer, § 52.]

2. APPEAL—(CASE-MADE)—CONCLUSIVENESS.

A mere inference arising from the record in this case that there might have been other evidence introduced at the trial than that preserved in the case-made will not outweigh the positive statement of the trial judge that it was all the evidence in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2854.]

(Syllabus by the Court.)

Error from District Court, Noble County; Bayard T. Hainer, Judge.

Action by Isaac Kime against Marion Gardner. Judgment for plaintiff, and defendant brings error. Reversed and rendered.

P. W. Cress and C. W. Ransom, for plaintiff in error. Green & Martin, for defendant in error.

KANE, J. This was an action in forcible entry and detainer brought by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover possession of certain real estate situated in the county of Noble, territory of Oklahoma. It appears from the record that after all the evidence was introduced counsel for the respective parties each moved the court to instruct the jury to return a verdict in favor of their client, whereupon the court said: "I suppose the jury may be excused from further consideration of the case. Both parties move for judgment, and that takes the case from the jury." To this statement there was no objection from counsel for either side, and the court then excused the jury from further consideration of the case; neither counsel for the plaintiff in error or counsel for the defendant in error making any objection.

Counsel for plaintiff in error insists that, under this state of the record, it was error for the court to take the case from the jury, and cites *Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801, in support of this contention. The plaintiff in error was entitled to have his case submitted to the jury unless his conduct, as above disclosed by the record, amounts to a waiver of this right. We do not want to be understood as holding that a mere request by both parties for a peremptory instruction amounts to a waiver of the right to have the jury return a verdict; but this case discloses other circumstances which, taken with the requests by both parties for a peremptory instruction, do amount to a waiver. Where both parties to a cause ask the court for a peremptory instruction to the jury to return a verdict in their favor, and the court thereupon states that such request takes the case from the jury, and no objection is made to this statement by the parties, and thereupon the court excuses the jury from further consideration of the case without objection or exception, such conduct

waived the right to have a verdict returned by the jury, and it was the duty of the court to render judgment as though no jury had been impaneled and sworn.

The only question, therefore, for this court to determine, is which one of the parties judgment should have been rendered for. From an examination of the record we find it contains no evidence whatever that the notice to quit was served on the defendant three days before the commencement of the action. This notice is an absolute requirement of the law governing cases of forcible entry and detainer, and the burden of proving such notice was on the plaintiff. A plaintiff cannot maintain an action of forcible entry and detainer if the three days' notice to leave the premises, prescribed by section 5089, Wilson's Rev. & Ann. St. 1903, of Oklahoma, is not given, and the plaintiff, to obtain judgment in such a case, must affirmatively show the service of the notice. *Stuller v. Sparks*, 51 Kan. 19, 31 Pac. 301. As there was no evidence in the record showing that the notice was given, it follows that the court below should have sustained defendant's motion and rendered judgment in his favor.

We are not unmindful of the authorities cited by the defendant in error (to avoid the force of the rule above laid down) to the effect that, when the case-made contains a statement that all of the evidence introduced upon the trial is contained therein, but the record itself shows upon its face that it does not, the record is the best evidence and will prevail over such statement. These authorities are not in point here. A paper which was presumably the return of the officer to the notice to quit was identified and offered in evidence, but it does not appear in the record. This would probably be sufficient to raise an inference that it was introduced, but such inference will not prevail over the positive statement in the record that it contains all the evidence. "A mere inference arising from the record in this case that there might have been other evidence introduced at the trial than that preserved in the case-made will not outweigh the positive statement of the trial judge that it was all the evidence in the case." *McCormick v. Holmes*, 41 Kan. 263, 21 Pac. 108.

It is therefore ordered that the judgment of the court below be reversed, and that judgment be rendered in favor of the plaintiff in error, defendant below. All the Justices concurring.

(20 Okl. 626)

MISSOURI, K. & T. RY. CO. v. SHEPHERD.
(Supreme Court of Oklahoma. April 13, 1908.)

1. NEGLIGENCE—QUESTION FOR JURY.

In cases involving the question of negligence, the rule is now settled that, "when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the

question of negligence is ever considered one of law for the court."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279-302.]

2. RAILROADS—DUTY OF RAILROAD COMPANY—INSTRUCTION.

Under the laws in force in that portion of the state known as Indian Territory prior to its admission as a state, an instruction in reference to the duty of railroads towards stock that "the company is required to keep a lookout for stock, and, if they keep a proper lookout and are not able to discover it in time to stop their train, they are not responsible," is not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1476-1482.]

(Syllabus by the Court.)

Error from the United States Court for the Central District of the Indian Territory, at South McAlester; Wm. H. II. Clayton, Judge.

Action by Walter Shepherd against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

On July 1, 1905, there was filed in the office of the United States commissioner for the Wilburton commissioner's district, Central district of Indian Territory, a complaint by Walter Shepherd against the Missouri, Kansas & Texas Railway Company, in which he charged the said company with having negligently killed a sorrel mare belonging to him, and asked damages for the same. On the trial of this cause judgment was rendered in his favor, and the case was appealed by the company to the United States court for the Central district of Indian Territory at South McAlester, where, on retrial, plaintiff again secured judgment, from which the railroad company appealed to the United States Court of Appeals for the Indian Territory, and the case is before us by virtue thereof.

Cliffour L. Jackson and Brewer & Andrews, for appellant. Arnote & Bain, for appellee.

DUNN, J. (after stating the facts as above). There are three specifications of error alleged by plaintiff in error, as follows: "(1) The trial court erred in refusing to instruct the jury to return a verdict for the defendant as requested by counsel for plaintiff in error. (2) The trial court erred in instructing the jury in this case as follows: 'The company is required to keep a lookout for stock, and, if they keep a proper lookout and are not able to discover it in time to stop their train, they are not responsible.' (3) The trial court erred in overruling plaintiff in error's motion for a new trial."

The proposition raised by the first specification of error strikes directly at the verdict, and presents for our consideration the question of whether or not there was any evidence to sustain it, or, if the verdict was such "that all reasonable men would agree that it was not supported by the evidence, and should be annulled." *Gulf, C. & S. F. Ry. Co. v. Ellis*, *infra*. On the physical facts sur-

rounding the case there is practically no dispute. The point of contact between these parties arises out of the facts transpiring at the time of the collision of defendant's engine and plaintiff's animal.

The evidence shows that the track of the Missouri, Kansas & Texas Railway Company through the town of Canadian, Ind. T., the place where the animal was killed, is almost a perfectly straight and a practically level track from the crossing north of the depot to the crossing south of the depot; the distance between these crossings not appearing definitely, but between them located on the east side of the track is a depot, and 80 yards south of that an old box car used for a toolhouse. From the toolhouse to the crossing south of the same is a distance of about 200 to 250 yards. On the west side of the track, and a little south of the depot, is a cotton platform. South of the platform is an icehouse and a cotton seedhouse. South of them are located the stockyards and a granary. Between the buildings on the west side of the track and the main line of the railroad there are several lines of switches, and on them, at the time of the killing mentioned, was a string of box cars. The train which killed the animal was coming from the north, and consisted of an engine and caboose car, running at a speed of 30 to 35 miles per hour. The mare in question was grazing at the side of the track a short distance south of the toolhouse, and to the east of the main track, and within a few feet thereof, when the engine and caboose car approached. At this time all parties agree the mare started to run across the track in front of the approaching train. The engineer in charge of the engine testified: "I don't suppose I was over 150 feet from where the horse was when I first saw it start towards the track, and, of course, I put in the emergency just as soon as I saw the horse start for the track. About the time I put in emergency it struck, and it did not slack my speed very much, so I released her again, and, when I looked out and seen the horse laying on the pilot, I applied emergency again for fear the horse would roll off under the engine and ditch the engine." On being questioned as to how far in his judgment it was below the toolhouse where he struck the mare, he states: "Could not have been over 25 or 30 feet"; that at the rate of speed he was going it required 500 or 600 feet for him to bring his train to a stop, and it was running from 44 to 50 feet per second. The evidence of the engineer thus given was corroborated by two or three witnesses on the question of where the mare was when struck, and was that upon which the company relied before the jury to show there was no negligence. The testimony of witnesses for plaintiff differs from this evidence, in that witness John West testifies that the "animal leaped across the track, turned right down south, and ran on down 80 or 100 yards, and maybe further. Don't know the distance.

Then she turned back towards the east side of the railroad, and got in the middle of the track, and started down it." She made three or four jumps before the engine struck her. On cross-examination this witness gave the following testimony: "Q. How far was it from where the animal crossed the track first to where she was struck? A. One hundred yards; might have been more. May be 120 where she was struck. Q. It might have been 400? A. No; it was not 400. Q. What is your judgment? A. About 120 yards." Another witness, John Lancy, testified: "She got frightened, and went over to the west side, and then run down the track and tried to get away. I suppose she tried to get back across the track—she run down a little past the stockyards I suppose, and got on the track, and maybe made four or five jumps down the track when the engine hit her." When interrogated as to how far she ran before she was caught said: "Well, I suppose between 100 and 130 yards." While not stating all the evidence given on either side, that quoted is sufficient to show the different theories presented to the jury. The defendant in error admits in his brief that "if the animal was killed where the engineer and other witnesses for plaintiff in error testified it was struck by the engine, it is clear that the engineer could not have stopped or checked up the speed of his train sufficient to have prevented striking the animal." He contends, on the other hand, that if his theory is correct, and his evidence is true, then the plaintiff in error was negligent in not retarding the speed of the train to such an extent as to have permitted the animal to have escaped, arguing that if the train could have been stopped in 500 or 600 feet, adding 150 feet which the engineer testifies was the distance that the mare was from him when he first saw her to the 300 or 360 feet which was the point at which she was struck after crossing the track as testified to by West and Lancy would make a distance of from 450 to 510 feet that the engineer had in which to so slack his train as to enable the animal to escape being struck.

Under these facts and the record made, the question now arises: Should the court or the jury decide it? Would all reasonable men draw the same conclusion from this evidence? Is there no room for honest difference of opinion among men of reason, judgment, and discretion? We cannot say so. Judge Caldwell, in the case of Gulf, O. & S. F. Ry. Co. v. Ellis, 54 Fed. 481, 4 C. O. A. 454, presents the best discussion of the proper province of the court and the jury that we have ever seen. Its fullness, clearness, and logic are so marked that no extenuating plea is necessary for the generous quotation which we make from it: "In common-law actions tried to a jury this court cannot review or retry the facts. If there is any evidence, direct or circumstantial, fairly tending to support the verdict, it must stand. Every presumption is

in its favor, and all doubts must be resolved in its favor. This court will not weigh or balance the evidence. And in cases like the one at bar, which turn on the question whether the party exercised ordinary care or was guilty of negligence, after the usual and appropriate definitions of those terms by the court, it is the province of the jury to say from a consideration of the evidence whether in the particular case ordinary care was exercised, or whether there was negligence. In other words, what is ordinary care, or what is negligence, in the particular case, is a question of fact for the jury, and not of law for the court. *Railroad Co. v. Stout*, 17 Wall. 657, 663, 664, 21 L. Ed. 745; *Jones v. Railroad Co.*, 128 U. S. 443-445, 9 Sup. Ct. 118, 32 L. Ed. 478; *Railway Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railroad Co. v. Foley*, 53 Fed. 459, 3 C. C. A. 589; *Pol. Torts*, 386 et seq. But in the trial of every case before a jury there comes a time when it may be the duty of the court to decide as a matter of law whether there is sufficient evidence for the jury to found a verdict upon. If there is not, the practice in the federal courts is to instruct the jury to return a verdict for the defendant. *Railway Co. v. Converse*, 139 U. S. 460, 11 Sup. Ct. 509, 35 L. Ed. 213. But the case should not be withdrawn from the jury, unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Railway Co. v. Cox*, 145 U. S. 593, 606, 12 Sup. Ct. 905, 36 L. Ed. 820. And, in cases involving the question of negligence, the rule is now settled that, 'when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court.' *Railway Co. v. Ives*, supra. The presumption is that jurors are reasonable men, and that the trial judge is a reasonable man, and, when the judge and jury who tried the cause concur in the view that the evidence establishes negligence, every presumption is in favor of the soundness of that conclusion. The whole fabric of our judicial system is grounded on the idea that jurors are better judges of the facts than the judges. By the Constitution of the United States, and by the Constitutions of all the states of the Union, juries are made the judges of the facts in all common-law actions. These constitutional provisions are founded on centuries of experience, and every day's practice confirms their wisdom. It may be said of our constitutional provisions on the subject of juries, as it has been said of the British Constitution, that juries 'are, as it were, incorporated with our Constitution, being the most valuable part of it.' *Jac. Law*

Dict. tit. 'Jury.' It was because the people thought the judges were poor judges of the facts that they committed their decision to a jury. Undoubtedly juries sometimes err in deciding the facts but their errors are trifling in number and extent compared with the errors of the judges in deciding the law. The numerous appellate courts of the country are engaged principally in correcting their own and the errors of other courts on questions of law. The mistakes of juries take up very little space comparatively in the enormous volume of law reports with which the country is being deluged. In their deliberations upon the facts of the case they are at liberty to exercise their common sense and practical experience and knowledge of human affairs, untrammelled by the excessive subtilty, overrefinement, and the hair-splitting of the schoolmen which have crept into the administration of the law by the courts to such an extent as to sometimes bring it into reproach. It is not by such modes of reasoning that the soundness of a verdict of a jury is to be tested. It is not, therefore, any ground for disturbing the verdict of a jury that the court would not have rendered such a verdict. It must appear that all reasonable men would agree that it was not supported by the evidence, and should be annulled. The constitutional right of the citizen to have the facts of his case tried by a jury must not be encroached upon by the courts under any pretext. 'It is of the greatest consequence,' said Lord Hardwick, 'to the law of England, and to the subject, that these powers of the judge and jury be kept distinct; that the judge determine the law, and the jury the facts, and, if ever they seem to be confounded, it will prove the confusion and destruction of the law of England.' *Rex v. Poole*, Cas. t. Hardw. 28. It is of equal consequence to the laws of this country and its people that the separate powers of the judge and jury be sedulously maintained." In the case of *Missouri, Kansas & Texas Railway Co. v. Farrington*, which was one wherein damages were sought for the killing of a cow, cited in 1 Ind. T. 646, 43 S. W. 946, Judge Townsend, after reciting that "the evidence of the plaintiff is that the train was 200 yards from the cow when she got upon the track, and the evidence of the engineer is that she was about 90 feet from the engine, that she got off the track, and he thought she would remain off, but that she came back on the track when the engine was about 50 feet from her." The speed of the train was estimated to be from "10 miles per hour by defendant's witnesses to 40 miles per hour by plaintiff's witnesses." On passing on the question of negligence, and in holding that it was properly a question for the jury, he says: "The evidence we think properly went to the jury, and it is the province of the jury to say whether the circumstances are sufficient to warrant a finding that the cow was killed through the negligence of the railway com-

pany. The duty of railway companies to keep a lookout for stock on their tracks is no longer an open question. We think the charge of the court properly stated the law to the jury. The questions involved in this case are fully discussed in *Railway Co. v. Ellis*, 10 U. S. App. 640, 4 C. C. A. 454, 54 Fed. 481; *Railway Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, 49 Fed. 347; *Railway Co. v. Elledge*, 4 U. S. App. 136, 1 C. C. A. 295, 49 Fed. 356; *Railway Co. v. Johnson*, 10 U. S. App. 629, 4 C. C. A. 447, 54 Fed. 447, and cases cited." Under the authorities of the jurisdiction in which the case arose upon the duty of a railway company in reference to keeping a lookout for stock, the instruction: "The company is required to keep a lookout for stock, and, if they keep a proper lookout and are not able to discover it in time to stop their train, they are not responsible"—was not erroneous. *M., K. & T. Ry. Co. v. White*, 2 Ind. T. 23, 47 S. W. 351; *M., K. & T. Ry. Co. v. Farrington*, 1 Ind. T. 646, 43 S. W. 946; *Gulf, C. & S. F. Ry. Co. v. Washington*, 49 Fed. 347, 1 C. C. A. 286; *Gulf, C. & S. F. Ry. Co. v. Ellis*, 54 Fed. 481, 4 C. C. A. 454.

There appearing no error in the record, the judgment of the lower court is accordingly affirmed. All the Justices concurring.

(20 Okl. 787)

ROBINSON & CO. v. ROBERTS.

(Supreme Court of Oklahoma. April 14, 1908.)

1. SALES.—FRAUD—EVIDENCE—MISREPRESENTATIONS.

In an action of replevin for property traded in on the purchase price of a threshing outfit, consolidated and tried with a suit for the balance due upon notes given for the remainder of said purchase price which had been foreclosed, leaving said balance due plaintiff, where the evidence showed a verbal agreement between plaintiff's agent and defendant that the notes and mortgage so given by him in payment therefor were to be held by the agent, and not turned in to plaintiff until defendant could take the outfit and try it for the first 10 days of the threshing season, and if it did not suit him could return it and get back his notes and mortgage so given, and in order to induce defendant to sign a contract therefor said agent represented to him that the contract contained said verbal agreement, and so read the same to defendant, who could not read the same because he did not have his spectacles, and who relied upon the statement of the agent that said order did contain said verbal agreement, when in fact it did not, but the same was a contract for an absolute sale of the property with covenants of warranty, and the outfit was returned because it did not do as so verbally agreed, held, that the finding of the jury that the defendant was induced to sign the contract by the fraud of the agent was supported by the evidence, although the evidence further disclosed that a copy of the contract was furnished defendant when signed by him, and which he did not read until the "trouble with the machine came up."

2. SAME—FRAUD—DILIGENCE—QUESTION FOR JURY.

Where defendant claims to be relieved on the ground of fraud, he must act with the utmost diligence and promptitude in discovering the fraud, and in claiming to be relieved by

reason of it, and whether he has so acted, is a question of fact for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 313-317.]

Kane, J., dissenting.

(Syllabus by the Court.)

Error from District Court, Garfield County; James K. Beauchamp, Judge.

Action by Robinson & Co. against C. F. Roberts. Judgment for defendant, and plaintiff brings error. Affirmed.

On November 25, 1903, Robinson & Co., a corporation, plaintiff in error, plaintiff below, filed in the district court of Garfield county, Okl., its amended petition in replevin against C. F. Roberts, defendant in error, defendant below, to recover possession of one sixteen horse power traction engine, Stephens make, of the value of \$500, and one Reeves separator, with wind stacker, weigher, and drive belt, of the value of \$200, by virtue of the terms of a written contract between plaintiff and defendant, dated June 13, 1903, a copy of which was attached thereto and marked "Exhibit A," wherein, as is alleged, defendant promised to, and did thereby, sell plaintiff the property therein described in part payment of certain other personal property therein described purchased of plaintiff by defendant, and wherein it was stipulated between them that defendant should deliver the property herein sought to be replevined before plaintiff should deliver to defendant said property bought by him of it, and which defendant refuses to surrender on demand. For answer defendant filed a general denial. On November 12, 1904, plaintiff filed an amended petition in an additional action, and stated in substance that on the — day of June, 1903, plaintiff and defendant entered into a contract, a copy of which was filed therewith and marked "Exhibit A," whereby plaintiff sold defendant one sixteen horse power right-hand traction engine, with full length cab and coal stack, one 32½x52 Bonanza separator, with Robinson self-feeder, American weigher, and wind stacker attached, one Gandy drive belt 150 feet and eight inches, four ply, one canvas cover, one tank, pump, and hose, one adjustable screen to be put in extra, subject to the conditions of the warranty printed in said contract, and in payment whereof defendant agreed to pay plaintiff the sum of \$15,500, evidenced by certain notes set forth in the complaint. It is further alleged that in addition defendant agreed to transfer to plaintiff as part of the purchase price of said property one sixteen horse power Stephens traction engine and Reeves separator, with wind stacker, weigher, and drive belt, and pay it the additional sum of \$250, evidenced by certain promissory notes set forth in the complaint; that all of said notes were payable to plaintiff, and were secured by a chattel mortgage on the machinery bought of plaintiff by defendant, which said notes were to be turned over in payment to plaintiff before delivery of said purchased

property; that pursuant thereto plaintiff delivered said property to defendant, but that he had failed and refused to deliver to plaintiff the property therein agreed by him to be delivered, and that plaintiff has done all that it contracted to do in the premises; that pursuant to said contract, and to secure said notes defendant, on June 18, 1903, made, executed, and delivered to plaintiff a chattel mortgage on the machinery so sold him by plaintiff, a copy of which is filed with its complaint and marked "Exhibit G"; that the debt evidenced by said notes becoming due and payable, plaintiff had foreclosed said mortgage according to the terms thereof, and had sold thereunder the property sold defendant, as aforesaid, for the sum of \$1,325, and had credited the same upon said notes, leaving a balance due thereon of \$544.45, for which it asked judgment.

For answer to this petition defendant says that on the ——— day of June, 1903, one J. M. Brandt, as agent for plaintiff, represented that he had in his possession in the city of Enid a certain threshing outfit set forth in Exhibit A to plaintiff's petition; that the same was new, well made, and of good material, and with proper management would do as much and as good work as any other of the size and made for the same purpose; that he desired to sell the same, and that he would allow defendant to take it out and try it and determine whether or not it would perform the work as represented; that thereupon they agreed that defendant should take said threshing outfit at the beginning of the threshing season in 1903, use the same for a period of 10 days, and if it worked satisfactorily it was then to become the property of defendant, for which he would pay plaintiff \$1,800, and also deliver to said agent one sixteen horse power Stephens traction engine and a Reeves separator, wind stacker, weigher, and drive belt, the property of defendant; that said indebtedness of \$1,800 was to be evidenced by five promissory notes due thereafter at stated intervals; that pursuant to said verbal agreement he called on said agent for the threshing outfit for the purpose of taking and trying the same, which was delivered to defendant, at which time said Brandt represented to defendant that it was necessary for him to execute the notes above referred to and set forth in the petition, and leave the same with him to be returned to defendant in case the threshing outfit proved unsatisfactory, and if, on the other hand, said notes were then to be delivered to plaintiff and become its property, the sixteen horse power Stephens traction engine and the Reeves separator, with wind stacker, weigher, and drive belt, were, in that event, to be also delivered to plaintiff. At the same time said Brandt represented to defendant that it was necessary to sign some writing to the effect that said threshing outfit had been delivered to defendant in accordance with their said verbal agreement, and he prepared a paper

partly in printing and partly in writing, which he said and represented to defendant contained their stipulation and verbal agreement above set forth; that he would retain said contract and agreement in his possession and under his control, and that it would only be delivered to plaintiff after the said defendant had tried said threshing outfit and accepted it, and that said writing would be delivered together with the notes to defendant if he decided not to accept the threshing outfit after giving it a fair trial; that, relying upon the statement of J. M. Brandt, the said agent, and believing that to be true, the said J. M. Brandt pretending to read the said agreement and contract, and believing that he read the same correctly, and relying upon him in that particular, being unable at the time to read said contract on account of his eyes, he signed said contract presented and read to him by the said J. M. Brandt, the said J. M. Brandt, as aforesaid, representing and stating to the effect that the said writing was in no way to affect or vary the terms of their said verbal agreement; that according to said verbal agreement defendant took said threshing outfit for the purpose of trying to see if it met the requirements and performed the work that it was represented to do; that said Brandt requested him that if it did not do so to at once notify him of any defect and he would send an expert or some one to remedy any defect that might be discovered in the outfit; that he took the same and gave it a fair trial, and that the same wholly failed to do the work as represented; that he notified said Brandt of the defects therein; that he and others acting under him took charge of the machinery and attempted to put it in working order, which they entirely failed to do in certain particulars specifically set forth in the complaint; that after repeated efforts so to do defendant notified said Brandt that he could not accept the said threshing outfit, and offered to return the same to him in the storehouse of plaintiff from which it was taken; that thereupon said Brandt and defendant verbally agreed that said Brandt take possession of said outfit and demonstrate at his own expense that the same would perform the work as represented, failing in which he would keep the same and return to defendant the purchase-money notes sued on, but if he succeeded in so doing the sixteen horse power Stephens traction engine and the Reeves separator, with wind stacker, weigher, and drive belt, were to be delivered to plaintiff; that pursuant thereto said Brandt, after repeated attempts to make the outfit do the work as represented, finally abandoned it, after the same was practically torn to pieces in an effort to do so; and that at no time did plaintiff ever deliver said threshing outfit to him as the purchaser thereof under the pretended contract marked Exhibit A, or any other contract, his signature to which was, in effect, procured by fraud and misrepresentation, and said notes are without consideration, and

said threshing outfit never by him accepted.

To this answer plaintiff filed reply, in effect, that at the time said contract was signed defendant took away with him a copy thereof given him by Brandt, and was then chargeable with notice of its contents, and was guilty of negligence in raising any objection thereto.

Charles West and Winfield Scott, for plaintiff in error. Denton & Denton, for defendant in error.

TURNER, J. (after stating the facts as above) By agreement these causes were consolidated and tried to a jury, which returned a verdict in favor of defendant. Plaintiff appealed, and the first assignment of error is that the court erred in refusing to instruct the jury at the close of the testimony on both sides as requested by plaintiff: "That this is not a case under the law and the evidence wherein the minds of reasonable men may differ, and you are instructed to return a verdict for plaintiff for the amount due on the notes, which the uncontradicted evidence shows is \$554.40, with six per cent. interest from October 12, 1903, and for the possession of the property sought to be replevined." This, in effect, was a request for the court to instruct peremptorily for the plaintiff, and the first question for us to consider is, was there sufficient evidence of fraud to support the verdict? In *Gulf, C. & S. F. Ry. Co. v. Ellis*, 54 Fed. 481, 4 C. C. A. 454, Justice Caldwell, speaking for the court, said: "If there is any evidence, direct or circumstantial, fairly tending to support the verdict, it must stand. Every presumption is in its favor, and all doubts must be resolved in its favor. This court will not weigh or balance the evidence."

The verdict of the jury, in effect, found that defendant was induced to sign the order for the threshing outfit in question by the fraudulent representations of Brandt, and that the contract between plaintiff and defendant pertaining thereto was as set forth in defendant's answer. Tested by the above rule, let us see if the evidence is legally sufficient to support the verdict. The proof shows that about June 13, 1903, J. M. Brandt was agent for plaintiff, and located in Enid, Okl.; that defendant was a farmer and lived a few miles in the country; that about that time defendant was looking around to buy or trade for a threshing outfit and ran across Brandt, who stated that he had a machine in Enid that he would trade for defendant's old outfit; that they talked the matter over several times, and finally agreed that defendant would let Brandt have his old outfit and give him \$1,800 for the one Brandt had in stock in Enid, provided that on 10 days trial after the threshing season commenced it was found by defendant to do good work and thresh 1,500 to 2,000 bushels a day. No other than a verbal contract was spoken of be-

tween the parties until defendant went to get the outfit from Brandt, at which time Brandt wanted a contract and things fixed up to show that the machinery was turned over to the defendant, and so informed him, and that he would hold the notes, mortgage, and contract in his possession and permit defendant to hold his outfit in his possession until defendant had the 10 days' trial agreed to, and that, if defendant accepted the property after trying it, it was understood between them that the notes and mortgage were to be turned in to the company; that in case the outfit did not do as verbally agreed between them it was to be turned back to Brandt, and plaintiff's contract, notes, and mortgage were to be returned to the defendant. This was done with that understanding, and the notes and mortgage set forth in this cause were prepared and delivered to Brandt. At the same time Brandt presented to him to sign a contract, of which Exhibit A to plaintiff's petition is a copy, which purports to be an absolute sale of the threshing outfit by plaintiff to defendant in consideration of \$1,550, defendant's old outfit therein described as "a sixteen horse power Stephens traction engine and a Reeves separator, with wind stacker, weigher, and drive belt," payable according to the terms of three promissory notes of \$450 each, and further containing covenants of warranty on the part of the seller. The verbal agreement above set forth is nowhere mentioned in said contract. When presented for defendant's signature, he did not read it, because he did not have his spectacles, and depended on Brandt to read it for him, which he did.

Defendant testified: "He read the contract down to where it stated in the original contract that according to our verbal contract where I was to have 10 days to try the machinery, if it wasn't satisfactory, it wasn't mine, and quit. He said the other didn't amount to anything; just kind of machine form; didn't concern our verbal contract at all. Q. Did you rely upon his statement as to whether or not he read the contract that you signed? A. Yes, sir; I relied on it." And again: "Q. What part did he read you? A. He read the contract the same as our verbal contract. * * * He read out what I understood the verbal contract was, but I do not think he read anything about the notes or any mortgage." At that time Brandt did not tell him not to read the contract, and did not read it all to defendant. Defendant further said: "Q. He did not tell you what else was in it? A. No; just read on down to where I tell you. Then he said: 'This is just merely machine form; don't amount to much.' * * * Q. He didn't read the lower part of the instrument at all? A. No, sir."

Plaintiff took the threshing machine outfit home with him, together with a copy of the contract which Brandt gave him, which he "threw down in the house somewhere, and never looked at it at all or read what

was in it until after the difficulty came up about the machinery." When he did notice it he observed for the first time that it differed from their verbal agreement. After 10 days' trial by defendant, the outfit proving unsatisfactory, he notified Brandt, who attempted to make it do as verbally agreed, but failed. Brandt afterwards put an expert on the machine, who also failed to make it do as agreed, during which time it was turned over to Brandt by the defendant, and afterwards ran out in the public highway and left by the agents of Brandt, and where it was when this mortgage was foreclosed. About that time, to wit, August 6, 1903, defendant wrote plaintiff this letter: "Mr. Robinson, Dear Sir: in regards to your machien and contract I had ten days triel and it failed to do the work I turned it back to your agent Mr. Brant and then wee mald another verbel contract before witnesses that he was to make the machien do the work and he put an expurt in charge of the machien and he faled to make it do the work and he was fired out of the field with the machien broke and he had full charge of the machien and he left it in the road and you had better see me and investigate this matter. Yours truly, C. F. Roberts."

Defendant's old outfit was never turned over by him to plaintiff. We are not unaware that Brandt testified that no such verbal agreement was made; that he and defendant talked the matter over thoroughly before the order was signed; that he told him nothing about a 10 days' trial of the machinery before purchase; and that he told him nothing about holding the notes and mortgage given for the purchase price and sued on in this cause, and returning the same if the machine did not suit him. And the witness Brooks, an employé of the plaintiff at that time, testified that he did not know of any such verbal agreement; that the order was written by Brandt and signed by defendant in his presence, at which time Brandt gave defendant a copy thereof; and that "there was no verbal contract any more than is in that order, that is, in my presence"; also that the order was dated June 13, and the notes and mortgage June 18, 1903. But we will not "weigh or balance the evidence." We think it sufficient to say, in the light of authority, that the evidence is ample to support the verdict.

Warder, Bushnell & Glessner Co. v. Whitish, 77 Wis. 430, 46 N. W. 540, was a suit to recover the purchase price of a Champion light blinder, manufactured by plaintiff, and delivered to defendant under a written contract with a warranty annexed. The answer alleged, and the proof showed, that the contract was signed under the false and fraudulent representations of the agent that said "binders were as good as any other binder"; that if defendant would buy one he might take it and try it until he was satisfied, and if it was not as good as they had represented,

and he was not suited with it, he could return it at any time and not pay for it; that the defendant was induced by such representations to take one of plaintiff's machines upon such terms; that thereupon said agent produced and asked defendant to sign a paper, which he then represented to defendant as nothing more than an order for a machine upon the terms and conditions stated; that said agent did not read said paper to him; that the defendant is and was an illiterate person, incapable of reading and writing, and relying upon such representations he signed the paper and received from the plaintiff a machine; that upon trial under the supervision of plaintiff's agent it was found not to be such a machine as represented by him, nor made of the materials represented, and that it did not operate as had been represented by him; that the defendant thereupon notified the agent of the plaintiff that he did not like the machine, and would not keep it; that said agent thereupon again tried said machine without being able to make it work as represented; that defendant thereupon informed said agent that the machine was not such as he had ordered and did not do good work; and that he would not keep it, and would return it. The court held that the verdict was supported by the evidence, and said: "This is not the case of a party, in the absence of fraud or mistake, failing to know the contents of a written instrument signed by himself by reason of his own negligence or want of reasonable care, as in the cases cited by the learned counsel for the plaintiff, and many others which might be cited, as, for instance, *Herbst v. Lowe*, 65 Wis. 316, 26 N. W. 751, where the distinction between those cases and cases like this is pointed out. Certainly no one will contend that a person can procure the signature of a party to a contract by false representations, and then enforce the contract on the ground that, had the party so deceived been more vigilant, he would have discovered the fraud in time to have withheld his signature from the contract. In other words, a person cannot procure a contract in his favor by fraud, and then bar a defense to it on the ground that, had not the other party been so ignorant or negligent, he could not have succeeded in deceiving him."

Chapman et al. v. Atlanta Guano Co., 91 Ga. 821, 18 S. E. 41, was a suit upon a promissory note. Defendant plead fraud in obtaining his signature thereto. There was judgment for the plaintiff. The court, speaking through Justice Lumpkin, in reversing the case, said: "The pleas, in effect, state that the plaintiff's agent represented the note to be for \$53.10, while in point of fact it turned out to be a note for \$90.20. This is not a matter for a mere difference of opinion. If the pleas speak the truth, the plaintiff's agent perpetrated a palpable fraud upon the defendants, involving nothing short of actual dishonesty. It is true that in the

last plea the defendants aver that the note was signed upon the representation that it was for the account at the price stated in the plea, to wit, \$53.10, without alleging by whom this representation was made; but, construing all the pleas together, we think it was sufficiently alleged that the representation in question was made by the plaintiff's agent, and that the note was signed upon the faith of this representation. * * *

In the case at bar one of the pleas alleges that the note was signed at night, when defendant signing the same could not well see, and another avers that the note was made at night, when defendant could not see the amount. These allegations, it is true, are not strong. They do not show that a light might not easily have been obtained, if the defendant had desired it, or that there was any haste about the transaction, or that the plaintiff's agent urged or requested an immediate execution of the note, or did anything, except the making of the representations complained of, to prevent the defendant from fully informing himself of the amount set forth in the note. Still, we think the pleas contain enough to authorize the case to be submitted to a jury, and allow them to determine whether or not a fraud was actually practiced upon the defendant." So we say in this case that, as the testimony of defendant shows that the agent represented the paper to contain the prior verbal agreement which, in point of fact, it did not do, but turned out to be a contract of sale with covenants of warranty, this was not a mere matter of difference of opinion, or the misstatement of the legal effect of the instrument, but was evidence of fraud sufficient, under all the circumstances, to go to the jury.

In *Wood v. Cincinnati Safe & Lock Co.*, 96 Ga. 120, 22 S. E. 909, the court said: "Whatever may be the rights of third persons, it is a rule of law of universal acceptance that as between the original parties thereto, fraud in its procurement voids a contract, and this upon the theory that, the consent of the parties being necessary to the binding force of the contract, if one apparently consenting by the execution of a written contract can show that he did not in fact consent to its terms as therein expressed, but that his apparent consent was induced by false and fraudulent practices, by means of which he was overreached by the other party, and, without negligence upon his own part really deceived as to the terms of the contract, he would be entitled to be relieved from its apparent obligations." See, also, *Hopkins v. Hawkeye Insurance Co.*, 57 Iowa, 203, 10 N. W. 605, 42 Am. Rep. 41, where the court said: "It is incumbent upon the party executing an instrument to exercise reasonable care and diligence to ascertain its contents. Ordinarily, however, what constitutes reasonable care and diligence is a question of fact, to be determined by the jury

in view of all the circumstances. In this case the plaintiff was unable to read the note on account of the absence of his spectacles. Whether he was justified in relying upon the reading of the agent, and in neglecting to call upon his wife or son, who were present, constitutes not a question of law, but one of fact. The question is, did he act as persons of reasonable and ordinary care would usually do under like circumstances? If he did, he was not negligent." See, also, *Jeremiah Taylor v. Thomas Atchison*, 54 Ill. 197, 5 Am. Rep. 118; *Union Pacific R. R. Co. v. Harris*, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003; 9 Cyc. 390, and cases cited.

But the plaintiff insists that the court erred in overruling his request for a peremptory instruction, because "the placing in defendant's hands of a copy of the order of the 18th of June and his failure to object to its terms until the 6th of August is a waiver of any objection to the terms of the contract." In other words, plaintiff, in effect, contends that by failing to read the contract and object to the terms thereof defendant was guilty of such negligence as amounts to a waiver of the fraud in procuring the contract, if any such there were. In support of this proposition plaintiff cites *N. Y. Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532, where the court said: "Neither the company nor its agent, therefore, made any representation or promise, or used any artifice or deceit, to prevent the insured from learning the terms of his policies. Their contents were not concealed. They were not misrepresented. The deceased must accordingly be conclusively presumed to have known their terms when he accepted them. If one can read his contract, his failure to do so is such gross negligence that it conclusively estops him from denying knowledge of its contents, unless he was dissuaded from reading it by some trick, artifice, or fraud of the other party to the agreement"—citing authorities.

This undoubtedly is the rule in case of the absence of fraud on the part of the agent procuring the contract. But in this case the jury found, and we have held, that there was sufficient evidence to warrant a finding that there was fraud on the part of Brandt in procuring defendant's signature to the contract, and hence the rule above cited does not apply. We do not accede to the proposition that under the circumstances the law imposed a positive duty on the defendant to read the contract. That being the case, he cannot be charged with negligence in failing so to do; and that being true, there is nothing upon which to predicate a waiver on his part.

In *Kister v. Insurance Co.*, 128 Pa. 553, 18 Atl. 447, 5 L. R. A. 646, 15 Am. St. Rep. 696, the court said: "We cannot say that the law, in anticipation of a fraud upon the part of a company, imposed any absolute duty upon Kister to read his policy when he re-

ceived it, although it would certainly have been an act of prudence on his part to do so. *Insurance Co. v. Bruner*, 23 Pa. 50; *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222, 20 L. Ed. 617. One thing is certain, however, the company cannot repudiate the fraud of its agent, and thus escape the obligations of a contract consummated thereby, merely because Klister accepted in good faith the act of the agent without examination."

In *Strohn v. Railway Co.*, 21 Wis. 562, 94 Am. Dec. 564, the plaintiffs had a verbal agreement with the defendant railway company as to the terms of shipment of a quantity of freight. The freight was delivered to the railway company, and afterwards, upon demand, the company delivered to the plaintiffs bills of lading therefor. These bills of lading contained conditions of shipment inconsistent with the verbal agreement of the parties. The plaintiffs having received and retained these bills of lading without reading them or knowing their contents, the railway company insisted that they were bound by the conditions contained in the bills of lading, which had been received without objection. In answer to this contention the court said: "Having previously entered into a special verbal agreement, he may rightfully assume, in the absence of notice to that effect, that it is embodied in the paper or receipt, or at least that the receipt contains nothing contrary to it. It is in the nature of a direct fraud or cheat for the company or its agents, after having entered into a verbal agreement, thus wrongfully to insert a contract of an entirely different character, and present it to the party without directing his attention expressly to it and procuring his assent. It is no answer for the company in such a case to say that the other party should have been more diligent and watchful, and should have detected the fraud." And to the same effect is *Boorman v. Express Company*, 21 Wis. 154.

In *McElroy v. Assurance Co.*, 36 C. C. A. 615, 625, 94 Fed. 990, 1000, the Circuit Court of Appeals for the Ninth Circuit say: "It would certainly have been an act of prudence on his part to read the entire policy, but his neglect to do so cannot excuse the company for the default of the agent in not writing the contract in accordance with the representations made by the insured. The insured had a right to rely upon the agent's performing his duty of making the contract in conformity with the information given, and the agent's failure to do so, whether the result of a mistake or of a deliberate fraud, cannot operate to the prejudice of the insured. The contract of insurance is pre-eminently one that should be characterized by the utmost good faith on both sides."

In *Fitchner v. Association*, 103 Iowa, 276, 72 N. W. 530, the Supreme Court of that state say: "The insured ordinarily rely upon the agent to properly set out the facts in the applications, and Laub did as men usually do

in assuming that the defendant's agent had done his duty. *Stone v. Insurance Co.*, 68 Iowa, 737, 28 N. W. 47, 56 Am. Rep. 870; *McComb v. Insurance Co.*, 83 Iowa, 247, 48 N. W. 1038. The mere failure of the assured to read his application, or the copy of it in the policy, does not establish negligence. *Hagan v. Insurance Co.*, 81 Iowa, 321, 46 N. W. 1114, 25 Am. St. Rep. 493; *Donnelly v. Insurance Co.*, 70 Iowa, 693, 28 N. W. 607; *Boetcher v. Insurance Co.*, 47 Iowa, 253. Nor is the omission to read the policy negligence. *Barnes v. Insurance Co.*, 75 Iowa, 11, 39 N. W. 122, 9 Am. St. Rep. 450; *Jamison v. Insurance Co.*, 85 Iowa, 220, 52 N. W. 185; *Boetcher v. Insurance Co.*, supra. Laub had no reason to suppose the policy and application were drawn differently than understood."

But is not the question whether one who claims to have been drawn into a fraudulent purchase has exercised the proper care and diligence to discover the fraud, and with due promptness in repudiating his contract on the ground of fraud, a question for the jury under all the circumstances of the case? We think so. In *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203, the defense was fraud in procuring a stock subscription. The trial court submitted the question of fraud, together with the question under consideration, to a jury, and the Supreme Court in passing, in the syllabus, said: "Parties who claim to be relieved on the ground of fraud must act with the utmost diligence and promptitude in discovering the fraud and in claiming to be relieved by reason of it, and whether they have so acted is a question of fact for the jury." Hence we cannot say as a matter of law that defendant was guilty of such negligence in not reading his contract or under all the facts and circumstances of this case as to amount to a waiver of the fraud in procuring the contract.

Plaintiff was undoubtedly entitled to have this phase of the case submitted to the jury on proper instructions, but since he did not request it he cannot now complain. It follows that the court did not err in refusing to give said instruction, or in giving the one as follows: "If you believe from the evidence that at the time the contract relied on in this action was made the defendant was unable to read writing readily, on account of defective eyesight, and requested the said J. M. Brandt to read the said contract to him, and said Brandt did so read it to the defendant, and if you further believe from the evidence that the said J. M. Brandt when reading the said contract changed the same in any material part, thus inducing the defendant to sign said contract when he otherwise would not have done so, this would constitute a fraud in law, and such contract is not binding on said defendant. The same is wholly invalid as to him."

The last assignment is that the court erred in giving the following: "You are further instructed that, if you believe from the evi-

dence that the defendant has clearly shown by a preponderance thereof that he was induced to sign the contract by the actual deception of plaintiff's agent, against which ordinary prudence may not have guarded him, and also, having so signed, the property so ordered failed to do what such machinery should do in the hands of competent men, then you will find for the defendant." The error, if any there be, in this instruction, is not clearly pointed out, and we can think of none except that it might be objectionable on the ground of repetition, as it is an almost exact reiteration of the first half of instruction No. 4 given for plaintiff. The same idea is conveyed in both in almost identical language. We can see no error in this, as repetition is not a ground for reversal. 11 Enc. Pl. & Pr. 299.

Furthermore, if error therein exists, it is such that plaintiff cannot take advantage of, being himself responsible therefor by requesting and having the court give for him substantially the same charge, thereby misleading the court. "The defendant will not be allowed, then, to take advantage of his own wrong, or the errors of the court induced on his own motion, and then compel the plaintiff to suffer the consequences." *Union Pacific Ry. Co. v. Harris*, 63 Fed. 800, 12 C. C. A. 598.

The judgment of the lower court is affirmed. All the Justices concur, except KANE, J., who dissents.

(20 Okl. 193)

MUSKOGEE LAND CO. v. BLACKBURN et al.

(Supreme Court of Oklahoma. April 14, 1908.)
APPEAL—REMAND—ASSESSMENT OF DAMAGES—PROCEDURE.

A writ of error would not lie to the United States Court of Appeals in the Indian Territory to revise and correct an order of the district court setting aside a judgment of said court and granting a new trial, although the court incorporated therein as reason therefor that it considered it to be without jurisdiction to assess damages in said matter, the sureties not having their day in court in such ex parte proceeding, and that the plaintiff further had its remedy by suit on the bond.

(Syllabus by the Court.)

Error to the United States Court for the Western District, at Wagoner, Indian Territory; Louis Sulzbarger, Trial Judge.

Action by the Muskogee Land Company against Priscilla Blackburn and others. Verdict for plaintiff. From an order granting a new trial, plaintiff brings error. Dismissed.

On the 9th day of March, 1906, upon motion of the Muskogee Land Company, as plaintiff, the mandate of the United States Court of Appeals for the Indian Territory in a certain cause entitled Muskogee Land Company, plaintiff, v. Priscilla Blackburn et al., defendants, being a suit in ejectment and for use and occupation, was ordered spread upon the record. Thereafter, on the 13th day of March, 1906, the plaintiff moved for judg-

ment on said mandate for the amount of the original judgment and costs against the defendants and their sureties on their appeal bond, and judgment was accordingly rendered in favor of said plaintiff for the possession of the land sued for in said action, and also against said defendants and their sureties in the sum of \$192, as and for plaintiff's damages sustained up to the time of the rendition of the original judgment, together with all of its costs laid out and expended, etc. Thereafter the plaintiff moved that a jury be impaneled to assess the damages for the rental value of the premises of which the plaintiff had been kept out of possession pending the appeal, and for judgment therefor against the defendants and their sureties on the supersedeas bond. And thereafter a jury was impaneled, and returned the following verdict: "We, the jury, find the rental value of the land in controversy in this suit, and which the plaintiff has been kept out of possession for the years 1904 and 1905, by reason of the appeal of this case, to be as follows: For the cultivated land \$2,010, and for the grass land \$527, making a total rental of the premises for the years 1904 and 1905 the sum of \$2,537." Afterwards, on the 14th day of March, 1906, the defendants therein filed their motion for a new trial; and thereafter, on the 16th day of March, 1906, the same was heard, and it was ordered by the court that the verdict rendered by the jury be set aside, because "the court believes it is without jurisdiction to assess the damages, and because they have not had their day in court by this ex parte proceeding, and that plaintiff had its remedy by suit on the bond, but the setting aside the verdict of the jury in assessing the damages incurred by the plaintiff pending the appeal does not and shall not in any manner affect the judgment rendered in pursuance to the mandate of the Court of Appeals of the original judgment and costs." To the sustaining of said motion and the setting aside of said verdict for the reason that the court was without jurisdiction to assess damages in that manner the plaintiff by its counsel then and there excepted and asked 30 days within which to prepare and file its bill of exceptions from the judgment of said court on appeal to the United States Court of Appeals in the Indian Territory. Thereafter in due time the same was properly prepared, signed, and filed. The language of the supersedeas bond is in hæc verba: "Whereas the appellants Priscilla Blackburn, James Hinshaw, and S. G. Swenson are about to take an appeal from the judgment of the United States Court for the Western District of Indian Territory, rendered at its March, 1904, term at Wagoner, against them, and in favor of the appellee, Muskogee Land Co., for the sum of \$192, with costs, and the appellants desire to supersede said judgment, now National Surety Company of New York, N. Y., surety, hereby covenants with the said appellee that the said appellants will pay to

the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that it will satisfy and perform said judgment in case it shall be affirmed, and any judgment or order which the United States Court of Appeals for Indian Territory may render, or order to be rendered by the inferior court, not exceeding in amount of value the judgment aforesaid, and also pay all rents or damages which, under the pendency of the appeal, may accrue on any part of the property which the appellee is kept out of possession by reason of an appeal." No notice was ever served upon the sureties of the intended action to have a jury impaneled to assess the damages. The motion to set aside the verdict embraces several grounds; but it is not necessary to set same out to determine this case.

Raymond, Maxey & Runyan, for plaintiff in error. C. E. Castle and Baker, Pursel, and Haskeel, for defendants in error.

WILLIAMS, C. J. (after stating the facts as above). The jurisdiction of this court, as successor of the United States Court of Appeals for the Indian Territory, to review upon a writ of error the judgment of the United States Court for the Western District of Indian Territory, at Wagoner, is derived from the provisions of section 12 of an act of Congress, approved March 3, 1905, (33 Stat. 1081, c. 1479 [U. S. Comp. St. Supp. 1907, p. 208]), entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian Tribes for the fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes." "That hereafter all appeals and writs of error shall be taken from the United States courts in the Indian Territory to the United States Court of Appeals in the Indian Territory, and from the United States Court of Appeals in the Indian Territory to the United States Circuit Court of Appeals for the Eighth Circuit in the same manner as is now provided for in cases taken by appeal or writ of error from the circuit courts of the United States to the Circuit Court of Appeals of the United States for the Eighth District." Accordingly appeals and writs of error to the United States Court of Appeals in the Indian Territory thereafter must be taken in the manner prescribed in section 6 of an act of Congress of March 3, 1891, and only as therein provided: "That the Circuit Court of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law." 26 Stat. 828, c. 517 (U. S. Comp. St. 1901, p. 549). An order awarding a new trial is not a final decision. *Hume v. Bowie*, 148 U. S. 245, 13 Sup. Ct. 582, 37 L. Ed. 438; *Lawson*

v. Moore, 44 Ala. 274; *State v. Ross*, 34 Ark. 377. See, also, *Morgan v. Thompson*, 124 Fed. 204, 59 C. C. A. 672; *Brush Electric Co. v. Electric Implement Co.*, 51 Fed. 557, 2 C. C. A. 379, and notes thereto; *Salmon v. Mills*, 66 Fed. 32, 13 C. C. A. 374, and notes thereto; *Carmichael et al. v. City of Texarkana*, 116 Fed. 845, 54 C. C. A. 179, 58 L. R. A. 911; *Hooven et al. v. John Featherstone's Sons*, 111 Fed. 81, 40 C. C. A. 229; *Robinson et al. v. Belt et al.*, 56 Fed. 323, 5 C. C. A. 521; *Life Ins. Co. v. Scheffer*, 105 U. S. 703, 26 L. Ed. 1110; *Houston v. Moore*, 3 Wheat. (U. S.) 433, 4 L. Ed. 428; *Smith v. Adams*, 130 U. S. 168, 9 Sup. Ct. 566, 32 L. Ed. 895; 1 Freeman on Judgments (4th Ed.) § 32-c; 1 Black on Judgments, § 31.

In the case of *State v. Ross*, 34 Ark. 378, the court says: "There was a valid trial and verdict against the defendant in error for murder in the second degree, which verdict the court in fact set aside for an erroneous reason; and there was no final judgment. We decline to send a mandate to the court below directing it to sentence the prisoner upon the verdict to set aside, because we cannot undertake to say that, if the court had not fallen into the error of setting aside the verdict on the ground stated in the record entry, it might not have granted a new trial on some of the grounds assigned in the motion." In this case it appears from the record that the defendants, at least the sureties, had no notice of the contemplated motion on the part of the plaintiffs for the assessment of damages on the supersedeas bond. It certainly would have been the better practice for the plaintiff to have given the defendants, each and all of them, reasonable notice of such intended action. It may have been held that, if the court had finally determined that it had jurisdiction, still within his discretion, on account of the failure to give reasonable notice to said defendants, or for other grounds assigned in the motion for a new trial, might have proceeded, within his discretion, to grant a new trial. The fact that he assigned a ground for granting it certainly does not make it any more a final judgment. It is not necessary for this court to determine whether or not the court below would have jurisdiction in said matter. The proper way to raise that question is to give the defendants, including the sureties, reasonable notice that it would move for the impaneling of the jury for the assessment of damages, and, if the court then declined to take jurisdiction, and plaintiff has no other adequate remedy of relief, then mandamus would be its proper course. *Life Ins. Co. of N. Y. v. Heirs of Wilson*, 8 Pet. (U. S.) 291, 8 L. Ed. 949; *Lawson v. Moore*, 44 Ala. 274; *Higgins v. Brown* (decided at this term, but not yet officially reported) 94 Pac. 703. The case of *Weller v. Western State Bank*, 18 Okl. 478, 90 Pac. 877, has no application to this case, as that arose under the laws of the territory

of Oklahoma, and section 4733, Wilson's Rev. & Ann. St. 1903, of Oklahoma, provides: "The Supreme Court may reverse, vacate or modify the judgment of the district court, for errors appearing on the record, and in the reversal of such judgment or order, may reverse, vacate or modify any intermediate order involving the merits of the action, or any portion thereof. The Supreme Court may also reverse, vacate or modify any of the following orders of the district court, or a judge thereof: First, A final order. Second, An order that grants or refuses a continuance; discharges, vacates or modifies a provisional remedy; or grants, refuses, vacates or modifies an injunction; that grants or refuses a new trial; or that confirms or refuses to confirm, the report of a referee; or that sustains or overrules a demurrer. Third, An order that involves the merits of an action, or some part thereof."

It will be observed that under the territory of Oklahoma the Supreme Court of that territory was especially empowered to vacate, modify, or reverse an order refusing or granting a new trial. The writ of error is dismissed. All of the Justices concurring.

(20 Okl. 634)

ZISKA v. ZISKA et al.

(Supreme Court of Oklahoma. April 13, 1908.)

1. FRAUDULENT CONVEYANCES — STATUTE OF LIMITATIONS.

In the absence of laches, in obtaining judgment, a suit to set aside a conveyance as fraudulent begun within two years after recovery of such judgment is not barred by virtue of the provisions of section 4216, Wilson's Rev. & Ann. St. Okl. 1903, which provides that actions for relief on the ground of fraud, can only be brought within two years after the discovery, and this notwithstanding the fact that the conveyance in question was made more than two years prior to the institution of such suit. Plaintiff's cause of action does not accrue until recovery of a judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 733.]

2. CREDITORS' SUIT—SUFFICIENCY OF ALLEGATIONS.

Where an attachment is levied upon real estate as the property of a nonresident defendant, although title to the same stands in the name of another, the attaching creditor acquires a lien upon any interest debtor may have in such land, which he may enforce after judgment, in a suit in the nature of a creditors' bill, and in such a case the petition need not aver execution issued and returned nulla bona; it being sufficient to aver in appropriate language the lack of any other available assets.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Creditors' Suit, § 161.]

3. TRIAL—DEMURRER TO EVIDENCE.

A demurrer to the evidence admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn from the evidence. On a demurrer to the evidence the court cannot weigh conflicting evidence, but will treat the evidence as withdrawn which is most favorable to the demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 352-354.]

Dunn, J., dissenting in part.
(Syllabus by the Court.)

Error from District Court, Canadian County; C. F. Irwin, Trial Judge.

Action by Katherine Ziska against F. R. Ziska and F. M. Ziska. Judgment for defendants, and plaintiff brings error. Reversed.

November 4, 1903, Katherine Ziska, plaintiff below, and plaintiff in error here, secured a judgment for \$1,700 in the district court of Lancaster county, Neb., against Frank R. Ziska, her husband, in a suit for divorce and alimony. On September 7, 1904, she instituted a suit on said judgment in the district court of Canadian county, Okl., suing out an attachment on a quarter section of land described as the N. W. $\frac{1}{4}$ of section 17, township 12, range 6 W., of I. M., and on the trial of the cause on November 21, 1904, secured judgment against Frank R. Ziska in the sum of \$1,834, in which the attachment was sustained and the land ordered sold as required by law. On January 6, 1905, she filed this suit in the district court of Canadian county against Frank R. Ziska and F. M. Ziska. The amended petition alleges that in April, 1880, plaintiff and defendant Frank R. Ziska were married and lived and cohabited together until about the 1st day of November, 1901, at which time defendant abandoned her; that on the 27th day of July, 1903, she instituted an action for divorce and alimony, in which case on the 4th day of November, 1903, judgment was rendered for an absolute divorce and for \$1,700 alimony; that the said judgment has become final; that on the 7th day of September, 1904, plaintiff instituted her action in the district court of Canadian county against Frank R. Ziska on the judgment above mentioned, and caused an attachment to be issued and levied on the land, and that on the 21st day of November, 1904, by the consideration of the said court, she secured a judgment against Frank R. Ziska in the sum of \$1,834 and costs of suit, and an order that said attachment be sustained and the land sold as required by law to satisfy the said judgment; that on the 12th day of August, 1893, while plaintiff and defendant Frank R. Ziska were living together as husband and wife, they purchased the said land, which was paid out of the separate estate of this plaintiff, and the legal title to said lands taken in the name of the defendant Frank R. Ziska; that on November 30, 1901, and after the abandonment of the plaintiff by defendant, a deed was made by the said Frank R. Ziska to his brother, which purported to convey to the said brother, F. M. Ziska, the tract of land in question, and the said deed was recorded in the office of the register of deeds of Canadian county on the 12th day of December, 1901; that the said deed so made as aforesaid was made by the said Frank R. Ziska, without consideration, and with the intent that the said F. M. Ziska should hold said land in trust for the said Frank R. Ziska, and for his use and benefit, and with the

intent and design, to hinder, defraud, and delay the plaintiff of her interest in said land in securing support and maintenance from defendant, and hinder, defraud, and delay plaintiff from collecting any judgment for alimony which might be awarded her thereafter; that said F. M. Ziska paid nothing for said land; that said F. M. Ziska has at all times been a resident of the state of Nebraska, and never took possession of said land or resided upon and cultivated the same nor claimed ownership thereof, and defendant Frank R. Ziska has at all times prior to the filing of this action claimed to be the owner of said land; "that the defendant Frank R. Ziska is insolvent, and has been at all times since the 1st day of December, 1901, and has no property subject to execution out of which plaintiff can make her judgment except the land heretofore described; that said deed from Frank R. Ziska to F. M. Ziska to said land is an obstruction to the process of this court, and hinders and delays plaintiff in the collection of her said judgment rendered in this court on the 21st day of November, 1904." Defendants' petition was followed by a prayer for a judgment canceling said deed and for costs of suit. To this the defendant F. M. Ziska filed a demurrer, setting out, among other things, that the petition showed on its face that it did not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant. This demurrer was overruled, to which defendant reserved an exception. He thereafter filed an answer denying every material allegation in plaintiff's petition, admitting the suit in which plaintiff secured a judgment and attachment, which are the basis of this suit, but averring that the defendant F. M. Ziska was not a party to said suit, and that no summons was ever served on him, nor was he given any notice of the pendency of the said suit, and that none of his rights were litigated therein; that he was the owner in fee simple of the land above set forth, and has been ever since the 30th day of November, 1901, and that the levy of said attachment on said land was an apparent cloud upon the title. This answer was followed by a prayer asking the court to render judgment in his favor, declaring the title to said premises to be in him, free and clear of any incumbrances, lien, or cloud caused by said suit, judgment, or attachment. Frank R. Ziska made no defense or appearance in this case. On the trial to the court, a demurrer was sustained to the evidence to which plaintiff excepted, and the case is before us on petition in error and case-made.

W. M. Wallace, for plaintiff in error. Noffsinger & Hinch, for defendant in error F. M. Ziska.

DUNN, J. (after stating the facts as above). Under the facts in this case as disclosed by the record and the briefs of the

parties, two propositions are raised for the consideration of this court. Plaintiff appeals from a judgment of the district court sustaining a demurrer to the evidence, and holding it insufficient to support the allegations of the petition, and argues at length the elements of fraud which it is contended are disclosed by the conveyance of the land attached. Defendant in error joins issue in his brief on this subject, and, in addition thereto, contends that the petition shows on its face that the cause of action is barred by the statute of limitation by virtue of paragraph 4216, 2 Wilson's Rev. & Ann. St. 1903, which provides: "Civil actions other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: * * * Within two years * * * an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." And, second, that the petition of plaintiff is insufficient to sustain her cause of action, for that there is no allegation that an execution issued on the judgment procured in Canadian county or elsewhere, and a return nulla bona, prior to the beginning of this suit to set aside this alleged fraudulent conveyance. We will first discuss the legal propositions in the order here stated.

The deed which it is sought to have annulled was made on November 30, 1901. The suit in this case was begun on the 6th day of January, 1905, and it must be conceded, under the petition filed, that if the construction of the statute invoked by defendant is made applicable to this class and character of actions, then the cause of action is barred, for there is no allegation of a discovery which would take it out of its operation. As appears in the statement of facts, the basis of the claim which plaintiff makes against her husband to defeat the collection of which the deed is charged to have been made is the judgment secured by her in Nebraska in November, 1903. On this judgment, on the 7th of September, 1904, she filed her suit in the district court of Canadian county, and on the 21st of November following secured a judgment sustaining an attachment upon this tract of land, and the suit in this case was instituted in the January following. Defendant, in support of his theory, cites the cases of *Arnett v. Coffey*, 1 Colo. App. 34, 27 Pac. 614; *Fox v. Lipe*, 14 Colo. App. 258, 59 Pac. 850; *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807. An inspection of the cases from Colorado shows that in neither of them plaintiff had any lien on the property sought to be subjected to the payment of his judgment, and the reasoning of the court virtually places its decision on this ground. The United States case is not in point, as it does not deal with this question. In that case *Carpenter*, the defendant, fraudulently transferred his property to preclude *Wood*, the

plaintiff, from subjecting it to the payment of certain judgments he held against him. Insisting that he was entirely without funds, and that his son-in-law would relieve him of these judgments by paying 50 cents on the dollar for them, defendant induced the plaintiff to sell the same at this reduced rate. Thereafter Carpenter secured title to his property holding it in his own name, and Wood brought this suit setting up the misrepresentations and fraud practiced on him which induced him to part title to his judgments at 50 per centum of their face value. The suit was brought to recover damages for this deceit, and was not to set aside a fraudulent conveyance. Hence it does not apply to the case at bar. Our investigation discloses, however, that the authorities are not altogether in harmony upon the question of whether or not the statute of limitations relating to fraud and its discovery apply in this character of cases, but it is our judgment that the better courts and the better reasoning both hold in reason and principle correctly in denying such application. A debtor about to be subjected to a suit or to the payment of claims of his creditors could very frequently long prior to the time when demand could be made upon him transfer all of his property, bring notice thereof to plaintiff, and after the expiration of the statute of limitations relating to fraud, and the claims of his creditors had matured, plead the statute and it, thereby, instead of being a salutary one for the prevention of fraud, would prove its most potent safeguard. We hold that in this class of cases the statute of limitations, which provides that actions for relief on the ground of fraud can only be brought within two years after the cause of action shall accrue or the discovery of the fraud, does not apply in actions to set aside deeds in fraud of judgment creditors where the plaintiff has not been guilty of such laches in securing his judgment as would render it inequitable to entertain his suit; that is, the statute will not be held to begin to run at the time of the conveyance or the discovery thereof, but at the time of securing the judgment, as this is the date of the accrual of plaintiff's cause of action.

The proposition involved is most clearly considered in the case of *Mickle v. Walraven*, 92 Iowa, 423, 60 N. W. 633. In that case the fraudulent conveyance was made 18 years prior to the time plaintiff secured judgment upon his original claim which was made the basis of his suit to set aside the conveyance, and, though the court held that, owing to the laches of plaintiff, he could not recover, its reasoning upon the question involved in this case is worthy of note, and in our judgment correctly states the law. "It has frequently been held by this court that the record of a deed is notice to the world of its contents, and that, where a deed which is fraudulent as against creditors is spread upon the public records, notice to the world is given of its

character, or at least, sufficient information is conveyed thereby, in the absence of special circumstances, to put creditors upon inquiry as to its contents and character. *Gebhard v. Sattler*, 40 Iowa, 152; *Bishop v. Knowles*, 53 Iowa, 268, 5 N. W. 139; *Gardner v. Cole*, 21 Iowa, 205; *Hawley v. Page*, 77 Iowa, 239, 42 N. W. 193, 14 Am. St. Rep. 275; *Laird v. Kilbourne*, 70 Iowa, 83, 30 N. W. 9; *Francis v. Wallace*, 77 Iowa, 373, 42 N. W. 323. Following these cases, we must hold that plaintiff discovered the fraud in these conveyances at the time they were recorded. At the time of the discovery of the fraud, however, plaintiff's right of action had not accrued. Before he could institute his action to subject the land to the payment of his claim, he must have had a lien upon it either by attachment or judgment. *Clark v. Raymond*, 84 Iowa, 251, 50 N. W. 1068; *Falvre v. Gillman*, 84 Iowa, 573, 51 N. W. 46; *Gwyer v. Fliggins*, 37 Iowa, 517; *Gordon v. Worthley*, 48 Iowa, 429; *Pearson v. Maxfield*, 51 Iowa, 76, 50 N. W. 77; *Miller v. Dayton*, 47 Iowa, 312; *Taylor v. Branscombe*, 74 Iowa, 534, 38 N. W. 400. As plaintiff's cause of action did not accrue until he obtained his judgment on September 15, 1891, the statute did not begin to run until that time, although he had knowledge of the fraud which he complains was perpetrated nearly 18 years before; and, as he commenced this suit within a few months after he recovered his judgment, the action, strictly speaking, is not barred. This is the holding in other states under similar statutes. *Gates v. Andrews*, 37 N. Y. 657, 97 Am. Dec. 764; *Compton v. Perry*, 23 Tex. 414; *Eyre v. Beebe*, 28 How. Prac. (N. Y.) 333; *Reynolds v. Lansford*, 16 Tex. 286; *Bump, Fraud. Conv.* (2d Ed.) p. 547; *Wilson v. Buchanan*, 7 Gratt. (Va.) 334, and authorities cited." In addition to the authorities cited, we call attention to the holding of the courts in the following cases, all of which support the proposition: *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 15 L. R. A. 784, 28 Am. St. Rep. 56; *Stewart v. Thompson et al.*, 32 Cal. 261; *Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314; *Ohm v. Superior Court of San Francisco*, 85 Cal. 545, 26 Pac. 244, 20 Am. St. Rep. 245; *Blackwell v. Hatch*, 13 Okl. 169, 73 Pac. 933; *Gates v. Andrews et al.*, 37 N. Y. 657, 97 Am. Dec. 764; *Watkins v. Wilhoit* (Cal.) 35 Pac. 646; *Rounds & James v. Green*, 29 Minn. 139, 12 N. W. 454; *Abbey et al. v. Commercial Bank of New Orleans*, 31 Miss. 434; *Richardson v. Mounce*, 19 S. C. 477. In the case of *Brown v. Campbell*, supra, the Supreme Court of the state of California says: "Statute of limitations in an action to subject property fraudulently conveyed to the payment of plaintiff's judgment does not begin to run at the date of such conveyance, but only on the recovery of the judgment, because until it was obtained plaintiff had no cause of action." This case was similar to the case at bar, in that plaintiff began his

suit against the defendant, who was a non-resident, by attaching real property which had been conveyed to an alleged fraudulent grantee, basing his action upon a foreign judgment and securing service by publication. The contention of the defendant was that the statute of limitations had run on the action, and the court said, in considering the proposition: "The cause of action stated in the cross-complaint is not barred by either section 343 or subdivision 4 of section 338 of the Code of Civil Procedure. The defendant's cause of action to subject the fund in controversy, or the property from which it was derived, to the payment of the indebtedness due to him from Joseph Brown, did not accrue at the date of the alleged fraudulent conveyance, but only when he obtained a judgment against his debtor upon which an execution would issue in this state. The general rule as to the time when a creditor acquires the right to maintain an action to set aside a fraudulent conveyance made by his debtor is thus stated at page 522 (2d Ed.) Bump on Fraudulent Conveyances: 'No creditor can be said to be delayed, hindered, or defrauded by any conveyance until some property out of which he has a specific right to be satisfied is withdrawn from his reach by a fraudulent conveyance. Such specific right does not exist until he has bound the property by judgment, or by judgment and execution, as the case may be, and has shown that he is defrauded by the conveyance in consequence of not being able to procure satisfaction of his debt in a due course of law. Then, and then only, he acquires a specific right to be satisfied out of the property conveyed, and shows that he is a creditor, and is delayed, hindered, and defrauded by the conveyance.' In accordance with this rule, it has been held in this state that the statute of limitations does not begin to run against such an action by a creditor until he has obtained such a judgment against his debtor, because until then he has no right of action. *Forde v. Exempt Fire Ins. Co.*, 50 Cal. 302; *Ohm v. Superior Court*, 85 Cal. 545, 26 Pac. 244, 20 Am. St. Rep. 245." The case of *Blackwell v. Hatch*, supra, was one involving practically the same proposition as is involved in the case at bar. In its appeal was made, as here, to the statute of limitations. The facts were: September 18, 1895, A. J. Blackwell conveyed by warranty deed certain real estate in Kay county to his wife. Thereafter, on the 14th of March, 1898, two years and a half after the conveyance, Hatch began his action in which he secured judgment against A. J. Blackwell. Suit was brought with this judgment as a basis to set aside the deed from Blackwell to his wife, subjecting the land to the payment of Hatch's judgment. Execution was issued and returned nulla bona. On the case being appealed to the Supreme Court, its holding was: "It is true that more than two years elapsed from the conveyance of the land to Rosa Blackwell until the com-

mencement of this action; but in a case like the one now under consideration it does not necessarily follow that the cause of action accrued at the time of the fraudulent conveyance, or even from the discovery of the fraud. It is a common expression that the statute of limitation runs from the discovery of the fraud, and that is the general rule. But, like all general rules, it has its exceptions. For instance, suppose that A. holds a note against B., which will mature in four years, and B. fraudulently conveys all of his property to a third person, to defraud A. The statute will not run against A. before the maturity of his note, because he would not be entitled to judgment in a court of law before that time; and a creditors' bill cannot be maintained until after judgment is recovered on the debt in a court of law, and an execution returned, 'No property found.' Counsel for appellant assume that the statute begins to run as soon as the fraudulent act is committed. This is not always true, as before stated. At any rate, the commission or even the discovery of the fraud does not start the statute to running, unless under conditions then existing a creditor's cause of action accrues. It is true that in many cases the cause of action accrues when the fraud is discovered, or when a party is in law chargeable with notice thereof; but in a case like this one the statute commences to run when an execution is returned nulla bona, and not from the date of the fraudulent conveyance. In other words, equity will not reach out and collect a debt until the party has exhausted his remedy in a court of law. It was the duty of Hatch to commence suit on his claim against A. J. Blackwell when due, and to collect the same in the ordinary way, if possible. This he did, and found that the debtor had no property out of which it could be made. He was then entitled to commence this action within two years after the execution was returned, for his cause of action at that moment accrued. In other words, he could not maintain a creditors' bill before the execution was returned, but he could at any time within two years thereafter bring such action. A cause of action is deemed to accrue at the earliest moment when a creditor can commence the particular action." Hence it must follow that in this case the contention of defendant that the statute of limitations had run, and that the action was barred thereby, cannot be sustained.

The next proposition to which our attention is invited is that the petition is insufficient, because it fails to aver that plaintiff had execution issued on her judgment and returned unsatisfied. In the case last cited, and from which we have quoted, it will be noted that the court in discussing the question of the statute of limitations incidently states that "a creditors' bill cannot be maintained until after judgment is recovered on the debt in a court of law, and an execution

returned, 'No property found.' This expression was simply applying the law to the facts of that case, and a holding that the two-year statute of limitations began to run on the date of the return of this execution which had been taken out and returned without satisfaction, and not of the date of the conveyance or its discovery. *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. Ed. 368. The defendant in support of his contention cites the following authorities: *Watkins v. Wilhoit* (Cal.) 35 Pac. 646; *Chandler v. Colcord*, 1 Okl. 260, 32 Pac. 330; *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. Ed. 368; *Adsit v. Butler*, 87 N. Y. 585; *Verner v. Downs*, 13 S. C. 449; *Burdsall v. Waggoner*, 4 Colo. 256; *Botcher v. Berry*, 6 Mont. 448, 13 Pac. 45. The case of *Watkins v. Wilhoit*, supra, was a California case, and an investigation of the facts and of the opinion will show, as do many other cases where the question has been raised, that the exhaustion of plaintiff's legal remedy may be shown by an allegation that the debtor has had execution issued and returned nulla bona; but does not hold that this is the only way in which it may be made to appear, for in this case an execution had been issued and returned without satisfaction, and the court holding on this point said: "It is essential to the cause of such an action that the plaintiff should have exhausted his remedy at law, otherwise a court of equity has no jurisdiction of the creditors' bill (3 Pom. Eq. Jur. art. 1415), and the fact that an execution has been returned nulla bona is conclusive that the legal remedy has been exhausted"—which, in effect, simply holds that the return nulla bona of the execution is sufficient evidence to support an appeal to the equitable side of the court. On this point the Supreme Court of that state said in the case of *Harris v. Taylor et al.*, 15 Cal. 348, the plaintiff must show in order to be entitled to relief at the hands of a court of equity "that he has been deprived of his remedy at law, and is compelled to resort to equity for relief. If the debtor has other property which may be reached by the ordinary legal remedies, a court of equity will not interfere. It must be affirmatively shown that such remedies have been exhausted, or that a resort to them would be fruitless and unavailing"; in effect, that the averment that there was no other property would show the inadequacy of an execution. The next case cited is the case of *Chandler v. Colcord*, supra. The syllabus in that case holds: "To enable a creditor to assail the validity of a chattel mortgage executed by his debtor, he must not only obtain a judgment, but also a valid execution against the property of the debtor." The force of this language of the syllabus is broken when the facts are considered and the language used by the court in the rendition of the opinion are observed. The limitation upon the scope of the syllabus is shown by the following paragraph: "The law is well settled that a creditor who has no lien on the property

covered by a chattel mortgage cannot be permitted to assail the validity of the mortgage on the ground that it was made with intent to hinder, delay, and defraud the creditors of the mortgagors. In order to do so, he must not only obtain a judgment, but must have a valid execution against the property of the mortgagor." This case is not applicable to the facts in the case at bar, for the attachment sued out in this case established a lien against this property in favor of the plaintiff. The case of *Taylor v. Bowker*, supra, from the United States Supreme Court, is not in point on the proposition under discussion. At the outset of the opinion Justice Harlan says: "The only point seriously insisted upon in argument, or which is necessary to be considered, is that this suit was barred by limitation." The question in the case was: Did the cause of action accrue at the time of the conveyance or transfer of the property involved, or at the time of the return of the execution, which was issued on the judgment and returned unsatisfied? The case arose in Maine, and the statute of limitations of that state in this character of cases is six years. "The judgment against the company was entered more than six years before the commencement of this suit. It is insisted that appellee's cause of action accrued upon the entry of the judgment; while it is contended, in behalf of appellee, that even if the foregoing limitation has any application in a suit in equity, brought in the Circuit Court of the United States by a citizen of another state, his cause of action did not accrue until the return of execution against the company, which occurred within six years prior to this suit." And the court held "that the complainant's cause of action should not be deemed to have accrued until the return of the execution. Consequently his suit was not barred by the limitation of six years." In neither of the cases *Adsit v. Butler*, supra, and *Verner v. Downs*, supra, does it appear that plaintiff sued out an attachment or in any other manner secured a lien upon the specific property which it was alleged had been fraudulently transferred, and which it was sought to subject to the payment of the judgment. The question of the effect of such a lien was not in either of these cases, nor was it considered or discussed by the court, and, to this extent, they are not authorities in the case at bar. The case of *Burdsall v. Waggoner* (Colo.) supra, simply holds that a party to maintain a bill of this character "is usually required to show not only a judgment obtains, but an execution sued out with a return of nulla bona, or that the writ is unsatisfied in whole or in part"; and then states: "But, even where such return is not necessary, the complainant must, by proper averment, lay sufficient ground for the relief he seeks in a court of equity. The bill should show, not only that the debtor has made a fraudulent disposition of his property, but that such disposition embarrasses him in obtaining satisfaction of his

debt or judgment. There must be an averment of want of property sufficient to satisfy such debt other than the property which is alleged to have been fraudulently conveyed; for, if there be other property sufficient, then the resort to equity is unnecessary." The case of *Botcher v. Berry*, *supra*, is not applicable. On its being urged upon the court that the suit was in the nature of a creditors' bill, it said: "But there is no creditors' bill in this case. The questions discussed at the bar do not arise. Here the property had been seized. It was in the possession of the sheriff, and the question was: Did it belong to Botcher, the assignee, or to McLean & Co., the assignors? It was not necessary to wait until the claim of the attaching creditor ripened into a judgment, and the return of an execution unsatisfied, before this question could be decided." The foregoing are the authorities upon which defendant relies to sustain the proposition that, before plaintiff could sustain her action in this case, it was necessary that she have an execution issued upon her judgment and a return of the same unsatisfied, either in whole or in part.

A number of courts hold, as is seen by some of the authorities above cited, that the execution and its return unsatisfied must be pleaded, or facts showing insolvency of the alleged fraudulent creditor and the total absence of any property out of which debtor or creditor may secure satisfaction of his judgment. Such, also, is the holding by the Supreme Courts in the states of Missouri and Iowa. *Turner & Knight v. Adams*, 46 Mo. 95; *Gwyer v. Figgins & Figgins*, 37 Iowa, 517. In the Iowa case the court states in the syllabus: "A court of equity will not interfere to annul a voluntary conveyance claimed to be fraudulent as against judgment creditors, unless the insolvency of the debtor is shown by return of nulla bona or other satisfactory proof." In the Missouri case the court says: "The judgment creditor must first exhaust his legal remedies, and this is usually done by obtaining judgment and execution, with return of nulla bona. But, where it is shown that the judgment debtor is insolvent, and that the issue of an execution would be of no practical utility, its issue may be dispensed with, and the attaching creditor may resort directly to chancery for his remedy against such judgment creditor without such prior proceedings." This is also the rule adopted in the United States Supreme Court as declared in the case of *Case v. Beauregard*, 101 U. S. 688, 25 L. Ed. 1004: "The rule is a familiar one that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must therefore show that he had done all that he could do at law to obtain his rights. But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only pos-

sible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, 'Bona, sed impossibilia non cogit lex.' It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. *Turner v. Adams*, 46 Mo. 95; *Postlewait & Creagan and Keeler v. Howes*, 3 Iowa, 365; *Ticonic Bank v. Harvey*, 16 Iowa, 141; *Botsford v. Beers*, 11 Conn. 369; *Payne v. Sheldon*, 63 Barb. (N. Y.) 169. This is certainly true where the creditor has a lien or a trust in his favor." And the court in the syllabus says: "Whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting his remedy at law." Here, again, we notice that the necessity for the issuance of an execution and its return without satisfaction is limited to those cases where there is no trust and no lien upon the specific property in favor of plaintiff. The attachment which plaintiff had levied upon the land here in controversy, and which was sustained as to the defendant, F. R. Ziska, in her suit against him, was a lien upon this land, and reached all of the right, title, or interest of any kind in and to the same held and owned by him. If the conveyance made was not fraudulent, but in good faith, or if debtor had sufficient other property subject to execution on this judgment, then plaintiff took nothing by this attachment; while, on the other hand, if the conveyance was fraudulent and there was lacking other property, it was void as to her, and she was entitled to have the land sold and all of the rights of the adverse holder foreclosed, and the avails of the same subjected to the payment of her claim. *Kimbrow v. Clark*, 17 Neb. 403, 22 N. W. 788; *Arper v. Baze*, 9 Minn. 108 (Gil. 98); *Westervelt v. Hagge*, 61 Neb. 647, 85 N. W. 852, 54 L. R. A. 333; *McKinney v. Bank*, 104 Ill. 180; *Loving v. Palro*, 10 Iowa, 282, 77 Am. Dec. 108; *Taylor v. Stone & Lime Co.*, 38 Kan. 547, 16 Pac. 751. The Supreme Court of the state of Nebraska in the case of *Kimbrow v. Clark*, *supra*, held in the syllabus as follows: "Where an attachment is levied upon real estate belonging to a nonresident debtor, or which it is claimed is owned by him, whether held in his own name or not, the attaching creditor acquires a lien upon the interest of the debtor, if any, in the land, which he may enforce after judgment by an action in the nature of a creditors' bill. Such an action may be maintained, even though the original judgment was obtained without other service than by publication in a newspaper." In the case of *Arper v. Baze*, *supra*, the court said: "A creditor may levy an attachment upon real estate of his debtor previously transferred

with intent to defraud creditors, and thereby acquire a lien on the property." In the case of *McKinney, Gilmore & Co. v. Bank*, supra, the court says in the syllabus: "Creditors have the right to treat conveyances of their debtors made to hinder, delay, or defraud them as void, and their election to treat them as void is shown by attaching the property so conveyed, and such attachments, when levied, will become a lien upon the property with the same effect as if no fraudulent conveyance had been made."

The question now presented to us, since, as we have seen, the existence of an attachment upon this land created a lien in favor of plaintiff, is what is the law in reference to the issuance of an execution and its return unsatisfied? Is this necessary? We conclude from an examination of the authorities that it is not. *Level Land Company v. Slyver*, 112 Wis. 442, 88 N. W. 317; *Scanlan v. Murphy*, 51 Minn. 536, 53 N. W. 799; *Francis v. Lawrence*, 48 N. J. Eq. 508, 22 Atl. 259; *Dawson v. Sims*, 14 Or. 561, 13 Pac. 506. In the case of *Level Land Company v. Slyver*, supra, the court says: "One having a specific lien, by judgment or otherwise, may maintain suit to remove fraudulent or invalid obstacles standing in the way of its enforcement without showing issue of an execution and return thereof unsatisfied." In the case of *Francis v. Lawrence*, supra, the court speaks as follows: "A creditor who obtains a lien by levy of attachment on lands can maintain a creditors' bill to set aside a fraudulent conveyance thereof." In the case of *Dawson v. Sims*, supra, the Supreme Court of Oregon holds that: "The lien created by an attachment duly levied upon the property of the debtor is a sufficient foundation for the jurisdiction of a court of equity to aid, by means of a creditors' suit, in removing fraudulent impediments or conveyances which prevent the creditor from laying hold of the property and applying it to the payment of his debt." In *Minnesota*, in the case of *Scanlan v. Murphy*, supra, the court, giving the fraudulent conveyance act its full force and holding the transfer as to the judgment creditor absolutely void and the judgment rendered subsequent to the transfer a lien on the land, holds that: "It is only necessary that the plaintiff shall have a lien by judgment on the real estate subsequent to the fraudulent conveyance. * * * It is not necessary, therefore, for the creditor to follow his legal remedy further than to recover and docket his judgment." It will be observed that these authorities all sustain the proposition that, where there is a lien, then it is not necessary to pursue the action in a court of law further than the establishment of such lien. There are very many other respectable authorities holding that, where the bill or petition alleges that the debtor is insolvent and that the issuance of execution would be of no practical utility, he need not pursue his legal remedy further than to recover and docket

his judgment, and this especially where a lien is thereby established.

There is no question but that under the ancient practice as it obtained in England, and later in the United States, and still in some courts of this country, where the courts of law and equity are separate tribunals, and where the rule was observed that equity granted relief in those cases only where the law by reason of its universality was not adequate, that it was a practice to require the judgment creditor to have an execution issued and a return thereon *nulla bona* before equity would reach out its strong arm and render any assistance, and that this was the only proof that such courts would receive to show that the creditor was without remedy or had exhausted the same at law. But, under our modern practice, a great many of the old forms and proceedings are no longer observed, and in our courts to-day, where law and equity are both administered in one form of action, and by the same court, the reason for the rule is passed and gone, and, when the reason is gone, the rule should and does go with it. Such is the law, in our judgment, in this jurisdiction, and such do we believe to be its declaration by the best authorities. 20 Cyc. p. 726; *Ryan v. Spieth*, 18 Mont. 45, 44 Pac. 403; *Bomberger v. Turner*, 13 Ohio St. 263, 82 Am. Dec. 439; *Lee v. Orr*, 70 Cal. 398, 11 Pac. 745; *Merry & Glenney v. Fremont et al.*, 44 Mo. 518; *Fleischner v. Bank*, 38 Or. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345. The text in 20 Cyc., supra, is as follows: "It has been held that the creditor must aver, not only that he has reduced his claim to judgment, but that he has had a return of an execution thereon unsatisfied in whole or in part, and that the place of such averment cannot be supplied by an allegation of a total want of property. This is put upon the ground that courts of equity are not tribunals for the collection of debts, although resort may be had to them after all legal means have been exhausted. But, after all, the fruitless execution, although generally conclusive, is only evidence that the creditor has no adequate remedy at law, or that he has exhausted his legal remedy. It is not, however, the only possible means of proof. Ordinarily neither law nor equity requires a meaningless form. Accordingly it has been decided in many cases that a judgment creditor whose judgment would have been a lien on the property but for the fraudulent conveyance may proceed at once to have the conveyance set aside. If he alleges and proves that the debtor is insolvent and that the issuing of an execution would be of no practical utility, he need not show that he has pursued his legal remedy further than to recover and docket his judgment." The Supreme Court of the state of Oregon in *Fleischner v. Bank*, supra, holds: "The issuance and return of an execution is not a necessary preliminary to the right to maintain a creditors' suit to set aside conveyances by

the debtor and to uncover assets, where the debtor is alleged to be insolvent." The case of *Merry v. Fremon*, supra, was one wherein it was ought to set aside certain conveyances because of their fraudulent character. The court says: "It is generally necessary to show the issuance of an execution and a return of nulla bona, but it may be dispensed with where it is shown that the debtor was insolvent." The Supreme Court of the state of Montana in the case of *Ryan v. Splith*, supra, involving the rule as to personal property and in which it was sought to set aside certain transfers on the ground that they were fraudulent, held: "A complaint in equity to reach and have applied to a judgment, property of the judgment debtor, alleged to be fraudulently concealed, which shows that there is no property subject to execution and what has become of it, need not also allege as a prerequisite to equitable relief that an execution was issued and returned unsatisfied." Under these authorities, and under the facts in this case, the judgment creditor having secured a lien upon the property, and averring in her petition that "the defendant Frank R. Ziska is insolvent and has been at all times since the 1st day of December, 1901, and has no property subject to execution out of which plaintiff can make her judgment except the land heretofore described," we hold that it was unnecessary for her to allege and prove the issuance of execution and its return nulla bona, and that, cause of action not being barred, the petition states a cause of action.

This conclusion brings us to a consideration of the evidence introduced in the case by plaintiff to sustain her petition. The only evidence offered aside from documentary proof is found in the testimony of plaintiff and her former husband, the alleged fraudulent grantor. This has been carefully read by the entire court, and the majority thereof finds that, while there is no direct proof upon some material allegations of the petition, it cannot be said from a consideration of the entire testimony and the relationship to each other of all the parties to the suit that there is no evidence either direct or circumstantial which does not tend in some degree to support the allegations. The rule in this state on the question presented is very clearly announced in the syllabus in the case of *Edmisson v. Drumm-Flato Commission Company*, 13 Okl. 440, 73 Pac. 958, where it is held: "A demurrer to the evidence admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn from the evidence. On a demurrer to the evidence, the court cannot weigh conflicting evidence, but will treat the evidence as withdrawn which is most favorable to the demurrant."

With this for a measure by which to consider the evidence offered it is our judgment

that the trial court erred in sustaining the demurrer thereto, and the case is accordingly reversed. The writer hereof is unable to yield his assent to the conclusion reached by a majority of the court on the sufficiency of the evidence to sustain the petition, and dissents from this portion of the opinion, concurring with the other Justices as to the balance.

**GERMAN-AMERICAN STATE BANK v.
SPOKANE-COLUMBIA RIVER R.
& NAVIGATION CO.**

(Supreme Court of Washington. April 24, 1908.)

1. PLEDGES—WRONGFUL ENFORCEMENT.

Defendant, owing plaintiff on a note, assigned several notes to it as collateral security under an agreement by which plaintiff might sell such collateral at public or private sale without demand, notice to redeem, or notice of time, place, or manner of sale. Two of defendant's stockholders offered \$5,000 for the collateral notes which offer plaintiff declined, and sold the notes at a private sale for \$2,500. Held, that plaintiff was guilty of lack of good faith rendering it liable for the actual value of the notes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, §§ 152-161.]

2. EVIDENCE—COMPETENCY—SHOWING VALUE.

The offer of a price for property made in good faith and rejected by the owner is competent as evidence of value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 280-285, 1216.]

Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by the German-American State Bank, a corporation, against the Spokane-Columbia River Railroad & Navigation Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with instructions.

B. C. Mosby, for appellant. Merritt, Oswald & Merritt, for respondent.

PER CURIAM. This is an action to recover a balance alleged to be due and owing upon a promissory note. The complaint alleges that the defendant, on or about the 13th day of December, 1905, executed its note to the plaintiff for the sum of \$5,000, payable 90 days after date, with interest thereon at the rate of 12 per cent. per annum from date until paid. After allowing certain credits, judgment is asked for \$2,420, with interest, and also for \$500 as attorney's fees. The answer shows that, on the 19th day of May, 1906, B. C. Mosby was appointed receiver for the defendant corporation, and that having duly qualified as such he answered as receiver in behalf of the defendant. It is denied that any sum is due and owing upon the note, and it is affirmatively alleged that, after the execution of the note, the plaintiff and the defendant entered into a written agreement concerning the note in suit, by the terms of which certain promissory notes—61 in number—the property of the defendant, and

of the aggregate face value of approximately \$15,000, were assigned and delivered to the plaintiff as collateral security for the payment of the defendant's aforesaid note; that afterwards the plaintiff wrongfully converted about three-fourths of the collateral notes to its own use through a fraudulent sale thereof; that the sale was made for \$2,500, which was about one-fourth of the actual value of the notes. It is alleged that the defendant is entitled to recover against the plaintiff the sum of \$4,083, and judgment is asked for that amount. The plaintiff replied that the agreement concerning the collateral notes provided that the plaintiff might sell and dispose of them without demand, notice to redeem, or notice of the time, place, or manner of sale, and at public or private sale; that, in accordance therewith, the plaintiff sold the notes, except such as had been theretofore paid, for \$2,500, which sum was applied upon the defendant's note. Upon the above issues the cause was tried before the court without a jury, and a judgment was rendered for the plaintiff in the sum of \$1,904.90 and costs, from which the defendant has appealed.

The evidence shows that two holders of stock in the appellant company went to the respondent and offered to pay the latter \$5,000 for the transfer of the collateral notes. The respondent refused to do this, and soon afterwards sold the notes at private sale, without notice, for \$2,500. No actual tender of the \$5,000 was made by the exhibition of the coin, but the circumstances showed that a tender was not necessary since the respondent refused to consider the offer, and so flatly stated at the time. Respondent argues that the offer was not made in behalf of the appellant, but that it was merely in behalf of the persons asking it for their own speculative purposes, and that respondent was under no obligations to assist them in a speculative scheme. Whatever may have been the motive of the persons who made the offer, it is nevertheless true that, if the offer had been accepted and the transfer consummated, the appellant would have benefited by it to the extent of \$2,500. To that extent at least the offer was in effect in the interest and behalf of appellant. Respondent held the collateral notes in trust for appellant for a specified purpose, and was under both the moral and legal obligation to realize for them a sum as near their actual value as could be reasonably obtained. Having refused an offer of \$5,000, respondent afterwards deliberately sold the notes privately for \$2,500. It is true the agreement was that the notes could be sold privately, but the law implies that, under all such agreements, at least ordinary good faith shall be exercised. We think the circumstances stated do not show good faith, and that the respondent must be held liable for the actual value of the collateral notes.

What was the real value as shown by this record? The offer of a price for property

made in good faith and rejected by the owner is competent as evidence of value. 16 Cyc. pp. 1136, 1141, 1143. The offer of \$5,000 in this case was therefore competent evidence of value. Respondent produced no evidence upon the question of value except that it was offered and had accepted \$2,500. That, however, did not overcome the force of the other evidence, that it had been offered and had rejected \$5,000. With the evidence standing thus, we think the value must be found to have been \$5,000. Respondent in its complaint, along with other credits, allowed a credit of \$2,500 upon appellant's note, as the proceeds of the sale of the unpaid collateral notes. There remains therefore \$2,500 more to be placed to appellant's credit. After deducting from the \$2,500 the amount the court found to be the balance upon appellant's note, judgment should go against respondent and in favor of appellant for the remainder.

The judgment is reversed, and the cause remanded, with instructions to enter judgment in accordance with this opinion.

COLEMAN v. LARSON.

(Supreme Court of Washington. April 22, 1908.)

1. SPECIFIC PERFORMANCE—GIFTS.

While an agreement, whether in parol or in writing, for a gift of land, will not be enforced on proof alone of the promise to give, yet where the promisee accepts the promise, enters into possession, and makes improvements on the land, or does some other act on the faith of the promise which materially changes his position, the promisor will be required to execute a deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 220–222.]

2. SAME—EVIDENCE.

On the issue of the existence of a gift of real estate, it appeared that the donor owned a house and lot; that she was advanced in years; that she desired to do something for the donee, her brother; that she directed her attorney to write to the donee, residing in a sister state, and offering him her home on condition that he would come there to live. The attorney's letter stated that the donor had asked him to write to ascertain whether the donee would be willing to make his home with the donor in consideration of her deeding her property to him as a gift. The donee replied that he accepted her offer, and removed from the sister state, and made his home on the donor's property. The donor repeatedly expressed a desire to do something in aid of the donee. *Held*, that the donee was justified in treating the letter as an offer to give him the property on the conditions named, so that, when he accepted the offer and performed the conditions, a contract enforceable in equity arose, and the donor could not change the donee's rights by thereafter conveying to him only a part of the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 220–222.]

3. ACCORD AND SATISFACTION — ACCEPTANCE OF PART.

A donee claimed a lot under a parol gift. The donor, after the gift was complete, executed a deed to the donee of only a part thereof. On the donor's death, the donee accepted the deed, and gave to the executor a written receipt. *Held*, that the donee was not estopped from

claiming a conveyance of the remainder of the premises, in the absence of evidence that he agreed to take a part in settlement of the dispute between the parties as to his rights.

Appeal from Superior Court. King County: R. B. Albertson, Judge.

Action by James Coleman against Martin L. Larson, executor of Mary Janson, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Andrew J. Balliet and James Klefer, for appellant. Bo Sweeney, for respondent.

FULLERTON, J. This is an action brought to enforce an agreement for a gift of real property. In brief, the facts are these: In the latter part of the year 1906 one Mary Janson was the owner of lots 1 and 2, in block 3, of Queen Ann's Second addition to the city of Seattle. The lots lay side by side, and together made a tract 60 by 120 feet in size. There was but one house on the lots. This had been moved from the front to the rear 40 feet of the lots, leaving a space on the front 60 by 80 feet in size unoccupied. Mrs. Janson made her home in the house. She was well advanced in years; and in very poor health. The respondent in this action was her brother. He was then residing in the state of California, was possessed of a large family, and was in very poor circumstances financially. Anticipating her own death, and desiring to do something to ameliorate her brother's condition, Mrs. Janson conceived the idea of leaving him a part of her estate, which consisted of the real property mentioned and some personal property, to the value of possibly \$3,000. In November, 1906, she gave oral directions to her attorney to write to her brother and offer him her home on condition that he would come to Seattle to live. The attorney thereupon wrote the brother the following letter: "November 13, 1906. Mr. James Coleman, Sr., Glenbrook, Lake County, Calif.—Dear Sir: Your sister, Mrs. Mary Janson, of this city, is endeavoring to arrange her affairs at this time, and asked me to write this letter to you to ascertain from you whether you would be willing to make your home in this city. Seattle, in consideration that she deeded to you as a gift, the home where she has been for some years, and is now living; the same to be your home. The lot is 60x120 feet. Is good property, and has a cottage on it with modern plumbing in it. Please answer me at once on receipt of this. Mrs. Janson has been ill for some time, and is quite ill at this time, and may not last many more days longer. Her condition is such that she may pass away at any moment. Yet, on the other hand she may live for several months. Yours truly, Andrew J. Balliet." Three days later she procured a friend to write to him another letter, fearing the attorney might overlook the matter. This letter was as follows: "Seattle. Nov. 16, 1906. Mr. James Coleman: At the request of your

sister, Mrs. Mary L. Janson, I write to tell you that she is very ill, has had two light strokes of paralysis, and may have another one at any time. And she is very anxious to see you, and wants you and wife to come to her at once. If you decide to come, telegraph at once, and she will telegraph tickets for you and your wife. Do not delay for she is very anxious to get her business settled and if you are here it will simplify business that she wants to settle for you. Telegraph at once on receipt of this letter. Respectfully, Mrs. M. A. Morse." To the attorney's letter the brother replied as follows: "Andrew J. Balliet, Esq., Attorney at Law, Seattle, Washington. 527-8-9 Coleman Bldg., Tel. Main 4321. Dear Sir: I received your letter of Nov. 13 on Nov. 18, 1906. I wrote a letter to my sister, Mrs. L. Jansen about four days ago and told her that I would try and go up there to see her and start on Wednesday the 21st of November. Dear Sir, you can tell my sister Mrs. L. Jansen I will except her kind offer and hope she will be better by the time I get up there. Yours truly, James Coleman, Sr. Glenbrook, Lake County, California." The brother left with his wife for Seattle at the date named in his letter, arriving there shortly after his letter arrived, and at once took up his abode with his sister, where he continued to reside until her death, which occurred on January 21, 1907. Shortly after his arrival Mrs. Janson executed a deed in his favor conveying to him the east 40 feet of lots 1 and 2 in the block above named, delivering it to her executor, with instructions to deliver it to her brother after her death. She also at the same time executed a bill of sale in his favor of all her household furniture, which she likewise delivered to her executor with the same instructions. These instruments were delivered to the brother within a few hours after Mrs. Janson's death. The brother shortly thereafter began this action to enforce a conveyance to him of the remaining 60 by 80 feet. It is not shown that the respondent knew anything of the contents of the deed and bill of sale prior to his sister's death, or that he knew of their existence other than in a very general way. Declarations of the sister to the effect that she had given the entire property to her brother made shortly prior to her death were shown; also that, in speaking of the place she called "home," she would indicate the entire property. It was shown, however, on the part of the executor, that she offered the land in dispute for sale even after the arrival of her brother in Seattle, and that the brother remonstrated against any sale of the property by her, claiming that it was his by gift. The will of the sister, while disposing of all her remaining property specifically, makes no mention of this real property. It passed under the will, if by the will at all, by virtue of the general residuary clause. The trial court held that the respondent was entitled to a conveyance of the remaining part of the two

lots, and entered a judgment accordingly. The executor appeals.

It is the appellant's contention that the letter of the attorney did not constitute an offer on the part of Mrs. Janson to convey her home to the respondent in consideration that he would come to Seattle to reside, but was rather in the nature of a preliminary inquiry by which it was sought to ascertain whether or not the respondent would accept of such a proposition should she afterwards make it; and, being so, there was no agreement to give him the land which can be specifically enforced. Unquestionably the letter is capable of that construction, and, standing alone, might properly be so construed, but the surrounding circumstances make it clear that this was not Mrs. Janson's intention. Her repeatedly expressed desires to do something in aid of her brother, together with the letter written through Mrs. Morse, make it clear that she intended to proffer him a gift of her home if he would come to Seattle to reside. The respondent was justified in treating it as an offer to give him the property on the conditions named, and, when he accepted the offer and performed the conditions, it became a binding contract which equity will enforce. An agreement for a gift of land will not, of course, be enforced on proof alone of the promise to give. This is true whether the promise be oral or in writing. But, where the promisee accepts the promise, enters into possession and makes improvements on the land, or does some other act on the faith of the promise which materially changes his condition, the promisor will be required to make good the gift.

We think, also, the original offer was intended to include the entire property. The letter of the attorney unmistakably includes the whole of it, but the instructions given the attorney were not specific. He was directed to make an offer of "the home," or "this home"; and it is thought that the deed she left indicates that her meaning was different from that expressed in the letter. But this description in the deed appears to be an afterthought on her part, arising from the fear that the means she had on hand would not suffice to care for her during her last sickness, and that it might be necessary to sell a portion of the lots to procure additional money for that purpose. But this change of mind could not affect the respondent's rights. If she offered him the entire property on terms that required some change of condition on his part and he accepted those terms, the gift was complete, and could not be afterwards modified by her. At the delivery of the deed and bill of sale to the brother on the death of his sister, he made no objection to the instruments because of the description of the property, but accepted and recorded them, giving to the executor a writing acknowledging their receipt by him. This is now thought to estop him from claiming a conveyance of the remainder of the

lots, but manifestly his conduct did not work an estoppel. His conduct could amount to an estoppel only in the case that he agreed to take a part for the whole in settlement of the dispute between the parties, but there is no evidence whatever that such was the condition on which he accepted these papers.

The judgment is affirmed.

HADLEY, C. J., and MOUNT, CROW, and ROOT, JJ., concur.

CHILCOTT v. GLOBE NAVIGATION CO.

(Supreme Court of Washington. April 20, 1908.)

1. APPEAL—NOTICE IN OPEN COURT—TIME.

Ballinger's Ann. Codes & St. § 6503 (Pierce's Code, § 1051), provides that notice of appeal in open court must be given when the judgment is "rendered or made," and Laws 1903, p. 285, c. 148, § 1, declares that, when a trial by jury has been had, judgment shall be immediately entered by the clerk in conformity to the verdict, but that such judgment shall be vacated by the granting of a new trial. *Held* that, when a motion for a new trial has been properly filed, the judgment is not final until the motion is determined, and that the time for taking an appeal begins to run only from the date of the denial of such motion, and notice of appeal in open court must be given when the motion for a new trial is denied.

2. SAME—SUBSEQUENT JUDGMENT.

A verdict having been returned for plaintiff on September 27, 1907, judgment was properly entered by the clerk the same day. Defendant's motion for a new trial was denied November 9th following, after which defendant, over plaintiff's objection, obtained from the court a signed judgment which was filed in the clerk's office on December 9, 1907, at which time defendant gave oral notice of appeal in open court. *Held*, that such written judgment was ineffective to extend the time for taking an appeal, or to make the notice of appeal then given relate back to the original judgment, which became final on the denial of a motion for a new trial, and that such notice was too late.

3. SAME—FEES—JUDGMENT ENTRY.

Laws 1907, c. 56, pp. 88, 89, 90, provides that, where judgment is rendered after an appearance by the adverse party and a trial in a case other than the foreclosure of a lien or mortgage or partition, a fee of \$6 shall be paid to the clerk at the time of the entry. *Held*, that the failure of the clerk to collect such fee at the time of entering a judgment did not render the judgment void, nor affect the finality thereof, for the purpose of an appeal.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Richard Chilcott against the Globe Navigation Company. Judgment for plaintiff, and defendant appeals. On motion to dismiss appeals. Granted.

H. R. Clise, for appellant. F. R. Conway, for respondent.

HADLEY, C. J. This cause was tried before a jury, and a verdict was returned for the plaintiff on September 27, 1907. Judgment was entered upon the verdict by the clerk on the same day. The defendant's motion for a new trial was denied November 9,

1907. The judgment from which the appeal is sought was signed by the judge, and filed in the office of the clerk on December 9, 1907. This judgment was signed and filed at the instance of the defendant, over the objection and exception of the plaintiff, and pursuant to a notice given by the defendant. The notice of appeal was orally given by defendant in open court at that time. The respondent has moved to dismiss the appeal on the ground that there was no sufficient notice of appeal. The notice of appeal to be effective if given in open court must be given at the time the judgment is "rendered or made." Ballinger's Ann. Codes & St. § 6503 (Pierce's Code, § 1051). It is also provided by section 1, p. 285, c. 148, Sess. Laws 1903, that, when a trial by jury has been had, judgment shall be immediately entered by the clerk in conformity to the verdict. The clerk so entered judgment in this case, and it must have been then "rendered or made." The statute of 1903 provides that the granting of a motion for a new trial shall immediately operate as the vacation of the judgment, and we held in *State ex rel. Payson v. Chapman*, 35 Wash. 64, 76 Pac. 525, and *Rice Fisheries Co. v. Pacific Realty Co.*, 35 Wash. 535, 77 Pac. 839, that, when a motion for new trial has been properly filed, the judgment will not be of final effect until the motion is determined, and that the time for taking an appeal begins to run from the date of the denial of the motion for a new trial. It follows that, if the notice of appeal is given in open court, it must be given at the time the motion for a new trial is denied, since it is then that the judgment becomes final and effective. The notice in the case at bar was not given at that time; but on December 9th, one month later, the appellant appeared with a prepared formal entry called a "judgment," obtained the judge's signature, filed the entry over the respondent's objection, and then gave notice of appeal from the judgment so entered. The notice of appeal did not relate to the first judgment entered, and it came too late as a notice of appeal from that judgment. The real judgment in the case had been previously entered, and it became final and effective on November 9th, when the motion for new trial was denied. To hold that the appellant's notice is sufficient would in effect permit a party to voluntarily extend his own time to appeal by bringing into court and filing at his convenience a so-called judgment entry long after the statutory judgment has been entered.

Appellant argues that the statute of 1903, providing for immediate judgment upon the return of the verdict of the jury, must be considered in connection with the statute in regard to costs. It is provided by the statute of 1907 (Sess. Laws 1907, pp. 88, 89, 90, c. 56) as follows: "The several officers herein named shall collect the fees herein prescribed for their official services. * * * Clerks of the Superior Court. * * * If a judgment oth-

er than a dismissal or continuance is rendered, the party obtaining the same shall pay, at the time of the entry thereof, a further fee as follows: * * * (4) Where the judgment is rendered after an appearance by an adverse party and a trial by jury or by the court or a judge, referee, or commissioner, in a case other than the foreclosure of a lien or a mortgage or partition of real estate, \$6." It is contended that, under the above statute, the judgment fee of \$6 in a case like the one at bar must be paid at the time the judgment is entered, and that there is, in fact, no judgment until the fee is paid. Appellant says the judgment fee was not paid until December 9th, when the entry which it requested was made. We find nothing in the record which shows that the fee was not paid until that time. But, assuming that it was not, we think that fact is immaterial here. The statute of 1903 makes it the duty of the clerk to enter the judgment immediately upon the return of the verdict. The statute of 1907 makes it his duty to collect certain fees, but it does not provide that a judgment shall be void for mere failure to collect the fee at the time judgment shall be entered. It is no doubt within the province of the clerk to demand the payment of the judgment fee at the time of making the entry, but his neglect to do so, or the mere neglect or refusal to pay on the part of the party in whose favor judgment should go, does not of itself render the judgment a nullity. If it might be held to be sufficient ground for the vacation of the judgment, the vacation would have to be accomplished through proper procedure for that purpose, and by an order of court to that effect.

For the foregoing reasons, the notice of appeal was insufficient; and the appeal is therefore dismissed.

FULLERTON, MOUNT, ROOT, and CROW, JJ., concur.

HOWARD v. HANSON.

(Supreme Court of Washington. April 22, 1908.)

1. REFERENCE—ORDER OF REFERENCE.

An order of reference in which the person named is called a "court commissioner," and is afterwards referred to as "said court commissioner," is not void for indefiniteness, because it did not show whether the reference was to the person named as referee or as court commissioner.

2. APPEAL—REVIEW—PRESUMPTIONS.

Where an interlocutory order is of doubtful meaning, it will be given the interpretation on appeal that was given by the court of original jurisdiction.

3. COURT COMMISSIONERS — APPOINTMENT — CONSTITUTIONAL PROVISIONS.

Under the express provision of Const. art. 4, § 23, the judge of the superior court, having jurisdiction in any county, may appoint from one to three court commissioners, who shall have authority to perform like duties as judge of the superior court at chambers, to take depo-

sitions, and to perform such business connected with the administration of justice as may be prescribed by law, and it is immaterial that the Legislature has limited the right to appointment of court commissioners to counties where there is no resident judge.

4. SAME—POWERS.

A court commissioner has power to hear a proceeding to determine whether a judgment debtor had any property subject to execution under Const. art. 4, § 23, giving court commissioners "power to perform such other business connected with the administration of justice as may be prescribed by law," and Ballinger's Ann. Codes & St. § 4729 (Pierce's Code, § 4390), giving them power "to take testimony and proofs * * * in all matters in which information is required by the court," and to compel attendance of witnesses in the hearing of such matters.

5. EXECUTION—SUPPLEMENTARY PROCEEDINGS—COSTS—ORDER.

A judgment which requires the defendant to pay into court the costs of suit is erroneous under Ballinger's Ann. Codes & St. § 5327 (Pierce's Code, § 912), providing "the judge may make an order allowing to the judgment creditor a fixed sum as costs, consisting of his witness' fees and referees' fees and other disbursements, and of a sum in addition thereto not exceeding \$25, and directing the payment thereof out of any money which has come or may come to the hands of the receiver or of the sheriff within a time specified in the order."

Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by A. D. Howard against J. B. Hanson. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with instructions.

Merrick & Mills, for appellant. Wm. Shelter and Cooley & Horan, for respondent.

FULLERTON, J. In 1905 the respondent recovered a judgment in the superior court of Snohomish county against the appellant for the sum of \$625.20. On January 16, 1907, he caused an execution to issue on the judgment, which was placed in the hands of the sheriff of Snohomish county for service. That officer was unable to find any property belonging to the appellant subject to execution, and returned the writ unsatisfied. The respondent thereupon instituted this proceeding under the statute relating to proceedings supplemental to execution, filing his affidavit, to the effect that the appellant had property in Snohomish county which he unjustly refused to apply towards the satisfaction of the judgment. After the filing of the affidavit, the court made an order requiring the appellant to "appear at the courtroom of the Honorable John Sandidge, court commissioner, on the 30th day of January, A. D. 1907, at the hour of 10 o'clock a. m., and that he then and there answer, before the said court commissioner, sitting as a representative of this court, concerning" any property he may have subject to execution for the satisfaction of the judgment mentioned. The appellant appeared personally and with counsel at the hearing, whereupon he was examined with other witnesses touching his property. At the close of the evidence, the appellant objected to any

further proceedings before the commissioner on the following grounds: "(1) That if said order of January 17, 1907, is an order of reference to John Sandidge, as referee, it appears that the said John Sandidge has never qualified by taking the referee's oath as prescribed by law, and that the parties have not expressly or at all waived the taking of such oath. (2) That if such order of January 17, 1907, is made to John Sandidge, as court commissioner, the defendant objects to any further proceedings on the ground that in Snohomish county there is no court commissioner; there being resident in Snohomish county a judge of the superior court." These objections were overruled by the commissioner, and a return made to the court, to the effect that the appellant was the owner and in possession of 14 shares of the capital stock of the Everett House Furnishing Company, a corporation, which he failed and refused to give up to execution, further reporting that he construed the order of the court referring the proceedings to him to be an order of reference to him as court commissioner, and not as a referee, and that he had acted accordingly. On the report of the commissioner the court entered the following judgment and order:

"* * * And the court having heard each of the parties in respect to said motion, and having considered the return of the court commissioner, and his findings of fact and conclusions of law in the supplementary proceedings herein, together with the testimony taken upon the hearing in said supplementary proceedings, now being fully advised in the premises, it is now hereby ordered that the above-named J. B. Hanson be, and he is hereby, directed and required within 90 days from and after the service upon him of this order to deliver up and surrender to the sheriff of Snohomish county, Wash., the certain certificate or certificates representing those certain fourteen (14) shares of stock owned and held by him in the Everett House Furnishing Company, a corporation, of Everett, Wash., the same, when so delivered by the said J. B. Hanson to said sheriff, to be by said sheriff disposed in the manner provided by law. It is hereby further ordered that the above-named plaintiff and judgment creditor, A. D. Howard, be, and he is hereby, allowed as costs of said supplementary proceedings the sum of \$25 and for disbursements incurred by him upon such hearing the additional sum of \$47.35 incurred as stenographer's fees and \$2.20 incurred as sheriff's fees, and the said defendant, J. B. Hanson, is hereby directed and required to pay to the sheriff by said J. B. Hanson to be by said sheriff paid over to the above-named plaintiff or his attorneys in satisfaction of said costs and disbursements herein allowed."

It is the appellant's first contention that there was no sufficient order of reference; that it is impossible to tell from the order made whether the reference was to a court commissioner or to a referee, and, this being

true, it is void for indefiniteness. But clearly the order was an order of reference to a court commissioner. Not only is the person named called such in the order, but he is afterwards referred to as "said court commissioner." If, however, the order as entered were indefinite in this respect, it would not render the proceedings void. The journal entry of an interlocutory order is at most only evidence of the action of the court, and, when it is of doubtful meaning, the appellate court will give to it that interpretation which the court of original jurisdiction gives to it. Here the court of original jurisdiction treated the order as an order of reference to a court commissioner when objection was made to its form, and, that being true, this court will give it the same interpretation, especially as the appellant was not misled by it.

It is next objected that the court of Snohomish county is without power to appoint a court commissioner. This contention is based on the fact that Snohomish county has a resident judge, and the further fact that the Legislature has apparently sought to limit the power of the court to appoint a court commissioner to those counties in which there is no resident judge. But the power to appoint a commissioner is vested in the court by the Constitution. Article 4, § 23, of that instrument reads as follows: "There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by such judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law." This grant of power is supreme in the courts, and the Legislature is without power to take it away. It does not limit the right of the court to appoint a court commissioner to those counties in which there is no resident judge, and, in so far as the Legislature has attempted to so limit it, its act is invalid for want of power.

It is further contended in this connection that, if it be held that the court had power to appoint a commissioner, the commissioner is without power to hear a proceeding of this kind, since it is not included in the grant of powers conferred on court commissioners by the Constitution. The powers there conferred, it will be observed, are (1) power to perform like duties as a judge of the superior court at chambers; (2) power to take depositions; and (3) power to perform such other business connected with the administration of justice as may be prescribed by law. What was intended by the Constitution makers to be included in the first of these grants of power is not clear, as they had in a prior section of the Constitution provided that the superior courts should always be open for the transaction of business, and thus eliminated the distinction that

formerly existed between the powers of a judge during term time and his powers after the adjournment of the term, doing away with the sittings of the court at chambers altogether. Nor has this court been more happy in its attempt to elucidate its meaning. In *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397, it was intimated that the court commissioners have the powers that were formerly exercised by the territorial judges at chambers, while in *State v. Phillip*, 44 Wash. 615, 87 Pac. 955, it was said that this was a strained construction of very plain language. Indeed, the latter case went further, and intimated that by the logic of some of our previous decisions court commissioners had been eliminated entirely from our judicial system. But this, too, was evidently an inadvertence. There can be no doubt that court commissioners have the powers conferred by the second and third of the enumerated grants, even if the first be eliminated because of its indefiniteness. They can still take depositions, and perform such other business connected with the administration of justice as may be prescribed by law. Some question is here made as to the meaning of this latter clause, but we have no doubt it was intended to leave the Legislature free to confer upon court commissioners such additional powers as the due administration of justice may from time to time require. Had the Constitution provided for the appointment of court commissioners, and enumerated their powers without going further, there would have been some question as to the authority of the Legislature to add to these powers, and it was to remove this doubt that the clause was inserted. The Legislature, therefore, has authority to give to court commissioners powers in addition to those specifically enumerated in the Constitution, subject to the restriction that such powers shall be connected with the administration of justice. Acting under its authority, the Legislature has provided that every court commissioner shall have power "(2) to take testimony and proofs in all cases where the same is required by law, and in all matters in which information is required by the court, and report in writing his findings of fact and conclusions of law thereon to the judge of the superior court of the county; (3) to grant adjournments, administer oaths, preserve order, compel the attendance of witnesses, and to punish them for nonattendance or refusal to be sworn or to testify in the hearing of any matter before him as fully as the court or judge." *Ballinger's Ann. Codes & St. § 4729* (*Pierce's Code*, § 4390). These powers are ample to authorize the doing of everything that was done by the commissioner in the case at bar, even if the power so to do is not found in those especially enumerated in the Constitution, and we therefore hold that he acted within the scope of his authority in the proceedings before us.

It is next objected that the evidence was insufficient to justify the findings of fact made by the commissioner and approved by the court. But, without entering into an analysis of the evidence, we think it amply sufficient in that respect.

The last objection goes to the judgment; the contention being that it does not conform to the statute. This objection we think is well taken. The statute under which it was entered reads as follows: "The judge may make an order allowing to the judgment creditor a fixed sum as costs, consisting of his witness fees and referee's fees and other disbursements, and of a sum in addition thereto not exceeding twenty-five dollars, and directing the payment thereof out of any money which has come or may come to the hands of the receiver or of the sheriff within a time specified in the order." Ballinger's Ann. Codes & St. § 5327 (Pierce's Code, § 912). This statute, it will be observed, empowers the court to allow a fixed sum as costs which it may direct to be paid out of any money which has come or may come into the hands of the sheriff within a time specified in the order. The judgment as entered required the appellant to pay this sum into court. This was error. A formal judgment should be entered against the person liable for the costs, followed by a direction that the sheriff pay the judgment out of such money as has come or may come into his hands. The defendant cannot be directed to make the payment, and then be punished as for contempt if he fails so to do.

The judgment appealed from is reversed and remanded, with instructions to modify the judgment in the particular indicated in the foregoing opinion.

HADLEY, C. J., and MOUNT, CROW, and ROOT, JJ., concur.

MOORE v. NATIONAL ACCIDENT SOCIETY.

(Supreme Court of Washington. April 22, 1908.)

APPEAL—PRIOR DECISION—LAW OF THE CASE.

Where, on a prior appeal in an action on an accident policy, the court held that, as the company denied liability for want of timely notice, its action amounted to a waiver of any other objection, such decision constituted the law of the case, and defendant, on a retrial, could not object that the action was not commenced within the time limited by the policy; the only question left for determination being the sufficiency of the notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4358-4368.]

Appeal from Superior Court, Kittitas County; H. B. Riggs, Judge.

Action by Cash Moore against the National Accident Society. Judgment for plaintiff, and defendant appeals. Affirmed.

Fred Parker, for appellant. Austin Mires and Graves & McDaniels, for respondent.

CROW, J. This action was brought by plaintiff to recover benefits under an accident insurance policy. Upon the first trial a judgment of nonsuit was rendered against plaintiff, which judgment was subsequently reversed by this court. 38 Wash. 31, 80 Pac. 171. Upon the remanding of the case, a second trial was had resulting in a judgment in favor of plaintiff, from which defendant prosecutes this appeal.

Appellant raises but one question, to wit: "Was this action commenced within the time limited by the contract of the parties as expressed in the policy itself?" Respondent contends that this question was necessarily involved in the decision of the case upon the former appeal, and that its determination then against the present appellant is now conclusive. We think this contention must be upheld. Pursuant to stipulation of the parties, the last trial was had upon the same record and evidence used at the former trial. Hence, if the form of the record and evidence could now present the question mentioned, it must have done so on the first trial and appeal. In its opinion upon the former appeal this court said: "As the company denied its liability and refused to treat with the insured on the ground of want of timely notice, its action amounted to a waiver of any other objection, and it is not now at liberty to vary its ground, and insist that the appellant cannot recover because he failed to comply with some other condition of the policy." There was consequently no question left for determination except that as to the sufficiency of the notice of the accident. The decision became the law of the case and conclusive against this appellant as to the question now sought to be raised. Wheeler v. Aberdeen (Wash.) 92 Pac. 135; Grant v. Walsh, 41 Wash. 542, 83 Pac. 1113.

The judgment is affirmed.

HADLEY, C. J., and FULLERTON, ROOT, and MOUNT, JJ., concur.

STOHLTON et ux. v. KITSAP COUNTY.

(Supreme Court of Washington. April 22, 1908.)

HIGHWAYS—ESTABLISHMENT BY PRESCRIPTION.

A skid road was built on private property for private logging purposes. Subsequently stringers were placed on the skids, and, with these as rails, the way was used as a tramway for logging purposes. Persons traveled over it on foot, on horseback, and occasionally by team. The road terminated at tide water. The county never undertook to repair the road, though individuals did some work on it. For years the road had not been used for logging purposes. Held not to show an adverse user by the public sufficient to establish a way by prescription.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 6-20.]

Appeal from Superior Court, Kitsap County; John B. Yakey, Judge.

Action by C. H. Stohltz and wife against the county of Kitsap. From a judgment for plaintiffs, defendant appeals. Affirmed.

C. D. Sutton and Brightman & Tennant, for appellant. G. Ward Kemp, for respondents.

HADLEY, C. J. This is an action to quiet title to real estate as against the county of Kitsap, and also to enjoin the county, its officers and agents, from trespassing, or inviting others to trespass, upon the land in question. The county answered that it claims no interest in the land except by way of a public easement within that portion thereof over which it alleges that a public highway exists. It is alleged that the way was used by the public adversely, continuously, and uninterruptedly for more than 10 years prior to the commencement of this suit, and that the plaintiffs have without right erected and fastened gates across the highway, and have thereby unlawfully obstructed the same, so that the public cannot use it. The cause was tried by the court without a jury, and resulted in a judgment for the plaintiffs, to the effect that they are the owners in fee and in possession of the whole of the land; that the claim that a public highway exists there is without right, and that the county is forever barred from asserting any claim against any part of the land. The county has appealed.

The errors assigned all involve the single contention that the judgment is not sustained by the evidence. The evidence discloses that what the county now asserts is a public highway was built as a skid road upon private property for private logging purposes many years ago. Afterwards strips of wood in the nature of stringers were placed upon the skids about eight feet apart, and with these as rails the way was used as a tramway for logging purposes. Persons traveled over it on foot, on horseback, and occasionally by team. The road terminated at tide water, where the water is eight feet deep at high tide. The county never undertook to work or repair the road, although individuals did do some work upon it. The travel over it was in all respects similar to that over other logging roads in the same locality which were generally regarded by the public as private ways. For years this way has not been used for logging purposes. We think the evidence does not show an adverse user by the public which establishes a way by prescription. The travel over it began when it was used as a logging way, and it was then unquestionably regarded as a private way. The travel must have been permissive in its character then, and no action inconsistent with a mere permissive right or privilege to travel there was taken by the traveling public or by the appellant's officers or agents until in the month of February, 1906, when the county's officers first asserted that it was a public

highway. Thereupon the respondents erected gates across the road and placed signboards there with words thereon in printed form, in large, legible letters, as follows: "Private Property. Please close the Gates." These gates were maintained by respondents until in March, 1907, when they were locked and fastened by respondents. The county caused the fastenings to be broken and the gates to be removed in April following. We think it is evident that the public generally did not regard the travel there as adverse. This is shown by the fact that other parts of this same logging road have been closed up by private owners, and no protest or complaint was made by the public or by the county authorities.

We think the judgment of the trial court is well sustained by the evidence; and it is affirmed.

FULLERTON, MOUNT, CROW, and ROOT, JJ., concur.

HEMENWAY v. WASHINGTON WATER POWER CO.

(Supreme Court of Washington. April 24, 1908.)

DAMAGES — PERSONAL INJURIES — EXCESSIVE DAMAGES.

Two of defendant's street cars collided, injuring plaintiff, a passenger on one of them, so that he was confined to his bed for more than a week. Up to the time of the trial, eight months afterwards, he had not been able to work at his trade of carpenter, but during a part of the time had been engaged in the real estate business. When injured he was 32 years of age, and earning \$3.00 a day. Subsequently wages were increased to \$4 a day. Although prior to the injury he was a strong, able-bodied man, since then he had continuously suffered pain, and could walk with difficulty. Doctors were unable to find any objective evidences of injuries upon his person, and the great weight of the testimony indicated no permanent injury. The jury returned a verdict for \$7,500. The trial court required plaintiff to remit \$2,500, or submit to a new trial. Plaintiff made the remission and judgment was entered for \$5,000. *Held*, that the judgment is still excessive, and that a new trial will be granted, unless plaintiff agrees to accept \$2,500.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 372-396.]

Appeal from Superior Court, Spokane County; Geo. A. Joiner, Judge.

Action by Arthur F. Hemenway against the Washington Water Power Company. From a judgment for plaintiff for \$5,000, defendant appeals. Reversed and new trial granted, unless plaintiff should agree to a judgment for \$2,500.

H. M. Stephens, for appellant. A. E. Barnes and Geo. A. Latimer, for respondent.

MOUNT, J. This is an action for personal injuries. The case was tried to a jury. A verdict was returned in favor of the plaintiff for \$7,500. Upon a motion for a new tri-

al, the trial judge required the plaintiff to remit \$2,500 from the verdict or submit to a new trial. The plaintiff made the remission, and the judgment was thereupon entered for \$5,000 in favor of the plaintiff. The defendant appeals from that judgment.

The only question argued upon this appeal is that the judgment is excessive. The evidence shows that the respondent was injured by the collision of two of appellant's street cars upon one of which respondent was a passenger. At the time of the collision the respondent was standing on the rear of the car, and, by the impact of the collision, was thrown against the seats, which struck him in the groin, and that he was thrown down upon the seats, and into the aisle of the car; that the injury made him sick, and he was confined to his bed for more than a week; that up to the time of the trial, which occurred about eight months after the accident, he had not been able to work at his trade, which was that of a carpenter. He had, however, been engaged in the real estate business for three or four months. At the time of his injury respondent was a young man 32 years of age, and was employed at the rate of \$3.60 per day. Subsequently wages were increased to \$4 per day. Prior to the injury he was a strong, able-bodied man, and since that time to the time of the trial he had continuously suffered pain, and could walk with difficulty. At the time of the injury and several times afterwards he was examined by certain doctors, none of whom were able to find any bruises or objective evidences of injuries upon his person. It was the theory of the plaintiff that he received an injury to his spinal cord which would be permanent. One of the doctors called by him as a witness testified at the trial that, in his opinion, the injury was to the spinal cord, and that the injuries would remain permanently. Several other doctors who examined the respondent carefully several times testified that there was no permanent injury and no evidences of injury to the spinal cord. We have examined the evidence carefully, and are of the opinion that the great weight thereof indicates that there is no permanent injury to the respondent. The size of the verdict returned by the jury would seem to indicate that they might have found that the respondent was permanently injured. But, whether so or not, the trial judge was of the opinion that the verdict was excessive, and in that opinion we concur. If there were no permanent injuries caused to respondent by the collision, it seems clear to us that \$5,000 is still excessive, and that one-half of this amount would be a liberal compensation for the injuries which he has suffered. So large a verdict as the one returned by the jury upon the facts in evidence in this case indicates to us that the jury were influenced by passion or prejudice, and that either a new trial should be granted, or we should reduce the amount of the verdict to what seems to us a fair amount.

The judgment appealed from will therefore be reversed, and a new trial granted, unless the respondent, within 30 days after the remittitur is filed below, shall file a remission of \$2,500 from the judgment entered, and agree to a judgment for \$2,500, in which event the judgment will stand affirmed for that amount, appellant to recover costs on this appeal.

ROOT, FULLERTON, and CROW, JJ., concur.

SHAFFORD v. BROWN et al.
(Supreme Court of Washington. April 22, 1908.)

1. STATUTES—AGRICULTURE—DESTRUCTION OF INFECTED APPLES—EFFECT OF VOID STATUTE.

That Laws 1903, p. 246, c. 133, assuming to create the office of county fruit inspector, has been held unconstitutional and void, does not make an inspector and the state commissioner of horticulture liable for apples destroyed by them after a finding that they were infected with injurious pests; the inspector and the owners evidently supposing the act to be valid, the owners recognizing the inspector by appealing from his decision to the commissioner, and the commissioner's authority to perform the functions of his office not being questioned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 57; vol. 10, Constitutional Law, § 47.]

2. PLEADING—AFFIRMATIVE DEFENSE—EFFECT OF DEMURRER.

A demurrer to an affirmative defense admits the material allegations thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 525-534.]

3. AGRICULTURE—DESTRUCTION OF INFECTED APPLES—LIABILITY.

If apples were infected and their destruction was necessary to avoid injury to the fruit and the fruit interests of the state, the owners suffered no loss by their destruction by the state commissioner of horticulture for which they could maintain an action.

Appeal from Superior Court, Yakima County; H. B. Rigg, Judge.

Action by K. W. Shafford against J. M. Brown and another. From a judgment of dismissal, plaintiff appeals. Affirmed.

Fred Parker, for appellant. John D. Atkinson, A. J. Falknor, and R. G. Sharpe, for respondents.

CROW, J. This was an action by plaintiff to recover damages for apples destroyed by defendants while assuming to act as county fruit inspector and state commissioner of horticulture, respectively. From a judgment of dismissal, plaintiff appeals.

In their answer respondents alleged as an affirmative defense that the apples destroyed were infected with pests injurious to the fruit and fruit interests of the state, and that the only way to avoid such injury was to destroy the infected apples; that respondent Brown, assuming to act as county fruit inspector, ordered the owners of the apples to destroy the same; that said owners appealed from

Brown's decision to respondent Huntley as state commissioner of horticulture; that the latter immediately heard the appeal upon the merits, and made a personal inspection of the fruit, and sustained the decision of Brown, and thereupon destroyed the infected apples. A demurrer was interposed to this defense, but was overruled by the trial court. Appellant then replied simply with a general denial of the allegations of the affirmative defense. No statement of facts or findings have been brought to this court. The only question presented is as to the ruling of the court upon the demurrer.

This court in the case of *State ex rel. Egbert v. Blumberg*, 89 Pac. 708, held that part of the act of 1903 (Laws 1903, p. 246, c. 133) which assumed to create the office of county fruit inspector to be unconstitutional and void. By reason of this, appellant contends that the action of respondents in condemning and destroying this fruit was a trespass, for which they must respond in damages to him as successor in interest to the then owners. This contention cannot be upheld. Respondent Brown was acting in good faith under a statute of the Legislature. He doubtless supposed it to be a valid statute. The owners of the fruit evidently supposed the same. They recognized Brown as county fruit inspector by appealing from his decision to the state commissioner of horticulture. There is no question about respondent Huntley being such commissioner and authorized to perform the functions of that office. Upon a personal examination of the fruit he found it infected. The affirmative defense alleged that the fruit was infected, and there is nothing to show that it was of any value. The judgment of the trial court is conclusive against appellant upon all of the material facts. The material allegations of the affirmative defense, for the purposes of the demurrer, must be assumed to be true. These recited that the fruit was infected and its destruction necessary. Assuming this to be true, the owners suffered no loss for which they could maintain an action. We think the demurrer was properly overruled.

The judgment is affirmed.

HADLEY, C. J., and FULLERTON, MOUNT, and ROOT, JJ., concur.

MOYLAN v. MOYLAN et ux.

(Supreme Court of Washington. April 24, 1908.)

1. ACTION—JOINDER—JOINDER OF CAUSES OF ACTION UNDER CODES AND PRACTICE ACTS.

An administratrix sued to recover, first, the amount by mistake overpaid defendant by the deceased on the dissolution of a partnership between them; and, secondly, to recover the purchase price of a one-third interest in certain lots of land sold and deeded to defendant by the deceased. *Held*, that both causes of action being upon contract might be joined under Bal. Ann. Codes & St. § 4042 (Pierce's Code, § 412), permitting the joinder of causes of action on contract, express or implied.

2. APPEAL—REVIEW—FINDINGS OF COURT ON CONFLICTING EVIDENCE.

Where there is evidence to support the findings and conclusions of the trial court, the Supreme Court, not being satisfied that such findings are erroneous, must take them as correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

3. INTEREST—BREACH OF CONTRACT—DETENTION OF MONEY.

In an action by an administratrix to recover the amount by mistake overpaid defendant by the deceased on the dissolution of a partnership between them, and to recover the purchase price of a one-third interest in certain lots of land sold and deeded to defendant by the deceased, where it was shown that a few days after the settlement the deceased notified defendant that a mistake had been made, and demanded by letter a return of the money, and subsequently other demands were made for specific amounts, it was not erroneous to allow interest on the amounts found due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Interest, § 23.]

4. WITNESSES—COMPETENCY—TESTIMONY OF PARTIES INTERESTED AGAINST REPRESENTATIVES IN TITLE OR INTEREST OF PERSON DECEASED—STATUTORY PROVISIONS.

In an action by an administratrix to recover the amount by mistake overpaid defendant by the deceased on the dissolution of a partnership between them, defendant was asked on his own behalf to "state what transpired at the time of the settlement and all you remember about it." *Held*, that the question was general, and called for everything that transpired at the time, and included private statements of the deceased, and was therefore objectionable under Ballinger's Ann. Codes & St. § 5901 (Pierce's Code, § 937), excluding in an action by or against the representative of a decedent testimony by the adverse party as to statements of deceased.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 663-682.]

5. JUDGMENT—ESSENTIALS—TIME OF RENDITION.

The mere fact that judgment was not rendered within 90 days after the trial does not of itself constitute error upon which the judgment may be reversed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 382-389.]

6. APPEAL—REVIEW—DISCRETION OF LOWER COURT—NEW TRIAL.

Following the trial the stenographer who had taken down the evidence in shorthand lost the notes. After an adverse decision defendant moved for a new trial, and offered to pay all the costs therefor in order to get a correct new record. *Held*, that the matter was within the court's discretion, and that a refusal of the motion was not an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3860-3876.]

Appeal from Superior Court, Lincoln County.

Action by Mary Moylan, as administratrix of the estate of Daniel Moylan, deceased, against John Moylan and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Neal, Sessions & Myers and H. A. P. Myers, for appellants. Merrill, Hilschman, Oswald & Merrill, for respondent.

MOUNT, J. This action was brought by the respondent against the appellants to recover

the sum of \$2,150 alleged to be due upon two causes of action. The lower court, after a trial, entered judgment in favor of the plaintiff upon both causes of action for \$1,943.50. The defendants appeal.

Mary Moylan, the respondent, is the administratrix of the estate of Daniel Moylan, deceased. She is the widow of the deceased. The appellant John Moylan and the deceased, Daniel Moylan, were brothers. They were copartners in a farming business for several years prior to December, 1902. The complaint alleged as a first cause of action, in substance, that the two brothers were engaged in business as partners prior to December 20, 1902, when on that day the copartnership was dissolved by mutual consent, and a settlement was made between them; that it was then agreed if any mistake had been made in such settlement it should be corrected. Soon afterwards Daniel Moylan discovered that a mistake had been made against him amounting to \$1,350, and immediately notified his brother thereof. The second cause of action alleges the sale to appellant of a one-third interest in certain lots of land of the value of \$800. The appellants demurred to the complaint upon the ground, among others, that several causes of action were improperly united in the complaint. This demurrer was overruled. The appellant thereupon answered, admitting that the settlement had been made, but denying that any mistakes had been made therein, and admitted that on June 23, 1903, the respondent and her husband, Daniel Moylan, who was then alive, made a deed of the lots in question to the appellant, but alleged affirmatively that the lots were formerly owned by John Moylan, Daniel Moylan, and Dennis Moylan, brothers, who inherited the lots from a brother Timothy; that the consideration for the deed from Daniel and wife to John was the fact that John had cared for his mother for many years prior to her death; and that the deed was made in consideration thereof at the suggestion of Daniel and Dennis Moylan. This affirmative matter was denied. The cause was tried to the court without a jury, commencing on June 5, 1906. The judge thereafter did not announce his decision until May 24, 1907, when findings of fact and conclusions of law were made in favor of the respondent, to the effect that at the settlement made between appellant and Daniel Moylan the latter had paid to the appellant \$6,270, which was \$1,293.27 more than he should have paid, and also that the agreed value of the lots was \$250 for respondent's one-third interest. The judgment was entered for these amounts, with interest.

Appellants claim on this appeal that the court erred in denying the demurrer to the complaint, for the reason that the two causes of action stated cannot be joined in the same complaint. Both causes of action are upon

contract, and may be clearly joined under the provisions of section 4942, Ballinger's Ann. Codes & St. (Pierce's Code, § 412).

Appellants next contend that the evidence is insufficient to show that a mistake was made in the settlement between the brothers. The appellant John Moylan was a witness, and admitted that within a few days after the settlement was made his brother Daniel claimed that mistakes had been made, and requested the appellant to correct the errors; that after the death of Daniel the widow and a brother of the widow upon different occasions made similar demands, which appellant rejected. There is evidence in the record to support the findings and conclusions of the trial court, and we are not satisfied on this appeal that his findings are erroneous. They must therefore be taken as correct.

Appellants also contend that the evidence is insufficient to support the finding that they agreed to pay \$250 for a one-third interest in the lots, as alleged in the second cause of action. The evidence is in direct conflict upon this question, and we are unable to say that it preponderates against the finding, and for that reason we shall not disturb the court's finding.

It is alleged that the court erred in allowing interest on the amounts found due on each cause of action. The record shows that within a few days after the settlement Daniel notified the appellant that a mistake had been made, and demanded by letter a return of the money, and subsequently other demands were made for specific amounts. Under these circumstances it was not error to allow interest on the amounts found due.

Appellants argue that the court erred in sustaining an objection to a question put to appellant while he was upon the witness stand as follows: "State what transpired at the time of the settlement, and all you remember about it." This question was objected to, because it called for a conversation with Daniel Moylan, deceased, and the objection was sustained on that ground. This question was general, and called for everything that transpired at that time, and included private statements of the deceased. As framed, the question was clearly objectionable under the statute (section 5991, Ballinger's Ann. Codes & St. [Pierce's Code, § 937]), and the court did not err.

Appellant argues that the judgment is erroneous, because it was not rendered within 90 days after the trial. We held in *Demaris v. Barker*, 33 Wash. 200, 74 Pac. 362, that such judgments were not void, and that the court did not lose jurisdiction by reason of delay. The mere fact that the judgment was not rendered within 90 days does not of itself constitute error upon which the judgment may be reversed.

It is claimed that the court erred in refusing to grant a new trial. It seems that after the trial the stenographer who had taken

down the evidence in shorthand lost the notes. After an adverse decision the appellants made application for new trial, and offered to pay all the costs of such new trial in order to get a correct new record. The court refused this application. This was clearly within the discretion of the trial court, and was not an abuse of such discretion.

The judgment must therefore be affirmed.

HADLEY, C. J., and RUDKIN, ROOT, CROW, DUNBAR, and FULLERTON, JJ., concur.

JAMES v. CITY OF SEATTLE et al.
(Supreme Court of Washington. April 24, 1908.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS FOR BENEFITS—AMOUNT OF ASSESSMENTS—STATUTORY LIMITATIONS.

By Laws 1903, p. 121, c. 82, any city of the first class may order any improvements, and charge the cost to the abutting property, when it does not exceed 50 per cent. of the real estate valuation, exclusive of improvements, within the proposed improvement district, according to the last valuation, when such improvement is authorized by a unanimous vote of the council, provided this limit may be exceeded when any improvements shall be petitioned for by three-fourths of the property owners to be assessed, and when such petition specifies not to exceed a certain higher percentage. A petition of three-fourths of the property owners in an assessment district for improvements provided that the cost should not exceed 200 per cent. of the value of the real estate therein. *Held*, that the statute placed no limit on the value of the improvements when petitioned for by property owners, except that specified in the petition, and the use of the word "percentage" did not limit the assessment to a fractional part of the valuation.

2. SAME—APPORTIONMENT OF EXPENSES—BENEFITS CONFERRED.

The constitutional limit of an assessment in proportion to the taxable value of the property by petition of the owners is the value of the actual benefits conferred.

3. SAME—MODE OF ASSESSMENT—VALUATION OF PROPERTY.

Where the ordinance authorizing the improvements, pursuant to a petition, was passed shortly after the petition was filed, and was based on the valuation placed on the property between the filing of the petition and the passing of the ordinance, the petition not reciting upon what valuation the contemplated assessment was based, the last valuation controls in fixing the amount of the assessment.

4. SAME—PRELIMINARY PROCEEDINGS—PETITION OF PROPERTY OWNERS—CONDITIONS CONTAINED THEREIN—ILLEGAL CONDITIONS—EFFECT.

Improvements were made under Laws 1903, p. 121, c. 82, authorizing improvements, and providing that the cost thereof may exceed the proportionate percentage named therein, based on the last valuation when the improvements are petitioned for by the owners of three-fourths of the property to be assessed within the district, and when such petition specifies a certain higher percentage. The petition, signed by the requisite number, recited that the petitioners signed it upon the following conditions; one of the conditions being that, for the purpose of the improvements, the district should be di-

vided into three subdistricts of described boundaries, and that the cost of the grading, etc., of streets lying within such subdistricts should be borne by the property therein, but that the work of regrading of the streets should be let by a single contract. *Held*, if this could not be legally done, it was not the intention of the petitioners that the improvements should not in that event be made, and, even if the conditions were illegal, their illegality was not jurisdictional, and did not render the proceedings fatally defective.

5. SAME—MODE OF ASSESSMENT—VALUATION OF PROPERTY.

The contention that there has been no valuation placed upon the property within the proposed assessment district, for the reason that a part of the property is taken for widening the street, and the balance of the property by itself has never been assessed, is unsound, since the city cannot take any property without compensation, and the increased width of the street is presumed to add to the value of the remaining property, and the last valuation for general taxation controls in fixing the cost of the improvement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 86, Municipal Corporations, § 1110.]

6. SAME—CONTRACTS—VALIDITY—CONDITIONS IN CONTRACT—EFFECT.

Improvements were made under Laws 1903, p. 121, c. 82, authorizing municipal improvements to be charged to the abutting property, and providing that the limit of the cost may exceed the limit fixed therein when the improvements are petitioned for by owners of three-fourths of the property to be assessed, when such petition specifies a higher percentage. The petition recited, among other conditions, that the city, when contracting for the work, should require, for the benefit of the property owners, that the contractor excavate the property of petitioners at the same cost as the price fixed for excavating the streets, and the petitioners might pay for such private excavation in a certain manner and time, and these conditions were incorporated by the city in the calls for bids. Some of the grades were very deep, and it was necessary to slope the adjoining property considerable in grading. *Held*, that the only requirement in contracts by the city for local improvements was that the conditions did not tend to increase the cost to the property owners, and, as the contractor could do the grading cheaper if he also did the private grading on the adjoining lots, the conditions did not render the contract void as a matter of law.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Suit by J. A. James against the city of Seattle and another. Judgment for defendants, and complainant appeals. Affirmed.

L. T. Turner, for appellant. Scott Calhoun, and Peters & Powell, for respondents.

MOUNT, J. This action was brought by the appellant to restrain the respondents from carrying out a contract for excavating certain streets. The contract was let by the city of Seattle to its correspondent, the Rainier Development Company. The defendants filed a general demurrer to the complaint. This demurrer was sustained by the court below. The plaintiff elected to stand upon the allegations of the complaint. The action was thereupon dismissed. He appeals.

The complaint shows that the authority of the city council to order the improvement

rests upon a certain petition signed by the owners of three-fourths of the property within the whole improvement district, under chapter 82, p. 121, Laws 1903; that the appellant is the owner of the real property abutting upon one of the streets to be improved; that he did not sign the petition therefor; that by the petition the owners of three-fourths of the property within the proposed district have attempted to confer upon the city council power to widen, alter, and change grades of certain named streets, and to excavate such streets to the new grades, and to do other work incidental to such regrading and to assess the cost of these improvements against the property benefited thereby, provided the cost of such regrading and improvements incident thereto "shall not exceed two hundred per cent. of the value of the real estate exclusive of improvements thereon within the district to be improved." The petition also states: "Your petitioners do further respectfully represent that they sign this petition upon the following understanding, and do hereby agree to the following terms and conditions: * * * (2) The contract for the grading and regrading of the streets and avenues embraced in the above-named district shall be let as a single contract, provided that for the purpose of prosecuting such work said contract shall provide that said district shall be subdivided into three subdistricts, the boundaries of which shall be as follows: [Then follows the description of each subdistrict.] The cost of grading and regrading the streets and avenues lying within the boundaries of each subdistrict as hereinbefore described, together with the cost of all other work necessary or incidental to said grading and regrading, shall be borne entirely by property lying within the limits of said subdistrict, respectively, so far as the same may be legally made a lien upon said property." In this connection it should be stated that the complaint shows that, while the owners of three-fourths of the property within the district as a whole signed the petition, the owners of three-fourths of the property within the subdistrict in which the plaintiff's property is situated did not sign the petition. The petition contains the further condition that the city of Seattle, in entering into the contract for the performance of the work, shall insert therein a provision for and on behalf of and for the benefit of private property within the district to be assessed for this improvement who may desire said property to be excavated; that said owner shall have the right and privilege to demand that the contractor shall excavate said private property at the same time the abutting streets are excavated, and at a cost per cubic yard not to exceed the price bid by said contractor for excavating the streets and avenues, and that said contractor shall be required to enter into a contract with such private owners for the performance of such excavating "in accordance with the terms and conditions herein pro-

vided." It is further provided in the petition that all the signers of such petition will enter into such contracts with the contractor, "provided that said contractor shall accept in full satisfaction for private excavation a lien against said private property, payable at the option of the owners thereof, in cash upon monthly estimates made in general conformity with the monthly estimates made for the streets abutting said property. The said owner may elect to pay for such private excavation at the expiration of any period not exceeding 10 years after the completion and acceptance of said work by the board of public works, with interest on deferred payments at the rate of 7 per cent. per annum, payable semiannually." This petition was filed with the board of public works of the city on May 12, 1906. Thereafter, on December 3, 1906, the city council, by unanimous vote, passed an ordinance as follows, omitting the formal parts:

"Section 1. That Third avenue and Third avenue produced, from Pine street to Cedar street; Fourth avenue, from Pine street to Cedar street; Fifth avenue, from Westlake avenue to Denny way; Olive street, from Stewart street to Westlake avenue; Stewart street, from Second avenue to Westlake avenue; Virginia street, from Second avenue to Westlake avenue; Lenora street, from Second avenue to Fifth avenue; Blanchard street, from Second avenue to Fifth avenue; Bell street, from Second avenue to Fifth avenue; Battery street, from the alley between Second avenue and Third avenue to Fifth avenue; Wall street, from the alley between Second avenue and Third avenue to Fifth avenue, and Vine street, from the alley between Second avenue and Third avenue to Fifth avenue, and the approaches to such streets and avenues for such distance back therefrom, not exceeding two hundred fifty-six (256) feet, as may be necessary to make proper and suitable approaches thereto, be improved by grading and regrading the same and by the construction of such temporary sewers and the alteration, removal, and reconstruction of the existing sewer system, as may be rendered necessary by the grading and regrading of said streets, avenues, and approaches, said improvement to be made in accordance with the stipulations and agreements contained in the property owners' petition therefor, being file No. 30060 of the records of the city of Seattle in the office of the comptroller of said city. Said improvement to be made according to the plans and specifications prepared under the direction of the city engineer and on file in the office of the department of public works. And that assessments be levied and collected upon all lots and parcels of land specially benefited by said improvement to defray the cost and expense thereof and local improvement district bonds be issued as hereinafter provided, and said assessment shall become a first lien upon all property liable therefor and for the payment of said

local improvement district bonds as herein-after provided.

"Sec. 2. That there is hereby established a local improvement district to be designated as 'Local Improvement District No. 1345,' which district is described as follows: All the property abutting, adjacent and approximate to said portion of said streets and avenues named and described in section 1 herein to such distance back from the marginal lines thereof as prescribed by the city charter, the property included within said local improvement district shall be deemed to be and shall be the property specially benefited by said improvement and the total cost and expense of the improvement herein ordered, including all necessary incidental expenses, shall be defrayed by collection of special assessments upon the property included in said local improvement district, which said assessment shall be made upon said property in all respects as provided by the laws of the state of Washington and the city charter and ordinances of the city of Seattle, and, together with interest to accrue upon the respective sums so assessed shall be collected as herein provided.

"Sec. 3. That the mode of making payment for the said local improvement shall be the mode of 'payment by bonds,' as provided by an act of the Legislature of the state of Washington entitled 'An act authorizing the issuance and sale of bonds by cities to pay for local improvement providing for the payment thereof and declaring an emergency,' approved March 14, 1899, and under the provisions of Ordinance No. 5693, of said city, approved December 6, 1899. The provisions of this section shall apply only to the mode of payment of said assessment and shall not be construed as limiting the method of assessment to the plan provided by the charter of the city of Seattle or said Ordinance 5693.

"Sec. 4. That said improvement shall be made under the supervision of the board of public works, which board is hereby ordered to proceed with said improvement as soon as the bonds of said local improvement district shall have been issued and the improvement shall not be begun until said bonds are negotiated and sold unless the said contract for said improvement shall provide for the delivery of said bonds to the contractor in payment therefor: Provided, if the contract for said improvement shall be so made that the contractor constructing the same shall accept the bonds in payment thereof, the improvement may be commenced immediately after the execution of the contract: Provided, that if the contract for said improvement does not provide for the delivery of bonds to the contractor, said bonds shall be negotiated before said improvement shall be commenced and if the bonds be not negotiated and the contract for said improvement shall provide that said bonds shall be delivered to the contractor in payment for such improvement, the board of public works shall provide for the delivery of any of said bonds during the progress of the

work, as in its judgment it may deem safe and proper.

"Sec. 5. That provision shall be made by ordinance for the issuance of bonds of said local improvement district for the whole estimated cost of said improvement less the amount issued against lands of the United States, the city of Seattle and less the amount paid upon the assessment prior to the time for the issuance of the bonds, and for their delivery to the contractor constructing the improvement in payment thereof or their negotiation and sale. Said bonds shall be payable in ten equal annual installments and shall bear interest at the rate of six per cent. per annum payable annually upon all unpaid installments of said bonds.

"Sec. 6. This ordinance shall take effect and be in force from and after its passage and approval if approved by the mayor, otherwise it shall take effect at the time it shall become a law under the provisions of the city charter."

Thereafter, pursuant to said ordinance, the board of public works called for bids and let a contract to the respondent Rainier Development Company for said work, which said call for bids and the contract referred to the plans and specifications then on file in the office of said board, which plans and specifications contained the following stipulations and provisions: "The said contractor agrees to all the stipulations and agreements as set forth in the property owners' majority petition now on file in the office of the city comptroller, said petition, stipulation, and agreement being part of this contract so far as the same is in conformity with the laws of the state of Washington, the charter of the city of Seattle and the ordinances of said city. Said stipulations and agreements are as follows: [Then follow the conditions of the petition set out above.]"

The complaint then alleges that the cost of the work provided for by the said contract and the amount required by the said contract to be paid by the contractor therefor is more than 200 per cent. of the authorized valuation of the lands (including the strips to be taken by the widening of the streets) in the assessment district, according to the assessed valuation thereof on the last annual assessment roll prior to the filing of said petition, but less than 200 per cent. and more than 50 per cent. of the total assessed valuation of said property for general taxes, as the same appears upon the last assessment roll made for the levying of taxes prior to the passage of said ordinance. The appellant contends that the contract is illegal because the statute does not confer upon the owners of three-fourths of the property in a proposed assessment district the right to fix a limit of assessment in excess of the value of the property. The statute referred to is as follows: "It shall be lawful for any city of the first class to order any improvement, the cost of which is to be charged to abutting property, when said cost shall not exceed fifty per cent. of the valuation of the

real estate exclusive of improvements within the proposed improvement district according to the valuation last placed upon it for purposes of general taxation, when such improvement is ordered by a unanimous vote of the council of said city of the first class: Provided, that this limit may be exceeded when any improvement shall be petitioned for by the owners of three-fourths of the property to be assessed for said proposed improvement, and when such petition specifies not to exceed a certain higher percentage." Laws 1905, p. 121.

It is argued that the use of the word "percentage" denotes a fractional part, and therefore the Legislature intended by the use of the word "percentage" to limit the petitioners to less than the whole value of the real estate. It seems clear by the context that the Legislature intended to, and did, limit the council to improvements costing 50 per cent. of the assessed value of the real estate to be improved when the improvement was ordered without a petition of the property owners, but expressly provided "that this limit may be exceeded when any improvement shall be petitioned for by the owners of three-fourths of the property to be assessed." This clearly indicates that no limit was intended to be fixed by law in such cases. But the last clause leaves the limit to be fixed by the petitioners themselves, so that, whatever may be the technical meaning of the word "percentage," it is clear from the whole context of the section quoted that no technical meaning was to be given to the word "percentage," and that no limit was fixed except in the case first named. Appellant states: "If the statute means that the city council may, upon petition of the owners of three-fourths of the property, fix any limit, no matter how high, then the statute is unconstitutional as depriving a citizen of his property without due process of law." No authorities are cited to support this statement, and no further argument made thereon. The limit of the council above 50 per cent. is fixed by the petition of the property owners, and the constitutional limit is the value of actual benefits conferred. 1 Cooley on Taxation (2d Ed.) p. 623 et seq.; Abbott on Municipal Corporations, § 337 et seq.; Hamilton on Special Assessments, § 202 et seq.; *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791.

It is next argued that it was the intention of the petitioners to limit the assessment with reference to the last valuation placed upon the property for general taxation which preceded the filing of the petition. The petition does not so recite, and the complaint shows that the ordinance was based upon the valuation last placed upon the property before the ordinance was passed. This valuation was fixed between the dates of filing the petition and the passage of the ordinance. We think this last valuation controls, particularly where the ordinance was passed within a reasonable time after the petition was filed.

It is next argued that the petition furnishes no jurisdictional basis for the improvement because the conditions expressed in the petition render it nugatory. It is true the petition recites that the petitioners "sign this petition upon the following understanding and do hereby agree to the following terms and conditions." By condition second the petitioners require the contract for the entire district to be let as a single contract, "provided that for the purpose of prosecuting such work said contract shall provide that said district shall be subdivided into three subdistricts." The boundaries of each are then specially described, and it is further provided that "the cost of grading and regrading the streets and avenues lying within the boundary lines of each subdistrict as hereinbefore described, together with the cost of all work necessary or incidental to such grading and regrading, shall be borne entirely by the property lying within the limits of said subdistrict, respectively, so far as the same may be legally made a lien upon the property." The whole provision specifies that the work of regrading all the streets shall be let as a single contract, and that, for the purpose of prosecuting the work, the contract shall provide that the district shall be divided into three subdistricts, and that "the cost of grading * * * within * * * each subdistrict shall be borne entirely by the property lying within the limits of said subdistricts, respectively, so far as the same may legally be made a lien upon said property." If this could not legally be done, it was not the intention of the petitioners that the improvement should not be made. The condition, therefore, was not a jurisdictional one. The third condition in the petition was to the effect that the city, on entering into the contract for the performance of the work, should insert a provision for and on behalf of and for the use and benefit of the property owners within the district binding the contractor to excavate the private property of the petitioners to the new grade at the same cost per cubic yard as the price fixed for excavating the streets. The fourth condition was to the effect that the property owners might pay the contractor for private excavation in cash or in ten years after completion of the work, the contractor reserving a lien on such private property. The city incorporated these two last-named conditions in the call for bids, and the contract was let accordingly. It is contended that the city was without authority to contract for private parties, and these provisions in the call for bids are to the manifest injury of the appellant. Unless it can be said as a matter of law that these conditions necessarily increased the cost of the improvement to the property owners, they do not render the contract void. Hamilton on Special Assessments says at section 452: "As the very purpose of inviting proposals for public work is to give the property owner the benefit of the lowest price he may obtain by a

free and unrestricted bidding, it follows that conditions of the specifications or contracts which restrict bidding or tend to increase the cost of the work will vitiate the entire proceedings. Where contracts for local improvements are required by law to be awarded to the responsible bidders offering to do the work for the lowest sum, any provision in the specifications tending to increase the cost and make the bids less favorable to the property owners is illegal and void. Such provisions are commonly restrictive of the hours of daily labor that men employed by the contractor may work, or forbidding the employment of Chinese or alien labor, or fixing the minimum rate of wages. Whatever form the restriction assumes will be disregarded by the courts if the conditions increase the cost of the work to the taxpayer," etc. We think it cannot be said, either as a matter of law or fact, that those conditions of the bid or contract in this case tended to increase the cost of the work to the taxpayer. It is common knowledge that large bodies of earth can be moved more cheaply per cubic yard than small bodies. It is conceded that some of the cuts for streets in this case are 50 feet deep, and that the private adjoining property must be sloped back by the contractor one foot for each foot in depth, and that the private adjoining property to be available must be graded to the level of the street. We think the contractor for the grading of the streets could do the public work cheaper where he knew he could do all or even a portion of the private work of the same kind adjoining than if the private work were omitted. If this is correct, it follows that the conditions named in the contract do not necessarily increase the cost to the taxpayer, but are a material benefit which he may avail himself of if he so desires. This condition, therefore, did not render the contract void as a matter of law. It is not alleged that they do so as a matter of fact.

Appellant also argues that there has been no valuation placed upon the property for general taxation within the proposed assessment district, for the reason that a part thereof is proposed to be taken for widening the streets and the balance as a body by itself has never been assessed for general taxation. There is no merit in this contention. The city cannot take any part of the property without compensation, and the balance is liable to assessment for its value. The increased width of the streets will presumably add some value to the remaining property; but, in any event, the last valuation for general taxation controls the jurisdiction of the city to order the improvements.

We are of the opinion that the trial court properly sustained the demurrer, and the judgment is therefore affirmed.

HADLEY, C. J., and CROW, ROOT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

BAUER v. WIDHOLM.

(Supreme Court of Washington. April 22, 1908.)

1. PROCESS — SUMMONS — SUFFICIENCY — SERVICE BY PUBLICATION.

A summons served by publication in a suit to foreclose a tax certificate, which required defendant to appear within 60 days after the service of the summons, exclusive of the date of service, and giving the date of first publication, and which omitted any statement of the particular day upon which service would be complete, is insufficient under Ballinger's Ann. Codes & St. § 1751 (Pierce's Code, § 8692), providing that a summons shall contain a direction to the owner summoning him to appear within 60 days after service of the summons, exclusive of the day of service.

2. JUDGMENT — COLLATERAL ATTACK — GROUNDS — WANT OF JURISDICTION — WANT OF SERVICE.

Where a judgment in a suit to foreclose a tax certificate was entered without jurisdiction, in that no service was made, it may be attacked collaterally.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 926.]

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by J. D. Bauer against P. F. Widholm. From a judgment for plaintiff, defendant appeals. Affirmed.

Totten & Rozema, for appellant. Thomas & Rutherford and J. D. Bauer, for respondent.

CROW, J. Action by J. D. Bauer against P. F. Widholm to vacate and set aside a tax foreclosure, sale, and deed. The trial court overruled a demurrer to the complaint. The defendant elected to stand upon his demurrer, and judgment was entered in favor of the plaintiff. The defendant has appealed.

The only question before us is whether the trial court erred in overruling appellant's demurrer. The respondent, in substance, alleged: That he had obtained title to a lot in the city of Seattle from one S. F. Shorey. That on November 23, 1900, a certificate of delinquency for the taxes of 1895 and 1896 was issued thereon to one Kenneth McCallum, who paid taxes for subsequent years, and on January 4, 1901, commenced an action against Richard Roe and all persons unknown claiming any title in and to the lot to foreclose his lien. That service was made by the publication of a summons containing the following citation: "You and each of you are hereby directed and summoned to appear, within sixty days after the service of this notice and summons upon you, exclusive of the date of service, in the above-entitled court, and defend the action or pay the amount due, together with the costs," etc. That no other service was made. That none of the defendants appeared. That the court had obtained no jurisdiction of the defendants or of the subject-matter of the action. That a default judgment of foreclosure was entered. That a sale had been made. That a tax deed had been issued to McCallum, who

afterwards conveyed the lot to the appellant Widholm. That a tender of the delinquent taxes, interest, penalty, and costs had been made to Widholm prior to the commencement of this action, and that the judgment and tax deed were void.

We will only consider the respondent's contention that the summons was void and not sufficient to confer jurisdiction. It was issued under sections 96, 97, p. 182, c. 71, Acts 1897 (section 1751, Ballinger's Ann. Codes & St. [section 8692, Pierce's Code]). It omitted any statement of, or reference to, the particular day upon which its service would be complete, and was therefore so indefinite and uncertain in fixing the time of appearance as to render it defective and avoid the judgment. *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043; *Smith v. White*, 32 Wash. 414, 73 Pac. 480; *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536; *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640; *Owen v. Owen*, 41 Wash. 642, 84 Pac. 606. The date of first publication was stated beneath the signature of the respondent's attorney, but this was not sufficient. *Dolan v. Jones*, supra.

The appellant contends that, as shown by the above cases, an irreconcilable conflict exists in former holdings of this court as to when service would be complete under the act of 1897, whether it would happen upon the first or the last date of publication. This suggests an immaterial point, as the summons neither referred to the first nor the last publication as the date upon which its service would be complete, and was, in any event, fatally indefinite, uncertain, and defective by reason of such omission.

The judgment in the tax foreclosure recited that notice and summons had been duly and regularly served on each and all of the defendants, and the appellant now contends that it cannot be collaterally attacked in this proceeding. The complaint alleged that no service whatever had been made other than the one above mentioned, and that allegation was admitted by the demurrer. The foreclosure judgment was therefore entered without jurisdiction, and, being void, was subject to the attack made upon it in this action. *Sturgiss v. Dart*, 23 Wash. 244, 62 Pac. 858. The trial court committed no error in overruling appellant's demurrer to the complaint.

The judgment is affirmed.

HADLEY, C. J., and MOUNT, ROOT, and FULLERTON, JJ., concur.

BRACE & HERGERT MILL CO. v. STATE.
(Supreme Court of Washington. April 22, 1908.)

1. NAVIGABLE WATERS—RIPARIAN OWNERS—SHORE LAND.

Under the state Constitution, asserting state ownership in the beds and shores of all navigable waters up to and including the line of ordinary high tide in waters where the tide ebbs and

flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes, the state owns the shore land below high-water mark as against the riparian owner acquiring title from the United States, except with reference to tide and shore lands patented prior to the adoption of the Constitution, where the meander line established by the government runs below the line of ordinary high water, in which case such line marks the boundary of the upland drain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 180-200.]

2. SAME—LAKES—"NAVIGABLE."

Where a lake had a total area of 905 acres, 499 of which were covered to a depth of over 25 feet with a maximum depth of 50 feet, and boats of considerable dimensions, as well as smaller craft at different times, had plied on its waters, and booms of logs, piles, shingle bolts, and other timber products had been transported from place to place thereon, as well as moored in booms while awaiting the process of manufacture, the lake was navigable, though little used for navigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 5-11.]

For other definitions, see Words and Phrases, vol. 5, pp. 4675-4684; vol. 8, p. 7728.]

3. SAME — OWNERS OF UPLANDS — TITLE TO SHORES.

Where the government in surveying the land around a lake did not extend its surveys across the lake, nor include the bed in any of the grants made of the upland surrounding it, but in disposing of such upland treated the lake as a navigable body of water, the title to the bed and shores was held in trust by the government for the state in which the lake was located, and, so far as it could do so, passed the title to such bed and shores to the state on its admission into the Union.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 239-252.]

4. ADVERSE POSSESSION—LIMITATIONS AGAINST STATE.

The statute of limitations does not run against the state except with her consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 24-42.]

5. SAME—ACTIONS TO RECOVER SHORE LAND—STATUTES.

The state having asserted title to certain shore lands on which the owners of upland had made certain improvements by Laws 1889-90, p. 435, c. 14, § 11, Acts 1895, p. 559, c. 178, § 74, and Acts 1897, p. 250, c. 89, § 45, recognized that such persons had substantial rights in their improvements which were entitled to protection, and, to that end, gave them a preference right of purchase when the land should be put on the market for sale, providing that, when such land should be purchased by one not the owner of the improvements, the purchaser should pay the value of the improvements to the state for the use of the owner as an additional part of the price. Held, that such legislation indicated an intent on the part of the state that the possession of such lands by the owners of the upland should be permissive as against the state for such time as it intended to withdraw the consent so given; and hence limitations did not begin to run against the state's right to such land at least until the lands had been finally appraised and placed on the market for sale.

6. SAME—COLOR OF TITLE.

The owner of upland could not acquire title to shore land along a navigable lake as against the state under Laws 1893, p. 20, c. 11, conferring title by adverse possession where the possessor has color of title and has paid taxes for seven consecutive years, as such section expressly provides that it shall not extend to lands own-

ed by the United States or the state, or to lands held for any public purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 29–42.]

7. SAME—ESTOPPEL.

The fact that the state had not interfered with plaintiff's use of certain shore land bordering a navigable lake for several years, but without objection had permitted plaintiff and defendant's predecessors to erect improvements on the property, pay taxes thereon, and mortgage the same, and treat it as their own, did not estop the state from claiming title to such land apart from the improvements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 29–42.]

8. NAVIGABLE WATERS—SHORE LINE—DETERMINATION.

Where it was difficult to determine the actual shore line surrounding a navigable lake because of the acts of plaintiff mill company in filling in the lake, and it appeared that the meander line was many feet from the true line, the court did not err in establishing a conventional line between the two, and in refusing to adopt the meander line; the line adopted being proximately coincident with the true line.

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by the Brace & Hergert Mill Company against the state of Washington. Judgment for defendant, and plaintiff appeals. Affirmed.

H. A. P. Myers, for appellant. John D. Atkinson, A. J. Falknor, and R. G. Sharpe, for the State.

FULLERTON, J. This is an action to quiet title to real property brought by the Brace & Hergert Mill Company against the state of Washington. In its complaint the mill company alleged that it was the owner in fee simple of the west half of block 94, in D. T. Denny's First addition to North Seattle, all of block A, in D. T. Denny's Sixth addition to North Seattle, and all of lot 12, in block 1, and lots 1, 2, 3, and 4, in block 3, of Mercer's Water Front addition to the city of Seattle, and that it was in the possession of such property, and had been in the open, public, notorious, adverse, and actual possession thereof for more than 10 years prior to February 26, 1903. It further alleged that the state of Washington claimed some interest in the property described, but that such claim was without right. The state for answer denied the allegations of the complaint, save the allegation that it claimed the property, and the allegation that the mill company was in possession thereof, and for a further and separate answer alleged that all of the lands described in the complaint were shore lands, lying below the line of ordinary high water in the bed of Lake Union, a navigable meandered lake; that such land became its property on its admission into the Union as a state; and that it had never parted with its title to the same. It further alleged that the mill company's possession of the property had not been adverse to it, but in virtue of its laws granting a preference right of purchase to occupants who had placed on such lands, prior

to March, 1889, valuable improvements which were in actual use for commerce, trade, or business. In reply the mill company deraigned its title, showing that a link thereon consisted of a mortgage and its foreclosure in the courts of the United States, that it had paid taxes on the property to the county and state ever since they had been in possession, and alleged again that it had been in adverse possession of the property for the statutory period.

The evidence tended to show that the land in dispute bordered on the shores of Lake Union, and were platted into lots and blocks as parts of the donation land claims of D. T. Denny and Thomas Mercer; that lot 12, in block 1, and lots 1, 2, 3, and 4, of Mercer's addition, were wholly in the bed of Lake Union below the line of ordinary high-water mark as it exists at the present time; that the west half of block 94 of Denny's addition is entirely above that line; that block A of the same addition is partly above and partly below such line. It appeared, also, that Lake Union is a fresh-water lake of irregular shape, having an extreme length north and south of some two and one-fourth miles, with an extreme width of about seven-eighths of a mile; that it has a total area of some 905 acres, some 499 acres of which has a depth of over 25 feet, with a maximum depth of 60 feet. Boats of considerable dimensions, as well as many smaller craft, have at different times piled upon its waters. Booms of logs, piles, shingle bolts, and other timber products have been transported from place to place thereon, as well as moored in booms while awaiting the process of manufacture. In 1852 or 1853 a dam was thrown across the outlet of the lake, causing the waters therein to rise some 11 feet above its general level. While this dam was still standing, a meander line was run to mark the shore line of the Denny and Mercer Donation land claims. This meandered line shows the shore line to have been entirely south of block 94, leaving the entire property in question in this action in the bed of the lake below the line of high-water mark. A second meander line, also run by the government surveyors, although it does not strictly correspond with the first, shows the same thing; and the recorded plats of Denny's additions show the shore line to pass through block 94 somewhere near the center of the block, leaving the north half of block 94, with the other described lands, below the line of ordinary high water. The dam mentioned went out in part some few years after its construction and was not rebuilt, and later on the balance of it went out, leaving the water level of the lake substantially as it was originally. The present shore line, as found by the court, lies entirely below block 94, passing through block A in a diagonal direction, running from a point 30 feet north of the southwest corner of the block to a point 170 feet north of its southeast corner. On the question of possession the evidence tended to show that the

lands in dispute had been in the possession of the mill company and its predecessors in interest since early in territorial days, and there was evidence, although not uncontradicted, that the owners claimed adversely to the state for a period of more than 10 years prior to February 27, 1903, the date the act relieving the state from the operation of the general statute of limitations went into effect. It was further shown that the mill company and its predecessors in interest had placed improvements upon the lands in question having an aggregate value of some \$85,000, and that a considerable part of such improvements were upon that part of the land the court found to be shore lands. It was shown also that these as well as some of the adjoining lands had been filled to a considerable depth by the mill company, and that its action in this regard made it difficult, if not impossible, to trace with precision the shore line as it originally existed, or would now exist, but for such fills. On the foregoing record, the trial court found that Lake Union was a navigable body of water, the property to the beds and shores of which was in the state of Washington; that the line of ordinary high-water mark marked the boundary between the uplands and the shore lands rather than the meander line run by government surveyors; that the mill company had acquired no title to the shore lands by its possession; that the state had acquired no title to the lands lying between the shore line and the meander line as the court had located it; that of the lands in dispute all of block A that lay to the north of that line, together with lot 12, in block 1, and lots 1, 2, 3, and 4, of Mercer's Water Front addition to the city of Seattle, were shore lands belonging to the state of Washington, and that all of block A lying south of the line described, together with the west half of block 94, were uplands, and the property of the mill company. It entered a decree in accordance therewith, from which both parties appeal.

Taking up the questions suggested by the appeal of the mill company, the first to be noticed is the contention that the property in dispute, both above and below the line of ordinary high water of the lake, passed by the patents from the government of the United States to Denny and Mercer, and from them by mesne conveyances to the mill company. In other words, the contention is that the upland owner on a navigable body of water has in virtue of his patent from the United States the right of a riparian proprietor in the water on which his land borders—a right which the state cannot by its laws take away. This question, in so far as it is within the powers of the courts of this state to determine it, has been determined against the appellant's contention. In its Constitution the state asserted ownership in the beds and shores of all navigable waters of this state up to and including the line of ordinary high tide in waters where

the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes. By a uniform course of decision this court has held that this declaration vested title in the lands claimed in the state. It was so held with reference to tide lands in the following cases: *Eisenbach v. Hatfield*, 2 Wash. St. 236, 26 Pac. 539, 12 L. R. A. 632; *Pierce v. Kennedy*, 2 Wash. St. 324, 26 Pac. 554, 28 Pac. 35; *Baer v. Moran Bros. Co.*, 2 Wash. St. 608, 27 Pac. 470; *Harbor Line Commissioners v. State*, 2 Wash. St. 530, 27 Pac. 550; *State v. Harbor Line Commissioners*, 4 Wash. 6, 29 Pac. 938; *State v. Harbor Line Commissioners*, 4 Wash. 816, 30 Pac. 734; *Morse v. O'Connell*, 7 Wash. 117, 34 Pac. 426; *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; *Lowndale v. Gray's Harbor Boom Co.*, 21 Wash. 542, 58 Pac. 663; *Sullivan v. Callvert*, 27 Wash. 600, 68 Pac. 363. And with reference to shore lands, or lands on which the tide did not ebb and flow, in the following cases: *McCue v. Bellingham Bay Water Co.*, 5 Wash. 156, 31 Pac. 461; *Washougal Transp. Co. v. Dalles, etc., Nav. Co.*, 27 Wash. 490, 68 Pac. 74; *Kalez v. Spokane Valley Land & Water Company*, 42 Wash. 43, 84 Pac. 395; *Van Sclen v. Muir (Wash.)* 89 Pac. 188; *Muir v. Johnson (Wash.)* 94 Pac. 899. The statement that the line of ordinary high water marks the boundary of the upland grant is, of course, understood with the modification that the meander line established by the government does not run below that line. We have held, in obedience to another clause of the Constitution disclaiming title in tide and shore lands where the same had been patented prior to the adoption of the Constitution, that where it does run below the line of ordinary high water such line marks the boundary of the upland grant. *Scurry v. Jones*, 4 Wash. 468, 30 Pac. 726; *Cogswell v. Forrest*, 14 Wash. 1, 43 Pac. 1098; *Washougal Transp. Co. v. Dalles, etc., Nav. Co.*, 27 Wash. 490, 68 Pac. 74; *Van Sclen v. Muir (Wash.)* 89 Pac. 188. But, subject to this modification, the rule is unqualified that the upland owner as such has no proprietary interest in the tide or shore lands bordering such uplands.

It is said, however, that the decisions of this court are in violation of the federal laws under which the lands were granted to the upland owner; but we cannot so regard them. Unquestionably the Supreme Court of the United States has uniformly held that grants of uplands bordering on navigable waters convey to the grantee title down to the line of ordinary high water of such navigable waters, but they have just as uniformly held that the answer to the question, whether it conveys more than this, depends upon the local law of the state wherein the granted lands lie. If the local law recognizes such grants as extending to low-water mark or to the thread of the stream,

it will be so recognized by the federal authorities, but, if the state limits the grant to the line of ordinary high water, as our state does, this line will be held to mark the boundary of the grant. This is founded on the principle that the shores and beds of all bodies of water, whether navigable or unnavigable, belong to the state in which they are situate, and that it is for the state to say whether or not it will assert its title to such shores and beds, or whether it will surrender them to the upland proprietor. *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. 210, 34 L. Ed. 819; *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331. This state, as we have shown, asserted its right to these shores and beds of its navigable waters in its Constitution. There can be, therefore, no question that its right thereto is paramount to any claim made by an upland owner in virtue of his patent from the United States.

The next contention is that Lake Union is not navigable in fact, and for that reason the grant of the uplands extended to the center of the lake. But on this question we likewise entertain no doubt. That the lake is capable of being navigated there is no question at all; the claim that it is not navigable being based on the fact that its size renders it of but little use for the purposes of navigation. But the fact that it is not much used does not conclude the question. Since it is capable of being navigated, and is used by the public for that purpose, even though to but a limited extent, the courts cannot say that the private rights of the upland owners are superior to the rights of the general public therein. Moreover, there is no equity in the claim of the upland owner. The government did not extend its surveys across the lake, nor did it include the bed of the lake in any of the grants made of the upland surrounding it. On the contrary, the government, when it disposed of the soil surrounding the lake, treated the lake as a navigable body of water, the title to the bed and shores of which it held in trust for the future state of Washington, and, in so far as it could do so, it passed the title to these beds and shores to the state of Washington on its admission into the Union as little incumbered by the rights of the surrounding property owners as it did any others of the tide and shore lands. *Madson v. Spokane Valley Land, etc., Co.*, 40 Wash. 414, 82 Pac. 718, 6 L. R. A. (N. S.) 257; *Kalez v. Spokane Val. Land, etc., Co.*, 42 Wash. 43, 84 Pac. 395.

The appellant next contends that it has title under the statute of limitations. By the general statute of limitations, brought over from territorial days, it was provided that actions for the recovery of real property, or

for the recovery of the possession thereof, must be brought within a period of ten years. *Ballinger's Ann. Codes & St. § 4797* (*Pierce's Code*, § 290). Another section from the same source reads as follows: "The limitations prescribed in this chapter shall apply to actions brought in the name of the state, or any county or other public corporation therein, or for its benefit, in the same manner as to action by private parties. An action shall be deemed commenced when the complaint is filed." *Ballinger's Ann. Codes & St. § 4807* (*Pierce's Code*, § 291). The section first cited is still the law of the state, and the latter continued to be until February 27, 1903, when it was amended so as to read as follows: "The limitations prescribed in this act (chapter) shall apply to actions brought in the name or for the benefit of any county or other municipality or quasi municipality of the state, in the same manner as to actions brought by private parties: Provided, that there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: And further provided, that no previously existing statute of limitation shall be interposed as a defense to any action brought in the name of or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to the adoption of this act, nor shall any cause of action against the state be predicated upon such a statute. An action shall be deemed commenced when the complaint is filed." *Laws 1903, p. 26, c. 24*. It is at once apparent that, if it was within the power of the state to remove the bar of the statute by legislative act after the bar had become perfect, the appellant has no standing on this branch of its case, as it is clear that the Legislature by this act attempted to do that very thing. But, since the appellant denies to the state that power, we will not examine the question, as there is another ground free from any constitutional objection on which a decision against the contention may rest. That ground is that the statute upon which the appellant relies is not applicable to this character of property. The statute of limitations, it must be remembered, does not run against the state except with the state's consent. When the state acquired its tide and shore lands on its admission into the Union, it found them in a large part in the possession of individuals who had erected and were maintaining thereon structures of various sorts, many of which were costly and valuable. Some of them were of a public nature, such as wharves, docks, and warehouses, useful to the public as an aid to trade and commerce. Others again were of a private nature, such as sawmills, shingle mills, and structures in which were manufactories of various sorts, and still others, again, were mere highways from the upland to deep water. After the state had asserted its title

to these lands, the Legislature recognized that these persons had substantial rights in their improvements which were entitled to protection, and to that end it gave them preference rights of purchase when the land should be put on the market for sale. It provided, furthermore, that, when such lands should be purchased by one not the owner of the improvements, the purchaser should pay the value of the improvements to the state for the use of the owner as an additional part of the purchase price. While no specific enactment on the subject of possession was made, the statute uniformly recognized this right to be in the owner of the improvements. For example, section 11, p. 435, c. 14, Laws 1890-90, the first enactment upon the subject, read as follows: "The owner or owners of any lands abutting, or fronting upon, or bounded by the shore of the Pacific Ocean, or of any bay, harbor, sound, inlet, lake or watercourse shall have the right for sixty days following the filing of the final appraisal of the tide lands to purchase all or any part of the tide lands in front of the lands so owned: Provided, that if valuable improvements in actual use for commerce, trade or business have been made upon said tide lands by any person, association or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid." Acts 1895, § 74, p. 559, c. 178, the first re-enactment of the statutes, contained the following: "Any person the owner of the abutting upland (to shore lands) shall have the preference right for sixty days following the filing of the plat and appraisement with the commissioner of public lands, to purchase the lot or block of land in front of the upland so owned by him: Provided, that if valuable improvements were, prior to March 26, 1890, in actual use for commerce, trade or business, made on any lands, the owner or owners of such improvements shall have, for the period aforesaid, the exclusive right of purchase during the period aforesaid of the lands so improved, and sufficient additional ground for the reasonable use of said improvements." And Acts 1897, p. 250, c. 89, § 45, the law now in force, contains this provision: "The owner or owners of lands abutting or fronting upon tide or shore lands of the first class shall have the right for sixty days following the filing of the final appraisal of the tide and shore lands with the commissioner of public lands to apply for the purchase of all or any part of the tide or shore lands in front of the lands so owned: Provided, that if valuable improvements, and in actual use prior to March 26, 1890, for commerce, trade, residence or business have been made upon said tide or shore lands by any person, association or corporation, the owner or owners of such improvements shall have the exclusive right to apply for the purchase of the land so approved for the period aforesaid. * * *" These statutes, it seems to us, when considered in connection with

the conditions existing at the time of their enactment, evidence a clear intent on the part of the Legislature that improvers of tide and shore lands shall not be disturbed in the possession of their improvements until the land on which the improvements are situated has been placed on the market for sale, and the time given them within which to exercise a preference right of purchase has expired. And, this being true, it must follow that the state intended such possession to be permissive until such time; that it intended to withdraw, in so far as these lands were concerned, the consent formerly given that the general statute of limitations should operate against it. Therefore, since the lands in question were finally appraised and placed on the market for sale about the time this action was commenced, the statute had not run in the appellant's favor. Nor is the appellant aided by the statute relating to possession under color of title and the payment of taxes for seven consecutive years. That statute expressly provides that it "shall not extend to lands or tenements owned by the United States, or this state, nor to school lands, nor to lands held for any public purpose." Laws 1893, p. 20, c. 11.

Lastly, it is asserted that the state is estopped from asserting title to the property in question. This contention is founded on the fact that the state has not interfered with the appellant's use of the property, but has stood by and raised no question while the appellant and its predecessors in interest have mortgaged and sold the property, paid taxes thereon, and otherwise treated it as their own. But acts of this character do not amount to an estoppel as against the state. The state at all times has recognized that the appellant had a property in its improvements, and this property it recognized the right to dispose of as it pleased. The improvement was property subject to taxation, and it could be no waiver of the state's title to the land to assess and collect taxes upon the appellant's interests therein. If the authorities sought to tax the appellant for something it did not own, the proper remedy was to object before the taxing board. The state appeals from the judgment of the court establishing the line of ordinary high water, as it found it to exist at the present time, as the boundary line between the shore and the uplands. This line, as we have before stated, could not be determined with accuracy owing to the fact that the mill company and their predecessors in interest had obscured it by fills which raised the surface above the present water level. The state contends that, since the true line cannot be definitely known because of those acts of the mill company, the court should have adopted the government meander line as the true line, in which event all of the land in dispute will be found within the boundaries of the state's property. But the meander line is concededly many feet from the true line, while the line adopted by the

court is approximately upon it. The fill complained of did not obscure the line entirely. It simply made it difficult to follow its sinuositities, resulting in the adoption by the court of a conventional line between the two points in dispute. As there is no evidence that the state is the loser by this rule of the court, we see no necessity for disturbing it.

The judgment appealed from is affirmed.

HADLEY, C. J., and MOUNT, CROW, and ROOT, JJ., concur.

KNIGHT-CAMPBELL MUSIC CO. v. BUCK.

(Supreme Court of Colorado. April 6, 1908.)

EVIDENCE—PAROL—ADMISSIBILITY TO VARY TERMS OF A WRITING.

In an action on a written contract for the sale of a piano, providing that the whole terms of agreement must be embodied in the contract, it was improper to permit defendant to show that when and after the contract was signed plaintiff's salesman represented that if defendant should be unable to pay the price plaintiff would take back the piano.

Appeal from County Court, City and County of Denver; Rice W. Means, Judge.

Action by the Knight-Campbell Music Company against William H. Buck. From a judgment of the county court for defendant on appeal from justice court, plaintiff appeals. Reversed.

Harry C. Riddle, for appellant. A. Newton Patton, for appellee.

BAILEY, J. The defendant made and entered into a contract in writing with the plaintiff, wherein he promised to pay to plaintiff the sum of \$278 in installments of \$8 per month. The consideration of this contract was the sale by plaintiff to defendant of a piano. The agreement provided that there should be a lien upon the piano for the amount of the purchase price, and in the event of the non-payment of the note the plaintiff could take possession of the piano, sell it, and out of the proceeds pay the costs attending the sale and a reasonable commission therefor, and apply the balance upon the note. After making two of the payments the defendant returned the piano to plaintiff. Plaintiff immediately wrote to defendant saying that it could not receive the piano, but had placed it in a storage room subject to his order, and demanding payment of the balance then due. This being refused, this action was brought in the justice court, and from there appealed to the county court, where judgment was rendered for the defendant. Plaintiff appeals.

The contract contains the following clause: "That the whole terms of agreement must be embodied in this contract, and that verbal arrangements made with agents relating to terms of sale, payment of principal and interest, or any other matter contemplated by this contract will not be binding." Notwithstanding this condition, and notwithstanding

the rule of law that parol testimony cannot be admitted to vary the terms of a written contract, the court, over the objection of plaintiff, permitted the defendant to prove that the salesman who acted for the plaintiff in making the sale represented to the defendant before, at the time of, and shortly after, the contract was signed, that in the event of the defendant's being unable to pay the amount stipulated in the contract the plaintiff would take back the piano. The trial court based its judgment upon this testimony. The ruling of the court in admitting this testimony was clearly erroneous. "When the parties to an agreement have reduced it to writing in such form as to import a valid legal obligation, complete and unambiguous in its terms, with no uncertainty as to the extent of the obligation, it is, in the absence of fraud, accident, or mistake, conclusively presumed that the writing constitutes the whole engagement of the parties, and no extrinsic evidence of prior or contemporaneous negotiations between the parties admissible to vary or qualify the written contract." *Oll Creek G. M. Co. v. Fairbanks, Morse & Co.*, 19 Colo. App. 142, 74 Pac. 543; *McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393, 58 Pac. 358; *Carr v. Schafer*, 15 Colo. 54, 24 Pac. 873. This doctrine must necessarily be enforced when the contract contains a provision which prohibits verbal arrangements made with agents, as is the case in this matter.

Because of the error of the court in admitting this testimony, and because it affirmatively appears from the record that the judgment for the defendant was based upon such incompetent testimony, the judgment must be reversed.

Reversed.

STEELE, C. J., and GODDARD, J., concur.

HOWE v. TOWN OF GUNNISON et al.

(Supreme Court of Colorado. April 6, 1908.)

LIMITATION OF ACTIONS — INSTRUMENT FOR PAYMENT OF MONEY—TOWN WARRANTS.

An action on town warrants, commenced more than six years after repudiation of the warrants by the town authorities as illegal and invalid, coupled with a positive refusal to provide for their payment, is barred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 125.]

Error to District Court, Gunnison County; Theron Stevens, Judge.

Action by Eugene H. Howe against the town of Gunnison and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Richardson & Hawkins, for plaintiff in error.

HELM, J. The judgment of dismissal before us followed an order sustaining a demurrer to the amended complaint. The ac-

tion related to certain warrants issued by the town of Gunnison during the years 1885, 1887, and 1888, aggregating the principal sum of \$1,350.03. The demurrer challenged the complaint upon two grounds: (1) That a cause of action was not stated therein; and (2) that relief was barred by our six-year statute of limitations. No oral argument was made in the case, and no printed argument or brief was filed for defendants in error; nor does the record contain any opinion or statement showing the specific ground upon which the demurrer was sustained by the court below. A strong and persuasive printed argument is, however, filed on behalf of plaintiff in error, and from the same we infer that the ruling below rested upon the statute of limitations. It is insisted that the complaint was carefully drawn, and that its averments sufficiently state a cause of action and require an answer; also that where, as in this instance, municipal warrants are issued by a town or city, which warrants are payable out of a special fund created by taxes to be levied, the statute of limitations does not begin to run until the money for the payment of such warrants has been collected and credited to the special fund, nor until by call of the warrants or otherwise as provided by law the holder has been legally notified to present the same for payment.

Upon both of these questions as at present advised we are strongly inclined to accept the view presented by counsel for plaintiff in error. But examination of the complaint reveals an infirmity not mentioned, which is also reached by the latter branch of the demurrer, and might have been the basis of the ruling below. The latest of the warrants in suit were issued and registered in 1888. This action was not begun until 1902. Thus a period of 14 years elapsed between the two dates. The complaint alleges that the town officers have at all times during this period claimed that there were no funds applicable to the payment of these warrants; also that such officials have refused to levy a tax or otherwise provide for such payment. But in referring to those officials, and stating the reason for their refusal to make such levy, the pleading declares that: "They do now claim, and have at all times claimed—and their predecessors before them—that the said warrants and orders are invalid and void, and that they have not provided, and will not provide, for the payment of the same or any part thereof." The paragraph in which this language occurs deals with the entire period mentioned. It describes the action of the town authorities and the efforts of the owner of the warrants from "the dates of the said several registrations as aforesaid" down to the time of the filing of the complaint. And we think it sufficiently appears on the face of the pleading that the first assertion by the town authorities of the invalidity of the warrants sued on and refusal to take care of the same occurred more than

six years prior to the commencement of the action.

The warrants were regular in form, and appear to be binding contracts of the municipality. They were, according to the complaint, taken by plaintiff for valuable consideration and in good faith. Their repudiation by the town authorities as illegal and invalid, coupled with a positive refusal to provide for their payment, certainly gave the holder a right to invoke judicial inquiry. Such holder at once became entitled to an adjudication in some form of the question of invalidity thus raised. And, if successful upon such inquiry, he could properly require a tax levy, or in some appropriate way coerce payment, if the municipal authorities still declined to act. Under these circumstances it became the duty of the holder of the warrants to proceed with reasonable promptness in the assertion of his rights. It cannot be that after such repudiation by the town officials he could remain passive indefinitely. He could not quietly wait for a change of heart by those officials, or for the election of others who would hold his warrants legal; nor could he fold his hands and bide his time until the evidence showing his warrants to be illegal had disappeared, either through the death or removal of witnesses, or by the loss or destruction of papers and documents. *Justices v. Orr*, 12 Ga. 141; 1 *Dillon, Munic. Corp.* (4th Ed.) § 505, note.

It follows from the foregoing that a plea of the statute of limitations was in order; and, as the matters essential to such plea sufficiently appear in the complaint, the demurrer was correctly sustained.

The judgment will be affirmed.

Affirmed.

STEELE, C. J., and BAILEY, J., concur.

MEAD v. PH. ZANG BREWING CO. et al.
(Supreme Court of Colorado. April 6, 1908.)

1. NEGLIGENCE—PERSONAL INJURIES—DANGEROUS PREMISES—LIABILITY.

That a city saloon license was in a brewing company's name does not make it liable to one injured by a trick stairway in the saloon, the business being conducted by another in his own name; he holding the federal license, and the company having no license in or control over the business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence. § 66.]

2. TORTS—JOINT LIABILITY—REQUISITES.

To make persons jointly liable for a tort, it must appear in some way that it was the result of their joint action or joint negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Torts, § 29.]

Error to District Court, City and County of Denver; Peter L. Palmer, Judge.

Action by Marcus S. Mead against the Ph. Zang Brewing Company and another. From a judgment for defendant company, plaintiff brings error. Affirmed.

Plaintiff in error sustained personal injuries by being thrown down, or falling from, a trick stairway located in the premises known as 919 Seventeenth street, in the city of Denver. At that time the place was being conducted as a saloon. He brought suit against John Hall and the Ph. Zang Brewing Company to recover damages, claiming that the saloon was being conducted by these defendants when he was injured. According to the testimony, Hall had purchased the fixtures from one O'Grady, subject to a mortgage thereon to the brewing company, for the sum of \$1,500. He gave the company a mortgage for this amount, one of the conditions of which was that he should purchase no beer for sale in the saloon except from it. The premises were leased by Hall, and he paid the rent. The government license authorizing the sale of liquors in these premises was secured by him and stood in his name, while the license from the city for the same purpose stood in the name of the brewing company. The latter had no interest in the business whatever, or any control over it. It was conducted by Hall, and was entirely under his management. At the conclusion of the testimony plaintiff in error requested an instruction to the effect that the fact that the city license for the sale of intoxicating liquors on the premises stood in the name of the brewing company was conclusive proof that the saloon was owned by, and under the control of, that company. This request was refused; the court instructing the jury to the effect that the mere fact that the city license was in the name of the company did not render it liable to the plaintiff, and directed the jury to return a verdict in favor of the brewing company. Plaintiff brings the case here for review on error.

Jerry A. Lovell and Jno. F. Mail, for plaintiff in error. Wolcott, Valle & Waterman and H. H. Dunham (Wm. W. Field, of counsel), for defendant in error.

GABBERT, J. (after stating the facts as above). The only question presented for our consideration is the ruling of the court refusing the instruction requested, and in directing the jury to return a verdict for the brewing company. The brewing company was not the lessee of the premises, and had no control thereover whatsoever. The fact that the license stood in its name would be competent to prove that it was interested in or was conducting the saloon, but not conclusive on that question in the face of the other undisputed testimony bearing on the subject of who was the owner of the saloon, or was, in fact, conducting it. Hall was the lessee, and conducted the business therein in his own name, and entirely in his own interest. Both these questions of fact are established beyond dispute by the testimony. In short, it appears that the saloon was his, conducted by him, and that the brewing company had no con-

trol whatever over the premises in which plaintiff was injured. A person is not responsible for injuries sustained by another through a device which he has neither constructed nor maintains, and over which he has no control. In order to render persons jointly liable for a tort, it must appear in some way that it was the result of their joint action, or joint neglect of duty.

It may be true, as contended by counsel for plaintiff, that Hall had no right to conduct the saloon without a license from the city authorities; but, be that as it may, the fact that a license to conduct the saloon in the premises occupied by him stood in the name of the brewing company would not, in the face of the undisputed testimony in this case, create a relationship between the company and himself, which would make the company responsible for his acts. Both may have been violating the law with respect to a license, but a violation of the law does not create a civil liability, except for the results naturally following such violation.

The judgment of the district court is affirmed.

Judgment affirmed.

STEELE, C. J., and CAMPBELL, J., concur.

MORSE v. PEOPLE (two cases). (Nos. 5,978, 5,979.)

(Supreme Court of Colorado. April 6, 1908.)

1. CRIMINAL LAW—COURTS—JURISDICTION— MODE OF ACQUIRING—CONSENT OF PARTIES.

Courts can entertain jurisdiction of causes only in the methods prescribed by law; and an agreement of the parties in contravention of such provisions has no force or effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 197.]

2. SAME.

2 Mills' Ann. St. § 2678, provides that no appeal shall lie from a judgment of a justice in any cause to the district court, but that such appeal shall be taken to the county court. Const. art. 6, § 23, provides that no appeal shall lie to the district court from any judgment given on an appeal from a justice of the peace. Act April 10, 1905 (Sess. Laws 1905, p. 274, c. 114), makes it unlawful to engage in the business of an "itinerant vendor" without being licensed so to do. Section 16 of the act (page 279) provides that justices of the peace shall have jurisdiction concurrent with district courts of all civil actions and criminal proceedings arising under the act. Held that, while the district court would have jurisdiction of a criminal proceeding arising under the act if properly brought in that court, it could not acquire jurisdiction by the transfer by consent of the parties of a proceeding originating before a justice of the peace, and pending on appeal in the county court; and, such a transfer being void, jurisdiction of the case remained in the county court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 197.]

Error to District Court, Rio Grande County; Charles C. Holbrook, Judge.

C. F. Morse was convicted of selling cer-

tain manufactured articles without having procured a license and brings error. Reversed and remanded.

C. F. Clay, for plaintiff in error. William H. Dickson, Atty. Gen., and Samuel Huston Thompson, Jr., Asst. Atty. Gen., for the People.

GODDARD, J. The above numbered cases were commenced before a justice of the peace upon sworn complaints, charging the plaintiff in error with selling and exposing for sale certain manufactured articles in Rio Grande county, Colo., without having procured a license from said county as required by an act approved April 10, 1905 (Sess. Laws 1905, p. 274, c. 114). Upon trial before the justice of the peace he was convicted and fined \$50 and costs in one case, and \$30 and costs in the other. From these judgments, he perfected an appeal to the county court of that county. Upon a stipulation entered into by the counsel for the people and the defendant, the causes were transferred by the county court to the district court of Rio Grande county. For the purposes of the trial, the causes were consolidated, and tried to the court upon an agreed statement of facts. The defendant was found guilty, and fined \$50 and costs upon both charges. To these judgments the defendant prosecutes writs of error.

The records in both cases being identical, for the purpose of filing abstracts of record and briefs the causes have been consolidated and argued together. It is unnecessary to consider any of the numerous assignments of error argued by counsel for plaintiff in error, because the district court was without jurisdiction to hear the causes or render the judgments complained of, for the reason advanced by the Attorney General. As he well contends, the attempt of counsel for the respective parties to confer jurisdiction upon the district court by transferring the causes from the county court in the manner disclosed by the record was of no avail; that there is no warrant for the course pursued by the county court, but such proceeding was in violation of the mandatory provisions of the statute and Constitution. 2 Mills' Ann. St. § 2678, provides that: "All appeals from judgments of justices of the peace, both in civil and criminal actions, shall be taken to the county court of the same county, and no appeal shall lie from a judgment of a justice of the peace, in any cause, civil or criminal, to the district court." Section 23, art. 6, Const., provides that "no appeal shall lie to the district court from any judgment given upon an appeal from a justice of the peace." It is too well settled to require the citation of authorities that courts can entertain jurisdiction of causes only in the methods prescribed by law, and the agreement of parties in contravention of such provisions has no force or effect whatever. As was said by Justice Campbell in *Smith v. Smith*, 24 Colo. 114, 48

Pac. 812: "Jurisdiction, if it attaches at all, is because the Constitution, or some statute of the state has given it." If the course pursued by the county court could be held to confer jurisdiction upon the district court, then the parties could by indirection accomplish a result which they are expressly prohibited by the foregoing statute and constitutional provisions from doing directly. In *Dykeman v. Budd*, 3 Wis. 640, the Supreme Court of Wisconsin had under consideration a proceeding identical with the one before us. The case was on appeal in the county court from a judgment of a justice of the peace, and the parties stipulated that the venue be changed to the circuit court. The court, speaking of the jurisdiction of the circuit court in that cause, at page 643 of 3 Wis., said: "The court in which the suit is brought cannot by stipulation of the parties transfer to another its own powers and responsibilities. As the law stood at the time of the change of venue in this case, the circuit courts had no jurisdiction of appeals from justices of the peace in civil cases, except in those, the venue of which was changed thereto in conformity with the provisions of the statute. * * * If jurisdiction could be acquired of appeals by the circuit court by stipulation of the parties, consent would open a clear and direct path from the justice to the circuit court without the intervention of the county court at all"—and upheld the decision of the circuit court holding that the stipulation and order of the county court changing the venue to the circuit court was unauthorized and void.

Counsel for the plaintiff in error concedes that the law is as above stated, but contends that there was no attempt to confer jurisdiction of the subject-matter in these cases by stipulation, for the reason that jurisdiction was expressly conferred by the statute itself upon the district courts of this state by section 16, c. 114, p. 279, Sess. Laws 1905, which provides: "Justices of the peace shall have jurisdiction concurrent with district courts to hear, try and determine all civil actions and all criminal proceedings arising under this act, or brought for the violation of any of the provisions of this act." While it is true that the district court would have jurisdiction to try and determine a criminal proceeding arising under this act, if properly brought in that court, it cannot acquire jurisdiction by the transfer of a cause originating before a justice and pending on appeal in the county court, but must obtain jurisdiction if at all, in the mode prescribed by law, which would be by an indictment or by an information, verified as the statute requires. "Jurisdiction to try and punish for a crime cannot be acquired otherwise than in the mode prescribed by law, and, if it is not so acquired, any judgment is a nullity. A formal accusation is essential for every trial for crime. Without it the court acquires no jurisdiction to proceed, even with the consent of the parties, and, where the law requires a particular

form of accusation, that form of accusation is essential." 12 Cyc. p. 221, and cases cited in notes 88 and 89. It is manifest, therefore, that the district court did not acquire jurisdiction either of the subject-matter or the person by the transfer to it of the causes by the county court. Such proceeding being void and of no effect, the jurisdiction to try the cases remains in the county court.

The judgments of the district court are therefore reversed, and the causes remanded to the district court, with direction to re-transfer the same to the county court.

Reversed and remanded.

STEELE, C. J., and BAILEY, J., concur.

LAGUNA CANAL CO. v. ROCKY FORD DITCH CO.

(Supreme Court of Colorado. April 6, 1908.)
JUDGMENT—CONCLUSIVENESS—MATTERS CONCLUDED.

In a proceeding supplemental to an original statutory proceeding for the adjudication of water rights, petitioner alleged an additional application of water so that its appropriation then aggregated the number of cubic feet specified, and prayed a supplemental decree covering this additional application and allowing a priority therefor dated as of the commencement of its canal. Demurrers on the ground that the petition did not state a cause of action were sustained, and a decree entered dismissing the petition without prejudice to petitioner's right to institute proceedings regarding any right claimed by it, and not antedating or conflicting with any of the various rights theretofore adjudicated by the decrees in the adjudication of priorities for the use of water theretofore had. Thereafter petitioner filed another petition, all the facts of which pertaining to petitioner's right had been stated in the prior petition and in practically the same form, involving the same subject-matter and identical issues and parties, and a decree was prayed allowing a priority dating as of the commencement of its canal. Held that, though petitioner was given permission to bring a new proceeding to adjudicate a proper priority for such new application of water, the decree was res judicata of petitioner's right to claim its priority as dating from the commencement of its canal.

Appeal from District Court, Bent County; Jesse G. Northcutt, Judge.

Supplemental proceeding in an original statutory proceeding for the adjudication of water rights by the Laguna Canal Company. The Rocky Ford Ditch Company filed a protest and answered, and from a decree adjudicating the priority of the canal company as of a certain date the canal company appeals. Affirmed.

On November 3, 1892, a decree was entered by the court below in an original statutory proceeding for the adjudication of water rights in district No. 17. To that proceeding both appellant and appellee were parties, and their rights of priority as then existing were determined. On April 7, 1894, a supplemental decree was entered on petition of appellant. By such supplemental proceeding appellant showed that it had made ap-

plication of an additional quantity of water from its canal, and the court entered a decree giving a priority for the water so applied; the aggregate quantity of water thus recognized being 155 cubic feet per second, and the priority dating as of the commencement of the canal. From that decree no appeal was taken, all parties acquiescing therein, and it has since been generally recognized by the water commissioners and others as governing the distribution of water. By the first decree the dimensions of Lake Canal, belonging to appellant, were given, and a carrying capacity of 566.5 cubic feet per second was allowed. In connection with both decrees there was an express finding that said canal was constructed with due diligence, and completed within a reasonable time; it otherwise appearing that the same was 25 miles in length. On August 1, 1902, appellant filed a petition in said priority proceeding reciting that since the decree of April 7, 1894, was entered it had made additional applications of water from Lake Canal, and demanding a decree for such new application of water with a priority dating from the commencement of the canal. The Rocky Ford Ditch Company filed a protest and answer to this new petition, pleading, among other things, an intermediate proceeding begun on September 5, 1899, and a decree entered therein on April 4, 1900. An argument was made on these pleadings, the position of appellee was sustained, and an interlocutory order or judgment was entered on April 22, 1903, denying appellant the right to such enlarged priorities dating from the beginning of its canal. This interlocutory order, however, permitted appellant to proceed, subject to the foregoing limitation, to establish a completed appropriation for the additional quantity of water shown to have been applied since the decree of April 7, 1894, was entered. Appellee, having accomplished its purpose, participated no further, and appellant proceeded with its proofs. On April 29th a decree was entered giving appellant a priority numbered 23 for the quantity of water applied since entry of the former decree. But the priority for such additional water was fixed as August 30, 1894; so that the new appropriation was evidently given the earliest possible priority that would not change or disturb the previous adjudication and priorities as fixed in the decree of April 7, 1894. From the last decree the present appeal was taken. Appellant's present challenge of this decree rests upon the contention that said priority numbered 23 should have been referred back to September 25, 1889, the date of the commencement of Lake Canal. In view of the conclusion reached in the opinion, it is deemed unnecessary to make a further or more detailed statement of the facts.

James W. McCreery, for appellant. Devine & Dubbs, for appellee.

HELM, J. (after stating the facts as above). The record in this case is voluminous, and a number of interesting questions relating to water priorities are strenuously argued by counsel for both parties. It is unnecessary for us, however, to discuss or determine these questions, as the plea of *res judicata* interposed by appellee is, in our judgment, decisive against reversal. From the supplemental transcript filed in this court by leave on December 4, 1905, among other things, we learn that after the decree of April 7, 1894, was entered, and before the present proceedings were begun in 1902, appellant instituted an intermediate supplemental proceeding which reached final determination. This proceeding was begun on September 5, 1899. Appellant then filed its petition reciting that since the former decree of 1894 was entered it had made additional application of 214.75 cubic feet of water to 9,550 acres of land, so that its appropriation through Lake Canal then aggregated 379.75 cubic feet. It prayed for a supplemental decree covering this additional application, and allowing a priority therefor dated as of the commencement of its canal. The court entertained the proceeding, and appellee, the Rocky Ford Ditch Company, and one other party, filed demurrers attacking the sufficiency of the petition. On April 4, 1900, these demurrers were sustained, and a decree entered dismissing the petition at the cost of petitioner; the following language being *inter alia* therein employed: "Without prejudice to the petitioner's right to institute such proceeding as it may be advised regarding any right claimed by it, and not antedating or in any manner disturbing or conflicting with any of the various rights and claims heretofore adjudicated in or by the decrees in the adjudication of priorities for the use of water heretofore had in water district No. 17 and referred to in the petition, and not adverse or contrary to the effect of such decree." From the decree of April 4, 1900, appellant prosecuted an appeal to this court, which was dismissed. A second appeal therefrom was also taken by certain consumers from Lake Canal, which on March 3, 1902, was likewise dismissed. *Randall v. Rocky Ford Ditch Company*, 29 Colo. 430, 68 Pac. 240.

It sufficiently appears from the record of that proceeding that the first of these dismissals was due to some mistake or irregularity in taking or perfecting the appeal according to law. The second dismissal rested upon the ground that such appeals are only given to the owners or persons controlling the canal, and that, in the absence of fraud or intentional neglect of duty by them, persons who are interested merely as consumers cannot exercise the privilege. The petition thus filed on September 5, 1899, was similar to the petition filed in the present supplemental proceeding. All the facts pertaining to appellant's rights here alleged

were there stated, and in practically the same form. The main question there presented for adjudication was the right of appellant to a priority dating from September 25, 1889, when the construction of its canal began, for its applications of water made since the decree of April 7, 1894, was entered. The demurrers were sustained on the ground that the facts alleged in the petition were not sufficient to constitute a cause of action, *i. e.*, to give appellant the right of relation thus claimed. By that decree it is true appellant was given permission to bring a new suit or proceeding to adjudicate a proper priority for such new applications of water. But its right to claim this priority as dating from the commencement of its canal was fully considered, passed upon, and positively denied; and this denial was emphasized by the language employed in allowing appellant to institute further proceedings. That decree was final. It determined the precise question submitted in the present proceeding. The same subject-matter was involved, and the issues were identical in both cases. The parties, plaintiff and defendant, were the same, and they sued and defended in the same capacity. Even the exceptions taken and assignments of error filed here on the two appeals were substantially identical with those now submitted. Although that decree was entered on demurrer, it was nevertheless an adjudication upon the merits; and so long as it stands it is *res judicata* of the issue so resubmitted in the present proceeding.

We are not now called upon to consider the correctness or incorrectness of that decree; and it would be improper for us to suggest a view touching its legality or regularity. The court had undoubted jurisdiction over the subject-matter and of the parties. And, however erroneous the decree may have been, it is decisive of the present controversy. It cannot now be ignored, nor could it have been questioned collaterally in this proceeding. *Farmer's U. D. Co. v. Rio Grande C. Co.*, 37 Colo. 512, 86 Pac. 1042.

The opinion in the case of *Smith v. Cowell*, 92 Pac. 20, recently pronounced by this court, practically covers and decides the only point upon which there could be doubt as to the propriety of holding the decree of April 4, 1900, *res judicata* of the question now raised. There, as here, the two proceedings were between the same parties, the issues and relief sought were substantially the same, and judgment of dismissal was entered in the latter upon a general demurrer to the complaint. And there, as here, also, the plea of *res judicata* was interposed to the second action, the general demurrer so sustained going to the merits. *Inter alia* the court said: "A judgment rendered in dismissing an action following an order sustaining a demurrer may or may not be a bar. If it was for lack of jurisdiction, or that plaintiff mistook his remedy, or for some technical

defect, it is not a bar. If the demurrer goes to the merits of the action, as where it is upon the ground that the facts stated are not sufficient to constitute a cause of action, it is as conclusive as a judgment entered on a verdict finding the facts." See, also, *Schroers v. Fisk*, 10 Colo. 599, 16 Pac. 285.

Without further prolonging the present discussion, we hold that in the case at bar the question submitted, viz., appellant's right to have the doctrine of relation so applied as to give Lake Canal a priority dating from its commencement for the new appropriation of water mentioned, became *res judicata* by the supplemental decree of April 4, 1900. And, so holding, an affirmance of the present decree necessarily follows.

Affirmed.

STEELE, C. J., and MAXWELL, J., concur.

SIEVERS v. HAMMERICH.

(Supreme Court of Colorado. April 6, 1908.)
APPEAL—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

A verdict on conflicting evidence under instructions not excepted to by either party will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

Appeal from District Court, Garfield County; John T. Shumate, Judge.

Action by H. G. Hammerich against Timm Sievers. Judgment for plaintiff, and defendant appeals. Affirmed.

Appellee brought this action against appellant upon a promissory note for \$50, dated September 1, 1896, and payable one day after date. At the trial appellant proved that in December, 1896, his brother George at his request paid appellee \$50. A receipt as follows: "Received \$50.00 in full. H. G. Hammerich"—was given upon payment of said \$50. This receipt, however, was written on the back of a check given by appellee to appellant for \$50, dated October 1, 1896, indorsed by appellant, and stamped paid by the Glenwood National Bank on the same date. The note remained among appellee's papers in the bank, and when about two years afterwards payment was demanded appellant claimed that it had been paid by his brother. Appellee testified that the note and check represented two separate loans of \$50 each to appellant. Appellant testified that there was but one transaction, and that the \$50 paid by his brother was upon the note. The testimony as to conversations at and about the time of payment of the \$50 is conflicting. Appellant claims that appellee said he was going to Germany and wanted his "note" paid. The brother testified that when he paid the money appellee said he did not have the note with him and gave the receipt. The portions of these conversations relating to the note are denied by appellee.

95 P.—19

J. W. Dollison, for appellant. Edward T. Taylor and Charles W. Taylor, for appellee.

HELM, J. (after stating the facts as above). The question of veracity between appellant and his brother on one hand and appellee on the other was submitted to a jury under instructions that were not excepted to by either party. The jury resolved the conflict of testimony in favor of appellee, and under the circumstances it is hardly necessary to say this court would not think of setting aside the verdict or the judgment entered thereon. Moreover, were the matter submitted to us unembarrassed by the verdict, our finding would probably be the same; for, while in one or two particulars appellant and his brother contradict appellee, yet the latter is corroborated by a strong circumstance, viz.: The promissory note sued on was given September 1, 1896, while the check upon which the receipt was indorsed was made on October 1, 1896, a month later. It follows, therefore, that the two instruments could hardly have represented the same transaction.

There is no question about the genuineness of these instruments, or about the correctness of their dates. Nor is there any pretense that the note was given in consideration of future advancements. Hence the jury may very properly have concluded that appellee told the truth, and that the debt represented by the note existed at the date of its execution, while the check given a month later represented a separate loan. Appellant offered no sufficient explanation touching this check. Had appellee owed appellant \$50, he would probably have paid the same by cancellation of the note instead of giving the check. Besides it fairly appears from the record that the parties had a number of similar transactions in which appellant was always the borrower and appellee always the lender.

The judgment must be affirmed.

Affirmed.

STEELE, C. J., and MAXWELL, J., concur.

FROST, Judge, v. BOARD OF COM'RS OF TELLER COUNTY.

(Supreme Court of Colorado. April 6, 1908.)

1. JUDGES—FEES—ACCOUNTING—ACTION.

Mills' Ann. St. Rev. Supp. § 1936c1, provides that any balance left to the credit of the funds of the various county officers from fees collected in any year after all the salaries and compensation provided for shall have been paid to the end of the year shall be placed to the credit of the general county fund, and section 1936z requires each officer to keep an account of the fees in a separate book open to the inspection of the board of county commissioners. *Held*, that where a surplus of \$1,806 remained in the account of the fees of the county judge for one year, which was not paid into the county treasury, a complaint to recover the same should have alleged the proportion of such amount actually collected by the county judge and unpaid and the amount uncollected by him.

2. SAME—NEGLIGENCE—WILLFULNESS.

Under Mills' Ann. St. Rev. Supp. § 1936d1, providing that every officer named therein shall collect their fee as prescribed in the act for services performed by him in advance if the same can be ascertained, and where any officer shall negligently or willfully fail to collect any such fee, the same shall be charged to him on account of his salary, a complaint against a county judge for surplus fees uncollected should allege that his failure to collect the same was negligent or willful.

3. EVIDENCE—OFFICIAL DUTY—PRESUMPTION.

The general presumption of law is that a public officer has performed his duty which presumption is applicable to the duty of a county judge to pay into the county treasury the surplus fees of his office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 105.]

4. JUDGES—ACCOUNTING — ACTION — BURDEN OF PROOF.

While the burden of proof is on the county commissioners, in a suit against the county judge to recover surplus uncollected fees of his office, to show that the fees were negligently or willfully left uncollected, slight evidence is sufficient to shift the burden of proof and require the officer to establish the exercise of reasonable diligence in endeavoring to collect such unpaid fees.

5. SAME—COUNTY JUDGE—CLERKS.

Where a county judge was authorized to appoint a clerk but was also entitled to perform the duties of clerk and retain the clerk's compensation as a part of his salary, and appointed a clerk who did not properly qualify until after the expiration of the year 1902, the fact that the clerk exercised the duties of such office during that year did not relieve the judge from liability to account for surplus fees earned in proceedings in his court during such year, the clerk having charge of the collections and disbursements.

Appeal from District Court, Teller County; Robert E. Lewis, Judge.

Action by the board of county commissioners of Teller county against Albert S. Frost as county judge, etc. Judgment for plaintiff, and defendant appeals. Reversed.

Temple & Crump, J. J. McFeely, B. W. Coleman, and R. Graham, for appellant. L. G. Campbell, for appellee.

HELM, J. This action was brought against appellant as judge of the county court of Teller county, for the purpose of recovering the fees earned by that court for the year 1902 in excess of the amount allowed appellant by law as salary including clerk hire. The amended complaint alleges that during the year mentioned said court earned in fees \$6,006.30; that appellant was entitled to deduct therefrom the sum of \$4,200 as salary and clerk hire; that there remained the sum of \$1,806.30, which under the law should have been paid into the county treasury, but that, notwithstanding repeated demands, no part of this sum had been so accounted for; and judgment was prayed for the full amount. The answer, omitting portions eliminated and abandoned, admits the allegations of the complaint which state the election and qualification of defendant as county judge and the earning by the county court during 1902 of \$6,006.30; but it denies that this sum came into appellant's

hands or was then in his possession. It further alleges that one Brewster was appointed clerk of the court; that he filed his bond and oath of office; and that he was throughout the said year 1902, and at the time of the commencement of the suit such duly appointed, qualified, and acting clerk. It denies every other allegation of the complaint.

The main ground relied on for reversal is that the amended complaint failed to state a cause of action. If the objection is well taken, the judgment must be set aside. For, although that pleading was not challenged by demurrer, this objection may under our practice be presented at any time. The action evidently rests upon sections 1936c1, and 1936d1, Mills' Ann. St. Rev. Supp. And it is contended on behalf of appellant that under these statutes the burden devolved upon the board of county commissioners as plaintiff below to plead and prove a failure to account for so much of this surplus fund as was collected, and also negligence or willfulness on the part of appellant in failing to collect the remainder thereof. Section 1936c1, provides, *inter alia*, that: "Any balance left to the credit of said funds (from fees collected by the officers named), in any year, after all the salaries and compensation provided for in this section shall have been paid to the end of such year, shall be placed to the credit of the general county fund." It appears from the evidence that of the \$6,006.30 earned during the year 1902, the sum of \$859.35 was not collected and \$438.60 had, previous to the commencement of the suit, been paid into the county treasury.

By another statute—Mills' Ann. St. Rev. Supp. § 1936z—a full and accurate account of all fees and emoluments received and of all clerk hire and other necessary expenses paid out must be kept by each of the county officers named, in a separate book provided for the purpose. This book is at all times subject to inspection and examination by the board of county commissioners. It does not appear that appellant failed or neglected to keep this book of account, or that the county commissioners were prevented from examining the same; hence there would have been no difficulty in determining the exact proportion of the \$1,806.30 actually collected and not paid into the county treasury; nor would that body have experienced any trouble in fixing the amount of such surplus fees remaining uncollected. And we think that the complaint should have alleged these particulars. Section 1936d1, above referred to, reads: "Every officer named herein shall collect every fee, as prescribed in this act for services performed by him, in advance, if the same can be ascertained, and when any officer shall negligently or willfully fail to collect any such fee, the same shall be charged to him on account of his salary." By this statute the duty of collecting fees in advance is imposed upon the officer where the same can be ascertained; but the fact is recognized

that sometimes such prior ascertainment may be impossible and therefore the fees may not be so collected. In order to stimulate or coerce the collection of the fees earned and belonging to the county, to wit, the excess above the sums necessary to make up the officer's salary, the penalty of charging the uncollected portion thereof against his salary is provided; but this penalty is not to be enforced unless the failure to make such collection is due to the negligence or willfulness of the delinquent official.

It follows, therefore, that the essence of the present action, in so far as it involves the uncollected fees, is negligence or willfulness on the part of appellant in the premises. And we are of opinion that the complaint is further defective, because it entirely fails to charge any such negligence or willfulness. The general presumption of law is that a public official has performed his duty. 16 Cyc. 1076; Mechem on Public Officers, § 579. And we know of no reason why this presumption should not be indulged in favor of appellant, in the first instance. It is true that it may be difficult for the county commissioners to prove the negligence or willfulness of a public official under such circumstances; but the mere existence of such difficulty does not relieve them from making the allegation, and at least presenting a prima facie case in support thereof. Owing to the fact that the nature of the efforts made to secure the uncollected fees as well as the circumstances attending such efforts, are in general, almost exclusively within the knowledge of the officer and comparatively easy of proof by him, we think that slight evidence in support of the averment of negligence or willfulness should be sufficient to shift the burden. And although the burden here does not shift in the first instances, as it sometimes does where a negative averment is relied on (*Machebeuf v. Clements*, 2 Colo. 45), yet when such prima facie showing is made, it should devolve upon the officer to produce proofs establishing the exercise of reasonable diligence in the endeavor to collect the unpaid fees.

In view of another trial, it is important to notice the allegations of the answer touching the appointment of a clerk of the county court. These averments rest upon the theory that by such appointment appellant relieved himself from all liability in the premises and the action should have been brought against his clerk. Judges of the county court are required to execute bonds in a sum not less than \$5,000 conditioned upon the faithful performance of their duties and the faithful application of all moneys that may come into their hands, as such officers. A county judge may appoint a clerk of his court, who discharges the functions usually devolved upon that office; or the judge may perform those duties himself and retain the portion of his salary which is designated as the clerk's compensation. There is no express statutory provision relieving the judge from responsi-

bility for the collection or disbursement of moneys earned, by reason of the appointment and due qualification of a clerk. But as to such liability we express no opinion; any decision of the subject being rendered unnecessary by the fact that Brewster, appellant's appointee, did not qualify for said office in the manner provided by law. On January 14, 1902, Brewster executed a bond in the sum of \$5,000 which was approved by appellant. But this bond was never filed in the office of the Secretary of State nor was it ever approved by the board of county commissioners of Teller county; neither was it filed with the clerk and recorder of Teller county until nearly 10 months after expiration of the year 1902, the period involved in the present accounting. So that whether a clerk of the county court, when one is appointed, is to qualify in the same manner as clerks of the district court, or whether he is to be treated as a county officer and is governed by the statute touching those county officers who are required to give bond, Brewster's attempted qualification was insufficient. He was, therefore, not legally authorized to enter upon and discharge the duties of clerk of the county court during the year 1902.

It may be that Brewster might be held liable for his acts or omissions in the premises as a de facto officer. But it was certainly the duty of appellant as county judge, when he exercised the option of appointing a clerk instead of performing the functions of clerk himself, to see that before entering upon the discharge of such functions a bond was executed, approved, and filed, and the other acts essential to the due qualification of his appointee, were performed in accordance with law. And when appellant permitted Brewster to enter upon the office and take charge of the collection and disbursement of fees without such compliance, his liability remained the same as if he had made no effort to appoint a clerk.

The judgment of the court below will be reversed and the cause remanded, with permission to amend the pleadings and proceed in accordance with the views above expressed. Reversed.

STEELE, C. J., and MAXWELL, J., concur.

PURSE v. PURCELL.

(Supreme Court of Colorado. April 6, 1908.)

1. WITNESSES—CROSS-EXAMINATION.

Where, in an action for a physician's services for treating defendant's children for scarlet fever, defendant denied that the services were of value, it was error to exclude questions asked the physician on cross-examination by defendant as to what the children's ailment was, what medicine he gave, and what their symptoms were.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 931-948.]

2. SAME—PARTIES—EXAMINATION.

Act 1899 (Session Laws 1899, p. 178, c. 95), providing that a party may be examined as

if under cross-examination at his adversary's instance, does not limit one's right to cross-examine an adversary who offers himself as a witness in his own behalf.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 967-975.]

3. APPEAL—CONTINUANCE—JUDICIAL DISCRETION.

The granting of a continuance is largely within the legal discretion of the trial court, and its decision will only be disturbed for abuse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3837.]

4. CONTINUANCE—GROUNDS.

It was not an abuse of discretion to refuse a continuance for absent testimony where there was no showing that if the case was continued the witness would be produced or her deposition secured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, §§ 58, 135.]

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Action by E. C. Purcell against John Purse; Bertha F. Purcell, plaintiff's administratrix, being substituted on his death. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

E. C. Purcell, a licensed physician, brought this action against John Purse to recover the reasonable value of professional services, which, at defendant's request, he rendered to defendant's children who were sick of scarlet fever. The answer denies that the services were of any value whatever, and alleges that plaintiff prescribed for and attended five of defendant's children, two of whom defendant admits had scarlet fever and diphtheria, and says the others had diphtheria, but not scarlet fever—though plaintiff treated all of them only for the latter—and that by reason of defendant's negligence, or want of skill, in making the proper diagnosis and prescribing the appropriate treatment, three of the children died. Substantially the same matters, alleged as a defense, are set up in two separate cross-complaints or counter-claims, in each of which defendant asks judgment against plaintiff in the sum of \$5,000 for malpractice. Both parties introduced evidence, and at its close plaintiff's counsel asked for an instruction to the jury directing a verdict in plaintiff's favor upon defendant's cross-complaints, which the court gave; and thereupon, being of the opinion that plaintiff's bill for services rendered was reasonable, directed the jury to return a verdict for plaintiff for the amount thereof. Judgment was entered upon this verdict in plaintiff's favor, and defendant's cross-complaints were dismissed. Defendant appeals.

John C. Murray and Edwin H. Park, for appellant. R. D. Rees and Jesse H. Blair, for appellee.

CAMPBELL, J. (after stating the facts as above). After this appeal was perfected, plaintiff died, and his administratrix has been substituted as appellee. It is appellee's contention, first, that defendant's action for

damages set up in the cross-complaint abates with the death of plaintiff; second, that the evidence was wholly insufficient to sustain such action. We shall not decide the first point, because we are clearly of opinion that, under the doctrine of *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577, a case of malpractice was not made out by the evidence. Indeed, defendant does not in his brief press his claim in that behalf, apparently because his own expert evidence precludes a judgment in his favor.

The other question raised on this appeal is as to the propriety of the direction of a verdict in plaintiff's favor for the value of his professional services. It must be admitted that there is no direct, competent evidence as to their value except the testimony of plaintiff himself and two other doctors called by him. All of it tends to show that the bill rendered, and for which judgment was entered, was the customary and reasonable fee for such services as the defendant said he performed. In the absence of any evidence of value to the contrary, or of evidence inconsistent with plaintiff's testimony as to the extent or character of the services, it might be that the jury ought to find in plaintiff's favor for the amount claimed; yet it seems clear that the court committed prejudicial error in limiting the scope of the cross-examination of plaintiff by defendant's counsel, for had the questions on cross-examination been allowed and the plaintiff required to answer, the jury might have found, on substantial evidence, that the services were of less value, or not so extensive as plaintiff says they were.

Plaintiff testified in his own behalf merely to the effect that he was a licensed physician and had, at defendant's request, attended the latter's children, and that the bill for which he sued was the customary and reasonable fee, no part of which had been paid. In his complaint he alleged that the children were sick with scarlet fever, and that the services rendered were on that account. Upon cross-examination he was asked, among other things, by defendant's counsel, what was the matter with the children, what medicine he gave them, and was asked to describe to the jury their symptoms and all the indications of disease which they exhibited. As throwing light upon the extent and value of the services, as well as bearing upon the diagnosis and method of treatment, it was competent under the issues to ask such questions. Plaintiff does not seriously contend that they do not come within the range of cross-examination, but his argument is, that under the act of 1899 (Session Laws of 1899, p. 178, c. 95), which provides that "A party to the record of any civil action * * * may be examined upon the trial thereof, as if under cross-examination at the instance of the adverse party," defendant here might have called plaintiff as his own witness, and elicited the information

which he sought to educe by these questions on cross-examination; hence, the refusal of the court to permit him to cross-examine his adversary was not harmful. It is true that this statute gives the defendant such right; and it is also true that, had he availed himself of the privilege thereby afforded by subsequently calling plaintiff and cross-examining him, he would not be concluded thereby. But we do not understand that this statute was intended, in the slightest degree, to limit the right of a party to cross-examine his adversary who offers himself as a witness in his own behalf. It grants to a party a right which, under the procedure at common law, he did not have, but it does not abridge any right which he had thereunder. When, as here, plaintiff offered himself as a witness to prove his own case, defendant was not obliged to omit all cross-examination and proceed under this statute after plaintiff's entire case was closed; but he had the right, at once, upon the close of the testimony in chief of the plaintiff, to proceed at once to cross-examine him upon all matters that are proper subject-matters of cross-examination. The questions propounded were germane to the first defense of the answer, which denies that the services which the plaintiff rendered were of any value to defendant. It was necessary for plaintiff to prove that his services were of value, and when he himself testified as to that issue, defendant might properly, by cross-examination, ask what the services were, and what the plaintiff did, and as to the symptoms and nature of the malady from which the children were suffering. Had these questions of defendant been answered by plaintiff, it may be that there would have been evidence before the jury from which they might have concluded that the plaintiff's services were not so valuable as he claimed them to be. A case quite in point is *N. Y. Iron Mine v. Bank*, 30 Mich. 644. See, also, *Thompson on Trials*, § 406; *Idaho Mer. Co. v. Kalanquin*, 8 Idaho, 101, 66 Pac. 933.

Defendant assigns as error the overruling of his motion for a continuance, because of an excusable failure to have at the trial a deposition of an important witness. Unquestionably the facts to which he says the witness would testify if present, or if her deposition could be obtained, are material under the issues, and defendant showed due diligence in an effort to produce this evidence. But applications for a continuance are largely within the legal discretion of the trial court, and, except in case of abuse, its decision upon them will not be disturbed. There was no showing by defendant that, if the case were continued, the witness could be produced, or her deposition secured. Therefore we cannot say that the trial court abused its discretion in denying the application for a continuance.

For the error of the court in limiting defendant's right to cross-examination, the

judgment is reversed, and the cause remanded.

Reversed and remanded.

STEELE, C. J., and GABBERT, J., concur.

HILL BRICK & TILE CO. v. GIBSON.

(Supreme Court of Colorado. April 6, 1908.)

1. PLEADING—NECESSITY FOR VERIFICATION.

Where the replication to a verified answer setting up new matter, which if established would prevent a recovery by plaintiff, was not verified as required by Mills' Ann. Code, § 61, providing that if any pleading is verified every subsequent pleading must also be verified, it was error to deny a motion by defendant for judgment on the pleadings.

2. SAME—REPLICATION—DEPARTURE.

A complaint alleged defendant's incorporation, that it was engaged in conducting a certain business, and that plaintiff was employed by defendant. The amended replication denied every allegation and statement contained in the answer, which answer, among other things, stated that the above allegations of the complaint were true. *Held*, that the replication was inconsistent with the complaint and a departure therefrom.

Appeal from District Court, El Paso County; Louis W. Cunningham, Judge.

Action by T. A. Gibson against the Hill Brick & Tile Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Arthus Cornforth, for appellant. W. A. Edmonston, for appellee.

CAMPBELL, J. The complaint and answer are verified. The latter contains denials of some material allegations, of the complaint and statements that defendant is a corporation and that it owns and carries on a certain business, in conducting which it employed plaintiff, and that he worked for defendant as alleged in the complaint. It also set up new matter as an affirmative defense, which, if proved at the trial, would prevent a recovery by plaintiff under the cause of action alleged in his complaint. In order to put in issue such new matter in a verified answer, it was necessary for plaintiff to file a replication, which, under section 61 of Mills' Ann. Code, must also be verified. 18 Enc. Plead. & Prac. 718. The first replication to this answer was unverified, and it "denies each and every allegation and statement therein contained setting up new matter of defense." Defendant moved to strike it from the files on the ground that it was not verified, but the court overruled the motion. The abstract does not disclose the reason for this ruling.

Several days after the replication was filed, but before the order overruling the motion to strike was made, plaintiff filed a separate affidavit, purporting to be a verification of the replication, and it may be, though no permission was given for filing the affidavit,

that the court considered it a sufficient verification of the pleading. The ruling complained of, however, is not important, in view of subsequent proceedings, except as throwing light thereon. After this ruling was made, a demurrer to the replication for insufficiency was sustained by the court, whereupon the plaintiff—although it does not appear that any leave was asked of, or given by, the court therefor—filed an amended replication to the answer, in which there was a denial of "each and every allegation and statement therein contained." This amended replication was not verified, and before the trial defendant called particular attention to such defect by moving for judgment upon the pleadings, not only because of this noncompliance with Code, § 61, but also because the replication was inconsistent with, and a departure from, the cause of action set up in the complaint. The court overruled this motion for judgment on the pleadings, and proceeded with the trial, which resulted in a judgment for the plaintiff. Again these defects in the replication were called to the court's attention in the motion for a new trial, and they are renewed here in the assignment of errors and brief of appellant.

The ruling below, denying a motion for judgment on the pleadings, constituted prejudicial error for which the judgment must be reversed. It is too plain for argument that the replication to this answer should have been verified. The Code expressly requires it, and the proper objections were seasonably and repeatedly interposed, and as often disregarded. Besides, the replication is inconsistent with the complaint; a defect which, under the common-law practice, is called a departure. To establish his cause of action plaintiff must prove the fact of defendant's incorporation, that it was engaged in conducting a certain business, and that he was employed by defendant, and was working therein as was expressly charged in the complaint. The amended replication denied every allegation and statement contained in the answer, and this answer, among other things, contained statements that these essential allegations of the complaint were true. The replication, therefore, in legal effect, denied the very things which plaintiff was required to prove before he was entitled to recover, and it was therefore inconsistent with, and repugnant to, important statements in the cause of action set up in the complaint. 18 Enc. Pl. & Pr. pp. 700, 705, 720, 722, 723; *Lebanon M. Co. v. Consolidated Rep. M. Co.*, 6 Colo. 371; *Bruce v. Endicott*, 16 Colo. App. 506, 66 Pac. 679; *Moyle v. Bullene*, 7 Colo. App. 308, 44 Pac. 69; *Allenspach v. Wagner*, 9 Colo. 127, 10 Pac. 802.

Because of both these defects, and for the reasons given the judgment is reversed, and the cause remanded.

Reversed and remanded.

STEELE, C. J., and GABBERT, J., concur.

FARRIER v. COLORADO SPRINGS RAPID TRANSIT RY. CO.

(Supreme Court of Colorado. March 2, 1908.
Rehearing Denied April 6, 1908.)

1. NEGLIGENCE — ACTIONS — QUESTION FOR JURY.

Negligence or contributory negligence is, as a general rule, a question of fact for the jury, but may become a question of law for the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279-302.]

2. SAME.

Where the question of negligence is dependent on inferences to be drawn from acts and circumstances of that character that different intelligent minds may honestly reach different conclusions, whether negligence has been established is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279-302.]

3. CARRIERS—ACTIONS FOR INJURIES TO PASSENGER—QUESTION FOR JURY.

In an action for injury to a street railway passenger due to another passenger so carrying a hoe that its handle caught under the hood of the forward car as it rocked up and down, and broke, hurling a piece back into the car, and striking him, whether the conductor's failure to cause the passenger to place his hoe on the floor of the car or to carry it in some other position was negligence held for the jury.

4. SAME — PROTECTION OF PASSENGERS FROM OTHER PASSENGERS.

A common carrier is under the same strict obligation to protect a passenger from the negligence or willful conduct of a fellow passenger that it is to carry him safely.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1125-1135.]

5. SAME.

Where a street railway passenger so carried a hoe that its handle caught under the hood of the forward car as it rocked up and down, and broke, hurling a piece back into the car and striking another passenger, the test of negligence by the carrier is whether, in view of the condition of the roadbed, the position of the trucks, and consequent rocking motion of the cars, and all the surrounding conditions, the conductor ought, as a reasonable man, to have anticipated or foreseen, as a natural and probable result of the way in which a passenger held his hoe, that this or a similar accident would likely happen.

Appeal from District Court, El Paso County; William P. Seeds, Judge.

Action by Annie L. Farrier against the Colorado Springs Rapid Transit Railway Company. Judgment for defendant, and plaintiff appeals. Reversed.

Action for damages for personal injuries alleged to have been caused by defendant's negligence. From a judgment for defendant, plaintiff appeals. The defendant company owns and operates a street railway between Colorado Springs and Manitou, with electricity as the motive power. On the day of the accident the defendant was running from Colorado Springs to Manitou a train of cars, consisting of a motor and an open trailer car, with seats in the latter running from side to side and about 12 in number, in which trailer plaintiff as a passenger for hire occupied a seat near the center. The attachment between the two cars was an automatic coupler, in

good order, which allowed a play of about an inch. When the cars were in motion, there was a space of about eight inches between the hood, or projecting top, of the rear end of the motor, and the same part of the front end of the trailer car. At some point between Colorado Springs and Colorado City, C. E. Bennett, a plasterer by trade, in no way connected with defendant, who was on his way home from work, got on the train, and took the end seat upon the front bench of the trailer. He had with him some plasterer's tools in a sack, and a shovel and a hoe which he carried in his hands. The handle of the hoe was a long one, and when he held it, as he did, in an upright position, the top of the handle of the hoe extended above the roof of the trailer. The hoe itself rested on the floor, and the top of the handle was held against the front end or hood of the trailer, projecting several inches above the same. Neither plaintiff, who saw Bennett, nor any of the passengers, had or expressed any expectation or fear of any danger resulting to any passenger from the manner in which Bennett held the hoe. The conductor saw Bennett get on the car and collected his fare, and, until the conductor went forward into the motor car to collect a fare, he had Bennett under his constant observation, and during all this time, for several minutes and while the train was running 10 or 12 blocks, Bennett continued to hold the hoe handle against the hood of the trailer car, in which position no such accident would be likely to occur. The motorman was on the front platform of the motor car, and did not see or have his attention called to Bennett. While the conductor was engaged in collecting the fare, with his back towards the trailer, and Bennett for the moment was out of his sight, Bennett, it seems, becoming tired, let go of the handle of the hoe, so that its top rested upon the rear end of the hood of the motor car, the other end still being on the floor of the trailer. The evidence of plaintiff tended to show that the track along this portion of the road was rough. The trucks under these cars were in the middle, instead of at each end. When the train was traveling at a fair rate of speed, as it was on this day, because of the condition of the track and position of the trucks of the cars, there resulted a perpendicular rocking motion, and sometimes, while the rear end of the motor car was going up, the front end of the trailer car was going down. After Bennett relaxed his hold on the handle, the hoe itself still resting upon the floor of the trailer car, the end of the handle lay upon the rear end of the roof of the motor car. In the rocking motion of the cars the handle was caught under the rim of the rear hood of the motor car, and broken, and a piece thereof was hurled backwards through the trailer car and struck the plaintiff, inflicting the injuries to recover damages for which this action was brought. Neither the conductor nor any of the passengers made any objection to the act of Bennett in taking his tools aboard, or the

manner in which he held the hoe, and no suggestion was made by the conductor to Bennett to lay down the tools in a horizontal position on the floor, or to put them in any other position than the one in which they were first held. The particular acts of negligence charged in the complaint are that the approximate cause of the injury was in allowing Bennett to get upon the car with his tools, shovel, and hoe, and in negligently permitting him to carry the hoe in a partially upright position, so that the handle thereof projected upwards and between the ends of the two cars. Both plaintiff and defendant introduced evidence, and, when they rested, the court, upon motion of its counsel, directed the jury to return a verdict for defendant, which was done, and judgment entered accordingly.

George Gardner and Samuel H. Kinsley, for appellant. McAllister & Gandy and David P. Strickler, for appellee.

CAMPBELL, J. (after stating the facts as above). The motion for a directed verdict was based upon seven specifications; and there is nothing in the record to show upon which ground or grounds the court rested its decision. It would seem, however, from the briefs of counsel, since to those points the argument is mainly directed, that the trial court was of opinion that the evidence failed to show that the defendant was guilty of the acts of negligence charged in the complaint, and that the approximate cause of the injury was the wholly independent, intervening negligent act of Bennett in dropping the hoe, for which defendant was in no way responsible.

The general rule is that the negligence of a defendant, or contributory negligence of plaintiff, is a question of fact for the jury. It may, however, become a question of law for the court. The circumstances in which a court may direct a nonsuit or a verdict for defendant in this class of cases have been stated by this and other courts in different language. In *D. & R. G. R. R. Co. v. Spencer*, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121, we said: "When the question of negligence is dependent upon inferences to be drawn from acts and circumstances of that character that different intelligent minds may honestly reach different conclusions on the question, it is for the jury to determine, under appropriate instructions, whether or not negligence has been established." In *Griffith v. Denver Consolidated Tramway Company*, 14 Colo. App. 504, 61 Pac. 46, it was said: "Where the facts are not in dispute, and there can be but one opinion as to their effect, the question is one of law, and it is proper for the court to decide it." In *Lord v. Pueblo S. & R. Co.*, 12 Colo. 390, 21 Pac. 148, it was said: "If the evidence, in the most favorable light in which it may be reasonably considered in behalf of the plaintiff, does not show, nor tend to show, the defendant guilty of the negligence causing the injury as alleged in the complaint, then the court may properly grant a

nonsuit or direct a verdict in favor of the defendant." And the court further said, in substance, what has already been quoted from the Spencer Case, *supra*. Other cases hold that if, under the most favorable light that can be taken of the evidence in plaintiff's favor, the court would feel bound to set aside a verdict in case the jury should find for him, the case should be withdrawn from the jury and a nonsuit, or verdict for the defendant entered. The difficulty is not so much in the ascertainment of the correct rule applicable, as in applying it to the ever varying facts of such cases as they arise. It is very rare, indeed, that a case presenting the same facts as the case in hand is obtainable, and, as might be expected, we have not found among those cited by counsel or others which we have examined one such as this.

Plaintiff maintains that the Spencer Case, *supra*, and Colorado Mortgage & Investment Company v. Rees, 21 Colo. 435, 42 Pac. 42, are on all fours with this, and conclusive that the trial court erred in directing a verdict. While some of the questions therein and some of the principles involved are the same as here, the facts of each case are, in material respects, different. In the Spencer Case the approximate cause of the injury was the negligence of a servant of the railroad company in leaving in an exposed condition near to the track of an approaching train a truck, which, colliding with the train, hurt one lawfully on the depot platform. In the Rees Case it was a defect in the construction of the lock of a door of an elevator, a failure of the owner to provide reasonably safe means of transit, by which a passenger was injured. Here the negligence claimed is the failure of defendant's conductor to exercise the proper care and control over a fellow passenger, whose act was such as to cause a reasonably prudent man to anticipate this, or a similar, accident, as the natural or probable result of the manner of holding the handle of the hoe by that passenger, which care, if exercised, would probably have prevented the injury. It would serve no useful purpose to discuss at length the various cases pro and con cited by counsel, as none of them are of much aid, except as stating the general rule which measures the duty of a common carrier for hire to protect one passenger from another. It may be true, as defendant's counsel say, that if Bennett, the fellow passenger, had continued to hold the handle of the hoe in the position it was when he was under the eye of the conductor, it would not be possible for such an accident to occur; and it may also be true that had the roadway been smooth and the trucks of these cars been at the ends, instead of the middle, there would have been no reason to anticipate or foresee that the handle would likely be caught in the hood of the motor car and broken, and a piece thrown backward into the trailer. But, considering the condition of the track and the position of the trucks,

and the consequent rocking up and down of these cars, to which there was evidence, and of which the conductor and the passengers were aware, we cannot say as matter of law that the consent which the conductor gave to Bennett to carry this hoe as he did was a proper exercise of control over a fellow passenger, or that his failure to cause Bennett to place his hoe on the floor of the car or to carry it in some other position was not negligence. It has been declared by our Court of Appeals, and we think it a correct statement, that a common carrier is under the same strict obligation to protect a passenger from the negligence or wilful conduct of a fellow passenger that it is to carry him safely. Hence the authorities cited by defendant to the point that defendant was in no respect responsible for the acts of Bennett are not applicable, for he was a fellow passenger of plaintiff, against whose negligence defendant was bound to shield her by the exercise of the utmost vigilance.

In Wright v. Railroad Company, 4 Colo. App. 102, 35 Pac. 196, the court, by Thompson, Justice, said: "It is now firmly established that a carrier of passengers must exercise the same degree of care to protect them from violence from their fellow passengers, or from intruders, that is required for the prevention of casualties in the management and operation of its trains." And, as to this duty, there is no difference between mere negligence and wilful misconduct. *Ferry Companies v. White*, 99 Tenn. 256, 41 S. W. 583. The rule to be extracted from the cases cited by the defendant itself is thus succinctly stated in *Flint v. Norwich Transp. Co.*, 6 Blatchf. (U. S.) 158, 161, Fed. Cas. No. 4,873: "The defendants were bound to exercise the utmost vigilance and care in maintaining order, and guarding the passengers against violence, from whatever source arising, which might reasonably be anticipated, or naturally be expected to occur, in view of all the circumstances." The same rule is announced in *Putman v. Railroad Companies*, 55 N. Y. 108, 14 Am. Rep. 190, cited to the point that no negligence of defendant was here shown. The court there said substantially that a defendant is bound to exercise all the means he can command whenever occasion requires to protect one passenger from another, and that if "a passenger receives injury which might have been reasonably anticipated or naturally expected from one who is improperly received, or permitted to continue as a passenger, the carrier is responsible." See, also, *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 307; *Loftus v. Ferry Co.*, 84 N. Y. 455, 38 Am. Rep. 533; *Morris v. Railroad Co.*, 106 N. Y. 678, 13 N. E. 455. In *Cole v. German Savings & Loan Society*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416, Sanborn, Circuit Judge, discusses with marked ability the liability of a defendant in a case which, in some aspects, is like this, and in the course of the opinion refers to *Investment Co. v.*

Rees, *supra*, in such a way as to indicate that in all respects the opinion therein does not meet with his approval. In case of conflict our duty would be plain; but we think the Cole Case can be distinguished from the Rees Case, and certainly from the one in hand. In the Cole Case the court said that the sole and proximate cause of the injury was the wanton act of a trespasser over whom defendant had no control, of whose presence it was unaware, and for whose acts it was not liable, and then laid down what, under the facts of that case, we consider to be the true doctrine: That, if an injury could not have been foreseen or reasonably anticipated as the natural or probable result of an act of negligence, it is not actionable, because such act is neither the remote nor any cause whatever of the injury. The test which the authorities furnish for this case is: In view of the condition of the roadbed, the position of the trucks, the rocking motion of the cars, and all the surrounding conditions, ought the conductor, as a reasonable man, to have anticipated or foreseen as a natural and probable result of the way in which Bennett held his hoe that this or a similar accident would likely happen? If so, there was negligence of defendant; if not, there was none. We must not, however, be understood as holding as matter of law that the act of the conductor in permitting Bennett to get on the cars with his tools and suffering him to carry the hoe handle in the position he did was a negligent act, or that it was the approximate cause of the injury. We merely say that in the light of all the evidence the case should have been submitted to the jury under appropriate instructions, to determine these questions of fact. The case, we admit, is on the border line; but we think it comes within the rule often announced by this court which requires submission to a jury.

Judgment reversed.

GABBERT and MAXWELL, JJ., concur.

WELLINGTON et al. v. BECK.

(Supreme Court of Colorado. April 6, 1908.)

1. WRIT OF ERROR—RECORD—OBJECTIONS—WALVER.

Where the record on appeal is insufficient, in that the judgment appears in the bill of exceptions and not in the record proper, but counsel for defendants in error announce that they prefer to have the case decided on the merits and not on technicalities, the objection will not be noticed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2795-2798.]

2. WATERS AND WATER COURSES—IRRIGATION—PRIOR APPROPRIATION.

A grantor in 1890 diverted and applied to the irrigation of lands adjacent thereto all the waters of a creek and continued to use the same until January 1, 1891, when his grantee moved upon the land and used the water thereafter. A second proprietor diverted the water of the

same creek in 1893, and used the same until 1897, though admitting that at all times there was not enough water to supply the grantee's land. *Held*, that the grantee, being the prior appropriator, had a right to the use of all the water necessary to the irrigation of his land, and that the second appropriator had only the right to use the excess of water for irrigating his land.

3. SAME—ESTABLISHMENT OF RIGHTS—PLEADING AND PROOF.

In an action by an appropriator of water to restrain the cutting off of the water, evidence that a prior appropriator had relinquished his rights to plaintiff is inadmissible, where the pleading bases the right of plaintiff to the remedy on the ground of an absolute right to use the water by virtue of his appropriation.

Error to District Court, Eagle County; Frank W. Owers, Judge.

Suit by Hele A. Beck against Martha Wellington and another to restrain the cutting off of the waters of a creek. From a judgment for plaintiffs, defendant brings error. Reversed.

See 65 Pac. 626, 70 Pac. 687.

James Dilts and A. J. Sterling, for plaintiff in error. Edward T. Taylor, and Charles W. Taylor, for defendants in error.

GODDARD, J. 1. Our attention is called to several defects in the transcript of the record, the most serious of which is the omission from the transcript of the final judgment and the injunction complained of. The final judgment and decree is set out in *hæc verba* in the bill of exceptions, instead of in the record proper, where it should appear. This defect could have been cured by filing an amended transcript certified by the clerk of the district court; and since counsel for plaintiff do not press these objections, but, as they announce, prefer to discuss the case and have it decided upon the merits rather than upon technicalities, we will omit further notice of these objections, and determine the case upon the facts pertinent to the issues made in the pleadings.

2. In *Wellington v. Beck*, 30 Colo. 409, 70 Pac. 687, this court decided that the court below erred in sustaining a demurrer to the answer and defense of the plaintiffs in error (defendants below), and hereafter called defendants, and reversed the judgment, and remanded the cause, with directions to overrule the demurrer. On June 1, 1903, the defendant in error (plaintiff below) hereinafter called plaintiff, filed a replication to the answer and further defense, wherein she denied each and every averment therein contained, "except the allegation as to the flow of water in said Berry creek, which plaintiff admits is small, and not sufficient for the irrigation of the lands lying adjacent thereto and capable of being irrigated therefrom."

The only issue, therefore, presented by the pleadings as they now stand, is whether the evidence introduced upon the trial in the court below sustains the allegations of the answer and defense which the court, on the former review, held were sufficient to entitle

plaintiffs in error to an appropriation of the waters of Berry creek prior to the appropriation claimed by defendant in error from the same source. Upon this issue there is no conflict in the testimony. It is undisputed that as early as 1890 Oscar Dutton, the father and grantor of plaintiff in error Martha Wellington, diverted and applied to the irrigation of lands adjacent thereto all the water flowing in Berry creek, and continued to use all of the water so diverted for the irrigation of his land until January 1, 1891, when he conveyed the land upon which the water had been applied to the defendant Martha Wellington, who has used the water so appropriated ever since. The plaintiff testified: "I moved out on this land in 1892. * * * The Dutton ditch was taking water out of Berry creek before I moved on the land, and the water from Berry creek was taken out through the Dutton ditch. That water was then used to irrigate what was then called the Dutton farm, now the Wellington farm. It was taken out on the east side of the creek. The Hawley ditch is taken out from Berry creek, and the Dutton ditch is taken out a little below it on the other side, on the east side of Berry creek. The water becomes low in Berry creek in the months June, July, and after that." It further appears, as admitted in the replication, that the flow of water in Berry creek is small, and not sufficient for the irrigation of the land of defendants adjacent thereto and capable of being watered therefrom. The attempted appropriation of May 10, 1893, claimed by defendant in error, was subject to the prior appropriation of defendants, and in the circumstances could be availed of only when the water flowing in Berry creek was in excess of the amount necessary to properly irrigate the land of defendants. The right to relief in the present case is not asked because of the interference by defendants with the right to use such excess water, but is predicated entirely upon the theory that by virtue of the attempted appropriation of May 10, A. D. 1893, the plaintiff is entitled to the unquestioned use of $1\frac{1}{2}$ cubic feet of water per second of time at all times. The court below accepted this theory, as evidenced by the following finding: "That the use of said ditch [Dutton ditch] from May, 1893, to the close of the irrigation season of 1897, was subject to the said rights of the plaintiff. * * * And that the said defendants, at the time of and prior to the bringing of this suit, * * * did not own an appropriation on Berry creek prior or superior to, or in any manner adverse to the said appropriation of the plaintiff herein." The court adjudged and decreed "that the said plaintiff is the sole owner of said Hawley ditch, and the water right thereunto belonging, being an appropriation from Berry creek initiated on the 10th day of May, A. D. 1893, for the irrigation of about $3\frac{1}{2}$ acres of land in actual cultivation thereunder belong-

ing to said plaintiff, and that the said water right is prior to and superior to any water right which said defendants now own or have any right to from the said Berry creek, and that said plaintiff is entitled to the sole, exclusive, and peaceable use of said Hawley ditch and of the waters of said Berry creek for the irrigation of her said land thereunder to such amount of water as is reasonably necessary for that purpose." And thereupon made the temporary injunction theretofore issued permanent and perpetual, enjoining the defendants from in any manner interfering with the plaintiff in the use of the Hawley ditch, "and the said water right from said Berry creek for the irrigation of her said lands lying thereunder." This finding and judgment of the court finds no support in the evidence introduced upon the trial of the cause, and is manifestly against the law applicable to the undisputed testimony in the case.

3. Over objection of counsel for defendants, the court permitted testimony to be introduced of a conversation between Mr. Dutton and Mr. Hawley at the time the Hawley ditch was built, to the effect that he (Dutton) told Hawley to build the ditch; that he did not need the water from Berry creek; and that he (Hawley) might use the water; and the court finds that by virtue of such statement the "plaintiff was permitted to appropriate and acquire the prior and exclusive right to the said waters of Berry creek sufficient for the irrigation of her said irrigated land thereunder." This evidence was clearly inadmissible under the pleadings. There is no averment that defendants or their grantor at the time the Hawley ditch was constructed, or at any other time, abandoned or relinquished their right to the full use of their appropriation, or to any part of it, but, on the other hand, plaintiff in her complaint bases her right to the use of $1\frac{1}{2}$ cubic feet of water at all times by virtue of an actual appropriation thereof made in conformity with the requirements of the statute on May 10, 1893. As we have seen, the judgment of the court below was predicated largely upon this incompetent testimony, and does not correctly announce the law applicable to the issues made by the pleadings and the competent evidence in the case.

For the foregoing reasons, the judgment is reversed.

Reversed.

STEELE, C. J., and BAILEY, J., concur.

RHONE v. NATIONAL LIFE INS. CO.
(Supreme Court of Colorado. April 6, 1908.)
INSURANCE — AGENTS — COMMISSIONS — EVIDENCE.

Evidence examined, and held insufficient to show the existence of a contract whereby an insurance company was to pay its agent a share

of the premiums collected by a solicitor in the company's employ working in conjunction with the agent.

Appeal from District Court, Mesa County; Theron Stevens, Judge.

Action by Henry R. Rhone against the National Life Insurance Company for commissions. From a judgment of nonsuit, plaintiff appeals. Affirmed.

S. N. Wheeler, for appellant.

HELM, J. Appellant brought suit in the court below to recover from appellee certain commissions claimed to have been earned as its subagent in procuring life insurance. The cause was tried to the court, a jury being expressly waived. Upon the conclusion of plaintiff's testimony defendant's motion for a nonsuit was sustained, and judgment was entered accordingly.

There was no direct employment of plaintiff by defendant. No terms of agency were discussed, or any amount of compensation or commission agreed upon between plaintiff and any general agent of defendant. Plaintiff's sole reliance in this regard was upon a letter of introduction from F. E. Busby, general manager of defendant company at Denver. This letter introduced the bearer, Mr. C. Schlottfeldt, as a successful soliciting agent of defendant. It stated that Schlottfeldt went to Grand Junction for business purposes, and asked plaintiff to assist him. Other than this it contained no suggestion of employment by or on behalf of defendant. It did, however, say: "You push the button. Mr. Schlottfeldt will do the rest; and perhaps between you a nice sum of money could be divided outside of the company's share." Schlottfeldt as special agent of defendant received 50 per cent. of the first year's premiums paid upon all insurance secured by him as full compensation for his services. He and plaintiff made an agreement whereby plaintiff was to introduce Schlottfeldt and assist him in securing business, receiving as remuneration one-half of Schlottfeldt's commission, viz., 25 per cent. of the first premiums so paid. Under this contract plaintiff worked for a time. Then being unable to do so longer, Schlottfeldt made a similar arrangement with one Forry, who took plaintiff's place, and afterwards and before suit assigned to plaintiff his claim for the services rendered. Upon issuing a policy Schlottfeldt always collected the first year's premium. From this amount he deducted and retained 50 per cent., remitting the balance in cash to defendant. From the 50 per cent. thus retained he paid, or should have paid, plaintiff and Forry the proportion contracted for by them. Neither plaintiff nor Forry ever had any communication with defendant through Busby or any other agent, save the letter of introduction above mentioned; nor is there any evidence showing or tending to show that the agreement be-

tween Schlottfeldt and these gentlemen or the terms thereof were ever disclosed to Busby or to defendant, or that defendant had any knowledge touching the rendering of the services until Schlottfeldt had gone away leaving unpaid all of their portion of the commissions except \$25, and correspondence was opened with Busby. Plaintiff offered in evidence a letter, part of such correspondence, in which Busby said: "Mr. Schlottfeldt works for me on a commission, and spends it as soon as he gets it; so when he told you he was out of money he probably told you the truth. May I ask you whether you had a written agreement from him that he would allow you 25 per cent. of the premiums collected?"

We think the action of the court below in sustaining the motion for a nonsuit was correct. Upon the case as made no contract appeared whereby defendant could be legally held responsible. It may be, as the trial court remarked, that in view of his letter introducing Schlottfeldt to plaintiff Busby ought to consider himself morally bound to protect plaintiff. But we cannot regard this letter as constituting a legal obligation on the part of Busby or the company he represented to do so. On the contrary, the declaration in that letter that, if plaintiff should see fit to aid Schlottfeldt, "perhaps between you a nice sum of money could be divided outside of the company's share," certainly tends to show that it was not the intention of Busby to legally bind either himself or defendant in the premises. The natural inference from this language is that plaintiff and Schlottfeldt might make an arrangement whereby the commission allowed Schlottfeldt would be divided upon some fixed basis, and, if a sufficient amount of business were transacted, a nice sum would be realized by each; and this view is reinforced by the fact that defendant had nothing whatever to do with Schlottfeldt's portion of the first year's premium collected. It is inconceivable that the company would knowingly obligate itself for the payment of 25 per cent. of the first year's premiums to plaintiff, and not upon the issue of each policy require an accounting to it by Schlottfeldt for this 25 per cent., as well as for its "share" of 50 per cent. The contracts for compensation were clearly personal contracts between Schlottfeldt on the one hand and plaintiff and Forry on the other hand. They trusted Schlottfeldt, and relied upon him. They were not authorized to hold the defendant company, and when Schlottfeldt, after collecting his 50 per cent. of the first year's premiums, left the country without accounting to them for their portion according to contract, they could not assert a legal claim therefor against the defendant company.

In view of the foregoing conclusion, it is clearly unnecessary for us to consider the claim of illegality of the contract between

plaintiff and defendant, had such a contract existed, based upon the failure by plaintiff and Forry to comply with the state insurance law relating to agents and subagents of foreign corporations.

The judgment will be affirmed.
Affirmed.

STEELE, C. J., and MAXWELL, J., concur.

BERGMANN v. KOERNIG.

(Supreme Court of Colorado. April 6, 1908.)
APPEAL—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error based upon rulings in the admission and rejection of evidence, which do not refer to the folio number of the transcript where the rulings appear, are not sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2900.]

Appeal from County Court, City and County of Denver; H. V. Johnson, Judge.

Proceedings for the allowance of the claim of Theodore Koernig against the estate of Anna Bergmann. Judgment for claimant allowing the claim, and Theodore Bergmann, executor, appeals. Affirmed.

Enos Miles, for appellant.

GODDARD, J. On July 27, 1904, Theodore Koernig filed a verified claim against the estate of Anna Bergmann, deceased, for "general services as nurse, cook, and general help, from Jan. 7, 1903, to Sept. 11, 1903, at twenty (\$20) per week—\$710.00." On September 26, 1904, upon trial to the court, \$215 was allowed as a fourth-class claim.

From the ruling of the court allowing this claim the executor of the estate prosecutes this appeal, and predicates his right to a reversal of such ruling upon the ground that the allowance was unwarranted by the evidence; that, although it is conceded that the claimant rendered the services charged for, it does not show that he was to receive any compensation therefore other than his board and lodging. There is no competent testimony to show an express employment of the claimant by the deceased, and no testimony to show an agreement on the part of the claimant that he would render services in consideration of his board and lodging. The court below we think was justified, in view of all the testimony, in holding that it could not be presumed that claimant rendered the services for nothing. Upon conflicting testimony as to the value of the services, it found that claimant was entitled to \$30 per month for the time he was engaged in the service of deceased, which, less an admitted credit, amounted to \$215. The assignments of error based upon the rulings of the court in the admission and rejection of evidence do not refer to the folio number of the transcript where such rulings appear, and will therefore not be considered. We can per-

ceive no reason for disturbing the ruling of the court below.

The judgment will be affirmed.
Affirmed.

STEELE, C. J., and BAILEY, J., concur.

ERIE MIN. & MILL. CO. v. GEARING.

(Supreme Court of Colorado. April 6, 1908.)

1. APPEAL—BILL OF EXCEPTIONS—SUFFICIENCY OF EVIDENCE.

Where exception to a judgment is not taken and preserved in the bill of exceptions, the sufficiency of the evidence to sustain the judgment cannot be considered on an appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1597.]

2. SAME—ABSTRACT—SUFFICIENCY—SUPREME COURT RULES.

Where a motion for a new trial is relied on as presenting the question of sufficiency of evidence, but the only reference thereto in the abstract on appeal is "Affidavit of M. L. Brown on motion for a new trial showing remarks of counsel in arguments objected to," and it does not appear that any exception was reserved, there is a plain violation of Supreme Court Rule 14 (80 Pac. viii), requiring the points relied on for reversal to be fully set forth in the abstract, and the sufficiency of evidence to sustain the judgment cannot be reviewed.

Appeal from District Court, San Miguel County; Theron Stevens, Judge.

Action by Benjamin L. Gearing against the Erie Mining & Milling Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Fitzgarrauld & Brown, for appellant. H. M. Hogg and Watson & Adams, for appellee.

BAILEY, J. There were three assignments of error in this action. The first and second relate to the admission of testimony over the objection of defendant and the exclusion of testimony upon the objection of the plaintiff. The third assignment is that the court erred in overruling defendant's motion for a new trial because the verdict was not supported by the evidence, and was against the instructions of the court. As to the first two assignments, the appellant in its brief contents itself with simply mentioning them. We have taken the trouble to examine the testimony as contained in the abstract for the purpose of determining whether or not the court erred in overruling the objection of the defendant in one case and sustaining the objection of the plaintiff in the other, and are satisfied that no prejudicial error was committed. We do not feel compelled to make an analysis or an argument to sustain our ruling in this matter, because, if counsel had faith that the assignments were meritorious, they should give some reason for such belief. No exception was saved to the judgment of the court rendered in this case, and consequently we cannot review the testimony for the purpose of determining whether or not it is sufficient to

support the verdict. In order to have this court consider the question as to whether or not the evidence is sufficient to sustain a judgment, an exception to the judgment must be taken and preserved by the bill of exceptions. *French v. Guyot*, 30 Colo. 222, 70 Pac. 683; *Goldsmith v. Newhouse*, 19 Colo. App. 1, 72 Pac. 809.

If it be said that the matter of the sufficiency of the evidence to sustain the judgment was fairly presented to the court by the motion for a new trial, and presenting the question in that form is sufficient to enable us to pass upon it even though the judgment had not been excepted to, we are still in no better position than we would be had no motion for a new trial been made, for the reason that the only thing contained in the abstract concerning the motion for a new trial is as follows: "Affidavit of M. L. Brown on motion for a new trial showing remarks of counsel in arguments objected to." We are unable to determine from this what, if any, motion for a new trial was made, and what, if any, ruling was rendered by the court in relation to it. There does not appear to have been any exception reserved. This is in plain violation of rule 14 of this court (80 Pac. viii), which requires that such matters be fully set forth in the abstract. Consequently we are unable to pass upon this assignment of error. *Wilson v. Kent*, 38 Colo. 496, 88 Pac. 461; *McPhee & McGinnity v. Fowler*, 36 Colo. 202, 85 Pac. 421; *Brock v. Schradsky*, 6 Colo. App. 402, 41 Pac. 512.

For the reason that the first two assignments of error do not appear to be meritorious and the third and only remaining one is not presented in accordance with the rules of this court, the judgment will be affirmed.

Affirmed.

STEELE, C. J., and GODDARD, J., concur.

PETTERSON v. PAYNE, Water Com'r, et al. (Supreme Court of Colorado. April 6, 1908.)

1. WATERS AND WATER COURSES—PUBLIC WATER COURSES—ACTIONS TO ESTABLISH WATER COURSES—BURDEN OF PROOF.

Where defendant ditch company's ditch headed on a main stream several miles below the junction of a tributary on which plaintiff's ditch headed, and plaintiff, a junior appropriator, sought to appropriate water from the tributary stream at a distance from its mouth, claiming that the water in the tributary stream, if suffered to flow, would not reach defendant's headgate on the main stream, and hence its diversion would not injure defendant, the burden was on plaintiff to show such facts, as it is presumed that the waters of a tributary stream less the evaporation, if not interfered with, will reach the main stream either by surface or subterranean flow.

2. TRIAL—INSTRUCTIONS—CURED BY SUBSEQUENT INSTRUCTION.

In a suit to secure certain irrigation rights, plaintiff claiming that the diversion of water from a tributary stream would not injure defendant's rights as senior appropriator, where the court remarked that the party making such

claim must conclusively prove it, it having immediately thereafter stated that the preponderance of the evidence was against plaintiff, even if the first remark was erroneous as placing a heavier burden on her than the law authorizes, it was harmless.

3. APPEAL—FINDINGS OF COURT—ON CONFLICTING EVIDENCE.

Where the evidence is conflicting, and the finding of the lower court is sustained by sufficient legal evidence, it will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3980.]

Appeal from District Court, Delta County; Theron Stevens, Judge.

Action by Martha J. Petterson against M. H. Payne, as water commissioner in district No. 40, and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Milton R. Welch, for appellant. King & Stewart, for appellees.

CAMPBELL, J. Surface creek and Milk creek are natural streams in Delta county, the latter being a tributary of the former. The Alfalfa ditch, having its headgate in Surface creek about four miles below the mouth of Milk creek, has the first priority to take water for irrigation therefrom. In the latter part of the irrigating season the combined waters of the principal and tributary streams are insufficient to supply that priority. The natural flow of Milk creek then becomes so far reduced that there is no surface flow in its channel where it empties into Surface creek and for some distance above, but farther up the stream there is always some water visible, the quantity varying from $\frac{1}{2}$ cubic foot to $1\frac{1}{2}$ cubic feet per second of time. After the owner of the Alfalfa ditch had perfected its appropriation the plaintiff, Mrs. Petterson, built an irrigating ditch called the "cross ditch," which taps Milk creek several miles above its junction with Surface creek, and through this ditch she proposed to convey water across the intervening divide and into Surface creek, and run the same down that stream with the other waters therein for a distance of about 7 miles, and then take it out through the Bruner ditch, whose point of intake is on Surface creek about $3\frac{1}{2}$ miles below the junction of the two streams, but above the headgate of the Alfalfa ditch, and thus convey the water to her lands. The case is not one where an appropriator seeks to divert from a natural stream a quantity of water which, by some artificial means, he has contributed to its natural flow; but it is that of a junior appropriator who seeks to divert a part of the natural flow of a tributary as against the rights of a senior appropriator from the main stream, upon the ground that the volume of water which is thus sought to be diverted at a point several miles above the junction of the two streams, if suffered to flow in its natural channel, will not reach the headgate of the ditch of the senior appropri-

ator. Hence the diversion from the tributary by the junior would result in no injury to the senior appropriator from the main stream. Manifestly the burden of establishing such a case rests upon the plaintiff, and her proof should be satisfactory. The trial court found against plaintiff, and her assignment is that prejudicial error was committed in that a heavier burden was put upon her than the law authorizes. In the course of its opinion or findings of fact the court remarked that a party who makes such a claim should conclusively prove it, whereas plaintiff says she is required to prove her case only by a preponderance of the evidence. Whether the degree of proof indicated by the observation referred to is or is not essential in this sort of case is not properly before us, as the trial court immediately proceeded to say that the preponderance of the evidence was against plaintiff. No possible harm, therefore, was done to her, even on her own theory.

The testimony in the case was conflicting. If we take that of plaintiff's witnesses alone, eliminating their conclusions and opinions, it is doubtful if there is enough definite or satisfactory evidence upon which to base a finding in her favor. The presumption is that the water of a tributary of a stream, less the evaporation, if not interfered with, will naturally reach the main stream either by surface or subterranean flow. It is a well-known fact that in this arid region, expressly recognized by this court in several decisions, notably *Platte Valley Irrigation Co. v. Buckers Co.*, 25 Colo. 77, 53 Pac. 334, and *Medano Ditch Co. v. Adams*, 29 Colo. 317, 68 Pac. 431, "the subterranean volume of water which finds its way through the sand and gravel constituting the beds of the streams which traverse the country adjacent to the mountains of this section are recognized as a part of the waters of the stream to the same extent as though flowing upon the surface." The court, in the *Buckers Case*, said: "It will be presumed that water flowing in a natural channel, which reaches the banks of a stream and there disappears in the sands of the bed, augments the flow in the main stream by percolation, until the contrary is shown, and the burden of proof is on the party diverting such water to establish that it does not mingle with the main waters of the stream." So here, when the plaintiff, by means of the cross-ditch, diverted waters of Milk creek, a tributary of Surface creek, to which, if the waters of the tributary reach the main stream, the defendant had prior right, it was incumbent upon plaintiff to show that none of the waters thus diverted, if permitted naturally to flow down the natural channel of the streams, would reach the headgate of the defendant's ditch. Water should be conserved as much as possible in the arid region, so as to get the greatest amount of benefit that can be derived from it; yet, where one appropriator thus enters

upon a stream and diverts water from it to which rights of others have already attached, it is incumbent upon him to show that his proposed diversion will not injuriously affect the prior vested rights.

The case is one of conflicting evidence, and, as the finding of the court below is sustained by sufficient legal evidence, the established rule in this court will not permit interference therewith. The judgment is affirmed.

Affirmed.

STEELE, C. J., and GABBERT, J., concur.

LACE v. PEOPLE.

(Supreme Court of Colorado. April 6, 1908.)

1. FALSE PRETENSES — CONFIDENCE GAMES — INDICTMENT — SUFFICIENCY.

An indictment framed in accordance with the wording of section 1333, Mills' Ann. St., charging that defendant secured the sum of \$370 in money of E. by means and use of the confidence game, is good, and not too indefinite and uncertain to advise the defendant of the nature and cause of the accusation against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 34-36.]

2. CONSTITUTIONAL LAW — STATUTES — CONSTRUCTION — ADOPTION OF FOREIGN ENACTMENTS.

When a state adopts the constitutional or legislative provisions of another state, it also adopts the construction given to such provisions by the decisions of the court of the state from which they are taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 17; vol. 44, Statutes, § 307.]

3. INDICTMENT — STATUTES — CONSTITUTIONALITY — NATURE OF ACCUSATION.

Mills' Ann. St. § 1333, providing that an indictment charging the crime of obtaining money by various means called the "confidence game," as set out in section 1332, shall be sufficient if it charges that accused obtained money from a named person by means of the confidence game, is not in conflict with Const. art. 2, § 16, providing that an accused shall have the right to demand the nature and cause of the accusation against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 175, 176.]

4. SAME — BILL OF PARTICULARS — DISCRETION OF COURT.

There is no error in refusing to require the state to furnish a bill of particulars to defendant indicted under section 1333, Mills' Ann. St., for obtaining money by means of the confidence game; the giving or refusal of a bill of particulars being within the sound discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 316, 317.]

5. STATUTES — CONSTRUCTION — REPEAL.

Where a new statute covers the entire subject-matter of an old one, and provides a different remedy, the latter repeals the former by implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 230-243.]

6. FALSE PRETENSES — STATUTES — REPEAL.

Mills' Ann. St. § 1332, providing for the punishment of one who obtains or attempts to obtain money or property by means of what is

commonly called the "confidence game," is not repealed by the later statute contained in section 1399, defining what constitutes a confidence game, and section 1401, providing the punishment to be inflicted upon a person convicted of such confidence game.

Error to District Court, Mesa County; Sprigg Shackelford, Judge.

James G. Lace was convicted of obtaining money by means of the confidence game, and brings error. Affirmed.

The plaintiff in error was prosecuted under section 1332, Mills' Ann. St., which reads as follows: "Every person who shall obtain, or attempt to obtain, from any other person or persons any money or property by means or by the use of brace faro, or any false or bogus checks, or by any other means, instrument or device, commonly called confidence games, shall be liable to indictment, and on conviction shall be punished by imprisonment in the penitentiary for any term not less than one year nor more than ten years." The information charges the accused with the offense in the form prescribed in section 1333 of the statute. Omitting its formal parts, it is as follows: "That James G. Lace, late of Mesa county, state of Colorado, on or about the 19th day of February, A. D. 1906, at and within the county and state aforesaid, did then and there unlawfully and feloniously obtain from one Edward F. Eldridge the sum of \$370.00 in money of E. F. Eldridge, by means and use of the confidence game." A motion to quash the information on the ground that it did not advise the defendant of the nature and cause of the accusation against him was overruled. A motion to require the prosecution to furnish the defendant a bill of particulars specifying the nature and cause of the accusation against him was also overruled. Upon trial the defendant was found guilty as charged in the information. A motion for a new trial was overruled, and he was sentenced to serve a term of from five to seven years in the penitentiary. To this sentence and judgment this writ of error is prosecuted. Numerous errors are assigned upon the rulings of the court below, which, taken as a whole, present the following reasons, upon which counsel for plaintiff in error relies for a reversal: (1) That the information is too indefinite and uncertain to advise him of the nature and cause of the accusation against him. (2) Section 1333, prescribing the form of indictment or information for the offense mentioned in section 1332, is in conflict with article 2, § 16, Const. Colo., which provides that the accused shall have the right to demand the nature and cause of the accusation against him, and the information cannot be sustained under and by virtue of the provisions of said section 1333. (3) That the court erred in not requiring the prosecution to furnish to defendant a bill of particulars, stating specifically the nature and cause of the accusation against him. (4) That section 1332 was re-

pealed by section 1399, Mills' Ann. St. (5) Error in the admission of evidence, and the insufficiency of the evidence to support the verdict.

A. H. Davis and Skelton & Morrow, for plaintiff in error. William H. Dickson, Atty. Gen., and George D. Talbot, Asst. Atty. Gen., for defendant in error.

GODDARD, J. 1. The first and second propositions advanced by counsel for plaintiff in error that the information, although it is in conformity with the provisions of section 1333, is obnoxious to section 16, art. 11, Const., in that it is too indefinite to advise the accused of "the nature and cause of the accusation" against him, is well answered by the reasoning of Chief Justice Breese in *Morton v. People*, 47 Ill. 468-474, wherein the validity of a statute of the state of Illinois identical in its terms with section 1332, and providing that the same form of indictment as prescribed in section 1333 sufficiently described the offense charged, was challenged because it was in violation of section 9, art. 13, Const. Ill., which is identical with section 16, art. 11, Const. Colo. At page 473 of 47 Ill. he uses this language: "It is insisted by the counsel for the plaintiff in error that the accused cannot know, from this indictment, the exact charge against him, and the outer lines within which the evidence must be confined, and cannot know what evidence he will be required to meet; nor could a conviction under this indictment be pleadable in bar of another indictment for the same offense; nor can the court see in it that a legally defined crime has been committed. They insist that the term 'confidence game' has no definition 'in law or literature,' and that 'no fifty men can be found who will define alike the confidence game.' They further insist that the indictment should specify all the facts with such certainty that the offense may judicially appear to the court." After quoting the sections of the statute defining the offense and prescribing the form of the indictment, he further said: "The nature and character of the so-called 'confidence game' has become popularized in most of the cities and large towns, and even in the rural districts, of this broad Union, and is well understood, and this defendant was distinctly apprised by the indictment of what he was called upon to defend. The accusation is sufficiently identified by the name of the victim. This name must appear in every indictment on this statute, and, appearing there, no second indictment for the same offense could be successfully prosecuted. The conviction on this indictment could be always pleaded in bar of a second. We are of opinion that the offense is so set forth in the indictment that the accused can be at no loss to know what it is with which he is charged, and can so prepare his defense." The statute was upheld. The views expressed by Chief

Justice Breese were expressly approved, and the same statute was upheld in the subsequent cases of *Maxwell v. People*, 158 Ill. 248, 41 N. E. 995, and *Du Bois v. People*, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183. Not only because of its satisfactory reasoning, but also because of the well-settled rule that, when a state adopts the constitutional or legislative provisions of another state, it also adopts the construction given to such provisions by the decisions of the courts of the state from which they are taken, we accept the rule announced by the Illinois courts as correctly expressing the law applicable to the question before us, and as conclusive that the first and second propositions advanced by plaintiff in error are untenable.

2. We think the third ground relied on is equally without merit. It is well settled that it is a matter within the sound discretion of the trial court whether the state shall be compelled to furnish a bill of particulars in any particular case; and we do not think that the court abused its discretion in refusing to require the prosecution to furnish a bill of particulars to the plaintiff in error in this case. If, as said by Chief Justice Breese 50 years ago, the nature and character of the so-called confidence game was well understood, it is certainly well and generally understood at the present day to be as defined in Webster's International Dictionary, as follows: "Confidence game is any swindling operation in which advantage is taken of a confidence reposed by the victim in the swindler." The evidence in this case shows a transaction on the part of the plaintiff in error which comes clearly within this definition, and it would be a useless ceremony to furnish him with a bill of particulars, since he was distinctly apprised by the information that the particular transaction relied on as constituting the confidence game was that through and by which he obtained \$370 of E. F. Eldridge, at the time and place mentioned. It is therefore manifest that he was in no way prejudiced by the refusal of the court to require the prosecution to furnish him with the particulars of the same.

3. Counsel cite us to many authorities in support of their contention that section 1332 is repealed by section 1399. It will not be controverted that when a new statute covers the entire subject-matter of an old one, and provides a different remedy, the latter repeals the former by implication; but this rule is not applicable here. The sections differ in terms, and were each adopted for a different purpose. Section 1332 provides for the punishment of one who obtains or attempts to obtain money or other property by means of what is commonly called confidence games, while section 1399 defines what constitutes a confidence man, and section 1401 provides the punishment to be inflicted upon a person convicted of being such confidence man. Repeals by implication are not favor-

ed, and we think by adopting section 1399 the Legislature did not intend to in any manner modify or repeal the former statute.

4. We have carefully examined the errors assigned upon the ruling of the court in admitting evidence, and also considered the sufficiency of the evidence to support the verdict, and, without noticing these objections in detail, suffice it to say that we think the evidence, properly admitted, discloses a swindling operation in which advantage was taken by plaintiff in error of the confidence reposed in him by Eldridge to deliberately swindle him out of \$370.

Perceiving no error in the record, the judgment is affirmed.

Affirmed.

MAXWELL, J., not participating.

CONLEY et al. v. DYER et al.

(Supreme Court of Colorado. April 6, 1908.)

1. WATERS AND WATER COURSES—IRRIGATION—APPROPRIATION—APPLICATION TO BENEFICIAL USE.

Filing requisite plats and notices of a water appropriation with the clerk and recorder, the commencement and construction of a canal with due diligence, and the actual diversion of water from a natural stream, unless accompanied by a beneficial use of the water, constitutes merely an inchoate right or interest therein, which is insufficient to bar junior claimants if their beneficial use of the water antedates that of the prior appropriator.

2. SAME—REASONABLE TIME.

What constitutes a reasonable time within which an appropriator of water for irrigation must actually apply the same to a beneficial use as against junior appropriators depends on the facts and circumstances connected with each particular case.

3. SAME—CONSTRUCTION.

Where a prior decree awarding water rights allowed an appropriation of 425 cubic feet proportionately as the parties increased their irrigable land, and provided that such increase and the user of the proportionate additional amount of water appropriated therefor should be made with reasonable diligence, such decree only vested in the appropriators an inchoate right to the water contained in such appropriation which could become fixed only on their applying the same to a beneficial use within a reasonable time.

4. SAME—INJUNCTION—COMPLAINT.

Complainant alleged that defendants were awarded 425 cubic feet of water for irrigation contingent on their devoting the same to a beneficial use within a reasonable time, and that, though 17 years had passed since such award, defendants had made use of but a small portion of the water, and that the total quantity of water awarded by a part of the former decree was largely in excess of the entire flow of the stream; that the whole of the flow had been appropriated and used by plaintiffs and other consumers for many years; and that defendants were threatening to use and dispose of the remainder of such apportionment, and would do so, unless restrained, to plaintiffs' irreparable injury. *Held*, that the complaint stated a cause of action for equitable relief.

5. SAME—"ABANDONMENT."

The term "abandonment" as applied to water rights is applicable only to completed appropriations of water, and not to a case where the

claimant never acquired a fixed right because of his failure to apply the appropriation to a beneficial use within a reasonable time.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 4, 13; vol. 8, p. 7539.]

6. SAME—IRRIGATION—WATER RIGHTS—DETERMINATION—DECREE—ISSUES.

Where, in a suit to restrain defendants from depriving plaintiffs of the use of certain waters for irrigation under an alleged inchoate appropriation, plaintiffs claimed no right to any of the water in a ditch from which defendants obtained the waters in question, a decree not only determining plaintiffs' rights, but also apportioning the water in defendants' ditch as between themselves, was erroneous as to the latter provision as not within the issues.

Appeal from District Court, Garfield County; John T. Shumate, Judge.

Action by Joseph M. Dyer and others against Edgar A. Conley and others. From a judgment for complainants, defendants other than defendant Curry appeal. Reversed and remanded, with directions.

Goudy & Twitchell, for appellants. Edward T. Taylor, for appellees.

HELM, J. The present controversy relates to priorities in water district No. 45, as determined by a decree entered on May 5, 1888. This district lies west of the Continental Divide, and includes territory contiguous to Grand river and certain of its tributaries. It was the district in which the first general adjudication of water rights took place in that portion of the state known as the Western Slope. At the time of this adjudication it was impossible to determine with accuracy or completeness some of the questions involved in such proceedings. The government surveys had not yet been extended through the section, and the ranchmen or settlers picked out and marked off their agricultural claims as best they could. The country was but sparsely settled, and each appropriator felt at liberty to draw upon his imagination and discount the future; that is to say, in proving the dimensions of the land claimed and the extent of the water required, as well as in giving the size and capacity of his ditch or canal, he took into consideration both his plans and needs for the future and his present actual uses. The result was that in many instances two or three times as much water was claimed and allotted as was needed to supply all reasonable present and prospective requirements; and in some cases priorities were recognized for more than the entire flow of the natural stream. The court in its decree occasionally made both a final and an interlocutory finding and award in connection with a particular canal or claimant. To so much of the water as had already been applied to beneficial uses, and therefore constituted a completed appropriation, the decree was final and conclusive. But for the protection of the pioneer settlers, who had incurred great hardship and risk, and were attempting in good faith to enlarge their cul-

tivated holdings, it was sometimes deemed expedient to enter what may properly be termed an interlocutory or conditional decree; that is, to recognize and declare the size and capacity of the canal or ditch with reference to the land proposed to be irrigated, and thus determine the quantity of water required for such future use, then to decree a right to the same contingent upon the exercise of diligence in constructing, extending, or enlarging the ditch as the case might be, and in applying the water therethrough, the requirement always annexed being that such construction or enlargement, application, and use should take place within a reasonable time from the date of commencement of the ditch or canal. The particular appropriations in the present controversy involved were all from Cache creek, a tributary of Grand river. Appellees, who were plaintiffs below, claim through priorities numbered 22, 45, 51, 56, 63, and 83; these priorities representing different ditches, and being awarded to them or to their grantors. Appellants who, together with one Curry, were defendants below, claim through priorities numbered 85 and 57. The two last-mentioned priorities were given to what is known as the Holmes ditch. They cover the two species of adjudication referred to. No. 35 was original and final for 100 cubic feet of water per minute of time; that being the quantity already applied from the Holmes ditch to beneficial uses. The date fixed for this priority was August 2, 1885. No. 57 was an enlargement priority granted said ditch. It covered 425 cubic feet of water per minute of time. Its date was fixed at June 27, 1886. It represented the quantity of water claimed by defendants or their grantors for the irrigation of land not yet brought under cultivation. After declaring that said 425 cubic feet should be allowed proportionately as the parties increased their irrigable land, the decree continued as follows: "And provided further that said increase of such additional land and the user of said proportionate additional amount of water appropriated therefor thereon be made by said parties with reasonable diligence." This decree has been accepted and acted upon by the water commissioner and by the parties in so far as it relates to the distribution of water from Cache creek. On June 5, 1902, the present action was begun. It is in the nature of a suit in equity for a permanent injunction. A large part of the water claimed and used by plaintiffs is held through appropriations junior to that of said priority 57. And if defendants are entitled to the 425 cubic feet contingently awarded thereby, and assert a right thereto, plaintiffs will be deprived of much of the water applied by them to beneficial uses since the decree was entered. The complaint alleges the entry of said decree, together with the facts above stated in relation to the rights of plaintiffs, and also in relation to the Holmes ditch and its pri-

orities 35 and 57. That pleading likewise further avers, among other things, that plaintiffs, since the entry of said decree, promptly and diligently applied to beneficial uses the water awarded their priorities, and have ever since been and still are so using the same; that, although 16 years have passed since the date given said priority 57, yet defendants have made use of only a small portion of the 425 cubic feet contingently awarded thereto; that the total quantity of water, aggregating some 3,000 feet per minute, covered by this part of said decree, was largely in excess of the entire flow of Cache creek; that the whole of such flow has been appropriated and used by plaintiffs and other consumers; that plaintiffs have been for many years and still are using all of said 425 cubic feet contingently awarded to priority 57 and unapplied by defendants; that by virtue of such user on their part and nonuser by defendants plaintiffs have acquired a vested right as against defendants to the water so used; that defendants are now threatening to claim, and preparing to use or dispose of, the remainder of said 425 cubic feet of water under priority 57 not hitherto applied by them, and will do so unless prevented by injunctive process from the court; and that such diversion and use by defendants will necessarily result in irreparable injury to plaintiffs. All of the defendants except Curry filed an answer to said complaint, and the cause was tried to the court according to the practice in equity. A decree was entered granting the permanent injunction as prayed, and from that decree all of the defendants save defendant Curry prosecuted the present appeal.

The proceedings and decree are here challenged by counsel under two general heads or divisions: (1) That the complaint does not state a cause of action; and (2) that, if a cause of action is stated therein, the same is not established by the evidence. It will be observed that, in so far as the decree of 1888 awards to the Holmes ditch priority 35 for 100 cubic feet of water per minute, it is really not challenged or sought to be disturbed in this action. The complaint mentions the same, but it also concedes to defendants the use and ownership of over 200 out of the 525 cubic feet allowed the two priorities. The entire controversy is limited to the 425 cubic feet covered by the contingent award under priority 57. The theory of the action is that by the decree defendants were only entitled to this water upon condition that they enlarged the Holmes ditch and applied the same to beneficial uses with reasonable diligence; that the neglect or failure on their part for the period of 16 years to do so does not show reasonable diligence, and is not a compliance with the decree; and that it was then too late for defendants to perfect such compliance and make good their contingent or incipient right to this water, plaintiffs having by their

diligence acquired intervening vested rights superior to any interest or claim of defendants therein. No principle in connection with the law of water rights in this state is more firmly established than that the application of water to a beneficial use is essential to a completed appropriation. Compliance with the law in other respects, that is, the filing with the clerk and recorder of the requisite plats and notices, the commencement and construction of the ditch or canal with due diligence, and even the actual diversion of water from the natural stream—all of these acts unaccompanied by the beneficial use of the water constitute but an inchoate right or interest. And unless such beneficial use follows the interest thus acquired does not ripen into an appropriation, the inchoate right terminates, and the water goes to junior claimants who have complied with all the requirements of law. Moreover it is equally well settled that in order to give the appropriation a priority dating from the commencement of the ditch or canal the beneficial use of the water must take place within a reasonable time from such date. What shall constitute this reasonable time depending upon the facts and circumstances connected with each particular case. The 425 cubic feet of water covered by priority 57 clearly belongs to the class of contingent or uncompleted appropriations. The question presented in this connection is therefore not one of abandonment, as that term when employed in our irrigation law applies only to completed appropriations of water, and there can be no abandonment of that which never existed. Hence it would be a mistake for us to apply the principles regulating abandonment to the loss by defendants of their contingent interest under priority 57. If we were dealing with a completed appropriation, the decree of 1888 would probably be as counsel for defendants contends *res judicata*. It could not be challenged collaterally, and as a direct attack neither the complaint nor the proofs in this action would be sufficient. But the integrity of the decree of 1888 is not disturbed; nor are the facts upon which it rests sought to be reinvestigated. On the contrary, that decree constitutes the basis of the present proceeding. When the court conditioned the right to the 425 cubic feet of water upon the application thereof to beneficial uses with due diligence, it held such right in suspension. The language employed was equivalent to an express declaration that in the absence of such diligence no appropriation would exist, and the inchoate interest tentatively recognized would terminate. By that decree, therefore, the existence or nonexistence of a vested or completed interest in this water was left open for future ascertainment and decision in some appropriate action or proceeding. No objection is made to the form of this proceeding. It is not contended that the judicial investigation and settlement of

the contingent right or interest involved may not take place through an independent action or suit in equity. Nor, as at present advised, are we disposed to find fault with the procedure in this respect. And the complaint in our judgment states a cause of action.

We come now to the other branch of the inquiry urged in support of a reversal, viz., were the averments of the complaint sustained by the evidence? This inquiry may be stated in another form, viz., does the evidence show that defendants did not use due diligence in completing their enlargement appropriation of 425 cubic feet of water through the Holmes ditch by application of such water to beneficial uses within a reasonable time? What shall constitute due diligence and what is a reasonable time depend of course upon many circumstances; and one adjudication cannot be taken as a test by which to determine these matters in another trial, for the reason that the circumstances are never precisely the same in both. The record in this case is voluminous, containing over 800 folios of testimony alone. The parties were given a full and careful hearing. The court below saw the witnesses and heard them testify; and no effort was spared in the attempt to solve correctly the problem of diligence so presented. The court reached the conclusion that defendants had applied to use 138.08 of the 425 cubic feet of water involved with sufficient diligence to complete a valid appropriation thereof and entitle them to retain the same. And we would not feel warranted in disturbing his conclusions by anything found in the record. Had the decree before us been limited to a decision of the foregoing matters, affirmance thereof would necessarily follow from the views above expressed. But a third subject is strenuously discussed in the briefs, and was referred to at the oral argument. Not only does this decree determine the questions presented by the pleadings and the matters in controversy as between plaintiffs and defendants, but it also undertakes to adjudicate a subject not so involved. After deciding that plaintiffs were entitled to the relief sought as against defendants, the court proceeded to consider and fix the status of defendants as among themselves. The controversy did not involve an apportionment or distribution of the water in the Holmes ditch between the different consumers taking therefrom. When it was decided that defendants were entitled to only 138.08 cubic feet out of the contingent allowance of 425 cubic feet of water, and that plaintiffs could hold the remainder, the issues presented were practically determined. And when the court proceeded to partition this 138.08 cubic feet, together with the original 100 cubic feet allowed under priority 35, among the defendants, he was exceeding the scope of those issues, and his action was erroneous. Defendants were consumers through the Holmes ditch.

Plaintiffs were consumers through other ditches, and had nothing to do with the Holmes ditch. They had no interest in the 238.08 cubic feet awarded that ditch, and it was a matter of no consequence to them how the water was divided among the consumers therefrom. The ratio of such distribution was a subject of regulation, and might be a subject of dispute among defendants themselves; but defendants neither asked for nor sought in this action any such partition or apportionment. The fact that Curry made no defense and took no appeal cannot affect the rights of his codefendants. The court properly received evidence showing the quantity of land each of the defendants had brought under cultivation, and how much water was required for the same. But this knowledge could only be used in the present action for the purpose of fixing the proportion of the 425 cubic feet of water that had failed to ripen into a valid appropriation and thus had become subject to use by plaintiffs.

In so far, therefore, as the present decree apportions the water from the Holmes ditch among defendants, the same is erroneous. It must be reversed and remanded, with directions to the court below for re-entry with this feature eliminated. And the parties will bear their own costs in this court respectively.

Reversed and remanded, with directions.

STEELE, C. J., and MAXWELL, J., concur.

CENTRAL SAVINGS BANK v. SMITH et al.
(Supreme Court of Colorado. April 6, 1908.)

1. CORPORATIONS—STOCK—TRANSFER—FAILURE TO RECORD—EFFECT.

Under the express terms of Mills' Ann. St. Rev. Supp. § 508, a transfer of corporate stock not recorded on the corporate books is a nullity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 479-482.]

2. SAME—CORPORATION'S FAILURE TO KEEP PROPER BOOKS—EFFECT.

That a corporation fails to keep a proper book in which to record stock transfers does not excuse a transferee from making a bona fide effort to have the stock transferred, under Mills' Ann. St. Rev. Supp. § 508, making transfers invalid where not so recorded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 479, 485.]

3. SAME—PLEDGE—CONSIDERATION.

An extension of time for payment of a debt is sufficient consideration for pledge of corporate stock as security for the debt.

4. SAME—TRANSFER OF STOCK—FUTILE ATTEMPT TO HAVE RECORDED—EFFECT.

A transferee of corporate stock having done everything in its power to have the transfer recorded in the corporation's books immediately upon assignment, the transfer is valid, though not recorded, because of the corporation's failure to keep a book for that purpose, under Mills' Ann. St. Rev. Supp. § 508, requiring corporations to keep such books, and making invalid transfers not recorded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 485.]

5. SAME—RIGHT TO SELL STOCK.

Until a corporation is dissolved the shares have the same characteristics as any other property, and the right of sale is an incident to its ownership, a stock certificate being a continuing affirmation by the corporation of the ownership of the stockholder, and his power over the stock, until it is withdrawn in some manner recognized by law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 463-469.]

6. SAME—STOCKHOLDER'S INDEBTEDNESS TO CORPORATION—EFFECT.

That a stockholder is indebted to a corporation does not prohibit the sale of the stock, because the corporation has no lien upon its shares which it can assert against its stockholders, restraining a free alienation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 408, 609-614.]

7. SAME—RIGHTS OF TRANSFERREE.

That the transferee of corporate stock knew that suit was pending for the appointment of a receiver and dissolution of the corporation, and to require the transferor to account for property alleged to have been wrongfully appropriated, did not prevent it from purchasing the stock free from all equities between the transferor and another stockholder, or the corporation.

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Action by Arthur K. Smith and another against J. R. Ward and another, Central Savings Bank intervening. From a judgment for plaintiffs, intervener appeals. Reversed and remanded.

A. J. Rising and S. E. Marshall, for appellant. Richard McKnight and Elliott & Bardwell, for appellees.

BAILEY, J. The J. R. Ward Auction Company was a corporation, the capital stock of which was \$10,000, divided into 10,000 shares. Of these shares J. R. Ward owned 4,999, Arthur K. Smith owned 4,999, and Alice M. Smith and Hattie M. Ward 1 share each. These four stockholders constituted the board of directors. Appellees instituted an action in the district court of Arapahoe county against the two Wards and the corporation for the appointment of a receiver, the winding up of the affairs of the company, to require the defendants to account for moneys and goods alleged to have been wrongfully appropriated by them, and for the dissolution of the corporation and the distribution of the proceeds between the parties. In this action a receiver was appointed on the 24th day of November, 1902. On February 20, 1903, judgment was rendered dissolving the corporation, and it was found that J. R. Ward was indebted to the corporation in the sum of \$833.02, which he was ordered to pay to the receiver. It was also adjudged that, in the event of his failing or refusing to pay such sum to the receiver, the receiver should pay to the plaintiff Arthur K. Smith, out of any sums remaining in his hands for final distribution, the sum of \$833.02, and make equal distribution of the balance between Smith and Ward. On the 3d of March, 1903, the

appellant, by leave of court, filed a petition of intervention, in which it was contended that on the 8th day of December, 1902, J. R. Ward assigned all of his stock to the intervener as collateral security to secure the payment of \$1,554 which Ward owed the intervener and that the intervener, being the owner of the stock, was entitled to the amount to which Ward would be entitled upon the final distribution, without any deduction from such sum on account of Ward's indebtedness to the corporation. Arthur K. Smith answered this petition, denying that the assignment was made upon the 8th of December, and averring that it was made upon the 3d day of July, 1902, that the assignment was void, for the reason that the stock had not been transferred upon the books of the company, and alleging that upon the 8th day of December, 1902, the intervener had knowledge of the action which was then pending for the appointment of a receiver and the dissolution of the corporation, and that intervener was not entitled to any of the funds of the corporation until the indebtedness of Ward to the company had been paid. To this a replication was filed, and, upon the trial, it was shown that on the 5th day of July 2,000 shares of the Ward stock were indorsed and transferred to the intervener; that no effort was made at that time by the intervener to have the stock transferred upon the books of the company, and on December 8th of the same year certificates amounting to 2,999 shares were assigned to the intervener. At that time the intervener sent a letter to the corporation, requesting that all certificates which had theretofore been assigned to the intervener be transferred upon the books of the company. The corporation acknowledged the receipt of this letter. It is also shown that the corporation failed to keep a stock register such as is required by statute, and that the intervener had notice of the appointment of the receiver previous to the 8th day of December, and had full knowledge of the proceedings wherein such receiver was appointed. At the trial upon the plea of intervention, the court rendered judgment in favor of the plaintiffs and against the intervener, from which judgment the intervener appeals.

The appellees contend that the judgment of the district court was correct, for the reason that the assignment of the stock made in July was a nullity because of the failure to have the transfer made upon the books of the company as required by statute (section 508, Mills' Ann. St. Rev. Supp.). This is true as to the assignment of the first 2,000 shares. In answer to this the intervener contends that it was excused from having the transfer made upon the books of the company, for the reason that any effort upon its part to have the stock transferred would have been idle, because the corporation had neglected to keep a book such as is required by the statute

wherein such transfer could be noted. *Weber v. Bullock*, 19 Colo. 214, 35 Pac. 183, is cited as an authority for the proposition that a compliance with the requirements of the statute essential to the transfer of the legal title of the stock is not necessary when it appears that the assignment was made in good faith on valuable consideration, and where the assignee has done all in his power to comply with the requirements of the statute, and is prevented from obtaining such transfer as the law requires by the fault of others. But this is not in point in this case, so far as the assignment of the stock made in July is concerned, for the reason that the assignee made no effort to have it transferred upon the books of the company. The assertion is made that, because it appears that the corporation failed to keep a proper book in which to record the transfers of stock, any effort made on behalf of the assignee would have been useless. This would not excuse the intervenor from making a bona fide effort to have the stock transferred. At the time of the assignment of the 2,999 shares in December, the intervenor did everything in its power to have the stock transferred upon the books of the company, and proper transfer was not made, because of the failure of the corporation to keep such books, and through no fault of the assignee. The plaintiffs contend that this second assignment was not made in good faith, but was brought about solely because of the failure of the bank to have the assignment made in July noted upon the books of the company, and that the assignee, having failed to have the stock transferred in compliance with the statute, could not by making a retransfer in December revive the assignment made in July so that it might be effective. This may be true, but it only refers to the 2,000 shares which were assigned in July. The 2,999 shares which were assigned for the first time in December rest upon entirely different conditions. The defendant Ward was indebted to the intervenor in the sum of something more than \$1,500, which upon the 8th day of December was past due, and which at his request the intervenor allowed to be extended "until the receiver matter should be straightened out." The extension of the time of the payment of the indebtedness was a sufficient consideration for the assignment of the 2,999 shares of stock. The assignee having immediately done everything in its power to have the transfer made upon the books of the company, the transfer was valid, unless it was affected by the action then pending, of which the assignee had notice, for the dissolution of the corporation.

Plaintiffs contend that, upon the dissolution of the corporation, the assets belonged to the stockholders, subject to the payment of the corporate debts, and the interest of each stockholder was a mere chose in action, and any transfer of that interest, whether by a transfer of the certificates of stock or otherwise, vested in the transferee only such rights

as the stockholder had, and the transferee took subject to all equities between the stockholder and the corporation—citing 2 *Thompson on Corporations*, §§ 2308, 2318; *James v. Woodruff*, 10 Paige (N. Y.) 541; *Nathan v. Whitlock*, 9 Paige (N. Y.) 152; 2 *Waterman on Corporations*, 184; 1 *Morowitz on Corporations*, § 168; 1 *Thompson on Corporations*, § 1074. And, also, that one who acquires an interest in personal property during the pendency of a suit concerning the same, with actual or constructive notice of the pendency of such suit, takes such interest subject to whatever judgment may be finally entered and acquires no better title than his assignor had—citing 21 *Am. & Eng. Enc. (2d Ed.)* 595, *Mechanics' Bank of Alexandria v. Seton*, 1 Pet. (U. S.) 299, 7 L. Ed. 152, and other cases, some of which will be hereafter noticed. The answer to the first proposition seems to be that at the time of the assignment of the stock the corporation was not dissolved. Until the dissolution of the corporation, the shares have the same characteristics as any other property, and the right of sale is an incident to its ownership. The general rule is that "every owner of corporate shares has the same uncontrollable right to alien them, which attaches to the ownership of any other species of property." 10 *Cyc.* 577. The mere fact that the owner of the stock is indebted to the corporation does not prohibit the sale of the stock, because the corporation has no lien upon its shares which it can assert against its stockholder, restraining a free alienation of them. 2 *Cook on Corporations (4th Ed.)* 520; 10 *Cyc.* 580; *Boone on Corporations*, 124. The corporation, having issued the stock certificates, affirms and advertises to the world that the person to whom they are issued is entitled to the stock. It holds out to any one who may deal in good faith with the persons named in the certificate that he is an owner and has capacity to transfer the shares, and this certificate is a continuing affirmation of the ownership of the stockholder and his power over the stock, until it is withdrawn in some manner recognized by law. *Holbrook v. N. J. Zinc Co.*, 57 N. Y. 616. If the corporation had desired to prevent the alienation of its stock, and defendant desired to have the stock holden to secure the indebtedness of Ward to the corporation, it should by some means known to the law have restrained or prohibited its transfer, or should have caused the stock to be surrendered to the receiver or placed in the custody of the court, so that it might not be transferred, and the rights of third parties become involved, but, it is said, the intervenor, having had notice of the pendency of the suit wherein a dissolution of the corporation and the division of the assets was sought, took the stock subject to all of the equities existing between the stockholder and the corporation. A number of authorities were cited in support of this proposition, but, as we view it, none of them are in point. *Mechanics' Bank of Alexandria*

v. Seton, 1 Pet. (U. S.) 299, 7 L. Ed. 152, is cited as an authority for the doctrine that the court is not bound to take notice of any interest acquired in the subject-matter of the suit pending the dispute. The case is not in point. There one Lynn was the holder of certain stock in the bank. He held it as trustee. The bank knew of this fact, yet attempted to hold the stock as security for an indebtedness due from him to the bank. The court held that the bank had actual notice that the stock was held in trust, that it was not the personal property of the stockholder, and that this could not be done. *Phelps v. Elliott* (C. C.) 35 Fed. 455, *Hackley's Executors v. Swigert*, 5 B. Mon. (Ky.) 86, 41 Am. Dec. 256, *Cromwell v. Clay*, 1 Dana (Ky.) 578, 25 Am. Dec. 165, and *Meux v. Anthony*, 11 Ark. 411, 52 Am. Dec. 274, are cited as authority for the contention of appellees, but in those cases the property was in the actual custody of the court at the time of the purchase. It had been taken from the possession of the debtor and sequestered for the purpose of paying his debts. The court held that, under such circumstances, the purchaser takes nothing by his contract, not even in a case where he pays full value and has no actual notice of the pendency of the suit. Cases of this character cannot have any bearing upon the principle here involved, because there the court had done everything within its power to prevent the sale of the property by the debtor. Here the court had done nothing, and the creditors had endeavored to have nothing done, but the stock was left in the hands of the debtor with full right, so far as the inspection of the certificates would show, to sell and barter the same as though no suit had been pending. If the intervener had inspected the complaint filed by plaintiffs in the suit for the dissolution of the corporation, it would have found nothing there asserting that plaintiffs were endeavoring to secure the stock owned by Ward. Neither would it have found anything expressing a desire upon the part of the plaintiffs to interfere with the alienation of that stock by Ward, nor that plaintiffs or the corporation desired to have that stock held for the payment of any indebtedness which Ward might owe the corporation. On the other hand, "It may be stated generally that, in order that what we term the *res litigiosa* may exist, three things must concur: First, the property must be of a character to be subject to the rule *lis pendens*; second, the court must acquire jurisdiction both of the person and the *res*; and, third, the *res* must be sufficiently described in the pleadings. If these three things do not occur, there is no *res litigiosa*." "As a general rule *lis pendens* is in law notice of any fact averred in the pleadings, pertinent to the matter in issue or the relief sought, and of the contents of exhibits filed and made a part of the pleadings, or proved. But, in order that the notice may attach, the property involved must be so pointed out in the proceedings, as we have be-

fore seen, as to warn the public that they intermeddle at their peril." *Bennett on Lis Pendens*, §§ 91, 92. In relation to this matter of notice of pending actions, *Pomeroy*, in his work upon Equity Jurisprudence, after defining the different kinds of notice, says that "the legal effect of actual or constructive notice, when established, is exactly the same." *Pomeroy's Equity Jurisprudence*, § 594. And, again, it is said by the same author: "Proper and specific allegations are a necessary requisite. *Lis pendens* is notice of everything averred in the pleadings pertinent to the issue or to the relief sought, and of the contents of exhibits filed and proved. In order that the notice may thus operate, the specific property to which the suit relates must be pointed out in the pleadings in such a manner as to call the attention of all persons to the very thing and warn them not to intermeddle. * * * The notice arising from a pending suit does not affect property not embraced within the descriptions of the pleadings; nor does its operation extend beyond the prayer for relief." *Id.* § 634.

Judged by this rule, there was nothing in the case for the appointment of a receiver which would prevent the intervener from purchasing the stock, and taking it free from all equities existing between defendant Ward and the plaintiff or the corporation. Upon this subject it is said by the chancellor in *Green v. Slayter*, 4 Johns. Ch. (N. Y.) 38: "I am not for carrying the doctrine of *lis pendens* to the length of not only raising a notice by construction sufficient to charge a party, but of also extending the objects of the bill by construction, in order to support the notice." Even though the action had been brought for the purpose of obtaining title and possession of this stock or of having a lien declared against it, it is doubtful whether the stock could be held by the plaintiffs or the corporation as against the assignee. "It has been said that a purchaser of certificates of stock is not chargeable with constructive notice that a suit is pending in which his vendor is defendant, and the plaintiff is endeavoring to obtain possession and title to the stock which the purchaser is buying." *Cook on Law of Stock and Stockholders*, 362. In suits affecting the title to shares of stock, "after judgment has been obtained and the decree of the court executed, any subsequent transfer of the certificates by the defendant is null and may be disregarded by the plaintiff and by the corporation. But, while the suit is pending, the defendant may transfer the certificates, and the bona fide transferee takes good title to the stock. The latter is not affected or bound to take notice of a *lis pendens* in that suit." *Cook on the Law of Stock and Stockholders*, § 361. "A purchaser of certificates of stock is not chargeable with constructive notice that a suit is pending in which his vendor is defendant and the plaintiff is endeavoring to obtain possession and title to

the stock which the purchaser is buying. The doctrine of *lis pendens* has no application to sales of shares of stock. The purchaser is bound to know that a judgment or decree has been rendered and executed, affecting the certificates he is buying, if such a judgment or decree exists, but he is not bound to know that a suit is pending in which judgment has not yet been rendered." Id. § 362. Along the same line it is said: "Since the decision of the case of *McNell v. Tenth Nat. Bank*, above cited, 46 N. Y. 325, 7 Am. Rep. 341, certificates of stock with blank assignments and powers of attorney attached must be nearly as negotiable as commercial paper. The doctrine of constructive notice by *lis pendens* has never yet been applied to such property. This doctrine must have its limitations. It could not be applied to ordinary commercial paper, nor to bills of lading, nor to government or corporate bonds payable to bearer. Indeed, I do not find that it has ever been applied, and I do not think it ought to be applied, to any of the articles of ordinary commerce. Public policy does not require that it should be thus applied. On the contrary, its application to such property would work great mischief and lead to great embarrassment." *Letch et al. v. Wells*, 48 N. Y. 613. "One of the leading principles upon which the doctrine of *lis pendens* is founded is that the specific property must be so pointed out by the proceedings as to warn the whole world that they intermeddle with it at their peril. There must, therefore, be something in the pleadings * * * at the date of the purchase to direct the purchaser's attention to the property as the identical thing which is the subject of the litigation." *Wade on Law of Notice*, § 351. In order to make the doctrine of *lis pendens* applicable, "the property upon which the *lis pendens* is to operate must be so identified in the action as to notify all who may subsequently become interested in the estate that there is an action pending which may or will affect it, and that, if they become interested in it they do so at their peril; that is, it must be sufficiently certain to give it the means of distinct and intelligible information of the matter to which it relates." 1 *Herman on Estoppel and Res Adjudicata*, 189. "While the doctrine (of *lis pendens*) in general applies to all equitable suits in which the subject-matter is land, or any estate or interest therein, the proposition is equally true and general that it does not extend to ordinary suits concerning personal property, goods, and chattels, security, or money." 2 *Pomeroy's Equity Jurisprudence*, § 636. "It is well settled that the doctrine of constructive notice from *lis pendens* does not embrace suits concerning negotiable instruments or moneys, so as to affect the title of a transferee for value in good faith during the pendency of the action, even when the transfer

was made in direct violation of an injunction, so that the endorser or assignor would be punishable for the contempt." Id.

Our attention has been called to no case or authority, and we have not succeeded in finding any, which holds that the assignee of corporate stock to whom the stock was assigned during the pendency of an action to dissolve the corporation took the stock subject to any indebtedness existing in favor of the corporation and against the original stockholder, while there are many authorities which hold that the stock may not be transferred after dissolution, that any attempted transfer amounts only to an equitable assignment, and is subject to the equities existing between the corporation and the stockholder. It seems to be the established doctrine that "a shareholder in a corporation has an interest in proportion to the amount of his stock in all the corporate property, and has a right to share in any surplus of profits arising from its use and employment in the business of the company; and this right does not depend upon the time when he became a shareholder, but attaches whenever he acquires the stock, and entitles him to all subsequent dividends." 10 *Cyc.* 557. And: "Upon the dissolution of a corporation all its property, both personal and real, is to be used in paying the debts of the corporation, and, after the debts are paid, the remainder is to be distributed among the stockholders." 2 *Cook on Corporations* (4th Ed.) 641. "In this respect the rights of a pledgee of shares of the capital stock appear to be the same as that of an actual grantee." 10 *Cyc.* 558. From the foregoing, we conclude that the intervenor takes nothing by reason of the attempted assignment of 2,000 shares upon the 5th of July, for the reason that the same were not transferred upon the books of the company pursuant to the statute. As to the 2,999 shares assigned to it in December, and of which assignment the corporation had due and timely notice, and the intervenor did everything within its power to have the same transferred upon the books of the company, we determine that the intervenor takes such stock free from any indebtedness existing in favor of the corporation and against Ward, and that it is entitled to a pro rata share of the assets of the corporation after the payment of the company's debts and the expense incurred in the matter of the receivership and dissolution of the corporation.

The judgment of the district court will therefore be reversed, and the cause remanded, with instructions that, if any further proceedings are had in this matter, they shall be in harmony with the views herein expressed.

Reversed and remanded.

STEELE, C. J., and GODDARD, J., concur.

BOARD OF COM'RS OF LAKE COUNTY v. SCHRADSKY.

(Supreme Court of Colorado. April 6, 1908.)

1. MANDAMUS—SUBJECTS OF RELIEF—ACTS OF PUBLIC BOARDS—LEVY OF TAXES FOR PAYMENT OF JUDGMENTS.

Unless forbidden by statute, mandamus will lie under proper circumstances to compel the levy of taxes to pay judgments against a county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 243-248.]

2. SAME.

The funding bond act of 1899 (3 Mills' Ann. St. Rev. Supp. § 780a et seq.) authorizes the board of county commissioners to issue bonds in satisfaction of a judgment against the county, to be exchanged dollar for dollar for the judgment and interest, if acceptable to the judgment owner, or, if not so acceptable, to be sold and the proceeds therefrom applied on the judgment and interest. The statute is not made exclusive, and it does not prohibit resort to any legal remedy theretofore existing for the collection of such judgments. *Held*, that the act does not forbid mandamus to compel the levy of taxes to pay a judgment against a county; its purpose being to furnish the county with additional means to raise funds to pay such judgments, and not to forbid legal remedies previously existing.

3. ELECTION OF REMEDIES—ACTS CONSTITUTING ELECTION.

A judgment was obtained on interest coupons attached to certain outstanding county bonds, issued pursuant to a funding statute similar to the act of 1899 (Mills' Ann. St. Rev. Supp. § 780a), for the purpose of paying another judgment against the county rendered previous to such funding process. Both funding statutes provided for the levy of a tax annually to pay the interest on bonds issued thereunder. *Held*, that the owner of the interest coupons by obtaining judgment thereon did not make an election of remedies so that she cannot compel the levy of a tax to pay such judgment, though she might have enforced such levy to pay the interest coupons.

4. MANDAMUS—NATURE IN GENERAL—DISCRETION AS TO GRANT OF WRIT.

Petitioner brought mandamus to compel the board of county commissioners to levy a tax to pay her judgment against the county. The answer showed the county to have a total of debts and current expenses amounting to 13½ per cent. of its assessed valuation. More than three-fourths of such indebtedness was represented by funding bonds, the payment of which might have extended over a period of 20 years. *Held* that, though the indebtedness was large, the court did not, because of the county's bankruptcy, greatly abuse its discretion in granting the relief prayed for.

5. SAME.

The grant of the writ of mandamus rests to a considerable extent in the sound discretion of the court, subject to well-settled principles established by the courts or fixed by legislative enactment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 5.]

Error to District Court, City and County of Denver; John I. Mullins, Judge.

Mandamus by Frieda Schradsky against the board of county commissioners of Lake county to compel it to levy a tax sufficient for the payment of her judgment against the county. From a judgment for relator, defendant brings error. Affirmed.

Charles Cavender and James Glynn, for plaintiff in error.

HELM, J. The judgment under consideration was in mandamus compelling plaintiff in error to levy a tax sufficient for the payment of another judgment previously entered against Lake county for \$11,404.75. To the petition filed in this case an answer was interposed. To that answer petitioner demurred generally. This demurrer was sustained, and, as plaintiffs in error declined to amend, the present judgment was entered requiring them to make the tax levy.

It is contended that the court below erred because: (1) The funding bond act of 1899 (3 Mills' Ann. St. Rev. Supp. § 780a et seq.) furnishes the exclusive method for paying such judgments, and mandamus can no longer be invoked; and (2) because the answer to which the demurrer was sustained shows that the county was virtually bankrupt, and owing to such financial condition this sort of relief should not have been given. Unless forbidden by statute, mandamus lies in this state under proper circumstances to compel the levy of taxes to pay judgments against a county. *Stoddard, Treas., v. Benton*, 6 Colo. 517. Hence the first of these objections is necessarily limited to the statute referred to. This statute authorizes the board of county commissioners to issue bonds in satisfaction of such judgments. These bonds are to be exchanged dollar for dollar for the judgment and interest, if acceptable to the judgment owner; or, if not, then they are to be sold, and from the proceeds realized the judgment and interest are to be paid. There is no express legislative declaration making the statute exclusive, or prohibiting resort to any legal remedy theretofore existing for the collection of these judgments. Nor does the act contain any language from which such a conclusion can be fairly deduced. On the contrary, the purpose of the act is evidently to furnish the county officials named with additional means for paying such judgments, or raising the funds with which to pay them. The statute is intended to avoid the necessity for resort to mandamus, or to any other legal remedy against the county. But the judgment for the payment of which the writ of mandamus issued in this case was obtained on interest coupons attached to certain outstanding bonds of Lake county, which bonds were themselves issued pursuant to a similar funding statute for the purpose of paying another judgment against the county rendered previous to such funding process. The funding statute pursuant to which the bonds were issued and the act of 1899 above mentioned each contained a provision directing the levy of a tax annually to pay the interest on bonds issued thereunder.

Upon the last foregoing circumstance counsel predicates another argument. He says that by obtaining an ordinary judgment for this interest defendant in error made an elec-

tion of remedies; that she cannot now compel the levy of a tax to pay the judgment thus obtained, even though she might perhaps have enforced such levy to pay the interest coupons; and that she must wait until such time as the county sees fit to issue more bonds, and by exchange or sale discharge that judgment. The principle of election thus relied on by counsel refers to cases where two inconsistent remedies exist, and one is chosen and pursued to judgment; as where a party affirms a fraudulent contract by suing for the price of the goods sold instead of rescinding the contract by a proceeding to recapture such goods. In the present case it would seem as if the procuring of the judgment upon the interest coupons was superfluous; but there may have been reasons of which we are not advised by the record making that course desirable. An ordinary action may have furnished facilities for determining the validity of the interest coupons superior to the facilities furnished by mandamus; and the mere fact that defendant in error saw fit to transform the obligation from the status of a claim for unpaid interest to that of a judgment does not justify an application of the rule thus invoked. We are not prepared to hold that under our statute the remedy in this respect is different between a judgment obtained upon county bonds and a judgment entered upon interest coupons attached to such bonds. The judgment upon the interest coupons is not itself challenged in this proceeding. Nor do we now inquire into the cause of action on which it rests or pass upon its regularity otherwise. For present purposes it possesses the attributes and is given the status of other judgments against the county. Demand was duly made upon defendants in error to levy a tax for the payment of this judgment. And when they positively refused to make such levy the present proceeding by mandamus was in order.

But it is urged under the second objection above stated that Lake county was bankrupt, and therefore the court grossly abused its discretion in granting the peremptory mandamus herein. Assuming the material averments of the answer to be true, as we must, it sufficiently appears that the total assessed valuation of the county was \$6,000,000; that there were outstanding \$625,000 in funding bonds; that the county was indebted in warrants and claims prior in time to the judgment of defendant in error to the extent of \$300,000, which were being exchanged for funding bonds at the ratio of 25 cents on the dollar, thus reducing this portion of the debt upon completion of the exchange to \$75,000. Hence it is fair to assume that the true indebtedness of the county as shown by the answer was in the neighborhood of \$700,000. It is further alleged that nearly \$100,000 would be required for the current county expenses. Thus we have a total of debts and current expenses amounting to 13½ per cent.

of the assessed valuation. This appears to be a large indebtedness; but it must be remembered that more than three-fourths of it was represented by funding bonds, the payment of which might extend over a period of 20 years. Under these circumstances we are not prepared to accept counsel's assertion that the county was bankrupt, or consent to the claim that in this regard the trial court greatly abused his discretion. "The exercise of the jurisdiction (by mandamus) rests to a considerable extent in the sound discretion of the court, subject to well-settled principles which have been established by the courts or fixed by legislative enactment." High's Extraordinary Remedies (3d Ed.) § 9; Merrill on Mandamus, § 62.

We discover nothing in the settled principles governing this remedy, or in our statutes relating thereto, that forbids its exercise in cases like the present. The court below might well have been influenced by the following among other circumstances above mentioned, viz.: That the judgment upon which the present proceeding was based covered interest coupons on funding bonds that had themselves been issued in payment of a former judgment; and that, although the funding statute under which those bonds were issued expressly imposed upon the county authorities the duty of making an annual levy of taxes for the payment of the yearly interest, this duty had been entirely neglected. There was here no such abuse of discretion or violation of settled principles as warrants interference by us.

The judgment will be affirmed.
Affirmed.

STEELE, C. J., and MAXWELL, J., concur.

(43 Colo. 55)

EDMONSTON et al. v. ASCOUGH.

(Supreme Court of Colorado. April 6, 1908.)

1. APPEAL—NATURE AND FORM OF REMEDY—PROPER MODE OF REVIEW.

Where an appeal was taken to the Supreme Court from a judgment not appealable to such court, but over which it had jurisdiction by writ of error, the appeal was dismissed, and the cause redocketed on error; such proceeding being in accord with the statute.

2. BILLS AND NOTES—NATURE OF LIABILITY ON INDORSEMENT IN GENERAL AS ORIGINAL PROMISOR.

Where one for the accommodation of the principal maker signed a note on its face when it was made, and before its delivery to the payee, the intention being to give the principal maker credit with the payee, and such intention was accomplished, bringing about the release of the principal maker's property held in pledge by the payee, such signer became a joint maker of the note, and was liable as such, even though the word "surety" was prefixed to his signature.

3. SAME—NATURE AND MODES OF DISCHARGE.

Even though the payee stated to such signer that he would release him and look to the principal maker alone for payment of the note

the signer, being a co-maker, was not thereby discharged; the promise of release being verbal only, and without consideration.

4. SAME.

Such signer was not discharged by his urgent request that the payee proceed against the principal maker while the latter was solvent.

Appeal from El Paso County Court; Robert Kerr, Judge.

Action on a promissory note by W. D. As-cough against W. A. Edmonston and another. From a judgment against Edmonston as a co-maker of the note, he appeals. Affirmed.

W. A. Edmonston and J. N. Rickards, for appellant. John R. Watt, for appellee.

HELM, J. The judgment before us was not appealable to this court. The appeal, therefore, has been dismissed, and the cause redocketed on error. The court having jurisdiction by writ of error, such proceeding is in accord with the statute. *D. & R. G. R. R. Co. v. Peterson*, 30 Colo. 79, 69 Pac. 77, 97 Am. St. Rep. 76. The action was against appellant and one Dustin upon a promissory note. Appellant signed the instrument prefixing the word "surety" to his signature. The judgment is against him as a co-maker and primary party to the contract.

The grounds relied on for reversal are: (1) That appellee by verbal agreement released appellant from liability upon the note; (2) that appellant notified appellee of Dustin's waning financial condition, and requested him to bring suit against Dustin at once; and that appellee's failure to do so, coupled with Dustin's insolvency, discharged appellant from liability. Both of these objections rest upon the alleged status of appellant as a party to the promissory note. It is assumed that prefixing the word "surety" to his signature brought him within the rules or regulations touching indorsers or guarantors of negotiable paper. But in this regard counsel are mistaken. The word "surety" did not change the nature of appellant's liability. His signature was attached at the time the instrument was made, and before its delivery. It was written on the face of the note and below the name of the principal maker. If appellant did not actually participate in the consideration, we are satisfied from the evidence that he nevertheless intended to assume the responsibility of a joint maker. We do not consider what the effect would have been under our negotiable instrument law, had appellant's name been indorsed in blank on the back of the instrument. Prior to the adoption of that law this would have made no difference. He would, even had he signed solely for the accommodation of Dustin, been regarded as a joint maker. "If he (defendant) put his name on the back of the note at the time it was made as surety for the maker, and for his accommodation, to give him credit with the payee, * * * he must be considered as a joint maker of the

note." *Rey et al. v. Simpson*, 22 How. (U. S.) 341, 16 L. Ed. 260; *Good v. Martin*, 1 Colo. 167, 91 Am. Dec. 706; *Kiskadden v. Allen*, 7 Colo. 208, 3 Pac. 221; *Byers v. Tritch*, 12 Colo. App. 380, 55 Pac. 622.

Assuming, as contended, that appellee stated to appellant that he would release him and look to Dustin alone for payment of the note, yet appellant was not thereby discharged. Appellee's promise was verbal only. There was no consideration whatever for the same; and, being a co-maker, appellant unquestionably remained liable. Moreover, such liability continued notwithstanding the alleged urgent request that appellee proceed against Dustin while the latter was solvent. Appellant should have paid the note, and then have brought suit himself against Dustin for reimbursement.

Holding, as we do, that appellant was liable as a joint maker of the instrument, it is not necessary for us to consider his status, had the same been that of suretyship; nor are we now called upon to discuss or distinguish *Martin v. Skehan*, 2 Colo. 615.

The evidence clearly disposes of the claim that the promissory note in this case was actually paid by Dustin. Any conflict appearing therein was resolved by the jury in favor of appellee.

The judgment will be affirmed.

Affirmed.

STEELE, C. J., and BAILEY, J., concur.

CAPITOL NAT. BANK v. HOLMES et al.
(Supreme Court of Colorado. April 6, 1908.)

1. SUBROGATION—MORTGAGES—TRANSFER OF EQUITY OF REDEMPTION—RIGHTS OF PURCHASER.

When a person having a subsequent interest in premises, and who is entitled to redeem to protect such interest, but is not primarily liable to pay a mortgage debt, pays off the mortgage, he may keep alive the lien as a security for himself against other incumbrances, and be subrogated to the rights of the mortgagor to the extent necessary for his protection, and whether he does so is a question of intention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Subrogation, § 48.]

2. SAME—ASSUMPTION OF MORTGAGE DEBT BY GRANTEE—PRESUMPTION.

When the grantee of premises pays off a prior incumbrance without actual notice of a junior judgment lien, it will be presumed that he paid it off for his own benefit, and equity will treat him as the assignee of the original incumbrance, and will revive and enforce it for his benefit, and he is entitled to subrogation, even though the deed to him recites that he shall pay off the mortgage as a part of the purchase price.

3. MORTGAGES—TRANSFER OF PREMISES—LIABILITY FOR MORTGAGE DEBT.

The recital in a deed to the purchaser of mortgaged property that he takes the property subject to a mortgage does not import a promise by the purchaser to pay the mortgage debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 729-734.]

4. SUBROGATION—MORTGAGES—PAYMENT OF DEBT BY PURCHASER—DISCHARGE ON RECORD—RIGHTS AS AGAINST JUDGMENT LIEN.

The owner of premises executed a mortgage thereon, and thereafter plaintiff filed a transcript of a judgment against such owner in the county in which the land was situated; but before it had proceeded to enforce the judgment the land was transferred to defendant H., the owner representing to him that the mortgage was the only incumbrance thereon, and furnishing him with an abstract prepared by attorneys, and defendant also caused the title to be searched before purchasing, and found it to be free from incumbrances except a mortgage. Defendant accordingly paid off the mortgage, and filed for record a release thereof, having no actual knowledge of plaintiff's judgment against his grantor. Plaintiff contended that the payment of the mortgage by defendant and release thereof on record operated as a discharge, and its judgment lien thereby became a prior lien on the property. *Held*, that defendant having paid the mortgage in ignorance of the judgment lien, and without negligence on his part, he will be subrogated to the rights of the mortgagor, and the mortgage will be revived for his benefit as a prior lien to plaintiff's judgment lien.

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Action by the Capitol National Bank, a corporation, against Orel Holmes and another. From a judgment for defendant Holmes on his cross-complaint, subrogating him to certain rights under a mortgage, plaintiff appeals. Affirmed.

Bicksler, Bennett & Nye, for appellant. R. H. Gilmore and Miller & Barnd, for appellees.

GODDARD, J. The facts set out in the pleadings and found by the court that are pertinent to the question presented in this case are, in brief, as follows: On the 11th day of March, 1902, Mary Wright was the owner in fee simple and in possession of certain described real estate. On the 11th day of March, 1902, she executed a note for \$1,500 to one Hugh McFetrich, and on the same date, to secure the payment of said note, executed a mortgage on said real estate. Thereafter, and on September 10, 1904, the appellant, the Capitol National Bank, caused to be filed with the county clerk and recorder of Adams county, Colo., where the land was situated, a transcript of a judgment obtained against Mary Wright for the sum of \$586.77 and costs. On the 19th day of September, 1904, and before the appellant had taken any steps to enforce its judgment by execution, Mary Wright sold, and by warranty deed conveyed, the land to Orel Holmes, one of the appellees herein. Holmes immediately went into possession of said property, and on September 21, 1904, paid said mortgage, and caused the same to be satisfied of record. As alleged in the cross-complaint, and as found by the court below, the said purchase, represented to the defendant Holmes that the said premises were free of all liens and incumbrances except the mortgage given by the defendant Wright to secure to Hugh McFetrich the sum of \$1,500 and interest

thereon. That previous to the completion of said purchase the defendant Wright furnished to the defendant Holmes an abstract of title prepared by a reputable abstract company which was engaged in the business of furnishing abstracts of title to lands in said Adams county. That thereafter the defendant Holmes had caused said title to be examined by attorneys at law in regular practice in this state, who found the title to the same free from incumbrance except said mortgage as shown by the entries on said abstract of title. That the defendant Holmes, at the time he completed said purchase and paid the amount of said mortgage and filed for record the release of said mortgage, had no actual knowledge of the judgment, and the entry of the same had by accident or otherwise been omitted from the said abstract of title of the said premises. That the defendant Holmes, in making the said purchase, and in examining the title to the said premises, pursued the usual and customary method to inform himself as to the condition of the title to said premises, and adopted the usual and customary cautions in order to learn the condition of the said title, and was, in that behalf, free from negligence, and it was ordered, adjudged, and decreed by the court "that the defendant Orel Holmes be subrogated to the rights of Hugh McFetrich in and under said mortgage, and that the said mortgage be revived and restored as if the same had never been released, and that the defendant Holmes be regarded as the equitable assignee thereof; that the release of mortgage executed by said Hugh McFetrich * * * be canceled and held for naught, as of the date in which the same was executed by the said mortgagee; * * * and that said mortgage be fully restored on the records where the same is recorded as a lien upon the said premises senior, prior, and superior to the lien of the said judgment of the plaintiff against the defendant Wright." And thereupon proceeded to foreclose said mortgage in behalf of the defendant Holmes, and ordered that the proceeds realized from a sale of said premises under such foreclosure proceeding be first applied to the payment of the mortgage debt, and the excess, if any, be applied upon the said judgment in favor of the appellant.

The contention of counsel for appellant is that in the circumstances of this case the payment of the mortgage by Holmes and the release of the same on record operated as a satisfaction and discharge of said mortgage, and that its judgment lien thereby became a prior and paramount lien upon said property. To the contrary counsel for appellees insist that the payment of the note and the satisfaction of the mortgage being made by Holmes, without actual notice of the lien of the judgment, and he being, as the court found, free from negligence, and having paid the mortgage under a mistake of fact, that he is entitled in equity to be subrogated to

the rights of the original mortgagee under the well-settled equitable doctrine that the mere fact of a charge having been paid off does not ipso facto extinguish it, but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it. The rule invoked is stated by 3 Pomeroy, in his work on Equity Jurisprudence, § 1212, as follows: "In general, when any person having a subsequent interest in the premises, and who is therefore entitled to redeem for the purpose of protecting such interest, and who is not the principal debtor, primarily and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit. He is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection." In *Vaughn v. Consolidated Mining Co.*, 21 Colo. 54, 39 Pac. 422, this court held that the purchase of a prior charge or incumbrance upon property by one who claims the ownership in fee does not in equity necessarily merge the charge or incumbrance, and therein we applied the rule as announced in section 798 in volume 2 of his work, which is also particularly applicable to the facts in this case: "When an owner of the premises who is not personally and primarily liable to pay the debt secured pays off a mortgage or other charge upon it, he may keep the lien alive as a security for himself against other incumbrances or titles, and thus prevent a merger. Whether he does so is a question of intention, governed by the rules laid down in the previous paragraphs." Counsel for appellant, however, while conceding the general rule to be as above stated, insists that it is not applicable to the facts in this case, for the reason that their judgment being a lien of record, that Holmes paid the mortgage in question with legal notice of its existence, and that the consideration in the deed to him being practically the full value of the land, that as between Wright and himself the real consideration was the extinguishing of the debt secured by the mortgage.

There is some authority to support the first contention, and also to the effect that where a grantee agrees, as a part of the consideration, to pay off the mortgage, such payment results in the extinguishment of the mortgage, and the party is not entitled to subrogation; but the question of merger being governed by the intention of the parties, we think that upon principle and under the rule announced in a large majority of cases, that when the owner of the fee title pays off a prior incumbrance, without actual notice of the junior judgment lien, it will be presumed that he paid the same for his own benefit and the protection of his own interests, and equity will treat him as the assignee of the original incumbrance, and will revive and enforce it for his benefit. In *Darrough v. Herbert Kraft Company Bank*, 125 Cal. 272, 57

Pac. 983, 984, the facts were very similar to those in the case at bar. It is there said that the rule laid down by the California court in previous decisions, citing them, was: "That a junior lienholder shall derive no advantage over a senior lien, where such senior lien has been paid off and canceled by the owner of the premises to which the liens attached without actual knowledge on the part of such owner of the existence of such junior lien, and that it will be presumed that such owner made the payment for his own benefit, and not for the benefit of the junior lienholder, and for the protection of his interests equity will treat such owner as the assignee of the original senior lienholder, and will revive and enforce such senior lien for his benefit." In *Bruse v. Nelson*, 35 Iowa, 157, the court said: "But it is urged that the Lamb mortgage was of record, and plaintiff had constructive notice of it, and therefore cannot be relieved. This position proves too much. In order that a debt may attach as a lien prior to a mortgage it must always, in some way, appear of record. * * * The argument, then, would amount to this—that a mortgage released in mistake could never be restored against a prior claim, which was in a condition to become a lien. In other words, that the lien of the mortgage could never be restored, except when the restoration is unnecessary and unimportant." In *Johnson v. Tootle*, 14 Utah, 482, 47 Pac. 1033, 1034, a case very like in its facts to those before us, it is said: "The general principle which runs through nearly all the cases of this character is that, 'when the legal rights of the parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new right acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons.'" We think that the authorities largely preponderate in favor of the proposition that, although the deed recites that the purchaser shall pay off the mortgage as a part of the purchase price, he is entitled to subrogation. Among them are: *Young v. Morgan*, 80 Ill. 199; *Johnson v. Tootle*, supra; *Barnes v. Mott*, 64 N. Y. 397, 21 Am. Rep. 625; *Emmert v. Thompson*, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566; *Ayers v. Adams*, 82 Ind. 109; *Rumpp v. Gerken*, 59 Cal. 496; *Elliott v. Tainter*, 88 Minn. 377, 93 N. W. 124. And that the taking a deed containing a recital that the premises are "subject to a mortgage" does not import a promise on the part of the purchaser to pay the mortgage debt. 1 *Jones on Mortgages*, § 865; *Pike v. Goodnow*, 12 Allen (Mass.) 472; *Strong v. Converse*, 8 Allen (Mass.) 557, 85 Am. Dec. 732; *Campbell v. Knights*, 24 Me. 332; *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554; *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213. *Barnes v. Mott*, supra, was an action to have a lien of a judgment upon certain premises discharged, and to restore the lien of a

former mortgage thereon that had been paid off and satisfied by a subsequent owner in ignorance of the judgment. The court, per Allen, J., said: "So much of the judgment as restores the mortgage upon the premises now owned by the plaintiffs, paid off and satisfied by the devisees of Burr, the then owners, and reinstates the same as a lien upon the mortgaged premises, prior and paramount to the lien of the judgment recovered by Orchard and assigned to the defendant, is clearly right. Upon payment of the mortgage by the then owners of the premises they were entitled to all the rights of the mortgagee, and to an assignment of the mortgage; and, having caused the same to be satisfied under circumstances authorizing an inference of a mistake of fact, equity will presume such mistake, and give the party the benefit of the equitable right of subrogation. To do so in this case is to prevent manifest injustice and hardship, and interferes with no superior intervening equities. *Hyde v. Tanner*, 1 Barb. (N. Y.) 76; *Runyan v. Stewart*, 12 Barb. (N. Y.) 537, per Wells, J."

The facts alleged in the second answer and cross-complaint, and admitted by the demurrer, abundantly show that the defendant Holmes in paying off the McFetrich mortgage was not negligent, but was in ignorance of the judgment lien, and acted under such mistake of fact, although the judgment lien was of record, that in equity he is entitled to be subrogated to the rights of McFetrich under the mortgage, and that the court properly overruled the demurrer to the second answer and the cross-complaint, and rendered judgment in favor of appellee Holmes.

Its judgment is therefore affirmed.

Affirmed.

STEELE, C. J., and BAILEY, J., concur.

CACHE LA POUDRE IRRIGATING DITCH CO. et al. v. HAWLEY, Water Com'r, et al. (NEW CACHE LA POUDRE IRRIGATING CO. et al., Interveners.)

(Supreme Court of Colorado. April 6, 1908.)

1. WATERS AND WATER COURSES—PUBLIC WATER SUPPLY—IRRIGATION—WATER COMMISSIONERS—DUTIES.

It is not the duty of a water commissioner to make any division or distribution of water between the users thereof from the same ditch, and he has no authority to interfere with the internal management of the affairs of a ditch company, though it is his duty to turn into a ditch no more water to which it is entitled under any decree than is necessary to serve the needs of the consumers under such ditch, and to refuse to turn water into any ditch for the use of one not entitled thereto.

2. SAME.

Where the right of a reservoir company to a proportion of the priorities belonging to a ditch company depended on the ownership of the stock of the ditch company, the water commissioner, in denying this ownership, based his action on a legal ground, and by refusing to turn water into the canal of the ditch company for

the use of the irrigation company, which, as he claimed was not entitled thereto, merely discharged the duties imposed on him by law, and in so doing committed no tort.

3. PARTIES—NEW PARTIES—INTERVENTION—STATUTORY PROVISIONS.

The purpose of Civ. Code, § 22 (Mills' Ann. Code), allowing any person to intervene in an action who has an interest in the matter in litigation in the success of either of the parties, or an interest against both, is that the one really interested in the result of an action may intervene and be made a party, so that the whole controversy shall be ended in one action and by a single judgment.

4. SAME.

Civ. Code, § 22 (Mills' Ann. Code), allows any person to intervene in an action who has an interest in the matter in litigation in the success of either of the parties, or an interest against both. In an action by a ditch company and by a reservoir company holding stock therein to compel the water commissioner and other officials to recognize the right of the reservoir company to divert a certain proportion of the ditch company's appropriations, an irrigating company intervened, alleging that it was an appropriator, junior to the ditch company, but senior to the reservoir company; that the ditch company was not entitled to more than a certain amount of water, because of an abandonment of the excess of that amount; that certain stockholders of the ditch company assumed to sell to the reservoir company rights to the use of water under contracts which, by virtue of their reservations, conveyed no rights whatever; and that, if the reservoir company was permitted to divert the water, intervenor would be deprived of the use of water from the common source of supply to which it was entitled. *Held*, that the petition showed that intervenor had such interest in the litigation as entitled it to intervene, and that it did not change the issues between plaintiffs and defendants.

5. SAME.

Under Civ. Code, § 22 (Mills' Ann. Code), providing that any person may intervene in an action who has an interest in the matter in litigation in the success of either of the parties, or an interest against both, the question of whether or not a new issue of fact is presented by a petition of intervention is not the test to apply in determining whether an issue different from that between the original parties will be made by the intervenor; the true test being whether the ultimate issue to be decided remains the same.

6. PLEADINGS — MOTIONS — JUDGMENT ON PLEADINGS.

Where by the answers and the petition in intervention material questions of fact were in issue which had to be determined from the testimony before a judgment could be rendered, a motion for judgment on the pleadings was properly denied.

7. WATERS AND WATER COURSES—IRRIGATION — CONTRACTS—VALIDITY.

A contract whereby certain stockholders in a ditch company sold their stock to a reservoir company, the vendors to continue in possession of their certificates, and to divert water for the use of their land to the same extent theretofore enjoyed, and the reservoir company to have the right to divert for storage and direct irrigation the difference between the quantity of water actually needed by the vendors and the maximum represented by the certificates in the priorities of the ditch, was invalid as requiring the water rights evidenced by the shares of stock to do double duty.

Error to District Court, Larimer County; Christian A. Bennett, Judge.

Action by the Cache la Poudre Irrigating Ditch Company and another against C. C.

Hawley, as water commissioner, and others. The New Cache la Poudre Irrigating Company and others intervened. There was a judgment, and plaintiffs bring error. Affirmed.

L. R. Rhodes and Paul W. Lee, for plaintiffs in error. James W. McCreery, for defendants in error.

GABBERT, J. Plaintiffs in error instituted an action in the court below against the water commissioner of water district No. 3, the superintendent of irrigation division No. 1, and the state engineer, the purpose of which was to compel these officials to recognize the right of the reservoir company to divert nineteen-thirtieths of the appropriations belonging to the ditch company. The complaint alleges that the ditch company is the owner of certain priorities to the use of water from the Cache la Poudre river for the purpose of irrigation; that these priorities are the property of its shareholders; and that each share is entitled to one-thirtieth of the water flowing in its ditch by virtue of these priorities, and that the reservoir company is the owner of 19 of these shares. While the complaint is not very clear on the subject, enough is alleged from which it appears that the place and character of use of the water to which the reservoir company claimed to be entitled by virtue of the ownership of the shares in the ditch company is changed, in that it appears to have constructed a lateral from the ditch of the ditch company through which it conveys its alleged share of the ditch company's priorities for use upon lands other than those to which it was originally applied, and to a reservoir from which it is subsequently drawn to apply to lands belonging to its shareholders. It then charges that the water commissioner has refused to allow any more than 20 cubic feet per second of time to flow into the ditch of the ditch company (this is far less than the aggregate volume represented by the priorities of the plaintiff's ditch); that he has refused to allow the reservoir company to take any water whatever by virtue of its ownership of shares in the ditch company, and has refused to permit the superintendent of the latter to distribute any water flowing in its ditch to the reservoir company; and that the other water officials have refused to redress these alleged wrongs, although appealed to for that purpose. The defendants filed answers, from which it appears that the main question between the plaintiffs and defendants is the right of the reservoir company to any portion of the decreed priorities of the ditch company by virtue of the ownership of shares in that company; that is to say, by the answers the ownership of the stock in question by the reservoir company was denied. The New Cache la Poudre Irrigating Company, by leave of court, filed a petition in intervention, wherein it set forth that it was an

appropriator from the Cache la Poudre river, junior to the ditch company, but senior to the reservoir company. It then alleged facts upon which it is claimed that the ditch company has abandoned and forfeited its right to the water represented by its priorities in excess of 22 cubic feet per second of time; that certain stockholders in the ditch company claim to have sold a certain amount of the capital stock of that company to the reservoir company under a contract, whereby the vendors were to continue in the possession of their certificates, and to divert water for the use of their land to the same extent theretofore enjoyed, and that the reservoir company was to have the right to divert for storage and direct irrigation the difference between the quantity of water actually needed by the vendors to supply their needs and the maximum represented by these certificates in the priorities of the ditch; that it is the purpose of the reservoir company to change the place and character of the use of water which it diverts from the canal of the ditch company; and that, if it is permitted to divert water to which it claims to be entitled by virtue of its ownership of the shares of the ditch company, it will deprive the intervener of at least 40 cubic feet of water per second of time during the irrigation season, which for more than 20 years last past has been customarily and continuously enjoyed by it and other junior appropriators. Plaintiffs filed a motion to dismiss the petition of the intervener, for the reason that it did not show an interest in the subject-matter of controversy, and that it injected new issues into the case. This motion was denied, and this ruling is the first question called to our attention by counsel for plaintiffs.

In support of the first proposition it is urged that the water officials were guilty of a tort in not recognizing the decrees under which the plaintiffs claimed to be entitled to water in excess of that which the commissioner turned into the ditch of the ditch company, and in refusing to allow the superintendent of the latter to turn into the lateral of the reservoir company any part of the water diverted from the river, and the action being to redress these wrongs which counsel denominate a tort, the intervener had no right to intervene. A water commissioner is not required, nor is it his duty, to make any division or distribution of water between the users thereof from the same ditch, neither has he any authority to interfere with the internal management of the affairs of a ditch company; but it is his duty to turn no more water into a ditch to which it may be entitled by virtue of any decree than is necessary to serve the needs of the consumers under such ditch, and to refuse to turn water into any ditch for the use of one not entitled thereto. The right of the reservoir company to a proportion of the priorities belonging to the ditch

company, as stated by the plaintiffs in their complaint, depended upon the ownership of the stock of the ditch company. The water commissioner denied this ownership, so that he based his action, of which plaintiffs complain, upon a legal ground, and was merely discharging the duties which the law imposed upon him by refusing to turn water into the canal of the ditch company for the use of one which, according to the issue made by his answer, was not entitled thereto. This was not a tort. The intervener company takes its supply of water from the same source that the plaintiff ditch company does. By its petition it alleges, in effect, that the ditch company is not entitled to more than 22 cubic feet per second of time, because the excess of that volume has been abandoned by the ditch company; that certain of the stockholders of that company have assumed to sell to the reservoir company rights to the use of water under contracts which, by virtue of their reservations, in fact convey no rights whatever, but, if the reservoir company is permitted to divert the water to which it claims to be entitled by virtue of an alleged ownership of the stock of the ditch company claimed under the contracts above referred to, intervener will be deprived of the use of water from the common source of supply to which it is entitled. It thus appears, according to the petition of intervention, that the intervener has a direct interest in the subject-matter of litigation, in that the right to the use of water which the reservoir company claims it is entitled to divert affects the rights of the intervener in the waters of the stream which is the common source of supply of the plaintiffs and intervener. Our Civil Code provides (section 22, Mills' Ann. Code): "Any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both." Under this provision it has been ruled by this court that a party is entitled to intervene in a suit between other parties when it appears that he has an interest in the subject-matter of litigation of such a direct and immediate character that he will either gain or lose by the direct legal operation and effect of the judgment, and that in determining the sufficiency of a petition to intervene the averments of the petition, so far as well pleaded, must be taken as true. *Henry v. Travelers' Ins. Co.*, 16 Colo. 179, 26 Pac. 318; *Wood v. Denver City Water Works Co.*, 20 Colo. 253, 38 Pac. 239, 46 Am. St. Rep. 238; *Morey v. Lett*, 18 Colo. 128, 31 Pac. 857. The purpose of our Code provision on the subject of intervention is that the one really interested in the result of an action may intervene, and be made a party, so that the whole controversy shall be ended in one action and by a single judgment. *Pomeroy's Rights and Remedies*, § 411; *Morey v. Lett*, supra. From the allegations of intervener's petition it is

clear that it had that interest in the litigation between the original parties which entitled it to intervene. For the purpose of determining the sufficiency of the petition, its allegations must be taken as true. It is apparent therefrom that the interest of intervener in the litigation is actual; that it is ultimately and actually interested in the result of the litigation; that it is directly interested in the subject-matter of controversy, i. e., the right to divert water from the common source of supply of the plaintiffs and itself; and that it will either gain or lose by the operation of a judgment on the questions to be litigated between the plaintiffs and defendants, because, if the former win, the stream will be depleted to the detriment of intervener, whereas, if the defendants are successful, it is benefited.

It would be practically impossible for one to intervene in an action without presenting a question of fact not involved in the pleadings of the original parties, and, if this was inhibited, then our Code provision on the subject of intervention would be of no avail. The question of whether or not a new issue of fact is presented by a petition of intervention is not the test to apply under a Code provision as broad as ours, in determining whether an issue different from that between the original parties will be made by the intervener. The issue between the plaintiffs and defendants, that is, the question to be determined, as presented by their pleadings, was the right of the plaintiffs to have turned into the canal of the ditch company a certain volume of water from the river. The petition of intervention did not change this question in any respect. True the intervener pleaded facts upon which it predicated a right to the subject-matter of controversy which are not stated in the original pleadings, and which, if established, would prevent the judgment which the plaintiffs seek, but that has not changed the original issue. It still remains as it was, i. e., are or are not the plaintiffs entitled to divert the water from the stream which they claim? In other words, although intervener predicates its right to the subject-matter of controversy upon which it relies for a judgment in its favor, and to defeat a recovery in favor of plaintiffs upon facts not stated in either of the pleadings of the original parties, yet the ultimate issue to be determined, the right to divert water from the stream, remains the same, and this appears to be the general rule by which to determine whether or not the intervener has injected a new issue into the case in which he is allowed to intervene. Upon overruling the motion just considered plaintiffs filed an answer to the petition of intervention. In what they denominate their further answer they set up what they designate as certain unconscionable transactions on the part of the intervener by which it is claimed they were deprived of the use of

water for a considerable period of time. Counsel upon their part also claim that one purpose of this answer was to show that the intervener "did not come into court with clean hands." To this further defense a demurrer was interposed by the intervener, and sustained by the court. This ruling was correct. Without going into details as to what this further answer stated, it is sufficient to say that none of the facts therein alleged had any connection whatever with the subject-matter of controversy between the parties, nor could they aid the court in the slightest degree in determining the rights of the parties. After this ruling plaintiffs filed a motion for judgment on the pleadings, which was denied. That this ruling was correct is apparent from the questions already determined. By the answers of the water officials and the petition of intervention material questions of fact were in issue which had to be determined from the testimony before a judgment could be rendered. In this state of the pleadings a motion for judgment thereon could not be entertained. Thereafter there was a trial to the court and judgment and decree entered which at first, at least, was not satisfactory to either the plaintiffs or the intervener company, as both excepted thereto; but the plaintiffs are the only parties who have brought the case here for review. The court entered a decree to the effect that the reservoir company was the owner of $6\frac{1}{2}$ shares of the capital stock of its coplaintiff, and by virtue of such ownership was entitled to divert from the canal of the ditch company of the water of the decreed priorities of that company for the use of its stockholders for direct irrigation only, and not for storage, one cubic foot of water per second of time for each share when needed and necessary for irrigation purposes.

The next two errors assigned are to the effect that the court erred in entering this decree and making its findings of fact upon which it was predicated, and particularly in limiting the right of the reservoir company to one cubic foot of water per second for each share of stock to which it was decreed to be entitled, for the reason that such decree and findings were outside the issues made by the pleadings. There is no merit in the ground assigned in support of this contention. Under the issues made by the pleadings the

volume of water which each share of the stock of the ditch company held by the reservoir company would represent would have to be determined from the total amount of water which the ditch company was entitled to divert for the use of the reservoir company by virtue of its ownership of such stock. This would depend upon what the testimony established with respect to the customary use of the water represented by this stock as formerly enjoyed by the grantors thereof, and the pro rata share which each share of such stock would represent in the priorities of the ditch company when the water thereby represented was used by the stockholders of the reservoir company at points which would deprive the intervener of water theretofore enjoyed, because used upon lands of a different character, or differently located from those to which it was formerly applied. The loss of water to the intervener occasioned by the reservoir company changing the place of use of the water represented by its shares of stock in the ditch company would have to be borne by the reservoir company. These were issues in the case, and whether or not they were correctly determined cannot be ascertained without an examination of the testimony. It has not been brought up in the bill of exceptions. There were other interveners whose rights were adjudicated, which we have not mentioned, because their right to intervene is not in any way challenged.

It is also contended on behalf of the plaintiffs that the court erred in holding that the contracts between individual interveners and the reservoir company evidencing their transfer of stock in the ditch company to the reservoir company were illegal and void, and in refusing to adjudicate the rights of the reservoir company in what is designated the "B. H. Eaton shares" in the ditch company. None of these questions can be determined without resort to the testimony. According to the petition of intervention the contracts declared illegal undertook to make the water rights evidenced by the shares of stock to which they related do double duty. This the law inhibits.

The judgment of the district court is affirmed.

Judgment affirmed.

STEELE, C. J., and CAMPBELL, J., concur.

(49 Wash. 385)

STATE ex rel. ATKINSON, Atty. Gen., v.
DUNLAP et al., Skagit County Com'rs.(Supreme Court of Washington. April 25,
1903.)**HIGHWAYS—ABANDONMENT—CONVEYANCE TO
RAILROAD.**

Ballinger's Ann. Codes & St. § 4338 (Pierce's Code, § 7093), authorizes a railroad to appropriate any part of a public road not within the limits of a municipal corporation, and provides that the county commissioners may agree on the terms and conditions of the appropriation. Section 4334 (section 7089) declares that the railway shall be holden to the county commissioners for all expenses incurred in relocating and opening the portion of the road so appropriated. *Held*, that the wagon road between B. and the line between S. and W. counties through the Cascade Mountains, for which the state appropriated funds by Laws 1895, p. 458, c. 168, should be regarded as a county and not a state road, and the same having been unsatisfactory as a highway, the county commissioners were authorized to transfer it to a railroad company for an adequate consideration, to be used in relocating and constructing a more satisfactory highway.

Appeal from Superior Court, Skagit County; George A. Joiner, Judge.

Application for writ of mandamus by the state, on relation of John D. Atkinson, Attorney General, against James Dunlap and others, as county commissioners of Skagit county. Judgment for defendants, and relator appeals. Affirmed.

John D. Atkinson, J. B. Alexander, and Fred W. Neal, for appellant. M. P. Hurd, J. C. Waugh, and Smith & Browley, for respondents.

ROOT, J. This action was brought by the state of Washington, on the relation of the Attorney General, praying that a writ of mandate issue against the county commissioners of Skagit county compelling them to repair that portion of a certain wagon road between the town of Blanchard in Skagit county and the line between that and Whatcom county, which road had been appropriated and destroyed by the Seattle & Montana Railroad Company. From a judgment of the superior court denying the writ, the state has appealed to this court.

By an act approved March 22, 1895 (Laws 1895, p. 458, c. 168), the Legislature provided for a state wagon road through the Cascade Mountains, and made an appropriation therefor; and it also provided in the same act that there should be expended "the sum of \$4,000 for the purpose of laying out, establishing, and constructing a wagon road from Blanchard, in Skagit county, to the boundary line between Skagit and Whatcom counties." The board of state road commissioners, acting pursuant to an understanding with the commissioners of Skagit county, expended the \$4,000 in the construction of two miles of the road extending from the county line south toward Blanchard, and the county commissioners expended \$6,000 in completing three miles more of the road. In

August, 1901, the Seattle & Montana Railroad Company made a proposition to the board of county commissioners to purchase a right of way through the lands where this public road ran, and offered therefor the sum of \$8,000. The highway had been found to be a very expensive one to keep in repair, as it extended through a mountainous country, and had many grades so steep that it could be used to little advantage. In consideration of \$8,000 the county commissioners consented to the railroad company entering into possession of portions of this road, and that company appropriated the highway at three points in such a manner as to destroy it as a thoroughfare. The commissioners thereupon caused to be surveyed and laid out another road from Skagit county to the Whatcom county line, connecting with the county road system of the latter county. The appellant contends that the road in question was a state road; that the commissioners had no authority to authorize the railway company to appropriate or take possession of it; and that the company in so doing became a trespasser, and that it is the duty of the county commissioners to eject it therefrom, and repair the road as a public highway. Respondents contend that it was not a state road, but a public road under the supervision and control of the county commissioners, and that it was discretionary with them to abandon said road or sell the interest of the public therein whenever it was deemed proper so to do.

It appears that the commissioners laid out this road, and that the rights of way therefor were obtained in the name of the county, and that it is known upon the public records of said county as the "John Behren's Road." The railroad company in constructing its road made large cuts through the rock, and in so doing destroyed portions of this highway, and made it impassable. Respondents call attention to the fact that the legislative act hereinbefore mentioned did not contemplate that the road from Blanchard to the county line should be a state road; and that this is evidenced by the fact that said road is not mentioned or referred to in the title of the act; and that it was the purpose of the state practically to donate to Skagit county the \$4,000 to assist in the construction of this difficult piece of road whereby the two counties might be connected. The appellant contends that the \$4,000 of state money was expended in contemplation of the expenditure by the county of the \$6,000, and that the commissioners had no right to abandon the road constructed pursuant to this arrangement. Sections 6 and 7 of the act of 1895 direct that the state road commissioners shall take deeds for rights of way in the name of the state, and that, where deeds cannot be obtained, a right of way may be condemned. In this instance, however, all the deeds for rights of way seem to have been taken in the name of the county. This

would hardly indicate an intention to establish a state road instead of a county road. The action of the trial court in excluding evidence as to a custom of taking rights of way or waivers for state roads in the name of the counties is assigned as error. It would seem that proof of a custom of this character would hardly be permissible in the face of sections 6 and 7 of the statute above referred to.

Section 12 of the legislative act of 1895 made it the duty of the county commissioners to keep the state road through the Cascades in repair. This law, however, was repealed in 1897, without any saving clause. There is nothing in the latter statute relating to the road in question here. Prior to the 24th of August, 1901, the railroad company had taken possession of this road and destroyed its usefulness as a highway, and the commissioners, believing it impracticable or impossible to repair the road, passed a resolution to the effect that the county should accept the \$8,000 from the railroad company, and that a quitclaim deed should be executed. This deed appears not to have been issued, and it is urged that the railroad company is in possession of this highway unlawfully, and is consequently a trespasser. Section 4338, Ballinger's Ann. Codes & St. (Pierce's Code, § 7093), authorizes a railroad to appropriate any part of a public road not within the limits of a municipal corporation, and provides that the county commissioners of the county where the road is situated may agree upon the terms and conditions of the appropriation. Section 4334 (section 7089) provides that such railway shall be holden to the county commissioners or county for all expenses incurred in relocating and opening the portion of the road appropriated. It would appear under these statutes that the county commissioners were powerless to prevent this railway company from taking possession of this highway, and it would also seem that the commissioners were justified in making an adjustment with the railroad company whereby they obtained the \$8,000 for the benefit of the county. The new road, which was laid out and intended to give the service which had formerly been given by the abandoned road, was shown to have cost at the time of the trial some \$8,000, and to require some \$4,000 more for its completion. We think it satisfactorily appears from the evidence that it would have been highly impracticable to have repaired the old road; that it never could have been made a satisfactory highway; and that its continuance would have necessitated large expenditures, for which it would have given very poor service in return. We think it was a county road over which the commissioners had supervision.

There is no contention that they had any personal interest in the transactions involved, or that their actions were in any wise attended by fraud or improper considera-

tions. They appear to have exercised their judgment in dealing with a matter which the statute brings within their official province. The view we entertain upon the merits of the case makes it unnecessary for us to pass upon the question of the right of the state upon the relation of the Attorney General to maintain a proceeding of this character.

The judgment of the superior court is affirmed.

FULLERTON, MOUNT, CROW, RUDKIN, and DUNBAR, JJ., concur.

PEABODY et ux. v. MEACHAM et ux.

(Supreme Court of Washington. April 25, 1908.)

COURTS—NUNC PRO TUNC ORDER—DELINQUENCY CERTIFICATE—FILING.

Where a certificate of delinquency was filed by the county treasurer on May 9, 1901, prior to the publication of summons in proceedings to subject the land taxed to the payment thereof, but the clerk omitted to mark the same filed as of that date, or until the certificate was returned to the clerk's office by the treasurer on June 10, 1901, when it was erroneously marked and entered as filed as of that date, the court after judgment of foreclosure was authorized by a nunc pro tunc order to correct the entry of the date of filing such certificate, so as to show that it was in fact filed on the earlier date as against subsequent purchasers from the defendants in the foreclosure proceedings.

Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by F. W. Peabody and wife against George F. Meacham and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Alexander & Bundy, for appellants. Brownell & Coleman, for respondents.

CROW, J. Action by F. W. Peabody and Katie A. Peabody, his wife, against George F. Meacham and Lucia M. Meacham, his wife, to quiet title to real estate in Snohomish county. From a judgment in favor of plaintiffs, the defendants appeal.

The respondents claim title under a county foreclosure and sale for delinquent taxes. There is no dispute as to the facts which were stipulated. Those material to this appeal are that taxes levied against the property for 1895 and prior years became delinquent; that on January 31, 1898, a certificate of delinquency was issued by the treasurer to Snohomish county; that on May 9, 1901, the county treasurer took the certificate of delinquency to the office of the clerk of the superior court, and delivered the same to a deputy clerk to be filed, but immediately thereafter temporarily withdrew it for use in his own office in completing a copy thereof; that at the time of its delivery the deputy clerk received the certificate for filing, but neglected to mark the same as having been filed, or to make any entry upon the books or records of the clerk's office showing such filing; that on May 24, 1901, publication of

notice of foreclosure was commenced; that on June 10, 1901, the certificate of delinquency was returned by the county treasurer to the office of the clerk of the superior court, and that the clerk, not knowing of its previous delivery to his deputy, then marked it as filed on June 10, 1901, and made corresponding entries upon the records in his office; that on October 21, 1901, a default foreclosure judgment was entered, in pursuance of which the property was sold to Snohomish county; that on September 5, 1902, after the judgment and sale, the superior court of Snohomish county, without notice, made and entered an *ex parte* nunc pro tunc order, directing the clerk to change the filing marks upon the certificate of delinquency from June 10, 1901, to May 9, 1901, and to so amend the records in his office as to cause them to recite that the certificate had been filed on May 9, 1901; that, except as above stated, the certificate was not in the office of the clerk of the superior court until June 10, 1901; that prior to that date no entry appeared in the office of the clerk of the superior court to show that it had been filed on May 9, 1901, or on any other date; that from and after June 10, 1901, until judgment and sale, and until September 22, 1902, all files, records, and entries in the office of the clerk of the superior court recited that the certificate had been filed on June 10, 1901; that the respondents afterwards acquired title by deed from Snohomish county, and that the appellants afterwards acquired their alleged title from former owners, defendants in the foreclosure action.

The points raised by appellants are that it affirmatively appears from the foreclosure proceedings that the court was without jurisdiction because the certificate of delinquency was not filed in the office of the clerk until June 10, 1901, which was after the first publication of notice had been made; that the statutes then in force (section 3, c. 178, p. 385, Sess. Laws 1901) provided that the county treasurer should issue certificates of delinquency to the county and file the same with the clerk of the superior court, and that thereupon foreclosure proceedings should be commenced; that under this act the actual filing of the certificate was a condition precedent to the commencement of the foreclosure; that, without such filing, the court obtained no jurisdiction; and that the subsequent nunc pro tunc order changing the date of filing to May 9, 1901, which was made without notice on an *ex parte* application of the county attorney, was unauthorized and void. It is conceded and stipulated that the lots in dispute were included in the same foreclosure proceeding which was sustained by this court in *Washington Timber & Loan Company v. Smith*, 34 Wash. 625, 76 Pac. 267. The questions now raised were there determined adversely to appellants' contention. An examination of our opinion in that case will show that the facts now before us were there stated and

passed upon. We then said: "The next objection to the sufficiency of the foreclosure is that the certificates of delinquency were not properly filed in the office of the clerk of the superior court before publication of summons. The complaint, however, shows that a nunc pro tunc order was made by the court in the foreclosure cause, by which it was declared that the certificates were in fact filed in the clerk's office on May 9, 1901, and it was directed that they be so marked, which was done, and the file mark was changed from June 10, 1901, to the above-named date. That date was 15 days before the first publication of the summons. It having been already determined that the court had jurisdiction of the cause by reason of the time the certificates were issued, and it appearing by the record that the certificates were filed in time, it follows that the point now raised relates to a mere irregularity which should have been raised in the foreclosure case. While the nunc pro tunc order was made after judgment, yet, assuming, as we must, that the record speaks the truth, the correction was such a one as could have been made during the progress of the action, under section 18, c. 141, p. 299, Laws 1899. Appellant is therefore estopped to raise the objection now. See section 1767, Ballinger's Ann. Codes & St. (Pierce's Code, § 8704). Also *Swanson v. Hoyle*, 32 Wash. 169, 72 Pac. 1011. The summons and its publication, we think, complied with the law. The property owner was therefore within the jurisdiction of the court, and was required to take notice of the action."

The arguments of the appellants now presented are substantially the same as those which were made in the *Washington Timber Company Case*. The entire substance of their present contention is (1) that the certificate of delinquency was not filed prior to June 1, 1901; (2) that the publication was commenced without authority of law; (3) that the judgment entered thereon was void; and (4) that the nunc pro tunc order was also void. The fact that on May 9, 1901, the county treasurer took the certificate of delinquency into the clerk's office for the express purpose of filing the same is not disputed, although the deputy clerk at that time failed to make the proper filing marks and entries. On June 10, 1901, an inadvertent and erroneous entry was made. Afterwards the judgment was entered and a sale made to the county, but later, and before the appellants acquired their present alleged title by quitclaim deed from defendants in the foreclosure proceeding, and before respondents acquired their title from Snohomish county, the trial court by a nunc pro tunc order directed a correction of the filing marks and records to recite the actual facts. "A court of record has an inherent power over its own records which includes the authority to require the correction of any errors that may creep into them. This power is not lost by lapse of time or the expiration of a term of court. The duty of a court to see

that its records speak the truth is an affirmative and active one; and it is not a jurisdictional prerequisite to its performance that one party should invoke it by motion, or that the other should have notice before action is taken." *Christlisen v. Bartlett*, 73 Kan. 401, 85 Pac. 594.

The judgment is affirmed.

HADLEY, C. J., and MOUNT, DUNBAR, FULLERTON, and RUDKIN, JJ., concur.

HEYBROOK v. INDEX LUMBER CO. et al.
(Supreme Court of Washington. April 25, 1908.)

1. BOUNDARIES—CONFLICTING DATA—PRECEDENCE BETWEEN.

Where the quarter section corners on two opposite sides of a section in which the lands of adjoining landowners lay were in place, and the dividing line between the adjoining lands was a straight line drawn between the two corners, such line was the boundary between the lands, instead of a line run on the magnetic variation given by the government surveyor when surveying the exterior lines of the section, since the variation could not control fixed monuments; the true corner always being where the United States surveyor establishes it, whether the point coincides with the other data or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 14-19.]

2. TRESPASS—CASUAL OR INVOLUNTARY CHARACTER.

Where two adjoining landowners disputed continuously over the location of the boundary lines between their lands, and one of them, instead of resorting to some proper mode for determining the true line, adopted an arbitrary standard not sanctioned by usage or law, and cut timber up to the line established in such manner, regardless of the protest of the other owner, his trespass in cutting the timber up to the line claimed by him, where such line was not the true boundary, was not casual or involuntary.

3. SAME—JOINT TRESPASS—EVIDENCE.

Evidence held sufficient to show that a trespass was jointly committed by two corporate defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, §§ 123-127.]

Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by Louis G. Heybrook against the Index Lumber Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Brownell & Coleman, for appellants. Coolery & Horan, for respondent.

PER CURIAM. The respondent is the owner of 40 acres of timber land described as the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 20, in township 27 N., of range 10 E., of the Willamette meridian, situated in Snohomish county, Wash. The appellant, H. J. Miller Lumber Company, owns the S. W. $\frac{1}{4}$ of the same section. In 1905 the appellant logged off its quarter section, and in so doing trespassed, so the respondent claimed, upon his land, cutting therefrom 23 trees, containing some 111,857 feet of saw timber. The trees,

after being cut, were taken to the mill of the appellant, Index Lumber Company, and there sawed into lumber, which lumber the appellants afterwards appropriated to their own use. The respondent thereupon brought this action to recover the treble value of the trees, alleging that the trespass was not casual or involuntary, but was made at a time when the appellants had probable cause to believe that the land on which the trespass was committed was the property of the respondent. The cause was tried in the court below without a jury, and resulted in a finding and judgment for the respondent in the sum of \$419.46, being the treble value of the timber the court found to have been taken. This appeal is prosecuted from the judgment so entered.

The questions presented by the record are the following: (1) Was there in reality any trespass? (2) If there was a trespass, was the trespass casual or involuntary? (3) Was there such a joint action between the two defendants as to render them both liable for the trespass? We think the trial court correctly answered each of these questions. The quarter section corners on the north and south sides of the section in which the lands of the parties lay were in place. The dividing line between their lands was a straight line run between these two corners. Instead of adopting this line, the appellants adopted a line run on a magnetic variation of $23\frac{3}{4}$ degrees, because the United States government surveyor had given this as the variation of the magnetic needle when surveying the exterior lines of the section. But this variation cannot control over the fixed monuments. The true corner is always where the United States surveyor establishes it, whether this point coincides with the other data given or not.

It is said, however, that the corner taken to be the quarter section corner on the north side of the section was not the corner established by the United States government surveyor, and for that reason the appellants had a right to resort to the magnetic variation to determine the true line. But, if this contention were true in fact, the rule contended for would not follow. If the corner on the north was actually lost, the line through the section should have been run from the known quarter corner to a post on the north line half way between the section corners, and this regardless of the magnetic variation reported by the government surveyor. We think, however, that the evidence fairly establishes the fact that the corner found on the north side of the section was the true quarter section corner, or, at least, a corner set at the place where the original government corner was established.

On the second question, we think the evidence justifies the court's findings, to the effect that the trespass was not casual or involuntary. There was a dispute between the parties from the very start over the location

of this line, and the appellants, instead of resorting to some proper method for determining the true line, adopted an arbitrary standard not sanctioned by usage or law, and cut up to the line so established regardless of the protests of the respondent. Under these circumstances, it is too much to claim that the trespass was casual or involuntary.

On the last question, the evidence shows that the two appellants are practically one concern, that the same individuals who own and manage the one also own and manage the other, and that the appellants were both interested in the business of removing the timber. There was therefore sufficient evidence on which to find a joint trespass.

The judgment is affirmed.

ANDERSON et al. v. McCARTHY DRY GOODS CO. et al.

(Supreme Court of Washington. April 29, 1908.)

NEGLIGENCE—EVIDENCE—RES IPSA LOQUITUR.

Under the rule of *res ipsa loquitur*, a prima facie case of negligence is shown, where a basket from an overhead carrier system, of standard make and in general use, falls on a customer in a store.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 218.]

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Peter Anderson and wife against the McCarthy Dry Goods Company and its receiver. Judgment for defendants. Plaintiffs appeal. Reversed and remanded for new trial.

John E. Humphries and Geo. B. Cole, for appellants. Kerr & McCord, for respondents.

ROOT, J. This was an action by appellants for damages alleged to have been sustained by appellant Mrs. Anderson on account of a personal injury received by a basket falling from an overhead carrier system in the store of the respondent company. From a judgment of nonsuit this appeal is prosecuted.

The material facts shown were about these: Mrs. Anderson entered respondent company's store to make some purchases, and, while there in the capacity of a customer, a basket used upon respondent's carrier system conveying goods to and from the wrapping counter fell or was precipitated from the track, and struck her. No evidence was introduced, except as to facts hereinbefore stated, showing or tending to show that the apparatus was improperly installed or out of repair. The evidence showed that the system was one of standard make and in general use. Appellants invoke the rule of *res ipsa loquitur*, asserting that the fact of the basket falling or being precipitated from the carrier track upon appellant under the circumstances mentioned was sufficient to establish a prima facie case of negligence as against respondent

company. The rule of *res ipsa loquitur* must be invoked sparingly, and applied only where the facts and demands of justice make its application essential. Negligence is never to be presumed from the mere happening of an injury or accident. But, when certain physical conditions are established, together with certain happenings in connection therewith, it is sometimes permissible to deduce therefrom a conclusion of the fact of negligence. "Though, as stated above, negligence is never presumed from the mere fact of injury, yet the manner of the occurrence of the injuries complained of or the circumstances surrounding may well warrant an inference or presumption of negligence; such a situation being described by the familiar phrase '*res ipsa loquitur*.' As a matter of course, the application of the maxim in question depends on the peculiar facts and circumstances of each particular case. * * * The presumption which arises by virtue of the application of the maxim, '*res ipsa loquitur*,' is usually referred to as a prima facie or rebuttable presumption, which, when it arises, merely shifts the burden upon the defendant to disprove the inferred existence of negligence by evidence that as a matter of fact all proper and reasonable care was employed." 21 Am. & Eng. Enc. of Law, 512, 513. "Sometimes the duty which the defendant owes to the plaintiff is of such a nature that proof that the accident happened to the plaintiff under certain circumstances will be of such legal value as to afford evidence of negligence on the part of the defendant, and make out a prima facie case in favor of the plaintiff. This is the doctrine of *res ipsa loquitur*, and it is not applied unless the thing causing the accident is under the control of the defendant or his servants, and the accident is of a kind which does not ordinarily occur if due care has been exercised. * * * It is therefore generally more correct to say that there are cases where the fact that the accident happened under given conditions, and, in connection with certain circumstances, will amount to evidence of negligence sufficient to charge the defendant. To illustrate this, let us take again the case of a traveler in the highway. While proof of the mere fact that he was struck and knocked down by some substance in front of A.'s building will not entitle him to recover damages of A., yet suppose that he is able to show (1) that he was struck by some solid substance; (2) that this substance was a bale of goods; (3) that, at the time it struck him, this bale of goods was being lowered from the window of a warehouse above the street; (4) that A. was owner of this warehouse. This, it has been held, will make out a prima facie case against A. But A. might rebut this prima facie case by showing (1) that the bale was being lowered without his knowledge by the servants of another person; or (2) that the traveler was himself one of the persons engaged in lowering the bale; or (3)

that, although the plaintiff was using the sidewalk as a traveler, yet he had stopped, and was standing still under the window from which the bale was being lowered, and that he was warned of the danger and told to stand from under, but negligently failed to do so. * * * A person is lawfully on the street when an adjoining building falls down, injuring him. In a suit against the owner of the building, he makes out his case by showing the facts stated without more. The reason is that the owner of the building adjoining a street or highway is under a legal obligation to take reasonable care that it is kept in a safe condition, so that it will not fall into the highway, injuring persons lawfully there. If it did so fall, every fair-minded man would draw the inference that it had not been properly inspected and kept in repair; and, if the contrary were true, it is easy for the defendant to show that fact. In another case it appeared that the defendants, who occupied for business purposes the second and upper floors of a building, were hoisting a box, weighing about 500 pounds, to their rooms, by means of iron hooks attached to its sides. Just as it reached the second floor the hooks broke, and the box fell, broke through the hatchway on the first floor, and struck and injured the plaintiff, who was lawfully in the basement. This, without more, was held evidence of negligence on the part of the defendants warranting a verdict for the plaintiff. So proof of the fact that water escaped from the defendant's hydrant into the plaintiff's apartment in the story below makes out a prima facie case of negligence, which the defendant must excuse or pay damages. So the fact that tools or other objects fall from an elevated railroad and injure a person thereunder, in the absence of explanation, is generally held to raise a presumption of negligence on the part of the railroad company." Thompson, Com. on Law of Neg. §§ 7635, 7636.

Ordinarily it must be a peculiar and exceptional case that will justify the invocation of this rule, except in cases against common carriers where it is frequently applied. However, where the proven or admitted physical conditions, together with the other established facts, show that the occurrence is one which could not ordinarily in the nature of things happen but for negligence on the part of defendant, and it further appears that negligent operation of the apparatus is naturally accompanied with danger, and its control and the knowledge of its condition are practically limited to the defendant or his servants, and evidence as to the same is unavailable except through him or them, the rule may usually be invoked by one to whom the defendant owed a duty of protection, and who was under no obligation to, and did not, know or have reason or opportunity to know of the danger that threatened him. The operation of baskets upon such a carrier system is fraught with some danger to customers

over whose heads the apparatus is suspended. While a six or eight pound wire basket with metallic wheels could not be presumed to inflict much of a physical injury if it fell upon a person, yet it might occasion some personal injury, as well as damage to the customer's clothing. The danger is greater than from the usual conditions obtaining in a store without such a system, and the knowledge of the apparatus, as to its being or not being in repair, is peculiarly with the storekeeper or his servants in charge. For this reason, greater care is required to protect his customers than would be demanded concerning the ordinary conditions existing in such a store not having such apparatus. When a plaintiff proves the existence of this carrier system, and the falling of the basket therefrom, causing damage, we think facts are shown from which a reasonable mind might properly infer that the apparatus was improperly constructed or out of repair. Hence a case for the jury is thus established. This case may be overcome by showing that the apparatus was properly installed and in good repair, or that it had been properly inspected and nothing wrong discovered. This defendant could easily prove if such were the facts. Upon rebuttal, of course, no substantive evidence could be introduced by a plaintiff except such as tended to rebut the particular probative facts established or sought to be established by respondent. In other words, plaintiff could not rely upon the rule in his case in chief, and then, upon rebuttal, introduce evidence of negligence that should have been produced in making his case. We think the rule here laid down is fair and just. A carrier system such as this is a mechanical contrivance, the operation of which requires some peculiar skill or knowledge not possessed by the average person, and carelessness in its operation or maintenance is calculated to endanger customers impliedly invited within its presence. Such a person would not ordinarily have an opportunity to inspect the apparatus or have sufficient technical knowledge of the device to know whether or not it was properly adjusted or in repair even if he did examine it. It would naturally be difficult to get evidence of its condition except from its owner or his servants. On the other hand, the owner, having the system in his possession, and under his control, and being legally bound to properly inspect and know of its condition, could readily produce evidence thereof. If the condition was proper, he could easily show it, and thus avoid liability. If improper and dangerous, he should not as a matter of justice escape liability, because from the peculiar nature of the thing the injured person was unable to get evidence of its condition.

Appellants cite, apparently with much reliance, the case of *LaBee v. Sultan Logging Company* (Wash.) 91 Pac. 560. A rehearing has been granted in that case, and the decision of the case at bar is made without tak-

ing into consideration the opinion in the case cited. The rule invoked has been recognized, however, in the cases of *Firebaugh v. Seattle Electric Company*, 40 Wash. 658, 82 Pac. 995, 2 L. R. A. (N. S.) 836, 111 Am. St. Rep. 990, and *Williams v. Spokane Falls & Northern Railway Company*, 39 Wash. 77, 80 Pac. 1100. In the case of *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, the Court of Appeals of New York applied the rule in a case where a passenger elevator in a building became unmanageable and a heavy counterweight fell down the shaft, killing a passenger in the elevator cage. In that case the trial court gave the following instruction: "There is another rule to which the plaintiff asks me to call your attention, and I am going to call to your attention the rule that where an accident happens which, in the ordinary course of business, would not happen if the required degree of care was observed, the presumption is that such care was wanting, and if you find in this case that this accident was one which, in the ordinary course of business, would not have happened if the required degree of care was observed, you have a right to presume that such care was wanting." This was upheld by the Court of Appeals, which, among other things, quoted from *Shearman & Redfield on Negligence*, § 59, as follows: "It is not that in any case negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer." And the court in its discussion used the following language: "The maxim is also in part based on the consideration that, where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present." In the case of *Ugla v. Brokaw*, 117 App. Div. 586, 102 N. Y. Supp. 857, it was held that, where a coachman driving in the street was struck by part of a skylight blown from an adjoining building, the incident itself raised a presumption of negligence under the rule of *res ipsa loquitur*. The rule is applied to cases of injury from falling objects perhaps more than to any other class of cases aside from those having to do with common carriers. Such cases were the following: *Kaples v. Orth*, 61 Wis. 531, 21 N. W. 633; *Morris v. Strobel & W. Co.*, 81 Hun. 1, 30 N. Y. Supp. 571; *The Joseph B. Thomas* (D. C.) 81 Fed. 586; *Taylor v. Peckham*, 8 R. I. 349, 91 Am. Dec. 235, 5 Am. Rep. 578; *Volkmar v. Manhattan Ry. Co.*, 134 N. Y. 418, 31 N.

E. 870, 30 Am. St. Rep. 678; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Scheider v. Am. Bridge Co.*, 78 App. Div. 163, 79 N. Y. Supp. 634; *Mentz v. Schleren*, 36 Misc. Rep. 813, 74 N. Y. Supp. 889; *McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464; *Weller v. McCormick*, 52 N. J. Law, 470, 19 Atl. 1101, 8 L. R. A. 798; *Schnitzer v. Phillips*, 108 App. Div. 17, 95 N. Y. Supp. 478. See, also, *Hammarberg v. St. Paul & T. Lumber Co.*, 19 Wash. 538, 53 Pac. 727; *Inland & Seaboard C. Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453; *Connolly v. Des Moines Inv. Co.*, 130 Iowa, 633, 105 N. W. 400; *Weber v. Lieberman*, 47 Misc. Rep. 593, 94 N. Y. Supp. 460; *Lubelsky v. Silverman*, 49 Misc. Rep. 133, 96 N. Y. Supp. 1056; 6 Current Law, 772. We think the case should have been submitted for the jury to say whether negligence of defendant was established by the facts proved, or respondents should have been permitted, if they desired, to show that the carrier system was properly installed, and that it was in good repair, or that it had been properly inspected without anything defective being discovered, or that the basket was caused to fall by some person or influence for whom or which respondent was not responsible.

The judgment of the honorable superior court is reversed, and the case remanded for a new trial.

HADLEY, C. J., and RUDKIN, DUNBAR, CROW, and FULLERTON, JJ., concur.

(49 Wash. 363)

RUSSELL v. B. SCHADE BREWING CO.
et al.

(Supreme Court of Washington. April 25, 1908.)

1. WITNESSES—CROSS-EXAMINATION.

Refusal to allow witness to be cross-examined as to what he would have done, had the circumstances been different from what he alleged they were, is proper.

2. TRIAL — DECISION — REVIEW — WRITTEN FINDINGS.

The court by orally giving an opinion, to the effect that judgment will go for defendant, and then, on plaintiff moving for judgment notwithstanding such opinion, entering written findings and conclusions on which judgment is rendered for plaintiff, does not review and reverse its decision, as under *Ballinger's Ann. Codes & St. § 5029* (*Pierce's Code*, § 645), providing that, on the trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk, and that, in giving the decision, the facts found and the conclusions of law shall be separately stated, and judgment on the decision shall be entered accordingly, there is no decision till the making of the written findings.

3. EVIDENCE — ADMISSIONS — ENTRY IN BOOK OF ACCOUNT.

The entry by a physician in his book of account, on account of treatment of injuries received by B., in the employ of the S. Company, "account of B. residence care of S. Company," the word "residence" being part of the printed form, is not such an admission as excludes consideration of plaintiff's explicit testimony that

his employment was by the S. Company, he testifying that the entry was not intended as a charge against B., but that the entry was simply his method of identifying the account as that of the S. Company for services rendered B.

4. CORPORATIONS—POWER OF PRESIDENT—EVIDENCE.

Evidence that, when an employé of a corporation was injured at its manufactory, S., its president, was there, and immediately gave directions as one apparently in charge; that the employés present appeared to expect him to do; that his consent to the calling of plaintiff, a physician, was sought and obtained after he had first suggested the calling of another; that plaintiff was called under his directions, and, when he arrived, he told S. it was necessary to immediately take the patient to the hospital; that an ambulance was then called at the direction of S.; that he afterwards talked with plaintiff, with the patient, and with the nurse in attendance as one having general powers of management; and that the confinement of the patient for two months, and the performance of two operations on him, and daily treatment of him, during that time, by plaintiff, was known of by S.—makes a prima facie showing that S. assumed to direct the affairs of the corporation, and was permitted by it to hold himself out and to act as one exercising apparent general authority, and so authorized to bind it by his contract of employment, on its behalf, of plaintiff to attend the injured employé.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Thomas A. Russell against B. Schade and another. From the judgment against the defendant B. Schade Brewing Company, it appeals. Affirmed.

H. M. Stephens, for appellant. James Dawson and F. E. Langford, for respondent.

HADLEY, C. J. This is an action to recover for services of plaintiff as a physician and surgeon. Suit was brought against B. Schade and B. Schade Brewing Company, a corporation, as defendants. The complaint alleges that on or about the 8th day of December, 1905, one Blickensdorfer was in the employ of the defendants, and that, while engaged in the work of his employment, he fell from a ladder or scaffold, and was severely injured; that about that date the defendant B. Schade, acting in his own behalf and in behalf of B. Schade Brewing Company, employed the plaintiff in his capacity as physician to take charge of Blickensdorfer, and to care for his injuries; that pursuant to said employment, he took charge of the patient, and furnished the usual medical care and attendance necessary in such cases, and continued so to do until about June 13, 1906, the value of the services being placed at \$1,186. It is alleged that the defendant Schade was the president of the defendant corporation, and appeared to be in the management and charge of its plant and affairs. The defendants by their answer admit the injuries to the employé, but deny that they employed the plaintiff to treat him. The cause was tried by the court without a jury, and resulted in a judgment for the plaintiff against the brewing company for \$1,186. Judgment against Schade was denied. The corporation has appealed.

The first suggestion of error is that the court refused to permit cross-examination of the respondent with reference to what he would have done if Schade had not made the alleged promise to pay him for the services. Cross-examination for the purpose of ascertaining all the facts and circumstances that actually existed was proper; but it was wholly immaterial what respondent might or would have done under merely supposed circumstances which he asserted did not exist, and it was not error to exclude cross-examination on such a purely speculative subject.

It is next urged that the court reviewed and reversed its own decision after it had been rendered, and that it was error to do so. At the conclusion of the introduction of testimony, the court delivered an oral opinion which was to the effect that judgment should go for the appellant. The court orally stated its reasons in the mere form of an opinion, but no actual decision was given in writing as required by section 5029, Ballinger's Ann. Codes & St. (Pierce's Code, § 645), when a cause triable by jury is tried by the court without a jury. The section is as follows: "Upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly." The next section (5030) provides that the findings of the court upon the facts shall be deemed the verdict. It is manifest therefore, that there is no verdict upon which judgment can be rendered until the findings have been given in writing and filed with the clerk. Following the announcement of the court's oral opinion, the respondent moved for judgment notwithstanding the same, and the written findings and conclusions afterwards entered constituted a verdict in favor of respondent upon which judgment was accordingly entered. That written findings are necessary under the above statute in actions at law tried by the court without a jury was early held by this court, although they may not be required in equitable actions. *Bard v. Kleeb*, 1 Wash. St. 370, 25 Pac. 467, 27 Pac. 273; *Kilroy v. Mitchell*, 2 Wash. St. 407, 26 Pac. 865; *Sadler v. Nlesz*, 5 Wash. 182, 31 Pac. 630, 1030. At no time did the court make a decision in writing favorable to appellant; and we think, particularly in view of our statute, that a distinction must be made between a mere opinion of a trial court and its decision. In *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565, Mr. Justice Field made the following observations: "The terms 'opinions' and 'decisions' are often confounded, yet there is a wide difference between them, and in ignorance of this, or by overlooking it, what has been a mere revision of an opinion has been sometimes regarded as a mutilation of a record. A decision of the court is its judgment; the opinion is the

reasons given for that judgment. The former is entered of record immediately upon its rendition, and can only be changed through a regular application to the court, upon a petition for a rehearing, or a modification. The latter is the property of the judges, subject to their revision, correction, and modification in any particular deemed advisable, until, with the approbation of the writer, it is transcribed in the records." Somewhat similar observations were made in *Thomas v. Tanner*, 14 How. Prac. (N. Y.) 426, as follows: "Some misapprehension seems to have resulted from the use of the term 'decision' in the 267th section of the Code. I have recently seen a case where my own opinion in an action tried without a jury had been carried bodily into the judgment record, and made the basis of a judgment which the attorney had conceived himself entitled to, as the result of the views expressed in that opinion. But the decision which, by the 267th section of the Code, is required to be 'given in writing and filed with the clerk,' is a very different thing from the opinion which the judge may think it proper to write. The opinion may, and often does, serve to enable the attorney to prepare the 'decision' for the judge to sign. This is the primary office of the opinion. But whether there be an opinion or not there must, in every case of a trial by the court, be a decision. That decision must be made by the judge. This can only appear by his signature or allocatur." It follows that, when an action at law is tried by the court without a jury, the mere announcement of an oral opinion is not the decision within the meaning of our statute, since the "decision" as it is named in the statute "shall be given in writing and filed with the clerk." Until that has been done, the decision that shall be rendered is still within the mind of the court and under its control. In the case at bar the court did not review any actual decision; and but one was rendered within the meaning of our statute.

It is argued that the court erred in not giving proper consideration to what is alleged to have been the admission of respondent. This contention is based upon the following entry in respondent's books of account: "Account of John Blickensdorfer, residence care of the Schade Brewing Company." It is insisted that the above entry is an admission that the charge was not at the time made against the appellant, but against the injured man. Respondent testified that it was not so intended, but that the entry was simply his method of identifying the account as that of appellant for services rendered Blickensdorfer. The account book was one with certain printed headings, and blanks left for entries. The word "residence" was printed, and was not erased. The actual entry respondent testified was made without any reference to the matter of residence.

The oral evidence was explicit as to the employment, and it is not to be excluded from consideration by the introduction of a mere loose memorandum not intended to be a permanent memorial of the agreement, to which class of writings entries made in books of account belong. 21 Am. & Eng. Enc. of Law (2d Ed.) 1086-7.

It is assigned that the court erred in not giving judgment for the appellant. We think without doubt that there is sufficient evidence to show that Schade intended in behalf of the corporation to employ the respondent, and that he intended that respondent should so understand it. The remaining question in this connection is whether he had the authority to bind the corporation. It is admitted in the pleadings that Schade was at the time the president of the corporation. Under many authorities, the mere fact that he was the president did not of itself empower him to make the contract. The rule followed in Illinois, as stated by the Supreme Court of that state in *Bank of Minneapolis v. Griffin*, 168 Ill. 314, 48 N. E. 154, is to the effect that, as a general rule, a corporation acts through its president and through him executes its contracts, and that an act pertaining to the business of the corporation not clearly foreign to the general power of the president, done through him, will, in the absence of proof to the contrary, be presumed to have been authorized by the corporate body. The court recognized that an exception to the general rule may be created by the provisions of the by-laws of a corporation limiting the powers of the president, but held that, in the absence of proof that such by-laws existed, the presumption of authority prevailed. If the above rule should be applied here, then Schade, being the president and head of the corporation, would be presumed to have been authorized, since there is no proof to the contrary. There is no proof that the by-laws of the corporation, or any other act of the corporate body, had placed any limitations upon his power in the premises. The Illinois rule is, however, criticised by appellant as not being in harmony with the weight of authority. It is true the authorities generally do not permit the presumption of authority to arise from the mere fact that one is president, but it has often been held that from such fact, coupled with a course of conduct in the way of active participation in the management of the corporation's affairs, authority will be implied, in the absence of proof that it has been expressly withheld. *White v. Elgin Creamery Company*, 108 Iowa, 522, 79 N. W. 283; *Meating v. Tigerton Lumber Company*, 118 Wis. 379, 89 N. W. 152; *Wells, Fargo & Co. v. Enright*, 127 Cal. 669, 60 Pac. 439, 49 L. R. A. 647; *Towers v. Stevens Cattle Company*, 83 Minn. 243, 86 N. W. 88; 10 Cyc. 903, and authorities cited. This court has already expressly held that, when a corporation allows certain

officers to participate in the management of its business, such as president, vice president, and superintendent, it must be responsible for their acts unless it affirmatively shows they were unauthorized. *Anderson v. Wallace Lumber & Mfg. Co.*, 30 Wash. 147, 70 Pac. 247; *Carrigan v. Port Crescent Improvement Co.*, 6 Wash. 590, 34 Pac. 148. It is true the testimony in the case at bar did not comprehensively cover the subject of the conduct of Schade in his relations with the corporation in general. It did show, however, that at the time respondent was injured Schade was at the brewery, that he immediately assumed to give directions as one apparently in charge, and that employes present appeared to expect him to do so. His consent to the calling of respondent was sought and obtained. He first suggested the calling of another. Respondent was called under his directions, and, when he arrived at the brewery, he mentioned to Schade the necessity of taking the patient to the hospital at once. Schade thereupon gave directions to the employes of the company to order an ambulance for that purpose, which was done. He afterwards talked with respondent, also with the injured man, and with a nurse who served the latter as one having general powers of management. The confinement of the injured employe covered a period of several months, during which time respondent performed two amputations upon one of the patient's legs, and otherwise treated him almost from day to day. These facts were well known to Schade, and he was bound to know that the services were being rendered in reliance upon his authority to make the employment. Having this knowledge as the president and head of the corporation, it should not be said that the corporation itself was under such circumstances wholly without knowledge of the situation. Schade was not only known to the respondent as the president of the corporation, but there was sufficient evidence to make a prima facie showing that he assumed to direct its affairs, and that he was permitted by the corporation to hold himself out and to act as one exercising apparent general authority. After such a prima facie showing, it devolved upon the corporation to show that Schade did not have the authority if such was the fact. This was not done, and we think, in view of all the evidence, the court did not err in entering judgment against the corporation. In so holding we do not wish to be understood as at this time giving our full allegiance to the Illinois doctrine as heretofore stated, that the presumption of authority arises from the mere fact that the employment is made by the president of a corporation. As we have seen, the facts of this case are such as place it in another and larger class of cases, which require some appearance of active direction of corporate affairs in order to raise the implication of authority.

Having discussed all the subjects assigned in the briefs, and finding no reversible error, the judgment is affirmed.

MOUNT, CROW, ROOT, and DUNBAR, JJ., concur.

ANDERSON v. AUPPERLE

(Supreme Court of Oregon. April 28, 1908.)

1. SEDUCTION—CIVIL LIABILITY—RIGHT OF ACTION—STATUTES.

The common-law action for the seduction of an unmarried female, in the name of the person having the right to her services, for loss of services, is not displaced by B. & C. Comp. § 35, authorizing a father, or, in case of his death or desertion of his family, the mother, to maintain an action for the seduction of a daughter, though there is no loss of services, and the common-law right of action for the seduction of a granddaughter, who is a member of plaintiff's household, exists.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seduction, §§ 9-14.]

2. SAME—DAMAGES.

Exemplary damages are recoverable when plaintiff is so connected with the female seduced as to be capable of receiving injury through her dishonor, regardless of the existence or nonexistence of the malice of defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seduction, § 47.]

3. SAME.

In an action for the seduction of a granddaughter, allegations in the complaint demanding special damages for injuries to plaintiff in her reputation and in that of her family and for injuries to her feelings are proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seduction, §§ 28-32, 45-49.]

4. SAME—EVIDENCE—ADMISSIBILITY.

The child born to the female seduced may be exhibited to the jury, though the child is under three months.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seduction, §§ 42, 76; vol. 6, Bastards, §§ 172, 173.]

5. SAME.

The question whether the sister of the female seduced, who also lived in plaintiff's family, objected when the female seduced went with other men than defendant, was immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seduction, § 35.]

6. SAME.

The testimony of a witness who had lived across the street from plaintiff's home for four years and had been well acquainted with plaintiff and her granddaughters, who lived with her, for over two years, that he had never seen defendant with the granddaughter seduced, was properly excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seduction, § 35.]

7. EVIDENCE—HEARSAY.

In an action for the seduction of plaintiff's granddaughter, the testimony as to what a sister of the female seduced had said concerning the conduct of the female seduced was properly excluded, in the absence of the laying of a proper foundation for the impeachment of the sister as a witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1174-1192.]

8. WITNESSES—OPINION OF WITNESS—REPUTATION—KNOWLEDGE.

The statement of a witness in an action for seduction that he knew that the reputation for

chastity of the female seduced was bad, based on what the witness had observed, and not on what he had heard others say, was properly excluded; the witness not having proved his qualification to testify on the subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 80-87.]

9. SEDUCTION—CIVIL LIABILITY—EVIDENCE.

In an action for the seduction of an unmarried female, evidence that she swore was inadmissible, since swearing by an unmarried female would not necessarily indicate a lewd character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seduction, § 40.]

10. EVIDENCE—OPINION EVIDENCE.

In an action for the seduction of an unmarried female, the testimony of a witness that the female seduced and a third person drank beer on one occasion, based on his opinion of what was drank, was properly excluded.

11. SEDUCTION—INSTRUCTIONS.

Where on a trial for seduction there was no competent evidence of the reputation for chastity of the female seduced, the court did not err in confining the jury, when determining the issue of chastity, to direct testimony of acts of sexual intercourse, or to circumstantial evidence from which such acts might be inferred.

12. APPEAL — REVIEW—INSTRUCTIONS—PRESUMPTIONS.

Where the record does not purport to contain all the evidence, and is silent on the question whether there was evidence on which to predicate an instruction, the court will presume there was evidence sufficient to make the instruction relevant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3751.]

13. TRIAL — INSTRUCTIONS—SUFFICIENCY—OBJECTIONS.

In an action for seduction, an instruction that, though a woman has once been of unchaste character, she has a right to reform, and when there has been a reformation she may again be a subject of seduction, etc., is not, on a general exception, open to the objection that it is deficient in fullness, and the party excepting must call the attention of the court to the particular grounds to which he objects, so that the court may have an opportunity to make the correction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 627, 628.]

Appeal from Circuit Court, Marion County; George H. Burnett, Judge.

Action by Lucy Anderson against Earl Aupperle. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff sues as one standing in the place of a parent for the seduction of her granddaughter Viletha Thurman by defendant, which occurred on or about January 22, 1906. It is alleged that Viletha was then under 18 years of age, and ever since 1893 had been a member of plaintiff's household, in consequence of the desertion and abandonment in 1891 by her father of his family, and the death of her mother in 1893, and that plaintiff was entitled to the services and society of her granddaughter; that as a result of the seduction Viletha became sick and pregnant and unable to render any services to plaintiff; that in addition thereto plaintiff would thereby be compelled to expend more than \$200 in nursing and taking care of her granddaughter during the latter's pregnancy and

sickness; and that plaintiff had been injured in her reputation and in that of her family and wounded in her feelings and disgraced to her damage in the sum of \$10,000. Defendant moved to strike out that part of the complaint referring to special damages, and upon a denial thereof he demurred on two separate grounds, viz., (1) incapacity to sue, and (2) insufficient allegation of facts to support the action. The demurrer also having been overruled, defendant answered by a general denial of the whole complaint with an affirmative defense that Viletha Thurman was not at any of the times mentioned in the complaint a chaste or virtuous child or woman. Issue being joined by a reply, a trial was had before a jury, and at the close of plaintiff's case defendant moved for a nonsuit upon the ground that plaintiff had not legal capacity to sue, that she had not proved facts sufficient to entitle her to a verdict, and that there was not sufficient proof of the seduction. The motion being denied, defendant offered his testimony, whereupon the jury returned a verdict in plaintiff's favor. From the judgment entered thereon defendant appeals, assigning as errors the overruling of his motion and demurrer, besides numerous exceptions taken to the rejection of testimony, and the giving of and refusing to give certain instructions.

A. M. Cannon, for appellant. John A. Jeffrey and M. E. Pogue, for respondent.

SLATER, C. (after stating the facts as above). At common law the only mode in which an action for seduction could be maintained is by bringing such action in the name of some person having a right to the services of the person seduced, the gist of the action being loss of service. 19 Ency. Pl. & Pr. 401; 4 Sutherland, Dam. 3755. The mere relation of parent and child will not give a right of action for the seduction of an unmarried female. That of master and servant, either actual or constructive, must exist. If such a relation exists, it matters not to the cause of action whether the plaintiff be parent, or merely stands in the place of a parent. 4 Sutherland, Dam. 3758. Such are the rules of the common law, and it is not contended here by defendant that under these rules, if they have not been superseded by statute in this state, plaintiff may not recover for the damages alleged. But it is argued by him that by B. & C. Comp. § 35, as interpreted and construed by this court in Patterson v. Hayden, 17 Or. 238, 21 Pac. 129, 3 L. R. A. 529, 11 Am. St. Rep. 822, the right of recovery is limited to the father, or, in case of his death or desertion of his family, to the mother, for the seduction of a daughter, and that loss of service can no longer in this state be the basis for an action of seduction. At any rate it is claimed that since that decision a person not named in the statute suing for the seduction of a female ought to be limited to

a recovery of actual compensatory damages for the loss of services, and be denied exemplary or punitive damages. The common-law remedy for loss of service is not displaced or superseded by a statute authorizing a father to maintain an action for the seduction of his daughter, without allegation or proof of loss of service (*Shellman v. Frymire*, 9 Ky. Law Rep. 894; *Hancock v. Wilhoite*, 1 Duv. [Ky.] 313), especially in the absence of any expression of a legislative intent that such shall be its effect. 25 Am. & Eng. Ency. Law (2d Ed.) 201. Such statutes are usually treated as cumulative in their effect; but under any view or construction of this statute the common-law right of action of persons who stand in the relation of parent to the seduced female could not be affected one way or the other, for they are not mentioned in the statute. As to the extent of the recovery in an action for seduction of a female, the plaintiff may recover exemplary damages when he is so connected with her as to be capable of receiving injury through her dishonor, regardless of whether malice existed. The act of seduction is necessarily wilful. In estimating the injury the jury may take into consideration, besides the loss of services and disbursements for medical treatment and other necessary expenses, the wounded feelings and affections of the parent, the wrong done to him in his domestic and social relations, the stain and dishonor brought upon his family, and the grief and affliction suffered in consequence of it, and give damages accordingly. If the action is brought by any other person than a parent, standing in the relation of parent, it will be governed by the same principles and rules of evidence. 4 Sutherland, Dam. § 1233. Hence no error was committed in overruling defendant's motion to strike out parts of the complaint, or his demurrer thereto.

During the course of the trial, and while Viletha Thurman was upon the witness stand in plaintiff's behalf, she was requested to bring forward the baby to which she had testified she had given birth, and of which the defendant was the father. The child, being then a little under three months of age, was offered and received in evidence for the inspection of the jury, over the objections of the defendant. It is strongly urged by defendant's counsel that it is error to expose, as an exhibit before the jury, a child less than three months of age for the alleged purpose of proving a resemblance to the defendant. The argument is that, "although a resemblance between the parties, properly proved, is some evidence upon the issue, but during the first few weeks or even months of a child's existence it has that peculiar immaturity of features which characterize it as an infant, and that it changes often and very much in looks and appearance during that period" (*Clark v. Bradstreet*, 80 Me. 454, 15 Atl. 56, 6 Am. St. Rep. 221), and that such evidence, when deduced from the exhibit of

an immature child, "is too vague, uncertain, and fanciful a nature to be submitted to the consideration of a jury" (*Hanawalt v. State*, 64 Wis. 84, 24 N. W. 480, 54 Am. Rep. 588). There is, however, a decided conflict of authorities upon the admissibility of such evidence, the adjudications ranging from a total exclusion thereof to an unqualified admission.

We shall not attempt a review of the cases to determine the correct principle of law which should govern the admission of such evidence, or to ascertain where the weight of authority lies; but it will be sufficient for that purpose to quote from the recent and most able opinion of Mr. Chief Justice Parsons in the case of *State v. Danforth*, 73 N. H. 215, 60 Atl. 839, 111 Am. St. Rep. 600, decided in 1905. After reviewing most of the cases on this point he says, at page 219 of 73 N. H., page 841 of 60 Atl. (111 Am. St. Rep. 600), of the opinion: "All the authorities concede, in effect, that there may be cases in which the maturity of the child, or the character of the peculiarities relied upon as a ground of resemblance or dissimilarity, render the child competent evidence on the issue of paternity. The objections urged to the competency of the evidence go rather to its weight than to its relevancy. When comparison is made to determine a difference of race or otherwise, greater weight may properly be given to the evidence; but the ground of its relevancy is the same as when the comparison is between individuals. The objection resting upon the immaturity of the child is merely to the definiteness of the proof. If all individuals developed by a fixed rule, it might be possible to fix upon a certain age below which the child should not be exhibited as evidence on this issue. If there were such an age, its scientific determination would involve the finding of a question of fact upon physiological evidence—an investigation which this court has no means or power to make. Whether the features of a child are sufficiently developed to authorize its use as evidence by comparison with the alleged parent is purely a question of fact. A court of law cannot determine this question of fact as a rule of law without evidence, upon their personal impressions, without basing their judgment upon a 'vague, uncertain, and fanciful' foundation. Conceding that resemblance properly proved is an evidentiary fact competent for consideration in connection with other evidence upon the issue of paternity, and that in certain instances or situations the individuals themselves may furnish evidence of such resemblance, the question whether the evidence offered by one of the individuals—the child—is sufficiently definite to have weight on the question in a particular case is a question of remoteness determinable at the trial term. *Pritchard v. Austin*, 69 N. H. 387, 369, 46 Atl. 188; *Morrill v. Town of Warner*, 66 N. H. 572, 29 Atl. 412." The cases on the subject are quite fully collected in *Wigmore, Ev.* § 166, and in a note to *State*

ex rel. v. Harvey, 52 L. R. A. 500. The conclusion of those authors that the weight of authority coincides with the rule announced in *State v. Danforth*, *supra*, appears to be sustained by an examination of the cases; and, as it meets our views, we must conclude that no error was committed when the evidence was received.

It was immaterial to the issues of the case whether or not Rena Richter, an elder sister of Viletha Thurman, who was also living in plaintiff's family, objected when the latter was going with men other than defendant; and the question of that import propounded to her on her cross-examination by defendant's counsel was not proper cross-examination.

The fact that defendant's witness Moore had never in his life seen defendant with Viletha, although the witness had lived just across the street from plaintiff's home for 4 years, and had been well acquainted with plaintiff and her granddaughters for 2½ years, as he testified, did not tend to disprove the possibility or probability that defendant had been with plaintiff's granddaughter, as alleged in the complaint; and therefore such evidence was immaterial and was properly excluded.

Error is claimed on the alleged ground that, on plaintiff's motion, the court struck out that part of the testimony of Miss Roland where, on examination in chief by defendant's counsel, she related what was said between the plaintiff and Rena Richter with regard to the conduct of Viletha. The question addressed to the witness called for what Mrs. Anderson, the plaintiff, had said to this witness concerning that matter, but the answer contained a statement by Rena Richter to the plaintiff. It was this latter statement, and not what was said by Mrs. Anderson, that was excluded by the court on plaintiff's motion. What Rena Richter may have said would not bind the plaintiff as an admission against her interest, and it would not be competent as impeachment of Rena Richter, because no proper foundation had been laid for the introduction thereof. This witness, on her direct examination, also testified that she knew the general reputation of Viletha Thurman for chastity in the neighborhood in which she lived prior to January 22, 1906, and that it was bad; but on cross-examination she admitted that her opinion was formed from what she had observed, and not from what she had heard others say, and that she had not talked to anybody in particular about the character of Viletha Thurman except just after this trouble began. On plaintiff's motion the statements of this witness as to the character of Viletha Thurman were stricken out, and error is assigned on that account; but, if evidence of that character was admissible for any purpose, the witness had not proved herself qualified to testify upon that matter.

J. W. Parrish, having testified in defend-

ant's behalf that he had seen Viletha Thurman out upon the streets as late as 11 o'clock at night with strange men, was asked what kind of language he had heard Viletha use, as to swearing or anything of that kind. On plaintiff's objection the court excluded the testimony, with the remark: "That does not affect her chastity." What answer was expected to this question by defendant's counsel does not appear; but, judging only from the form of the question, and assuming that the witness, if permitted to testify, would have said that Viletha swore, we should say that swearing by an unmarried female would not necessarily indicate a lewd or lascivious character. It would be an index of her general conduct as to civility or rudeness, and might be material on the question of damages; but it was not offered specifically for that purpose, as the remark of the court clearly indicates.

The exclusion of the testimony of Elmer Russell is assigned as error. He testified that he had seen Viletha in company with one Fletcher, and that they were drinking beer, by the looks of things, at the schoolhouse; that he had seen them coming from the way of the Gallon House (meaning a place where beer was sold) with a bucket, which the witness took to contain beer; that they went in back of the schoolhouse and behind a pile of four-foot wood and out of sight. On plaintiff's objection that the witness was giving merely his opinion as to what the parties were drinking the court struck out this testimony; and that ruling we think was correct.

Defendant's counsel have not urged as error the denial of his motion for a nonsuit, and, assuming that it has been abandoned, we have not considered it.

Defendant requested the court to give the following instruction: "In order to determine whether or not the plaintiff was a chaste female at the time of the alleged seduction, it will be your duty to carefully consider all the evidence, if any, throwing light upon that subject, such as specific acts of wantonness or incontinence, or general behavior tending to show wantonness or vulgarity. It will also be necessary to consider the evidence introduced before you of the general reputation of the plaintiff's granddaughter for virtue and chastity, and if, after weighing all such evidence introduced by the defendant and by the plaintiff on the subject of the moral character, chastity, and virtue of the woman, Viletha Thurman, you come to the conclusion that the plaintiff's granddaughter was not at the time of the alleged seduction a chaste female, then, as I have heretofore said, your verdict must be for the defendant."

The court refused the instruction requested, but instructed the jury as follows: "You are not to consider the attempts to show the reputation of the girl, Viletha Thurman. The witnesses who attempted to testify on that subject were not qualified to so testify, with-

in the rules of the law; and I renew the instruction which I gave to you during the trial: 'You are not to consider any of that attempt to prove her reputation.' The evidence on that part of the case to prove her chastity must be confined to proving acts of sexual immorality on her part. They are entitled to prove that by direct testimony, or by circumstances which shall convince you by preponderance of evidence that she was guilty of actual sexual intercourse with some other man than the defendant prior to the charge named in the complaint."

To the refusal to give, and the giving of these instructions, defendant severally objected, and the question attempted to be raised is whether evidence of general reputation for unchastity is available in a case of this kind as proof of actual unchastity. But whether the unchastity of Viletha Thurman at and prior to the time of the alleged seduction may be established by evidence of her general reputation for virtue and chastity, as contended by defendant's counsel in the requested instruction, or whether he is confined to direct testimony of sexual immorality on her part, or to proof of circumstances from which the fact may be fairly and reasonably inferred, as the jury were instructed by the court, need not be determined, for there was no competent evidence of her reputation for unchastity before the jury to be considered by them. The witnesses who attempted to testify on that subject were not qualified within the rules of law so to testify; and, as we have held, the court rightly rejected the proffered testimony. Therefore no error was committed by the court in confining the jury, when determining the issue of chastity, to direct testimony of acts of sexual immorality by Viletha Thurman, or to circumstantial evidence from which the fact might be inferred.

A general exception was saved to the giving of the following instruction: "I also charge you that, although a woman has once been of unchaste character, she has a right to reform, and, if there has in fact been reformation, she may be again a subject of seduction"—and to this, also, of the same import: "If you find that Viletha Thurman was of chaste character at the time of the charge named in the complaint, either on the ground that she had never had sexual intercourse voluntarily with any other man than defendant prior to this time, or on the ground that, although she was at one time unchaste, she had reformed, and, if you further find that the defendant seduced her, within the rules I have given you you will proceed to consider the damages which should be awarded to the plaintiff."

Two reasons are now urged to support the defendant's challenge to the propriety of these instructions. The first one is that there was no evidence of a reformation by Viletha Thurman on which to base this instruction. The record, however, does not purport to

contain all of the evidence, nor any more than plaintiff's evidence in chief; and there is no declaration or statement in the bill of exceptions to the effect that there was no such evidence submitted. When the record is silent it will be presumed, in support of the judgment, that evidence was given of a nature to make relevant the instruction. *Fleckenstein v. Inman*, 27 Or. 328, 40 Pac. 87; *Bingham v. Lipman, Wolfe & Co.*, 40 Or. 363, 67 Pac. 98. The second reason urged is that the charge as given is too deficient in substance to be a correct statement of the legal principle sought to be applied, because it is said, *arguendo*, that the court failed to define what would constitute reformation sufficient to amount to a defense. The instruction is not entirely free from such criticism, but it correctly states a sound principle of law. At least we cannot say that it asserts an erroneous proposition of law as applied to the case, for the facts as to the assumed reformation are not before us. The gist of the criticism is that the instruction is deficient in fullness and does not go far enough in this respect; that it ought to have declared that the plaintiff's granddaughter must have honestly abandoned and ceased her unchastity for a reasonable time before the alleged seduction took place. This defines what is meant by reformation. The necessity and propriety of such particularity would depend upon the facts as disclosed by the testimony, and under such circumstances a general exception is not sufficient upon which to base an assignment of error, but it was incumbent upon the party excepting to call the attention of the court to the particular grounds upon which he objects, so that the trial court may have an opportunity to make the correction sought. *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. 309; *Nickum v. Gaston*, 24 Or. 380, 33 Pac. 671, 35 Pac. 31; *Farmers' Nat'l Bank v. Woodell*, 38 Or. 294, 61 Pac. 837, 65 Pac. 520; *McAlister v. Long*, 33 Or. 368, 54 Pac. 194.

A number of other errors have been assigned and urged by defendant's counsel; but, after a careful examination of each of them we are of the opinion that they are without merit, and will not therefore be considered in detail.

It follows that the judgment must be affirmed.

GAFFNEY v. GAFFNEY et al.
(Supreme Court of Oregon. April 30, 1908.)

On petition for rehearing. Modified and affirmed.

For former opinion, see 94 Pac. 561.

EAKIN, J. Defendant asks that the decision of this court be modified, to the extent that the judgment rendered by the lower court in favor of plaintiff and against Mrs. Gaffney for the sum of \$1,480 be set aside,

and the settlement of the matter therein involved be permitted to stand, maintaining that of the \$2,900 cash on hand the wife was entitled to one-third, being the amount paid to her in the settlement; but this claim is not conceded. It was the subject of the litigation in one of the suits pending at the time of the settlement, and the rights of the parties thereto are not before us for consideration. This affects \$980 of the \$1,480. The remaining \$500 was the value of one-third of the crop on the home place. It appears that it was plaintiff's proposition to pay the wife \$500 for her one-third thereof, and that plaintiff thereupon removed and marketed the crop, and cannot now restore Mrs. Gaffney to her former condition in relation thereto; and it will be inequitable to permit him to retain the crop and also recover the \$500 from Mrs. Gaffney.

Therefore the decree of the lower court will be modified, to the extent that the judgment in favor of plaintiff for \$1,480 will be reduced to \$980, and in all other things affirmed.

MITCHELL v. KNOTT.

(Supreme Court of Colorado. April 6, 1908.)

1. PLEADING — ALLEGATION OF TITLE AND POSSESSION—METHOD OF RAISING DEFENSE—DEMURRER.

Where a petition to quiet title alleges upon information and belief that plaintiff is the owner and in possession of certain real estate, though it may not be a good form of pleading, the defect can be raised only by motion, and not by demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 418.]

2. QUIETING TITLE — DEFENSES — DIFFERENT PARCELS INVOLVED.

The title to many different lots may be quieted in the same action where the adverse title is in the same party.

3. APPEAL—REVIEW—DISCRETION OF TRIAL COURT—TIME OF FILING PLEADINGS.

Permitting a replication to be filed after the expiration of the statutory period will not warrant reversal, in the absence of a showing of abuse of discretion or prejudice to the adverse party resulting from the delay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3825-3833.]

4. PLEADING—REPLICATION—IRREGULARITY OF TAX DEEDS—SHAM PLEADINGS.

In an action to quiet title, defendant set up title by virtue of a tax deed, and plaintiff, in reply, denied its validity, and alleged defects in the proceedings leading up to the tax deed. *Held*, that the replication was not a sham pleading, on the ground that plaintiff knew defendant and his assigns had tax deeds to the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1120-1128.]

5. TAXATION—TAX TITLE—ACTION TO TRY—PLEADING — CONSTRUCTION—ADMISSION OF DEFENDANT'S POSSESSION AND INTEREST.

By alleging reasons why a tax deed, under which defendant claimed, conveyed no title, plaintiff in an action to quiet title did not admit defendant's possession or interest in the property.

6. SAME—CONTRADICTORY COUNTS.

In an action to quiet title, where the first count of a replication is a general denial of de-

fendant's answer and the second count sets up defects in defendant's alleged tax title, the counts are not contradictory.

7. QUIETING TITLE—GROUNDS OF DEMURRER—OTHER OUTSTANDING TITLES.

In an action to quiet title, plaintiff's pleadings are not demurrable because they show there are other persons holding outstanding titles, and that making them parties would result in a multifariousness of properties and parties, for it is no concern of defendant that there are other outstanding titles that might constitute a cloud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 73, 82.]

8. SAME—ANSWER—ISSUES AND PROOF.

In an action to quiet title, where one defense filed to the complaint consisted solely of admissions and denials, and another consisted solely of assertion of title in defendant and his grantees, plaintiff is not required to prove his title or possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 85.]

9. TAXATION—NOTICE OF TAX SALE—PROOF OF PUBLICATION—SUFFICIENCY.

Under a statute requiring the affidavit of publication of notice of tax sale to show that copies of each number of the paper containing the notice were delivered by carrier or transmitted by mail to each of the subscribers, an affidavit asserting that the paper containing the notice was delivered by carrier or transmitted by mail to each of the subscribers in a certain county in the state is insufficient, and the sale based thereon is invalid.

Appeal from District Court, City and County of Denver; Samuel L. Carpenter, Judge.

Action by Lydia M. Knott against W. C. Mitchell to quiet title. From a judgment for plaintiff, defendant appeals. Affirmed.

W. C. Mitchell, for appellant. Dowd & Fowler, for appellee.

BAILEY, J. This is an action to quiet title to real estate. The complaint is in the usual form, except that it is alleged upon information and belief that the plaintiff was the owner and in possession of certain real estate. The property to which it is desired to quiet the title consists of 17 lots. The first error assigned is upon the overruling of defendant's demurrer to the complaint. Five grounds of demurrer are alleged. The first is that the complaint does not state facts sufficient to constitute a cause of action; the contention being that the allegation upon information and belief that the plaintiff was the owner of and in the possession of the property is insufficient. While this may not be a good form of pleading, the defect cannot be raised by demurrer but must be done by motion. *Carpenter et al. v. Smith et al.*, 20 Colo. 39, 36 Pac. 789; *Jones v. Pearl Min. Co.*, 20 Colo. 417, 38 Pac. 700.

The second ground of demurrer is that there is a multifariousness of properties set forth in plaintiff's complaint. We know of no reason why plaintiff might not have the title to several pieces of property quieted where an adverse title is claimed by the same party, and counsel has called our attention to neither reason nor authority why this may not be done.

The other three grounds of demurrer are

not apparent upon the face of the complaint, and are therefore untenable. The defendant answered, and in the first defense, which consisted solely of admissions and denials, denied the title and possession of plaintiff. In the second defense defendant pleads title in himself by virtue of a tax deed. Plaintiff replied, denying the validity of the tax deed, and alleging that the proceedings leading up to its execution were defective in several respects, among which was that no sufficient affidavit of the publication of the notice of the tax sale had been made.

The defendant moved to strike the replication from the files, first, because it was not filed for more than 10 days and for more than a month after the answer was filed. The matter of extending the time for filing a replication or of permitting it to be filed after the expiration of the statutory period rests within the discretion of the court and there is nothing to show that this discretion was abused or that the defendant was prejudiced by the delay. In the absence of which showing, the judgment will not be reversed solely because of such delay. The second ground of the motion to strike is that the replication shows that "plaintiff well knew that defendant and his assignors had tax deeds upon the property. It is a sham pleading." The replication is in the usual form, setting up the defects in an alleged tax title. No argument is advanced why it is a sham pleading, and we cannot see why it should be termed such. The third ground upon which the motion to strike is based is as follows: "And because it seeks to remove a cloud and contradicts the complaint. When it shows plaintiff was not in possession and that defendant has an interest, it departs from the case as made." We have read the replication to learn wherein it discloses that the plaintiff was not in possession of the property, and fail to find such an allegation. The replication does not show that defendant has an interest in the property, but it alleges reasons why the tax deed does not convey any interest in the same. The fourth ground of the motion to strike is "because the first count of said replication is a general denial, and the first and second counts contradict each other." Defendant's answer alleges that he is the owner of the property by virtue of the tax deeds. The general denial denies this. The second defense sets up the defects in the alleged tax title. The two defenses are perfectly consistent.

There was a demurrer filed to the replication, the principal ground of which was that all the pleadings combined showed that there were other parties, grantees of defendant, who had an interest in the property, and that they should be made parties, and that, if they were made parties, the action could not be maintained because it would result in a multifariousness of properties and parties. This action was brought to quiet title against defendant, and it is no concern of his that oth-

ers might have outstanding titles which would constitute a cloud upon the title, and, as hereinbefore stated, there is no good reason why the title of several lots might not be quieted in the same action.

At the close of the trial, judgment was rendered in favor of the plaintiff quieting title against the claims of defendant, conditioned upon the payment by plaintiff to defendant of the amount of taxes, interest, and penalties paid by defendant. It is contended by defendant that this judgment was wrong, for the reason that the plaintiff submitted no proof of her title or possession. It will be remembered that there were two defenses filed to plaintiff's complaint; the first consisting solely of admissions and denials, the second consisting solely of assertion of title in defendant and his grantees. In the second defense there is no denial of the title or possession of the plaintiff. In the case of *Lambert v. Shumway*, 36 Colo. 350, 85 Pac. 89, it was determined that a defense consisting solely of admissions and denials was insufficient for any purpose in an action to quiet title, and that a defense consisting solely of averments showing defendant's title did not put the plaintiff upon proof of his title and possession. The affidavit of publication of the notice of tax sale in this case has the same defect as the affidavit in the case of *Lambert v. Shumway*, namely, that affiant asserts that the paper containing the notice "was delivered by carrier or transmitted by mail to each of the subscribers in the county of Arapahoe in the state of Colorado." The statute provides that the affidavit shall show that copies of each number of the paper containing the notice were "delivered by carrier or transmitted by mail to each of the subscribers," and it was there held that the affidavit was insufficient and the sale based thereon invalid.

Perceiving no error, the judgment will be affirmed.

Affirmed.

STEELE, C. J., and GODDARD, J., concur.

WYATT v. BURDETTE.

(Supreme Court of Colorado. April 6, 1908.)

1. MALICIOUS PROSECUTION—ACTIONS—BURDEN OF PROOF—PROBABLE CAUSE—MALICE. In actions of malicious prosecution, the burden of proving lack of probable cause and the existence of malice is upon plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, § 114.]

2. SAME—QUESTION FOR JURY.

Where the evidence as to probable cause is conflicting, the question is one of mixed fact and law, the fact to be determined by the jury, and the law applied thereto by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, §§ 160-162.]

3. SAME—MALICE.

Malice may be inferred from want of probable cause, but it is not a legal presumption,

and the existence of malice is a question to be determined by the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, §§ 163, 164.]

4. SAME—WANT OF PROBABLE CAUSE—CRIMINAL PROSECUTIONS—ADVICE OF COUNSEL.

Defendant, for the purpose of showing probable cause and repelling any inference of malice which might arise from the circumstances showing probable cause, may show that, before instigating the criminal prosecution, he made a full and fair statement of the facts within his knowledge, or which he might have learned by reasonable diligence, to a responsible attorney, and acted upon the advice so obtained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, § 41.]

5. SAME—ACTIONS—BURDEN OF PROOF—STATEMENT TO ATTORNEY.

Where the defense is that defendant consulted a reputable attorney before bringing the prosecution, the burden is on defendant to show that he made a full and fair statement of the facts to his attorney by proving the facts stated.

6. EVIDENCE—PRESUMPTIONS—KNOWLEDGE OF LAW—LAW GOVERNING HUMANE OFFICERS.

In an action for malicious prosecution where plaintiff was arrested while acting as a humane officer for taking up cattle belonging to defendant, it will be presumed that defendant knew the law governing such officers, and that he had a right to act within the powers conferred on him by law.

7. SAME—DISCHARGE OF OFFICIAL DUTIES—HUMANE OFFICERS.

Where plaintiff was arrested while taking up cattle in the discharge of his duties as a humane officer, it will be presumed that he, as an officer of the law, was discharging his duty in conformity to the statutes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 105.]

8. MALICIOUS PROSECUTION—WANT OF PROBABLE CAUSE—CRIMINAL PROSECUTIONS—ADVICE OF COUNSEL.

In an action for malicious prosecution, evidence held to show that defendant failed to make such a reasonable investigation as would have informed him of the actual facts, and failed to show such a full statement of the facts to the district attorney as would entitle him to make out a defense based on the doctrine of advice of counsel.

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Action by A. L. Burdette against D. C. Wyatt. From a judgment for plaintiff, defendant appeals. Affirmed.

Talbot, Denison & Wadley, for appellant. S. S. Abbott, for appellee.

MAXWELL, J. Action for malicious prosecution. Plaintiff had judgment, and defendant appeals. The complaint, in substance, alleged that on or about the 29th day of March, 1902, the defendant, D. C. Wyatt, maliciously and without probable cause, made a complaint before a justice of the peace of Weld county charging plaintiff with unlawfully, knowingly, willfully, and feloniously driving and assisting in driving from their usual range 26 head of neat cattle, of the value of \$20 per head, and of the aggregate value of \$520, the property of D. B. and D. C. Wyatt, not then and there being the owner, and not then and there having the right of possession of said cattle, contrary to the form of the

statute, etc.; that, upon a warrant issued by the justice, plaintiff was arrested and compelled to give a bond for his appearance at the preliminary examination; that he was bound over and held for trial in the district court of Weld county, giving a bond for his appearance in said court; that, upon a trial in said court upon an information filed against him charging him with the crime above set forth, he was acquitted; and that, by reason of said acts, he expended large sums of money and was otherwise damaged, for which damages judgment was prayed. The answer admitted the arrest, the preliminary hearing upon the criminal complaint, the binding over to the district court, the acquittal in said court, and denied all other allegations of the complaint.

Plaintiff was an agent of the "State Bureau of Child and Animal Protection," commonly known as the "Humane Society." Agents of such society are authorized by statute to take charge of any animal found abandoned, neglected, or cruelly treated, giving notice thereof to the owner, if known, and to care and provide for the same until the owner shall take charge thereof. Mills' Ann. St. § 111. Plaintiff's testimony tended to show that previous to March 18, 1902, complaints had been made to him, as an agent of the Humane Society, that certain cattle at and near the town of Orchard, in Morgan county, were suffering for feed and water; that he went to Orchard and investigated the condition of the cattle, finding the reports to be true; that there were several hundred head of cattle within a mile and a half to three miles of Orchard unable to obtain feed or water; that he called up the secretary of the Humane Society at Denver by telephone, advised him of the situation, and asked for instructions; that the secretary of the Humane Society instructed him to notify the owners of the cattle, so far as he could ascertain them, take up the cattle, and provide them with feed and water until such time as the cattle should be claimed by the owners, and the expenses incurred by him paid, as provided by statute; that acting under the instructions of the secretary, and pursuant to his authority as an agent of the Humane Society, he summoned to his assistance a number of men, and proceeded to gather up all the cattle which seemed to him to require attention, and immediately notified the owners thereof, so far as they could be ascertained, by telephone and by mailing to them written notices; that he found a number of dead cattle and others in such condition that they had to be killed; that March 18th he notified appellant by telephone; that on the 19th he proceeded to take up appellant's cattle and care for them as he did the other cattle; that March 20th or 21st an employé of appellant came to Orchard, where he had placed the cattle in pasture, demanded appellant's cattle, and told him that appellant would remit the amount of the bill of expense as soon as he received the

same, whereupon he delivered appellant's cattle to the employé, and within a few days thereafter received a check from appellant in settlement of the expense bill; that the cattle which he took charge of were within from $2\frac{1}{2}$ to 3 miles of the town of Orchard, and none of them in Weld county; and that he instructed those whom he employed to assist him in taking up the cattle not to go beyond three or four miles from the town of Orchard; that at the time the cattle were taken up by him the cattle were suffering for feed and water, and that there was no water which they could get at; that the feed on the range was poor, and that the cattle which he took up were in a suffering condition. The secretary of the Humane Society corroborated the testimony of appellee as to the instructions which he had given him; and appellee's testimony as to the condition of the range and the water supply was corroborated by the testimony of an agent of the Humane Society. Testimony was introduced by appellant to the effect that the usual range of the cattle was in good condition, and that there was an abundance of water on that range; appellant's witnesses testifying that, when they last saw the cattle taken up by appellee, they were some eight or ten miles west and north of Orchard, and over the Weld county line; but, as this testimony related to a time some eight or ten days previous to the time when the cattle were taken up by appellee, appellee's testimony as to the points from which the cattle were taken up and as to range and water conditions seems to be practically uncontroverted. Testimony was also introduced by appellant as to certain alleged statements by appellee as to how far he had driven the cattle; all of which were denied by appellee. It seems to be fairly well established by the evidence that none of the cattle taken up by appellee were driven from over the Weld county line. Appellant also introduced testimony to the effect that, before instigating the prosecution, he made a full and fair statement of the facts as he knew them to the deputy district attorney, and proceeded upon his advice. This testimony will be hereinafter referred to. It appears from the record that appellee was arrested by the sheriff on five or six warrants, sworn out by different cattlemen, at the same time the prosecution instigated by appellant was commenced, some of whom appeared before the deputy district attorney and made statements of the facts upon which such officer advised, and upon which appellant relies as a defense to this action. It also appears from the record that the examining magistrate bound appellee over to the district court because appellee failed to produce at the preliminary hearing his certificate of appointment as agent of the Humane Society; the magistrate declining to receive other proof of such appointment.

In actions of this character the burden of proving lack of probable cause and the exist-

ence of malice is upon the plaintiff. Where there is a conflict of the evidence bearing upon the question of probable cause, the question is one of mixed law and fact, the fact to be determined by the jury, and the law to be applied thereto by the court. Malice may be inferred from want of probable cause, but it is not a legal presumption. The existence of malice is a question to be determined by the jury. The defendant, for the purpose of showing probable cause and of repelling any inference of malice which might arise from circumstances showing a want of probable cause, is permitted to show that, before instigating the criminal prosecution, he made a full and fair statement of the facts within his knowledge, or which he might have learned by the exercise of reasonable diligence, to a reputable and impartial attorney, and acted upon the advice thus obtained. It is essential that the statement of facts be full and fair, and it rests upon the defendant to show that he made such statement by proving what facts were stated. The above principles are settled by numerous cases in this state. *Brown v. Willoughby*, 5 Colo. 1; *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366; *Whitehead v. Jessup*, 2 Colo. App. 76, 29 Pac. 916; *Clement v. Major*, 8 Colo. App. 86, 44 Pac. 776; *Brooks v. Bradford*, 4 Colo. App. 410, 38 Pac. 303; *Gurley v. Tomkins*, 17 Colo. 437, 30 Pac. 344; *Florence O. & R. Co. v. Huff*, 14 Colo. App. 281, 59 Pac. 624; *Van Meter v. Bass* (Colo.) 90 Pac. 637. In *Florence O. & R. Co. v. Huff*, 14 Colo. App. 287, 59 Pac. 626, it was said: "The cases where the opinion of counsel, given upon a full and candid statement of the facts, may be shown as a defense to an action for malicious prosecution, are those in which the facts disclosed did not constitute probable cause for the prosecution, and the advice that they did was erroneous. Acting in good faith upon the mistaken opinion of counsel will not subject the prosecutor to liability to the person prosecuted. The advice will shield him from judgment in a suit for malicious prosecution, but he must prove at the trial that his statements to the attorney embraced all that he knew upon the subject, and that they were true. If, however, the facts disclosed warranted the institution of criminal proceedings, those facts would constitute his defense. To supplement the proof of them by proof of the opinion of an attorney would not strengthen his case in the least. Without reference to what counsel may have said, the court would instruct the jury that as a matter of law they constituted probable cause for the prosecution, so that the defendant would be under no necessity of sheltering himself behind the advice. If he established the facts which he communicated, proof of the advice would be superfluous. If he did not, it would be worthless." The issues presented by the pleadings, viz., want of probable cause and malice, were properly submitted to the jury under instructions which are

unassailed by appellant, except one, which will be hereinafter considered. The jury having found these issues against appellant upon conflicting evidence, the judgment will not be disturbed, unless prejudicial error occurred upon the trial or is found in the instruction alluded to.

Counsel for appellant strenuously insist that, upon the undisputed facts in this case, it was the duty of the court to have taken the case from the jury, upon the theory that there was no fact known to appellant which he did not communicate to the deputy district attorney, and that in instituting the criminal prosecution he acted upon the advice of such officer. To maintain the defense of advice of counsel, it is necessary that defendant should make to counsel, before instigating the prosecution, a full, fair, and honest statement of all the facts within his knowledge, and such facts as he might have reasonably ascertained by the exercise of reasonable diligence, and, if there was any fact within his knowledge which would have put a reasonably cautious man upon inquiry, a failure to make such reasonable investigation would charge him with knowledge of such facts as he might have ascertained by such reasonable inquiry. Appellant knew that appellee was an officer of the law—an agent of the Humane Society—and knew that he was claiming to act in the premises under the authority conferred upon such officer. Appellant is presumed to know the law governing such officers. It is also manifest from his testimony that he made no attempt whatever to ascertain the facts from any persons cognizant thereof, except those in his employ or who were interested with him in the prosecution of appellee and their employes. With very little effort he might have learned facts which would have convinced any reasonable, cautious, fair-minded man that a criminal prosecution could not have been maintained in this case, and facts which, if communicated to fair and impartial counsel, should have led to advice against a prosecution. The sheriff, Mr. Elliott, who seems to have been the prime mover in this prosecution, although he was at Orchard when he made the arrest, made no inquiry whatever of those whom he met there as to the facts. The deputy district attorney, Mr. Green, whose duty it was to investigate before advising the criminal prosecution, seems to have relied largely, if not altogether, upon information derived from the sheriff and the others interested in the prosecution. The presumption prevails that appellee, as an officer of the law, was discharging his duty in conformity with the statutes. *Catron v. Co. Commissioners*, 18 Colo. 553, 561, 33 Pac. 513. "Every reasonable intendment is to be made in favor of the acts of public officers, who are sworn to perform their official duties correctly, so long as they appear to be acting in good faith, with due care and discretion, and within the limits of their conceded powers." *Smith v. Com'rs*, 10 Colo. 17, 21, 13 Pac. 917, 919. The undis-

puted facts in this case were of such a nature as would have put a reasonable and cautious man upon inquiry; and, failing to make such inquiry, appellant should be held to a knowledge of such facts as a reasonable inquiry would have disclosed. 19 Am. & Eng. Enc. Law, 661; *K. & T. Coal Co. v. Galloway*, 71 Ark. 351, 360, 74 S. W. 521, 100 Am. St. Rep. 79. The authorities are practically unanimous upon the proposition that, where the defense of advice of counsel is relied on, it is absolutely essential that the defendant disclose by his testimony the facts which he communicated to counsel, so that the jury may determine whether or not the defendant made a full, fair, and honest statement to counsel. The abstract of record prepared by counsel for appellant in this case is so deficient in many respects that we go to the transcript upon this point, that no injustice may be done appellant. After testifying that he, with others, went to the district attorney's office, the following appears in the transcript: "Q. I am asking who was present at the district attorney's office. A. When we went there, there was myself, Andy McMillan, and I think Chuck Pearson and Mr. Laustellet. Q. Was Bruce Eaton there? A. Not to my recollection. Q. Who did the talking beside the district attorney? A. Mr. Elliott done part of it, Mr. McMillan done some of it, and I think we all talked some. Q. What was said there by the others to inform Mr. Green as to what had taken place? What did they inform him? A. They informed him that these cattle had been driven out of Weld county—a big portion of them. Q. What was said about water and feed there? A. They said water and feed was plenty; that is, for the time of year. Q. I am not asking of your personal knowledge, but what was said? A. That is what they said about it. Q. Was it stated to Mr. Green under what claim of right Burdette had taken them? A. Yes, sir. Q. What was said about that? A. It was said we understood he was a humane agent. I think we all understood it in that line." It will be noticed that there is not a single word in the above testimony as to any statement of facts made by appellant to the deputy district attorney. It will also be noticed that the statements made to the deputy district attorney were to the effect that the cattle had been driven from Weld county, and that there was plenty of feed and water there. The slightest inquiry upon the part of appellant of those who knew the facts with reference to the points from which the cattle had been driven and the conditions as to feed and water at the place where the cattle were taken up by appellee would have revealed the fact that the cattle were not driven from Weld county, and that the cattle at the time they were taken up were suffering from a want of feed and water.

Upon the theory that statements made to the deputy district attorney by others, in the presence of appellant, at the time he consulted

that officer, may be considered as statements made by him, we here quote from the abstract of record. The sheriff, Mr. Elliott, after having testified to what he had told appellant previous to going to the district attorney's office, testified: "This I told Mr. Wyatt, and advised him to see the district attorney in regard to it. Mr. D. C. Wyatt, Mr. Bruce Eaton, Mr. Andrew McMillan, and I went to the district attorney's office—Mr. Franklin J. Green—whom I told in their presence fully what I heard in regard to the cattle, and I asked him if there was not some way to stop it, telling him who had driven them, to wit, the humane agent of Ft. Morgan, and telling him that I was informed that they needed no care, so far as I could find out, and when we went to his office Wyatt was present. I know District Attorney Green wanted to stop them from running the cattle off." Upon this point the district attorney testified: "Q. Now, Mr. Green, I will ask you this question: Were any statements made by Mr. Wyatt to you that you recollect? A. There were statements that he made to me as to what he had heard. Q. What were those statements? A. In a general way, he told me that he had been informed that Burdette was a member of the Humane Society, or agent, and in a general way that his cattle, with others, had been driven off the range down into Morgan county, together with the fact that at that time he was informed they had sufficient food and water." The above is all the testimony to be found in the record to show what statement of facts was made to the deputy district attorney by appellant, or any one in his presence, at the time he sought the advice of that officer. In our judgment it is not sufficient to comply with the rule above stated. General statements, or statements "in a general way," do not place before the jury the facts upon which alone they can determine this issue. It appears from the testimony of appellant and his witnesses that March 19th or 20th appellant sent an employé of his to Orchard with instructions to take his cattle and put them on the range, and say to appellee that he would pay the expense bill; that previous to filing the criminal complaint he paid the expense bill by check to appellee. Appellee testified that on March 18th he notified appellant by telephone that he would take up the cattle. Appellant, upon redirect examination, was asked: "Q. Did you ever talk with this man Burdette over the phone? A. No, sir. * * * I will take that back. Later on I think I did talk with him over the phone."

Circumstances corroborate the evidence of appellee to the effect that he telephoned appellant on the 18th. Appellant did not communicate to the deputy district attorney these communications and transactions between himself and the party whom he was seeking to prosecute. They were material and important and should have been com-

municated, and were the only facts within the personal knowledge of appellant. The testimony discloses that there was considerable feeling on the part of the sheriff and some of the witnesses who testified for appellant, and upon whose statements he relied before he consulted the district attorney, against the Humane Society and its agents, that several unsuccessful prosecutions against such agents had been conducted by the deputy district attorney prior to the time of this prosecution, and appellant must have known of this state of feeling from conversations which he had with the sheriff and the deputy district attorney, which knowledge should have prompted him, as a man of ordinary caution, to thoroughly investigate the facts, and communicate all the facts which he knew to the deputy district attorney before he entered upon the prosecution.

Under the circumstances of this case, appellant's failure to make such reasonable investigation as would have led him to knowledge of the true state of facts in this case, he having knowledge of facts which would have put him upon inquiry, his failure to place before the jury all the facts which constituted the statement made by him to the district attorney, upon whose advice he acted in the matter, and his concealment from the deputy district attorney of material and important facts known to him, in our opinion destroy his defense, based upon the doctrine of advice of counsel. In any event, this defense was submitted to the jury upon proper instructions, and must have been found by them against the appellant upon the testimony submitted, which finding of the jury we cannot disturb.

Counsel for appellant complaint of instruction No. 17, upon the ground that there was no question raised in the evidence as to the character and honesty of the deputy district attorney upon whose advice appellant acted. Under the facts disclosed by the evidence in this case, this instruction, when considered with other instructions upon the question of advice of counsel, could not have misled the jury to the prejudice of appellant. The instructions requested by appellant and refused were fully covered by the instructions given, which, considered as a whole, completely covered the law of the case and were eminently fair to appellant, which is shown by the fact that of 23 instructions given 3 were excepted to and only 2 discussed in appellant's brief.

We have examined with care all assignments of error discussed by appellant's counsel, and fail to find error in the rulings of the court which would warrant a reversal of the judgment; wherefore the judgment will be affirmed.

Affirmed.

STEELE, C. J., and HELM, J., concur.

LINES v. DIGGES.

(Supreme Court of Colorado. April 6, 1908.)

1. TAXATION—TAX SALES—DEEDS—DESCRIPTION OF PROPERTY—STATUTORY PROVISIONS—CONSTRUCTION.

Mills' Ann. St. § 3893, provides that the county treasurer shall keep a record of tax sales in which shall be entered a description of each tract of land or town lot sold, etc. Section 3894 provides that the person who offers to pay the amount due on any parcel of land for the smallest portion of the same shall be considered the highest bidder. Section 3897 provides that the county treasurer shall execute to the purchaser of any real property sold for taxes a certificate of purchase, describing the property on which the taxes and costs were paid by the purchaser, and also stating how much and what part of such tract was sold. Section 3901 prescribes the form of the tax deed, and requires that the sale clause of the deed contain a description of the property sold. *Held*, that the sections of the statute preceding section 3901 show that competitive bidding as usually understood was not to prevail, but that he who offered to pay the taxes due in return for the smallest portion of the property should be successful, so that, under the rule that every section, clause, and word of a statute must be considered to reach the legislative intent, the insertion in the tax deed of a description of the property sold as required by section 3901 was not a mere matter of form, but its omission was a fatal defect, and hence, though the first clause of the tax deed described the property taxed, a description in the sale clause of the property sold merely as "the said property * * * which was the least quantity bid for" was insufficient, as it did not show what amount of property was sold.

2. SAME—PARTICULARITY REQUIRED.

Though Mills' Ann. St. § 1901, prescribing the form of tax deeds, requires two descriptions of the property, one of the property assessed, and the other of the property sold, the second description need not be of the same particularity as the first, but any apt words which clearly indicate the property bid for and sold are sufficient, and hence, where the entire property assessed is sold the use of the words "said property," "the property above described," or "the whole of said property," is a sufficient compliance with the statute, being a description of the property bid for and sold by reference to the property described as taxed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1519-1522.]

3. SAME.

Where no state of facts can exist which will relieve a prospective purchaser of land sold for taxes from bidding for the least quantity of the property which he would take and pay the amount of taxes and costs due, upon which bid the portion of the property bid for would be sold to him, it was just as essential to state in the deed to him, as required by the statute, a description of the property sold, even though the property taxed was described therein, as it was to recite that the property was subject to taxation, and hence the rule that where a recital is necessary only under a particular state of facts, and that state of facts does not exist, the omission of the recital does not affect its validity, does not apply so as to validate a deed not containing a description of the property sold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1519-1522.]

4. APPEAL—REMANDING CAUSE—RIGHT OF PLAINTIFF—ALLOWANCE TO DEFENDANT—OFF-SETS.

Where, in ejectment against a person in possession claiming under a tax deed, the trial court rendered judgment for plaintiff by order-

ing him to pay to the clerk of court for defendant's use the taxes paid by defendant and interest thereon, plaintiff on appeal by defendant was not entitled to have the cause remanded for further proceeding to enable him to set off against the amount so allowed to defendant the rents and profits which accrued pending the appeal.

Appeal from District Court, Montrose County; Theron Stevens, Judge.

Action by Jennie Digges against Rosa B. Lines. From a judgment for plaintiff, defendant appeals. Affirmed.

Ross & Brown and T. J. Black, for appellant. John Gray and John T. Mall, for appellee.

MAXWELL, J. This is an action in ejectment to recover possession of 160 acres of land in Montrose county. Appellant was defendant below. Plaintiff proved title in fee, without objection. Appellant, to show her title, offered in evidence a tax deed, which was objected to upon the ground, *inter alia*, that it was void upon its face. The court sustained the objection, and, no further evidence being offered upon behalf of appellant, rendered judgment for appellee. The only question presented is the validity of the tax deed.

The defect complained of is in the recital of the sale clause in the deed offered, which is as follows: "And, whereas, at the time and place aforesaid C. H. Rogers of the county of Montrose and state of Colorado, having offered to pay the sum of thirteen dollars and fifteen cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on said property, for the year 1898 which was the least quantity bid for, and payment of said sum having been made by him to the said treasurer, the said property was stricken off to him at that price." Section 3901, Mills' Ann. St., provides that this clause of tax deeds shall be substantially in the following form: "And whereas, at the time and place aforesaid, A— B—, of the county of —, and — of —, having offered to pay the sum of — dollars and — cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on said property, for [here follows the description of the property sold] which was the least quantity bid for, and payment of said sum having been made by him to the said treasurer, the said property was stricken off to him at that price." Appellant contends: That the words and figures, "the year 1898," inserted in the deed between the word "for" and the words, "which was the least quantity bid for," are surplusage and should be disregarded, and, treating them as surplusage, the deed would read: "Being the whole amount of taxes, interest and costs then due and remaining unpaid on said property, which was the least quantity bid for." That it was not the intention of the Legislature in prescribing the form for a tax deed that the

property should be described twice. That the well-known rules of grammatical construction applied to this deed make it perfectly plain that the words, "said property," occurring just before the phrase, "which was the least quantity bid for," refer back to the description of the property taxed contained in the first clause of the deed. That this construction makes it apparent that the deed clearly states, by reference, that "the least quantity bid for" was the entire property taxed. That the words, "the real property hereinbefore described," in the granting clause of the deed by the same process, refer to the entire property taxed, and the omission of a description of the property bid for from the space provided for that purpose in the deed does not render it void under the rule of liberal construction applied by this court to tax deeds in *Waddingham v. Dickson*, 17 Colo. 223, 29 Pac. 177; *Barnett v. Jaynes*, 26 Colo. 279, 57 Pac. 703; and *Bertha Gold M. & M. Co. v. Burr*, 31 Colo. 264, 73 Pac. 36.

Appellee admits that the rule is that a substantial compliance with the form of tax deed prescribed by the statute is all that is required; but that two descriptions of the property in the tax deed are absolutely essential to its validity—one, the description of the property taxed, and the other the property bid for and sold to the purchaser—and that the omission of the latter is fatal to the deed, for the reason that it is only property bid for, sold, and struck off to the bidder which can be conveyed by a tax deed; and that the omission of the latter description renders the granting clause of the deed ineffectual, as the words therein, "the real property last hereinbefore described," refer to and are predicated upon nothing in the deed, and cites in support of this contention *McDonough v. Merten*, 53 Kan. 120, 35 Pac. 1117; *Hale v. Sweet*, 7 Kan. App. 409, 53 Pac. 279. An examination of the sections of the statute preceding section 3901 will aid in arriving at a solution of the question presented. Section 3893, *Mills' Ann. St.*, provides that the county treasurer shall keep a record of tax sales in which shall be entered, *inter alia*: "Third. The description of each tract of land or town lot sold. Fourth. The name of the purchaser. Fifth. The total amount of taxes, interest, penalties and costs at time of sale." Section 3894 provides: "The person who offers to pay the amount due on any parcel of lands for the smallest portion of the same, shall be considered the highest bidder"—and then provides how the portion sold shall be set off. Section 3897 provides that the county treasurer shall make out, sign, and deliver to the purchaser of any real property sold for the nonpayment of taxes a certificate of purchase describing the property on which the taxes and costs were paid by the purchaser as the same was described in the book of tax sales; also stating how much and what part of such tract or lot was sold, and prescribing the form of certificate

to be issued to the purchaser. One clause of which certificate is headed: "Description of Part Sold." From the sections of the statute preceding the section which prescribes the form of the deed, it is clear that the Legislature intended that competitive bidding, as it is usually understood, where the one who bids the highest sum takes the property, should not prevail at tax sales, but that he who offers to pay the taxes, etc., for the smallest portion of the property should be the successful bidder, and that a permanent record of the property sold, "which was the least quantity bid for," should be kept, and a certificate of the portion sold should be issued to the purchaser. Counsel for appellant, in their effort to arrive at the intention of the Legislature in prescribing the form of the tax deed, make no reference to the foregoing sections of the statute, and ignore entirely the phrase in the prescribed form of deed included within the brackets, *viz.*: "Here follows a description of the property sold."

It is a familiar rule of statutory construction that every section, every clause, and every word must be considered in attempting to arrive at the intention of the lawmakers. Applying this rule, we cannot say that the Legislature intended that the insertion of the description of the property sold in the tax deed should be considered a mere matter of form. On the contrary, we believe that such description is of the essence and substance of the deed, and its omission a fatal defect. In *McDonough v. Merten*, 53 Kan. 120, 35 Pac. 1117, the identical question here presented was ruled under a statute identical with section 3901, *Mills' Ann. St.*, upon the point here under consideration. Chief Justice Horton, writing the opinion of the court, said: "The county clerk has failed to include in the tax deed a description of the property, or any property, bid for at the sale. The words in the deed, 'which was the least quantity bid for,' on account of this omission, do not refer to any property, and it cannot be ascertained from the deed what amount of the property was sold to pay the taxes of 1872. This fatal omission is not supplied in the granting clause of the deed, because there is no description therein of the property sold at the tax sale or conveyed in that clause. * * * The Legislature intended that at least two descriptions should be included in every tax deed: First, a description of the property assessed, taxed, and offered for sale; and, following that, a second description, showing the least quantity bid for. It was the intention of the lawmakers that the granting clause of the deed should refer to and convey the property actually bid for at the sale. The property actually bid for being omitted, the granting clause refers to nothing. * * * It [the deed] should show that the provisions of the law have been substantially followed, and if there is any fatal omission which ought to have been embraced in the

deed under the provisions of the statute, the courts cannot supply or cure such fatal defects. The tax deed, on account of the omission of the property bid for at the sale, did not vest in the grantee thereof an absolute estate in fee." This case was followed in *Hale v. Sweet*, 7 Kan. App. 409, 53 Pac. 279. While we believe that the Legislature intended that a tax deed should include two descriptions, the first a description of the property assessed, taxed and offered for sale, and the second the property bid for and sold, it does not follow that the second description should be of the same particularity as the first, but any apt words which clearly indicate the property bid for and sold will be sufficient; and, where the entire property assessed, taxed, and sold is bid for and sold, the use of the words, "said property," "the property above described," or "the whole of said property," will be a sufficient compliance with the statute, being a description of the property bid for and sold by reference to the property described in the first clause of the deed. *Gibson v. Hammerburg*, 72 Kan. 363, 83 Pac. 23; *Robertson v. Lombard Co.*, 73 Kan. 779, 85 Pac. 528. Counsel are mistaken when they characterize the opinion of Chief Justice Horton in *McDonough v. Merten* as dictum, as the opinion was upon the only question involved in the case. Counsel for appellant insist that the rule applied in the Kansas case is inapplicable in this court, under the doctrine announced in *Barnett v. Jaynes*, 26 Colo. 279, 57 Pac. 703, as follows: "But we think it is also true that where a recital is necessary only under a particular state of facts, and that state of facts does not exist, the omission of the recital does not affect its validity." There the court had under consideration the question of the effect of a failure to recite in a tax deed the amount of subsequent taxes paid by the purchaser or his assignee, and concluded that, inasmuch as no obligation rested upon the purchaser to pay subsequent taxes, in case he does not do so, there was no necessity for the recital of the deed; and, under such a state of facts, the above principle was announced. Here no state of facts could exist which would relieve the prospective purchaser from bidding for the least quantity of property he would take and pay the amount of taxes, interest, penalty, and costs due, upon which bid the portion of the property bid for would be stricken off and sold to him. And it seems to us that it is just as essential to state in the deed, in its prescribed place, a description of the property sold, by reference or otherwise, as it is to recite that the property was subject to taxation.

The other authorities cited by appellant are readily distinguishable from the case at bar, and for this reason are not in point.

The decree below ordered plaintiff to pay to the clerk of the court, for the use of defendant, taxes paid by defendant and interest thereon within 60 days. We are asked by counsel for appellee to remand the case for

such further proceedings as will enable appellee to set off against this amount the rents and profits which have accrued pending this appeal. We know of no authority for such action, and counsel have cited none.

For the reasons cited above, the judgment will be affirmed, and it is so ordered.

Affirmed.

STEELE, C. J., and HELM, J., concur.

DENVER & S. F. RY. CO. et al. v. HANNEGAN et al.

(Supreme Court of Colorado. April 6, 1908.)

1. DEDICATION—STREET—EFFECT ON FEE.

On the dedication of land as a street the fee vested in the city in trust for the public use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 96, 97.]

2. MUNICIPAL CORPORATIONS—STREETS—USE FOR RAILWAY PURPOSES—MUNICIPAL POWER.

City authorities could authorize the occupancy and use of a street for railway purposes, though that is a servitude not strictly within the ordinary use of the street.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 175, 1432.]

3. STREET RAILROADS—USE OF STREETS—INCONVENIENCE TO GENERAL PUBLIC—AVOIDANCE OF CLAIM.

Where city authorities authorized the occupancy of a street for railway purposes, the city may not claim damages through the resulting inconvenience to the general public, and no one may, so long as the company or its successor limits such occupancy and use to legitimate railway purposes, and in accordance with the ordinance granting the use, sue upon the ground that such occupancy and use constitute a nuisance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 64.]

4. EMINENT DOMAIN—RIGHTS OF ABUTTING LOT OWNERS.

On a city authorizing the use of a street for railway purposes, abutting property owners are only entitled to recover for injuries suffered by them as such, and not for such annoyance or inconvenience as is common to the general public; they being entitled to indemnity for permanent interference with ingress to, or egress from, their lots, and for loss in the value thereof, or otherwise, and the measure of their compensation being the actual diminution in market value of their premises for uses to which they might reasonably be put, caused by the operation of the railroad through the street.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 304-311, 348.]

5. SAME—TIME FOR SUING.

The right of an abutting property owner to sue for damages caused by the use of a street for railway purposes may be lost by a delay, or be barred by limitations; limitations running from the first occupancy of the street for such purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 783-788.]

6. RAILROADS—LIABILITY OF PURCHASER FOR VENDOR'S DEBTS, ETC.

A sale of a railroad not appearing to have been made upon inadequate consideration, or to have been characterized by bad faith, the purchaser takes it without liability for the vendor's unsecured debts, or unassented and undetermined obligations growing out of alleged trespasses,

and hence is not liable for damages to abutting property owners caused by the construction of the road in a street, where it had no knowledge of, and no reason to suspect the existence of, such claim.

7. EMINENT DOMAIN—STREETS—USE FOR RAILWAY PURPOSES.

An increase in traffic over railway tracks in a street is fairly within the original servitude.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 304-311.]

8. RAILROADS—SALES—LIABILITIES OF PURCHASER.

Owners of property abutting on a street used for railway purposes may not recover against the purchaser and the lessee of a railroad on account of such use, where it does not appear that after the purchase the street was subjected to any other or different servitude, or that the property owner suffered any added injury because of an unreasonable, improper, or wrongful use of the track.

Appeal from District Court, Arapahoe County; F. T. Johnson, Judge.

Action by Mamie Hannegan and others against the Denver & Santa Fé Railway Company and another. From a judgment for plaintiffs, defendants appeal. Reversed.

In 1880 plaintiffs were the owners of two lots abutting on Clark street and Fifth avenue, in Sumner's addition to the city of Denver. In 1881 the city council adopted an ordinance granting to the Denver Circle Railroad Company a right to occupy and use Clark street for the purpose of constructing its line and operating its trains through the same. The Circle Company at once built its line, and from 1882 to 1887 operated its trains through and along said street. In the latter year appellant the Denver & Santa Fé Railway Company bought all of the property, franchises, etc., belonging to the Circle Company. At or about the same time the Denver & Santa Fé Company executed a 99-year lease of this property to appellant the Atchison, Topeka & Santa Fé Railroad Company. The latter company at once took possession and operated the line of railway through said street until the present suit was begun, to wit, September 22, 1888. For some reason the cause was not brought on for trial until October 22, 1903. A jury being waived, the trial was had to the court, who upon hearing the testimony entered judgment in favor of appellees, who were plaintiffs below, for the sum of \$500. To reverse that judgment the present appeal was taken. It was stipulated that the fee to the lots in question was in plaintiffs prior to the occupancy of Clark street by the Circle Company, and that it continued and remained in plaintiffs down to the date of trial. It also appeared in evidence that the line originally constructed by the Circle Company was narrow gauge; that subsequent to the purchase and leasing by defendants a change thereof to standard gauge by the laying of a third rail was considered; that the laying of such rail was never completed, and standard gauge trains were never operated through Clark street;

and that some time after the commencement of the action the rails and ties laid by the Circle Company were removed, and the occupancy and use of Clark street were entirely abandoned. The injuries suffered by appellees consisted of annoyance and inconvenience through the occupancy and use of the street for narrow gauge railway purposes. No evidence was offered showing or tending to show broad gauge uses. Plaintiffs were, even at the date of trial, minors, and no defense was pleaded or objection interposed based upon delay in commencing or prosecuting the action, or referring to statutes of limitation.

Rogers, Cuthbert & Ellis, for appellants.
W. W. Cover, for appellees.

HELM, J. (after stating the facts as above). No proofs were offered tending to show that the fee to Clark street was in plaintiffs. The stipulation touching ownership of the lots mentioned did not reach or include title to the street. On the contrary, under the dedication the fee thereto was vested in the city in trust for the use of the public. A discussion of this subject is rendered unnecessary by the decision in *Denver & S. F. R. Co. v. Domke*, 11 Colo. 254, 17 Pac. 777, wherein the status in this regard of Clark street was considered and affirmatively declared. It follows from the foregoing fact, coupled with the authority vested by the Constitution and statutes in the city council, that that body had plenary control over the street. The city authorities could authorize the occupancy and use thereof for railway purposes, although it is a servitude not strictly within the ordinary uses of a public street. And the effect of the grant to the Denver Circle Railroad Company by the ordinance of January 28, 1881, was to render legal such occupancy and use, and avoid any claim by the city for damages through the resulting inconvenience to the general public. Moreover, so long as the grantee or its successors limited such occupancy and use to proper and legitimate railway purposes, conducting the same in accordance with the provisions of the ordinance, no action could be maintained by any one upon the ground that such occupancy and use constituted a nuisance. The only relief to which plaintiffs were entitled was for injuries suffered by them as abutting lot owners. They could not recover for such annoyances or inconveniences as were common to the general public. They could claim indemnity for permanent interference with ingress or egress to and from their lots, and for loss in the value thereof otherwise. The measure of their compensation was the actual diminution in market value of their premises for uses to which they might reasonably be put, occasioned by the construction and operation of the railroad through Clark street. Upon this view of the law the complaint was evidently drawn, and the trial was manifestly conducted, although both the printed and

oral arguments before us contain suggestions based upon the theory of a continuing trespass or nuisance. Under the authorities in cases of this kind the abutting lot owner sues for and recovers the total amount of his injury in a single action. This action is usually brought at or about the time of the occupancy of the street by the railway. And the right to maintain the same may be lost by delay, and barred by statutes of limitation, which statutes begin to run from the first occupancy of the street for railway purposes. The foregoing interpretation of the law and statement of principles touching the subject in hand have been heretofore fully adopted by this court. *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6; *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247, 17 Pac. 777; *Railway Co. v. Foley*, 19 Colo. 280, 35 Pac. 542; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403, 15 Pac. 714; *Colo. M. Ry. Co. v. Trevarthen*, 1 Colo. App. 152, 27 Pac. 1012; *Frankle v. Jackson* (C. C.) 30 Fed. 398. Plaintiffs were entitled to recover from the Denver Circle Railroad Company compensation for the injuries, if any, suffered by them as such abutting lot owners, under the rules above stated. And although the evidence is somewhat doubtful and unsatisfactory, yet, had the action been brought and recovery been had against that company, the judgment would not be disturbed.

This brings us to a question not hitherto squarely determined in Colorado, viz., Did plaintiffs' right of action in the premises against the Denver Circle Railroad Company extend to the present defendants? Or, stating the proposition in another way, did the liability of the Denver Circle Railroad Company to plaintiffs pass by means of the sale and lease to defendants? The complaint, after detailing the construction and operation of the line through Clark street by the Denver Circle Railroad Company, alleges that the Denver & Santa Fé Railway Company "purchased said railroad with all its rights, privileges, and franchises, appurtenances, and property, and became the owner thereof, and took possession of the same." The answer admits such purchase and possession. But neither in the pleadings nor in the evidence is there anything showing or tending to show a want of adequate consideration for the purchase, or in any manner tending to establish bad faith in connection therewith. The two defendant corporations were, so far as we are advised by the record, wholly separate and distinct from the Denver Circle Railroad Company. Nor is there anything in the record bringing home to the purchasing or leasing company knowledge of plaintiffs' claim for damages against the Circle Company. Some authorities hold that, where one corporation transfers all its assets to another, and practically ceases to exist, leaving debts unpaid, the latter corporation takes title subject to an equitable lien or charge in favor of the vendor's creditors. But upon careful examination it will be found that

all or nearly all of the cases cited in support of this rule deal with transfers not in the ordinary course of business, and where peculiar circumstances require its application in the interest of equity and justice, for instance, where the purchasing company expressly assumes the debts of the seller; where the purchasing company is organized by the officers, directors, or stockholders of the vendor, and is practically the same company under a different name; where the consideration for the sale is nominal, or grossly inadequate; where two old companies, by reason of consolidation, become extinct, and all their assets are taken over by a new company organized for the purpose; in short, where either the purchasing company assumes payment of the debts of the vendor, or the transaction is of such a nature as that the element of actual or constructive fraud fairly enters therein. And in all cases where a corporation disposes of its entire assets, and practically goes out of business, leaving unpaid obligations, the sale will, especially in equity, be scrutinized with unusual care, and a strict rule of accountability for any bad faith discovered will be applied against the purchasing company. But, on the other hand, where, as in the case at bar, nothing appears in the record either by pleadings or proofs tending to show that the sale was made upon inadequate consideration, or that it was characterized by bad faith in any manner, the purchaser takes the property without liability for payment of the vendor's unsecured debts. "Where a corporation transfers all its assets to another corporation, which does not agree to assume the liabilities of the selling corporation, and both corporations maintain a separate existence, then, in the absence of fraud, the purchasing corporation will not be answerable for any debts of the selling corporation." 10 Cyc. 1268; *Goldmark v. Magnolia Metal Co.*, 44 N. Y. App. Div. 39, 60 N. Y. Supp. 425; *Brundred et al. v. Rice*, 49 Ohio St. 650, 32 N. E. 169, 34 Am. St. Rep. 589; *Montgomery Web Co. v. Dienelt*, 133 Pa. 596, 19 Atl. 428, 19 Am. St. Rep. 663. Such being the rule as to "debts" of the vendor, it is unnecessary to comment upon the purchaser's liability for unasserted and undetermined claims against the former growing out of an alleged trespass.

As already observed, no proofs are offered showing that the Denver & Santa Fé Railway Company when it purchased the property in question had notice or knowledge that plaintiffs claimed compensation from the Denver Circle Railroad Company for damages to their abutting lots. Nor, so far as the record discloses, did defendants have reason to suspect the existence of any such claim. In fact, the commencement of this action more than a year subsequent to the purchase and more than six years after construction of the railway line in Clark street, appears to have been the first intimation of such claim given to either defendant. The laying of a third rail and operation of the line upon a standard gauge basis

was at one time contemplated by defendants. But this project was given up. No third rail was laid in front of plaintiffs' lots, and no attempt appears to have been made to operate standard gauge trains through the street even by the use of narrow gauge tracks; nor is it shown that defendants permitted cars to stand in front of plaintiffs' lots, or otherwise improperly obstructed the street. So that the possession and control by defendants as successors to the Circle Company did not constitute in law a different or additional burden. The mere increase of traffic and operation of a larger number of narrow gauge trains, if such increase and operation took place, were fairly within the original servitude. It follows, therefore, that plaintiffs could assert no claim against defendants, based upon any new burden different from or in addition to the burden imposed by the Denver Circle Railroad Company in the first instance.

It is clear that upon the record before us neither of the defendants could be held responsible for damages to plaintiffs growing out of the original construction of the line in Clark street and use of said street for railway purposes. And as it does not appear that after the purchase the street was subjected to any other or different servitude, or that plaintiffs suffered any added injury by reason of an unreasonable, improper, or wrongful use of the railway track, no new cause of action arose in their favor and against defendants.

The judgment must be reversed.
Reversed.

STEELE, C. J., and MAXWELL, J., concur.

O'GRADY v. PEOPLE.

(Supreme Court of Colorado. March 2, 1908.
Rehearing Denied April 6, 1908.)

1. CRIMINAL LAW — TRIAL — REQUESTED INSTRUCTIONS—MATTERS COVERED BY OTHER INSTRUCTIONS.

In a prosecution for keeping a saloon open and selling intoxicating liquor on Sunday it was not error to refuse a requested charge that if accused kept open his saloon and sold intoxicating liquors at any time prior to midnight on the day immediately preceding the Sunday in question he should be acquitted, where the court expressly confined the charge upon which accused was being tried and restricted the evidence to the time between the hours of 12 o'clock midnight of Saturday and 6 o'clock in the morning of the following Monday, and charged that unless the alleged offense was committed during that time there could be no conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

2. SAME—MISLEADING INSTRUCTIONS.

The requested charge was misleading and confusing since it in effect told the jury that even though accused kept his saloon open and sold liquors between midnight on Saturday and six o'clock of the following Monday morning, he should be acquitted if at any time prior to midnight of Saturday he also kept it open and sold liquors.

3. SAME — INSTRUCTIONS SUBSTANTIALLY GIVEN.

In a prosecution for illegally selling intoxicating liquors, it was not error to refuse a requested charge that the testimony of private detectives should be considered by the jury with great caution and distrust, where the court charged that the jury were the judges of the credibility of the witnesses and the weight to be attached to their testimony, and that in weighing testimony greater care should be used by the jury in relation to the testimony of persons who were interested in or employed to find evidence against accused than in other persons' testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

4. SAME—WEIGHT OF EVIDENCE—DISCRETION OF COURT.

The giving of instructions as to the caution to be observed in weighing testimony of private detectives or persons employed to find evidence is based upon rules of practice rather than of law, and rests largely in the discretion of the trial judge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1774.]

Error to Weld County Court; Charles E. Southard, Judge.

Jack O'Grady was convicted of keeping open his saloon and selling intoxicating liquors on Sunday, and he brings error. Affirmed.

H. E. Churchill, for plaintiff in error. William H. Dickson, Atty. Gen., and S. H. Thompson, Jr., Asst. Atty. Gen., for the People.

CAMPBELL, J. In an information containing two counts, the defendant was charged with keeping open his saloon and selling intoxicating liquors on Sunday, contrary to the statute. He was found guilty upon both counts, and the court sentenced him to pay a fine under the first, and to be imprisoned in the county jail under the second. The evidence introduced by the prosecution consisted, in the main, of the testimony of two witnesses who were private detectives employed to procure evidence to convict defendant. The defendant asked for an instruction, which the court refused, by which the jury were told that if defendant kept open his saloon and sold intoxicating liquors at any time prior to midnight of the day immediately preceding the Sunday in question, that they should find him not guilty. The refusal to give this instruction was not error. The court, in the fifth instruction given to the jury, expressly confined the charge upon which defendant was being tried, and restricted the evidence to the time between the hours of 12 o'clock midnight of Saturday and 6 o'clock in the morning of the following Monday, and told the jury that unless the alleged offense was committed during that time, there could be no conviction. Then, too, the instruction as tendered, was misleading, and would tend to confuse the jury, since, in effect, it tells them, even though defendant kept open his saloon and sold liquors between the hours of midnight on Saturday and 6 o'clock of the fol-

lowing Monday morning, he should be acquitted if at any time prior to midnight of Saturday he also kept open his saloon and sold liquors.

The other objection argued is that the court refused defendant's tendered instruction, by which the jury were told that they should consider the testimony of the detectives with "great caution and distrust." Authority for this instruction is said to be a statement in section 440, Wharton's Criminal Evidence (8th Ed.). The learned author says that "an informer, it has been held, is not technically an accomplice"; but, the author says, "the jury should be instructed to receive his evidence with the greatest caution and distrust"—citing *Commonwealth v. Downing*, 4 Gray (Mass.) 29; *Dunn v. People*, 29 N. Y. 523, 36 Am. Dec. 319; *Williams v. State*, 55 Ga. 391. In *Commonwealth v. Downing* no such decision was made, but the court said that while the jury might well have been instructed that the testimony of a detective should be received with the greatest caution and distrust, it also said that such a witness was not an accomplice, and the court held that the refusal of the presiding judge so to instruct was not ground of legal exception. In *Dunn v. People* the witness in question was not an accomplice in the strict sense of the term. The court remarked that it was not generally discreet for a jury to convict upon the testimony of an accomplice, but that it is not the law that a conviction upon such testimony can in no case be had. We find nothing in *Williams v. State* that tends to support the statement of the text. This court held in *Wisdom v. People*, 11 Colo. 170, 17 Pac. 519, that there may be a conviction upon the testimony of an accomplice alone, although the court said that it was proper to admonish the jury that such testimony should be received with great caution.

We do not find any authority which sustains the position of defendant that the refusal of a trial court to instruct the jury that the testimony of private detectives, who are employed to procure evidence, should be received "with great caution and distrust," necessarily constitutes prejudicial error. The instruction which it is usual to give in such cases is referred to in the following, among other cases: *State v. Dawson*, 124 Mo. 418, 27 S. W. 1104; *State v. Dana*, 59 Vt. 614, 10 Atl. 727; *State v. Kellerman*, 14 Kan. 135; *State v. Coates*, 22 Wash. 601, 61 Pac. 726; *State v. Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *Preult v. People*, 5 Neb. 377; *State v. Fullerton*, 90 Mo. App. 411; *State v. Stebbins et al.*, 29 Conn. 463, 79 Am. Dec. 223; *People v. Bonney*, 98 Cal. 278, 33 Pac. 98; *State v. McKean*, 36 Iowa, 343, 14 Am. Rep. 530; *Wright v. State*, 7 Tex. App. 574, 32 Am. Rep. 599. See, also, 9 Am. & Eng. Enc. of Law (2d Ed.) 410 et seq.; 12 Cyc. 447, 453; 1 Am. & Eng. Enc. of Law (2d Ed.) p. 389 et seq. In some of these cases the word "distrust" is used, the one from 98 Cal. say-

ing the statute requires it; but usually the court tells the jury that such testimony should be viewed and considered with great caution or scrutiny. In the *Preult Case* in 5 Neb., the Supreme Court was of the opinion that the trial court fulfilled the requirements of the practice when it told the jury that in weighing this class of testimony greater care should be used than in other cases. In the case at bar, the court, of its own motion, instructed the jury that they were the judges of the credibility of the witnesses and the weight to be attached to their testimony; and that in weighing testimony "greater care should be used by the jury in relation to the testimony of persons who are interested in or employed to find evidence against the accused than in other persons' testimony." In so doing, we think the court sufficiently cautioned the jury, and that no prejudicial error was committed in refusing the particular instruction tendered.

In section 380, 1 Greenleaf on Evidence (16th Ed.), the author says: "The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury," and while the author says that good practice requires the court to instruct that in weighing such testimony great caution should be observed, this is not a rule of law, but rather of practice, and its giving or refusing rests largely in the discretion of the trial judge. Even if it be conceded, which we do not, that the detectives are accomplices—and none of the authorities so hold—and if the same rule applies to both, the instruction which was given here by the court is a sufficient compliance with good practice.

Perceiving no prejudicial error in the record, the judgment is affirmed.

Affirmed.

GABBERT and MAXWELL, JJ., concur.

GRAVES et al. v. WHITE.

(Supreme Court of Colorado. April 6, 1908.)

1. BROKERS—ACTIONS FOR COMPENSATION—COMPLAINT—EVIDENCE—"DIVIDE."

A complaint in an action by a broker for commissions, which alleges that plaintiff was employed to assist in making a sale; that defendants promised to pay plaintiff for his services a half of the commissions received, on a sale being made; that a sale was made through services of plaintiff; and that defendant received a specified sum for commissions—is supported by evidence that defendants agreed to "divide" the commissions with plaintiff, the word "divide" in common parlance meaning, when used by two contracting parties, a severance or partition into equal parts.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2142, 2143.]

2. APPEAL—ERRORS FAVORABLE TO PARTY COMPLAINING.

The action of the jury in a suit for a half of commissions received by defendants as brokers, on making a sale of real estate, in first deducting the expenses incurred by defendants,

and then dividing the remainder between the parties, was not prejudicial to defendants.

Appeal from District Court, Rio Grande County; Charles C. Holbrook, Judge.

Action by William E. White against Arthur Graves and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Jesse Stephenson, for appellants. James P. Veerkamp, for appellee.

MAXWELL, J. This is an action to recover commissions upon the sale of real estate, differing from most actions of this character in that appellee sues appellants, who were partners, to recover one-half of the commissions which he assisted them in earning through the sale of certain real estate in Rio Grande county.

The complaint alleged that the defendants employed plaintiff to aid and assist them in effecting and making a sale of the land to one A. C. Phares, and promised to pay him as compensation for his services one-half of the commission or brokerage they might receive, in case a sale of the land was made to Phares; that the sale was made through valuable services rendered by plaintiff to defendants; that defendants received \$622 as commissions for making the sale, and now refuse to pay him anything for his services. The answer admitted that the sale was made and the commissions paid, and denied all other allegations of the complaint. Before the trial, defendants filed a written offer of judgment for \$75 and costs. Trial to a jury resulted in a verdict and judgment in favor of plaintiff for \$174, from which is this appeal. All the witnesses who testified in the case, including the defendants, were called by plaintiff; so that there is no conflict in the testimony, except that defendants denied making any contract whatever with the plaintiff, and did not think plaintiff assisted them in making the sale. One of the appellants testified that he intended to do what was right with appellee. Appellee testified that appellant Ahrens, at the time he engaged appellee's services, agreed to divide the commissions with him. Appellants testified that certain expenses were incurred by them in making a sale, the amount of which does not clearly appear from the abstract of record furnished by appellants. The judgment is assailed upon the ground that appellee failed to prove the contract alleged in the complaint, and that under the allegations of the complaint he could not recover on a quantum meruit. This point was presented to the court below in a motion for a nonsuit interposed at the close of plaintiff's evidence, and in a motion for a new trial, and ruled adversely to appellants, and is the only point urged here.

Appellants' contention is thus stated in their brief: "It is true that the plaintiff testified that one of the defendants said he would divide the commission. That statement is denied. Conceding that he said it, for the

purpose of this argument, there is still no contract. If that statement were made, the one making it may have had in mind that he would give him 1 per cent. of the proceeds of the transaction, while the other person to whom it was said may have had in mind that it would be 50 per cent. A promise to divide the commission did not necessarily mean to give him half of it. It is so indefinite that no one can tell just what the statement does mean. If the defendant Ahrens had paid the plaintiff one dollar of the proceeds, he would have been carrying out the promise to divide commissions. What was said by these parties was not sufficient to constitute a contract that will support a recovery." We cannot agree with this contention. "Divide" is thus defined in the Standard Dictionary: "To sever into two parts; to cut or part into several or many pieces." We think that by common usage the common acceptance and definition of the word "divide," unqualified by other words, when used by and between two contracting parties, limits the severance or partition to two equal parts. This is the construction placed upon "divide" by the court below, which is approved.

The court below, in overruling the motion for a new trial, stated that the jury may have deducted from the commission paid the amount of expenses incurred by appellants in making the sale, as shown by the evidence introduced, and divided what remained. Appellants have no ground for complaint against this action of the jury in arriving at a verdict. Under the above definition of the word "divide," as applied to the facts of this case, appellee's testimony proved the contract alleged in the complaint.

The judgment will be affirmed.

Affirmed.

STEELE, C. J., and HELM, J., concur.

McGEEHAN v. REED et al.

(Supreme Court of Colorado. Feb. 3, 1908.

Rehearing Denied April 6, 1908.)

CONTRIBUTION—JOINT DEBTORS.

Plaintiff and defendant S., being interested in a corporation operating certain mining claims under a lease, arranged for the settlement of certain of its indebtedness, including a debt to a bank by payment of \$1,500, S. agreeing to pay one-half thereof. He also suggested to plaintiff that he might promise the bank and others to pay the balance of the debt if plaintiff could get the money out of the affairs or business of the corporation. Plaintiff contracted to pay the bank \$1,525 cash, which amount was furnished by S., and also agreed to pay the balance of the bank's debt out of the proceeds of a sale of the mining claims. Held that plaintiff, having paid the balance of such debt as agreed, could not compel contribution from S.; the money not having been derived from the business of the corporation, but out of property in which S. was not interested.

Appeal from District Court, City and County of Denver; Samuel L. Carpenter, Judge.

Action by Robert P. McGeehan against Homer Reed, trustee, and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

A. Newton Patton and M. B. Carpenter, for appellant. C. M. Kendall, for appellees.

BAILEY, J. This action was brought by appellant against the defendants, contending that defendant Swope was indebted to plaintiff in the sum of \$1,809.54, with interest, for moneys advanced by plaintiff "for the use of, on account of, and at the special instance and request of said Thomas H. Swope." At the close of plaintiff's testimony, the court, upon motion of defendant, ordered a nonsuit, and plaintiff appeals.

Plaintiff and defendant Swope were interested in a company called the San Juan Gold Mining & Milling Company. This company was working the Sampson group of mines under a lease, and became indebted to divers people in the sum of about \$9,000. Defendant Swope authorized the plaintiff to compromise this indebtedness by paying \$3,600 or \$4,000, for one-half of which amount plaintiff was to give his note to Swope. In a letter written by defendant Swope to plaintiff on the 4th of July, 1894, the following suggestions were made: "If you meet Barnes or the banker, try and get that debt out of the way at \$1,500.00. In drawing for this \$1,500.00, of course, a proper satisfaction of judgment must accompany draft. * * *

In settling debts, you might promise bank and others on honor to pay balance if you ever get it out of the affairs or business of the San Juan Company. Whether this will help you any in effecting settlements I don't know, but it might." Upon the 28th of July, 1894, plaintiff entered into a contract with the bank at Silverton, being the bank mentioned in plaintiff's letter, wherein it is recited that plaintiff was indebted to the bank in the sum of \$3,825 of which he paid \$1,525, leaving a balance of \$2,300, and that the party of the first part (meaning plaintiff) agreed that he would pay to the second party the said sum of \$2,300 in the manner following: The first party being a part owner of the capital stock of the Sampson Mining & Milling Company which is the owner of the following mining claims (describing them), "and as such he proposes to negotiate the sale of said mining claims, and when such sale or transfer is made, or in any dealing in relation to said properties whereby first party obtains a commission, first party hereby agrees to pay to second party a one-fourth part of the amount realized by him as commission in any such transaction, and the balance of said sum of twenty-three hundred dollars which may thereafter remain unpaid, first party agrees to pay out of any further moneys coming to him in the sale of said properties as commission or otherwise, until the full amount of said sum of twenty-three hundred dollars is paid." Swope furnished

the money to pay the \$1,525. In 1897 plaintiff sold the Sampson claims mentioned in the contract with the bank, and out of the proceeds the \$2,300 and the interest thereon, making a total of \$3,019.08 paid on the 28th of July, 1898. Half of this sum forms the basis of plaintiff's claim against defendant Swope. Swope was not interested in the ownership of the Sampson group of mines, but the San Juan Company, in which Swope was interested, was operating these claims under a lease. It does not appear that Swope was informed of the contract made by plaintiff with the bank until the year 1900, at which time plaintiff made a demand for the payment of one-half of the amount. It does not appear that anything was realized by either the plaintiff or the defendants from any of the holdings of the San Juan Company. The defendant Swope was not personally liable for the debts of the company, unless it should have been made to appear that he was responsible because of the fact that he was a member of the board of directors, and the board had failed to make its annual financial report and file the same with the Secretary of State as provided by law. Upon this state of facts, the trial court in finding, upon the motion for nonsuit, that "to charge the defendant the evidence must show a promise at least. To charge him with the deferred payment to the Silverton Bank, the evidence must show a promise, either expressed or implied, on his part. The only point in the testimony upon which a promise could be predicated at all, it seems to me, is the expression of one of the letters of July, 1894, with respect to the deferring of a payment to the bank. That language, in my judgment, is simply a suggestion, and raises no promise on the part of the defendant"—was correct. If that suggestion had amounted to a direction or a promise, it would have been necessary for the plaintiff to have executed it in terms; that is, "to promise the bank and others on honor to pay the balance if you ever get it out of the affairs or business of the San Juan Company." This money was not obtained out of the affairs or business of the San Juan Company, but was obtained out of the property in which the defendant was in no wise interested. The trial court having properly sustained the motion for a nonsuit, the judgment will be affirmed.

Affirmed.

STEELE, C. J., and GODDARD, J., concur.

STEELE v. GOLD FISSURE GOLD MINING CO.

(Supreme Court of Colorado. April 6, 1908.)

1. CORPORATIONS—DIRECTORS—FIDUCIARY RELATION—VOTING ON SALARY.

The relation of a director to the corporation which he represents in that capacity is fiduciary,

and the law forbids him from making a contract in which his private interests may conflict with the interests of his principal. Hence a director of a corporation who has been elected president thereof is disqualified from voting on a resolution purporting to fix his salary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1340.]

2. SAME—MAJORITY OF DIRECTORS INTERESTED IN RESOLUTION—EFFECT.

A majority of a quorum of the board of directors of a corporation must be disinterested in the subject-matter of a resolution voted on to make it valid and binding on the corporation. Hence, where two of the three directors of a corporation are officers whose salaries are fixed in a single resolution, they are both disqualified, and cannot be counted to make a quorum or to pass the resolution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1340.]

3. SAME—OFFICERS—RIGHT TO COMPENSATION FOR USUAL SERVICES.

Neither the president nor the directors of a corporation are entitled to compensation for their services as such in discharging ordinary duties, in the absence of a valid agreement of the corporation to pay therefor. Hence, where a resolution fixing the salary of the president of a corporation is not legally passed, there can be no recovery for services rendered as president, in the absence of allegation and proof that they were outside the ordinary duties of such officer, and the fact that the invalid contract is an executed one is immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1334.]

4. HUSBAND AND WIFE—AGENCY OF HUSBAND FOR WIFE—PRESUMPTION OF AUTHORITY.

It will not be presumed that the husband of a stockholder in a corporation has authority to represent her, in the absence of evidence to that effect.

Appeal from District Court, Arapahoe County; Frank T. Johnson, Judge.

Action by Clay B. Steele against the Gold Fissure Gold Mining Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Appellant, as plaintiff, brought suit against the appellee, as defendant, to recover the balance claimed to be due for services rendered the latter as its president. There was judgment for the defendant, from which the plaintiff appeals. The defendant is a corporation organized under the laws of this state. Its articles of incorporation fix the number of directors at three. By these articles George A. and Willis Bristol and plaintiff were designated as directors to manage its affairs for the first year of its existence. The board as thus constituted met and passed the following resolution: "On motion, duly seconded, the following resolution was adopted: Resolved, that the salary of the superintendent be fixed at \$150.00 per month for the coming year, and that of the president and secretary and treasurer at \$200.00 per month each for the year." Previous to adopting this resolution, the board had convened and elected plaintiff president and George A. Bristol secretary and treasurer. This action, as well as the adoption of the resolution, was had on the 1st day of Feb-

ruary, 1900. From that date until the 1st day of April, 1901, plaintiff acted as president of the corporation, and during that period went East, remaining there between two and three months for the purpose of selling the treasury stock of the company, and did sell stock, for which the company received something over \$15,000. It is under the resolution above mentioned, and by virtue of the services rendered, that he claims the defendant is indebted to him for the balance of salary which is the subject-matter of the action brought by him in the court below. At the time the resolution was adopted the shareholders of the corporation were the directors, their wives, and Bertha T. Blakeley. The latter was present at the meeting.

Chas. J. Hughes, Jr., and Gerald Hughes, for appellant. Branch H. Giles, for appellee.

GABBERT, J. (after stating the facts as above). The relation of a director to the corporation which he represents in that capacity is fiduciary, and for this reason the law forbids him from making a contract in which his private interests may conflict with the interests of his principal. He cannot unite his personal and representative character in the same transaction. Paxton v. Heron, 40 Colo. —, 92 Pac. 15; Morgan v. King, 27 Colo. 539, 63 Pac. 416; Fishel v. Goddard, 30 Colo. 147, 69 Pac. 607; Mosher v. Slinnott, 20 Colo. App. 454, 79 Pac. 742; Butts v. Wood, 37 N. Y. 317; Coleman v. Second Ave R. R. Co., 38 N. Y. 201; Hoyle v. Plattsburgh & Mo. R. R. Co., 54 N. Y. 314, 13 Am. Rep. 595; Martin v. Santa Cruz W. S. Co., 4 Ariz. 171, 36 Pac. 36; Ward v. Davidson, 89 Mo. 445, 1 S. W. 846. Plaintiff was therefore disqualified from voting upon the resolution which purported to fix his salary. He could not make a bargain with himself for a salary binding upon the company. Counsel for plaintiff contend that the vote of the other two directors was sufficient to render the resolution valid. By the resolution in question, Bristol, as secretary and treasurer, was voted a salary. He, as well as plaintiff, was interested in its adoption, and the object to be attained by its passage; i. e., securing a salary for each. Bristol was as much interested in its adoption as plaintiff, and, being personally interested therein, was disqualified from voting thereon. The two directors, Bristol and plaintiff, were acting together to secure a contract from the company in favor of themselves. The resolution by which it was sought to make this contract could not have been passed except both voted thereon, because, with respect to plaintiff's salary, he was disqualified from voting, and on the subject of the salary voted for Bristol he was also disqualified, but, as each was personally interested in its passage, he was disqualified from voting upon it at all. It is essential that the majority of the quorum of a board of directors be disinterested with respect to the matter voted upon in

order to render it valid and binding upon the corporation. *Smith v. Los Angeles I. & L. Co-Op. Ass'n*, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53; *Mallory v. Mallory-Wheeler Co.*, 61 Conn. 131, 23 Atl. 708; *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; *Miner v. Belle Isle I. Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; *Graves v. Mona Lake Hy. M. Co.*, 81 Cal. 303, 22 Pac. 665. Counsel for plaintiff cite *Funsten v. Funsten Commission Co.*, 67 Mo. App. 559, wherein it seems to be held that a resolution of the character under consideration is divisible, and that the vote of Bristol could be counted in favor of that part of the resolution fixing plaintiff's salary. We think this case is clearly opposed to the weight of authority, and clearly contrary to the universal doctrine that a director who is disqualified by reason of personal interest in the matter before a director's meeting loses his character as a director, and cannot be counted for the purpose of making it a quorum, nor can his vote be counted for the purpose of determining whether a resolution has been passed by a majority vote. Under this rule it seems clear that, when a director has a direct personal interest in the passage of a resolution, he is disqualified from voting upon it for all purposes, even though part of it may not relate to matters in which he has such an interest as, standing alone, would disqualify him.

It is next urged by counsel for plaintiff that, the contract entered into by virtue of the resolution in question having been executed, the defendant is precluded from questioning its validity. There are cases to which this rule of law applies, but it is not applicable to the case at bar. Directors of a corporation are not entitled to compensation for their services in that capacity in discharging their ordinary duties, unless it is legally provided for. *Brown v. Republican Mt. Silver Mines*, 17 Colo. 421, 30 Pac. 66, 16 L. R. A. 426; *Thompson on Corporations*, § 4380; *Arapahoe Inv. Co. v. Platt*, 5 Colo. App. 515, 39 Pac. 584; *McConnell v. Comb. M. & M. Co.*, 30 Mont. 239, 76 Pac. 194, 104 Am. St. Rep. 703. The rule is the same with respect to the president of a corporation. 4 *Thompson on Corporations*, § 4682. It does not appear from the resolution in question, or from the pleadings or evidence, that the compensation which the directors undertook to provide for the president was to be paid for anything more than such duties as he would ordinarily discharge in that capacity; so that it does not appear that, by virtue of this resolution, he performed any services other than those which he would have been required, in the absence of a legal agreement, to perform gratuitously. Therefore he is not in a position to invoke the rule contended for by his counsel, because he does not appear to have performed any services other than he should have performed, and, in order to recover for those, he must estab-

lish an antecedent, valid agreement by the corporation to pay for them. This he has failed to do.

The final question upon which counsel for plaintiff rely is that all the stockholders were present at the time when the resolution fixing his compensation was passed, and therefore it will be presumed that, although the resolution was not regularly passed by the board, the corporation assented thereto. The record does not sustain the contention as to the presence of all the stockholders. It was not a stockholders', but a directors', meeting, in which the stockholders took no part as such; but waiving this question, inasmuch as the wives of the directors were not present, it will not be presumed that their husbands had any authority to represent them. Neither is there any evidence to the effect that they claimed to have such authority. The members of the board only assumed to act in the capacity of directors.

The judgment of the district court is affirmed.

Affirmed.

CAMPBELL and MAXWELL, JJ., concur.

PHENIX et al. v. BIJELICH. (No. 1,745.)
(Supreme Court of Nevada. April 24, 1908.)

1. APPEAL—PRESENTATION OF GROUNDS OF REVIEW.

The sufficiency of the verification of the answer cannot be raised for the first time on appeal.

2. PLEADING—WAIVER OF DEFECTS—MOTION FOR JUDGMENT ON PLEADING.

Where plaintiff moves for judgment on the pleadings upon other specific grounds, he waives the objection that the answer was not sufficiently verified.

3. VENDOR AND PURCHASER—VENDOR'S TITLE—RIGHT OF PURCHASER TO DISPUTE.

The rule that while a purchaser remains in possession of land conveyed under a contract, and claims the right of possession under the contract, he cannot dispute the vendor's title or refuse to comply with the contract is not applicable where the purchaser, while he admits that he entered into a contract for possession, does not claim possession under the contract, but claims that the contract was fraudulent, and that the vendor never had any title to the property to convey.

4. PLEADING—MOTIONS—JUDGMENT ON PLEADINGS.

Where a party moves for judgment on the pleadings he not only, for the purposes of his motion, admits the truth of all the allegations of his adversary, but he must also be deemed to have admitted the untruth of all his own allegations which have been denied by his adversary.

5. VENDOR AND PURCHASER—RESCISSION OF CONTRACT FOR DEFECT IN TITLE—DUTY OF VENDEE.

Where a purchaser in possession seeks to rescind a contract for the sale of land because of defect in the title, he is bound to restore to the vendor what he received under the contract and place the vendor in his original situation, but where he received nothing from the vendor under the contract, but asserts fraud upon the vendor's part in falsely representing the title and claims title in himself, there is no such duty.

Appeal from District Court, Esmeralda County.

Action by George L. Phenix and others against Nikola K. Bijelich. From a judgment for plaintiffs upon the pleadings, defendant appeals. Reversed and remanded for trial.

Henry Farnam, for appellant. Thompson, Morehouse & Thompson, for respondents.

NORCROSS, J. This is an appeal from a judgment upon the pleadings entered in pursuance of a motion for that purpose.

The complaint contains the following allegations: "That on, to wit, the 31st day of January, 1905, the plaintiffs were the owners of that certain lode mining claim in Goldfield Mining District, county of Esmeralda, state of Nevada, known and called the 'September,' and on said day said plaintiffs and said defendant made and entered into a written agreement, a true copy of which is hereunto attached, marked 'Exhibit A,' and made a part of this complaint; that thereafter said defendant in pursuance of said agreement paid said plaintiffs the sum of \$75 and entered into the possession and occupancy of said lot of land in said agreement described, and ever since has been and now is in the occupation and possession thereof; that said defendant has made no further payments, and although more than ten days has expired since the remaining payment as provided in said agreement became due, and was to be made, and although demand has been made therefor, said defendant has failed, refused, and neglected to pay the same, and therefore plaintiffs aver that said defendant has forfeited his said contract and agreement as in said agreement specified, and plaintiffs are entitled to the possession and sole ownership of said lot of land and improvements thereon."

The material portions of the agreement referred to in and made a part of the complaint read as follows: "This agreement, made and entered into at Goldfield, Esmeralda county, Nevada, this 31st day of January, A. D. 1905, by and between G. L. Phenix, Dr. White Wolf, P. C. Kortz, W. S. Williams, and Addie Williams, of Goldfield, Nevada, parties of the first part, and Nikola K. Bijelich of Goldfield, Nevada, party of the second part. Witnesseth, whereas the said party of the first part is the owner of that certain mining claim known and designated as the 'September,' situated in the Goldfield Mining District, Esmeralda county, Nevada, and whereas the said party of the second part is desirous of securing a portion of the surface ground of said claim. Now, therefore, in consideration of the sum of one dollar (\$1.00) lawful money of the United States, paid to the first parties, by the second party, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, the parties hereunto have promised, covenanted and agreed and do hereby

promise, covenant and agree as follows: (1) The second party shall have, and he is hereby given a leasehold interest in and to the surface ground embraced within that certain lot, or parcel of land, designated upon the town-site survey of said mining claim as lot No. 5, in block No. 4, said leasehold interest to continue until the first parties acquire a government patent, to said September Mining location. (2) The second party agrees to pay to the owners of said mining claim the sum of \$225.00, gold coin of the United States at the time and in the manner following: (\$75.00) seventy-five dollars cash down, upon the signing of this agreement and the balance in several deferred payments as follows: On or before July 30th, 1905, \$150.00, together with the further sum of one dollar (\$1.00) per annum, payable in advance as rental, said deferred payments shall bear interest at the rate of one per cent. per month until paid. It is expressly understood and agreed by the parties hereto that if the second party shall fail, neglect or refuse to make said payments or any of them, as above specified, and said payments or any of them shall be in default or arrears, for a period of ten days following the date when such payment is due and payable, then and in that event, the first parties, or any of them, may enter into and take possession of said premises together with the improvements without further notice or demand and without process of law, and the second party will surrender to the first parties all of the second party's right, title and interest in and to said premises or arising under and by virtue of this contract as liquidated damages for said breach of contract. * * * (3) Upon issuance of a government patent for said September mining claim, the first parties will make and execute and deliver to the second party a good and sufficient deed to said lot No. 5, provided the second party shall make written demand therefor upon the first parties together with the tender of one dollar within six months after the date of recording said patent in the office of the recorder of said county. * * * (6) Time is of the essence of this agreement."

Defendant's answer contains the following admissions, denials and allegations:

"(1) Defendant admits that he entered into an agreement as set forth in plaintiffs' complaint, also, that he paid the plaintiffs the sum of seventy-five dollars. Defendant also admits that he has refused to make further payments under said agreement. Defendant also admits that he is in possession of the property described in plaintiffs' complaint. (2) Defendant, further answering, denies that the plaintiffs are the owners, and entitled to the possession of a certain lode mining claim, called the 'September,' situated in Goldfield Mining District, Esmeralda county, Nevada. (3) Defendant, further answering, charges that the plaintiffs falsely and fraudulently represented to the defendant that they were

the owners of said property, when in truth and in fact said plaintiffs never did have, and have not now, any title whatsoever to said lode mining claim. (4) Defendant, further answering, alleges that he has expended a large sum of money, to wit, fifteen hundred dollars in improving said property, and is entitled to said improvements together with the possession of said property.

"Wherefore defendant prays that said contract be canceled and annulled, and all moneys paid the plaintiffs under said contract be adjudged the property of this defendant, and that this defendant have the right of possession of said property, and his improvements thereon, and his costs of suit, and such other and further relief as the court may deem equitable and just.

"Nicola K. Bijelich

"Nikola K. Bijelich, by

"Elmer Rogers,

"Attorney for Deft.

"Subscribed and sworn to before me this 15th day of May, 1907.

"E. Hardy, Clerk of District Court,

"By J. B. Rourke, Deputy."

Respondents' motion for judgment on the pleadings was based upon the following grounds and none other: "That the denials and statements set forth in defendant's answer raises no issue to be tried and constitutes no defense to plaintiffs' cause of action as set forth in plaintiffs' complaint."

Respondents raise the question upon this appeal that as the complaint was verified, and the answer not verified, that alone would be sufficient cause to affirm the judgment. While there is a pretense of a verification of the answer, made after the filing of the answer but before entry of judgment, it must be readily conceded that such verification is not in accordance with the provisions of the statute and upon proper objection would be held insufficient, in which case an opportunity should be granted to amend. However, no question as to the sufficiency of the verification of the answer was raised in the lower court, and it cannot, therefore, be raised for the first time in this court. Counsel, we think, by moving for judgment upon the pleadings upon other specific grounds, waived objection to the verification.

It is contended by counsel for respondents that appellant is governed by the rule providing that while the vendee remains in possession of the land conveyed under the contract and claims the right of possession under the contract, he cannot dispute the vendor's title or refuse to comply with the terms of the contract, and that an application of this rule to the facts admitted by the pleadings in this case affords a complete justification for the judgment awarding plaintiffs possession of the property, together with the improvements and payments made as liquidated damages as prayed for in the complaint. That the rule contended for is the general rule may be

conceded. The pleadings, however, in this case, we think, take it outside the rule's application. While the answer of the defendant admits that he entered into the contract in question with plaintiffs, he alleges that such contract was fraudulent in its inception in that plaintiffs falsely and fraudulently represented that they were the owners of the said "September" mining claim, "when in truth and in fact said plaintiffs never did have, and have not now, any title whatsoever to said lode mining claim." The answer also specifically denies the plaintiffs' allegation of ownership of the claim, and alleges that defendant is entitled to possession of the property involved in the action. It cannot, we think, be said, as counsel for respondents contends, that appellant "claims the right of possession under the contract." There is nothing in the pleadings wherein appellant makes any such specific claim affirmatively or admits such fact by failure to deny an allegation to that effect of the plaintiffs. Other allegations in the answer are inconsistent with such position. In all of the cases to which our attention has been called and others which we have examined where the general rule has been enforced, the grantor has been conceded to have some title to the premises in controversy. The appellant in this case, however, does not even concede a defective title in plaintiffs and respondents, but upon the contrary he alleges that "plaintiffs never did have, and have not now, any title whatsoever to said lode mining claim." He charges, in effect, that the contract sought to be enforced was induced by the false and fraudulent representations of the respondents and that he received nothing by reason thereof. "When a party moves for judgment on the pleadings, he not only for the purposes of his motion admits the truth of all the allegations of his adversary, but must also be deemed to have admitted the untruth of all his own allegations which have been denied by his adversary." *Walling v. Bown*, 9 Idaho, 184, 72 Pac. 960; *Idaho Placer Min. Co. v. Green* (Idaho) 94 Pac. 161, 164; 11 Enc. Pl. & Prac. 1046.

When the motion for judgment upon the pleadings was made, applying the rule last quoted, it was conceded that defendant never acquired any rights to the land under the contract, for the reason that the plaintiffs had none to convey, and that plaintiffs were not in position to carry out their part of the agreement in any extent whatever. In a case, somewhat similar in principle to this, the Supreme Court of Michigan in an opinion written for the court by Cooley, J., said: "Equity could not allow the rights of a purchaser under such a contract to be forfeited by the vendor, when the latter had no title to convey, and was not in position to perform his own undertaking." *Converse v. Blumrich*, 14 Mich. 109, 90 Am. Dec. 230; *Getty v. Peters*, 82 Mich. 661, 46 N. W. 1036, 10 L. R.

A. 465; *Warren v. Crew*, 22 Iowa, 315; *Peck v. Brighton Co.*, 69 Ill. 200. Where a vendee in possession seeks to rescind a contract for the sale of land because of defect in the title, he is in duty bound to restore to the vendor what he received under the contract and place the vendor in his original situation, but where he received nothing from the vendor under the contract, asserts fraud upon the part of the vendor in falsely representing the title, and claims title in himself, the reason for the rule falls. *Whitlock v. Denlinger*, 59 Ill. 96.

We think the answer of the defendant, especially in the absence of a demurrer thereto, sets up a good defense to plaintiffs' cause of action. This view of the case makes it unnecessary to determine other questions presented.

The judgment is reversed, and the cause remanded for trial.

TALBOT, C. J., and SWEENEY, J., concur.

BRANSON v. INDUSTRIAL WORKERS OF THE WORLD et al. (No. 1,736.)

(Supreme Court of Nevada. April 24, 1908.)

1. DISMISSAL AND NONSUIT—GROUNDS—MOTION—COMBINED MOTIONS—GRANT OR REFUSAL.

Where no specific provision is made in the statutes for a combined motion to strike the complaint, to vacate the summons, annul all the proceedings in the cause and dismiss the action, such motion cannot be granted unless the moving party is clearly entitled to the relief asked for, and the pleading cannot be amended so as to cure the defects complained of.

2. ASSOCIATIONS—ACTIONS AGAINST—PARTIES.

In equity, an action may be instituted by or against a voluntary unincorporated organization where the members comprising the same are numerous by simply joining as defendants a few natural persons, members of the organization, sufficient to represent and protect the interests of the entire membership, and the few may be made plaintiffs or defendants for all.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Associations, §§ 37-40.]

3. ACTION—LEGAL OR EQUITABLE NATURE—ABOLITION OF DISTINCTION—CODE PROVISIONS.

Under the Code of Nevada, there is but one form of civil action, and legal and equitable distinctions so far as practice is concerned are largely, if not entirely, done away with.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 156; vol. 19, Equity, § 4.]

4. ASSOCIATIONS—MULTIPLICITY OF PARTIES—EQUITY RULE IN CIVIL ACTION.

Since it was the intention of the Legislature by section 14, Civ. Prac. Act (Comp. Laws, § 3109), providing for the joinder of parties as plaintiffs or defendants, where the parties are numerous and it is impracticable to bring them all before the court, and to permit one or more to sue or defend for the benefit of all, to make the equity rule as to the joinder of parties available in an action at law, in an action against voluntary associations, it is proper to sue the associations as such and join a few natural persons, members of the association, to represent all the members.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Associations, §§ 37-40.]

5. MOTIONS—RELIEF GRANTED—REMEDY BY DEMURRER.

Under Comp. Laws, § 3135, authorizing a demurrer to a complaint for a defect or misjoinder of parties defendant, and under section 71 of the Practice Act (Comp. Laws, § 3106), authorizing the court to disregard errors not affecting the substantial rights of the parties, it is error in an action against a voluntary unincorporated association in which are joined a few natural persons, members of the association, to represent all the members, to grant a portion of a combined motion to strike the complaint, to vacate the summons, annul all the proceedings in the cause and dismiss the action, by dismissing only as to the association as such, since the court, not being able to grant the relief asked, should have denied the motion in toto and left the parties to their remedy by demurrer.

6. ASSOCIATIONS—MEMBERS—ATTACHMENT—AFFIDAVITS—PARTIES.

Where, in an action against a voluntary unincorporated association, a few natural persons, members of the association, are made parties to represent all the members, an affidavit for an attachment in the action, good against the natural persons made parties, is good against all the members of the association.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Associations, §§ 37-40.]

7. CONSPIRACY—CRIMINAL RESPONSIBILITY—ENTICING SERVANTS.

Neither at common law nor under statutes modifying the common-law doctrine is it lawful for workmen to combine to injure another's business by causing his employés to leave his services by intimidation, threats, molestation, or coercion, and such a combination constitutes an indictable conspiracy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 56.]

For other definitions, see Words and Phrases, vol. 2, pp. 1454, 1461; vol. 8, p. 7613.]

8. WORDS AND PHRASES—"BOYCOTT."

The term "boycott" ordinarily means a confederation, generally secret, of many persons whose intent is to injure another by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 855, 856; vol. 8, p. 7592.]

9. ATTACHMENT—AFFIDAVITS—CRIMINAL ACTS—BOYCOTT—ASSOCIATIONS.

Where, in an action against voluntary unincorporated associations and their members for damages for injuries to plaintiffs' business by boycott, etc., an affidavit for attachment alleges in the words of Comp. Laws, § 3218, that defendants criminally incurred the damages for which suit has been commenced, and in addition, makes the complaint part of the affidavit, which complaint alleges in substance that the defendants combined together to injure plaintiff's business by threats, boycott, and the like, and the use of violence, setting out specific acts which were alleged to be unlawful, and that the reason for their action was the refusal of plaintiff to accede to the demands of defendants, that plaintiff compel his employés, who were union men and to whom he paid union wages, to join a rival labor organization, the affidavit states a good cause of action for an attachment on the ground of criminally incurring the damages sued for, since the allegations of the complaint show that there was not a peaceable co-operation of the employés to better their condition by securing an advance in wages or in fixing the hours of labor as expressly authorized by Comp. Laws, § 4751, and the acts in themselves show a criminal conspiracy.

10. SAME.

Held, also, that it was not necessary that all the specific acts alleged to have been committed in pursuance of the conspiracy be in themselves of a criminal nature, or that it be determined whether each and every specific act is unlawful.

11. APPEAL—REVIEW—QUESTIONS CONSIDERED—ACADEMIC QUESTIONS.

Where, in an action against a voluntary unincorporated association and its members for damages to plaintiff's business by a conspiracy to boycott, an appeal is taken by plaintiff from an order dismissing the action against the association as such, the fact that property was wrongfully taken by the sheriff under a writ of attachment sued out in the action cannot be reviewed on the record presented.

Appeal from District Court; Nye County.

Action by L. C. Branson against the Industrial Workers of the World and others for damages caused by a conspiracy to boycott and injure plaintiff's business. From an order dismissing the complaint as against part of the defendants, plaintiff appeals. Reversed and remanded.

L. A. Gibbons and Wm. Forman, for appellant. P. M. Broler, Jr., for appellees.

PER CURIAM. This is an action brought by the plaintiff and appellant against various voluntary unincorporated labor organizations—such organizations being designated in the complaint by their respective names—against the president and secretary, respectively, of each of said organizations, both in their official and individual capacity; also against a number of other persons, members of said organizations. At the time of the filing of the complaint a writ of attachment was obtained upon an affidavit, reciting that the ground of attachment was that "defendants criminally incurred the obligations for which the suit has been commenced." In the affidavit for attachment a copy of the complaint was set out in full, and made a part thereof.

The complaint, briefly epitomized, alleged that plaintiff was the owner and publisher of two certain newspapers published in the state of Nevada, to wit, the Tonopah Daily Sun, published at Tonopah in Nye county, and the Goldfield Daily Sun, published at Goldfield in Esmeralda county; that plaintiff had invested more than \$27,500 in said two newspapers, and the plants connected therewith, and that he was dependent upon the public for the support and patronage of the same; that plaintiff in the publishing of said newspapers employed only "union" men and paid them "union" wages; that the defendants demanded of plaintiff that he require his employes to become members of the defendant organization, the Industrial Workers of the World, and upon plaintiff's refusal so to do, the defendants, and each of them, entered into a conspiracy to damage, injure, and ruin plaintiff's business and interest in said two newspapers, by means of boycotts, threats, intimidation and violence; that in pursuance of said conspiracy, defendants are charged in

the complaint with specific acts of violence, threats and intimidation, as follows:

"(1) That on the 3d day of August, 1906, defendants caused and procured a strike of the newsboys or those who delivered and sold to the Goldfield Daily Sun in Goldfield, Esmeralda county, Nevada, and that said newsboys thereupon struck and refused to sell or deliver said the Goldfield Daily Sun; that thereupon plaintiff employed one H. C. Farmer, and Everett Read to deliver his said papers, and thereupon said defendants caused said parties to be physically assaulted and called 'scabs' and other opprobrious names, and by violence and intimidation prevented said parties from delivering said paper, and by said means, and others hereinafter set forth, plaintiff has been and is prevented from delivering his said papers in Goldfield. (2) The defendants issued and caused to be distributed a circular throughout Goldfield, and sent the same to the customers and subscribers of plaintiff, in which circular plaintiff, the Goldfield Daily Sun, was declared unfair. * * * And the public was asked and commanded not to buy said paper or in any way patronize the same. (3) That defendants visited all advertisers who advertised in the Goldfield Daily Sun, and falsely stated to all said advertisers that said paper was unfair, and that defendants had boycotted the same, and demanded of said advertisers that they cease to advertise in said the Goldfield Daily Sun, and threatened said advertisers that if they continued to advertise in said the Goldfield Daily Sun any advertiser so doing would be boycotted by defendants. (4) That said defendants demanded of the public in general that they not subscribe for, advertise in, or in any way patronize the Goldfield Daily Sun, and threatened any one who did so with boycott by defendants. (5) That defendants visited all the news stands in Goldfield where the Goldfield Daily Sun was sold or dealt in, and threatened each and all of said news stands with a boycott at the hands of defendants, and that defendants would post any news stand selling the said the Goldfield Daily Sun as 'unfair' and a 'scab,' unless said news stand ceased absolutely to sell or handle said paper. That one of said news stands was owned by one of plaintiff's employes, and that defendants by the use of said threats and intimidations forced and compelled said employe not alone to cease selling or handling the said the Goldfield Daily Sun, but also quit the employ of plaintiff; and that said employe of plaintiff was forced to accede to the demands of defendants through fear that defendants would ruin his business unless he did comply with their demands. (6) That defendant maintained a blackboard or billboard on the public streets of Goldfield in front of the Miners' Union Hall, on which blackboard or billboard they caused to be posted the names of all those who advertised in the Goldfield Daily Sun, and in connection with the names of said

advertisers so posted stated that 'the Goldfield Daily Sun had been declared unfair,' and asked the public not to patronize those persons or firms or corporations whose names appeared upon said blackboard or billboard for the reason that they advertised in the Goldfield Daily Sun; that by reason of said acts of defendants all advertisers save five, whose names were posted on said blackboard, were forced to and did withdraw their advertisements from the Goldfield Daily Sun. (7) That defendants established an espionage upon the office of the Goldfield Daily Sun and watched all persons who entered into the office of the said paper, and that by reason of the threats of a boycott and intimidation forced and compelled many persons to cease to patronize the job printing department of the Goldfield Daily Sun, and in many cases forced and compelled customers to cancel orders for work given to said paper, even after the work had been completed by plaintiff. (8) That defendants combined and conspired with the employes of the Tonopah Goldfield Railroad Company who handle freight and with the transfer companies operating in Goldfield, whereby said railway employes and said transfer companies agreed not to in any way handle, deliver, or forward any of the freight sent by or to plaintiff or the Goldfield Daily Sun, and that by reason of said combination and conspiracy said railway employes have refused to handle or unload freight sent to or by the Goldfield Daily Sun, and the transfer companies have refused to handle in any way freight sent to or by the Goldfield Daily Sun, and that as a direct result of said combination and conspiracy plaintiff is unable to receive or ship any freight unless his own employes receive the same at the cars or deliver the same to the cars for shipment. (9) That defendant organizations have enforced their said boycott against plaintiff and his paper the Goldfield Daily Sun and the Tonopah Daily Sun, and has compelled its members to enforce said boycott by placing a fine of \$15 upon any member who bought a copy of either paper. (10) That the defendant organizations have directed and ordered all their members to withdraw their subscriptions from the Tonopah Daily Sun under a penalty of a fine by or a dismissal from said organizations. (11) That defendants have persuaded and endeavored to compel those who sell and deliver the Tonopah Daily Sun to strike and refuse to sell said paper or to deliver the same to its subscribers, and in pursuance of said conspiracy and combination have offered to pay said newsboys, and those who deliver and sell said the Tonopah Daily Sun, \$1.50 per day if they would strike and refuse to sell or deliver said newspaper. (12) That said defendants have caused by threats and intimidation the newsboys, and those who sell and deliver the Tonopah Daily Sun in Manhattan, Nye county, Nevada, to strike and refuse to sell or deliver said the Tonopah Daily Sun, and thereby greatly decrease the

circulation of said paper, and prevented plaintiff from obtaining new subscribers. (13) That defendants or their agents have visited the newsdealers in Tonopah, Nye county, handling or selling the Tonopah Daily Sun, and demanded of them that they cease selling or handling the Tonopah Daily Sun, and threatened them that if they did not do so that they, the defendants, would boycott the newsdealers continuing to handle said the Tonopah Daily Sun. (14) That defendant Shaw entered the office of the plaintiff in Tonopah, and attempted by threats and intimidation to compel plaintiff to submit to the demands of the defendants, and persisted in his said threats and intimidations until it became necessary to eject him from plaintiff's said office. (15) That defendants have demanded that advertisers in the Tonopah Daily Sun withdraw their advertisements from said paper, and have threatened that unless they did so defendants would boycott them, and that as a result of said threats and intimidations, advertisers in said paper have withdrawn their advertisements therefrom and have ceased to advertise in said paper. (16) That defendants have publicly, falsely stated and caused said statement to be circulated among the public that the Tonopah Daily Sun was unfair, and that the same was published solely in the interests of the mine owners, and demanded of all persons that for these reasons they do not subscribe for or patronize said paper. (17) That plaintiff is informed and believes, and therefore alleges the facts to be, that defendant organization I. W. W. and its officers plotted and planned to blow up and destroy the plant of said the Tonopah Daily Sun, and was prevented from so doing only by the vigilance of the plaintiff in guarding his said property. (18) That defendants for the purpose of intimidating plaintiff and preventing him from publishing his said newspaper, and for the purpose of injuring and destroying his business and his property rights in said newspapers, and for the purpose of depreciating in value thereof and forcing plaintiff to comply with their demands have repeatedly publicly stated and threatened as follows: That the boycott (against plaintiff) would not be raised until the plaintiff had sold both his newspapers, and that if plaintiff did not do so his two plants would not be worth fifteen cents. That plaintiff would have to sell his Goldfield paper, prove the sale to be bona fide, compel the employes of the Tonopah Daily Sun to join the Industrial Workers of the World, and publish in the Tonopah Daily Sun an apology to the Industrial Workers of the World. That the purchaser of the said the Goldfield Daily Sun would have to carry the so-called 'I. W. W. Card' or publish a column devoted to the Industrial Workers of the World. That plaintiff could sell his business and plant in Goldfield only to the I. W. W. That they (defendants) would not let up on plaintiff until they had driven him from the state of Ne-

vada. (19) The defendants caused plaintiff's employes to be assaulted while they were delivering mail to the United States post office or taking mail therefrom."

The complaint further alleges that as a result of the alleged conspiracy of defendants, and the acts and things done in pursuance thereof, plaintiff was damaged in the sum of \$25,000, and judgment for that amount, together with costs, is prayed for against defendants.

Certain of the defendants appeared specially, and filed a notice and motion, the body of which is as follows: "The defendants, Industrial Workers of the World, Tonopah Miners' Union No. 121, Mining Department Industrial Workers of the World, Goldfield Miners' Union No. 220, Mining Department Industrial Workers of the World, Goldfield Branch Industrial Workers of the World, Newsboys' Union No. 45, I. W. W., Herbert T. Shaw, as president of the Tonopah Branch of the Industrial Workers of the World, G. A. Roberts, as secretary of the Tonopah Branch of the Industrial Workers of the World, J. M. Brown and Joe Smith, respectively as president and secretary of the Tonopah Miners' Union No. 121, Mining Department, Industrial Workers of the World, F. Clough and J. B. Barry, respectively as president and secretary of the Goldfield Miners' Union No. 220, Industrial Workers of the World, L. O'Handley and A. Morris, respectively as president and secretary of the Newsboys' Union No. 45, I. W. W., above named appearing herein only for the purpose of this motion, ask: That the complaint on file herein be stricken from the files, the summons vacated, quashed, and set aside, and all and singular proceedings, so far had and taken in said court and cause be annulled and declared void; that plaintiff take nothing thereby, and that said action be dismissed, and upon the following grounds: That the said complaint does not conform to the provisions of section 39 of the Civil Practice Act of this state (Comp. Laws, § 3134), in that the same does not specify that said defendants, so as aforesaid, specially appearing, are thereby sued as persons natural or artificial; upon the contrary, said action is brought, and the same is pending and prosecuted against said defendants, and each of them, as a voluntary 'unincorporated association, composed of persons voluntarily combined and associated together for their common benefit.' That said complaint complains and alleges that said action is against said defendants not as natural or artificial persons, but as an unincorporated voluntary association or society, which is not a legal entity, and has no existence apart from and separate from those persons comprising said unincorporated voluntary association. That said action is brought and pending against said defendants in the name and names of unincorporated voluntary associations, sep-

arate and apart from the person and persons who compose them."

At the same time, the same defendants appearing specially, and subject to the foregoing motion, reserving all the rights therein claimed, moved: "That the writ of attachment issued out of said court in said cause be vacated, quashed, set aside, dissolved, discharged, and declared void, and all and singular funds, property and money thereby seized upon and held be released and discharged therefrom upon the following grounds: That said writ of attachment was improperly issued, in this: That the affidavit upon attachment, filed in said cause, does not conform to the provisions of an act of the Legislature of the state of Nevada, entitled 'An act to amend an act entitled "An act to regulate proceedings in civil cases in the courts of justice in this state," and to repeal all other acts in relation thereto,' approved March 8, 1869; approved February 14, 1887; St. 1887, p. 55, c. 48; for in that said attachment was attempted to be issued on account of defendants having criminally incurred the obligation for which suit has been commenced, whereas said affidavit sets forth no fact or facts describing any criminal act or acts on the part of the defendants, or any or either of them, and contains no statement of fact or facts describing any act or acts of defendants showing the commission of any criminal act whereby said defendants, or either of them, were criminally liable, or which would subject the defendants, or any or either of them, to civil damages. That said affidavit does not contain any fact or facts showing that any act or acts of defendants, or that any or either of them criminally incurred any obligation for which plaintiff has commenced suit, or for which plaintiff is at all entitled to recover any compensation whatsoever. That said affidavit fails to show that the nature of the plaintiff's claim is just, or that he is entitled to recover in this action. That said affidavit is wholly insufficient and does not state any fact or facts sufficient to conform to the provisions of the statute aforesaid, in that it fails to show that any debts whatever, or that the amount for which this suit is commenced, has been criminally or otherwise incurred by said defendants, or any or either of them. That said affidavit for attachment was and is wholly insufficient to give this court jurisdiction to issue the writ of attachment, for it fails to show that any liability of defendants, or any or either of them, was incurred criminally, fraudulently, or otherwise. That said affidavit does not state facts sufficient to show the nature of the plaintiff's claim, and particularly that said claim is a just one, and that the same was criminally contracted whereby an obligation on the part of the said defendants was incurred for which this suit was commenced."

These motions coming on regularly to be heard before the trial court, the following

order was made: "It is ordered that as against each and all of the voluntary unincorporated associations named and set forth in the complaint as defendants, the motion of defendants to dismiss said action and dissolve said attachment is hereby granted." From this order plaintiff appeals.

1. It will be observed that in the first motion quoted above it was asked, first, "that the complaint on file herein be stricken from the files"; second, "the summons vacated, quashed, and set aside"; third, that "all and singular the proceedings so far had * * * be annulled and declared void"; fourth, "that said action be dismissed." There is no specific provision in the statutes for motions of this character, and they should not be granted unless the moving party is clearly entitled to the relief asked for, and the pleadings are not capable of being amended so as to cure the defect complained of. It is manifest that the court could not appropriately grant any of the things demanded in the motion when there were any proper parties defendant. If the court had denied the motion, respondents could not have successfully assigned error, even though it be conceded that it was not proper to make voluntary unincorporated associations of persons, parties to actions merely by the name of the association. If no natural persons had been made defendants in this action, then the case would have been in the same situation as that of *Mexican Mill v. Yellow Jacket S. M. Co.*, 4 Nev. 40, 97 Am. Dec. 510, relied on by respondents, in which this court said: "The very first step towards the commencement of a civil action or proceeding is the filing of a complaint, in which it is indispensable that there be shown a plaintiff and a defendant, and without which it is an absolute nullity, and renders void all subsequent proceedings had under it. In this instance, no person natural or artificial is named as a plaintiff, and if an amendment were allowed to supply the omission the effect of such an amendment would necessarily be to make a plaintiff where there were none such at the inception of the action." In this case, however, the plaintiff is a natural person, and numerous natural persons are included as defendants. While the trial court could not grant the motion in its entirety, as prayed for, it did grant it in part, by dismissing the action in so far as the voluntary unincorporated associations named and set forth in the complaint were concerned. It seems to be conceded that the effect of this order would be practically to strike from the complaint all defendants, excepting the few designated by name, while the many hundreds who compose the organizations would in no sense be parties to the action. For the purposes of this opinion, we will treat it as having such effect.

While a voluntary unincorporated association cannot by its name alone sue or be sued,

nevertheless, such an organization has its rights and responsibilities, which rights it may enforce by appropriate procedure; and, by the same procedure, it necessarily follows, it may be held accountable for its responsibilities. These organizations usually comprise a large membership, and are governed in accordance with prescribed rules and regulations by officers elected for the purpose. They frequently not only possess a large amount of property, but exercise vast powers in the communities in which they exist. It is conceded that they may sue or be sued by joining all their members, but this, if requisite, would impose great inconvenience upon the organizations themselves, as well as hardship upon those seeking redress against such organizations, for it would be impossible, in many instances, for nonmembers to obtain the names of more than a small fraction of the membership, without great effort, delay, and probable expense. It is manifest, we think, from the complaint, that the plaintiff proceeded upon the theory that the persons constituting the defendant organizations, being numerous, he could proceed against a few personally, who would represent the whole body of the defendant organizations. Counsel for appellant now contends that the defendant organizations are properly made defendants upon this theory. It has long been recognized in proceedings in equity that an action may be instituted by or against a voluntary unincorporated organization, where the members comprising the same were numerous, by simply joining as defendants a few natural persons, members of the organization, sufficient to represent and protect the interests of the entire membership, and that the few may be made plaintiffs or defendants for all. *Story's Eq. Pl. § 97; 15 Ency. Pl. & Pr. p. 608; 22 Ency. Pl. & Pr. p. 247; U. S. v. Coal Dealers' Association (C. C.) 85 Fed. 252.* The case of *United States v. Coal Dealers' Association* was a "bill by the United States against the Coal Dealers' Association of California and the members of the association, and against Charles R. Allen, Central Coal Company, R. D. Chandler, George Fritch, J. C. Wilson & Co., Oregon Improvement Company, Oregon Coal & Navigation Company, W. G. Stafford, trading as W. G. Stafford & Co., R. Dunsmuir's Sons, John Rosenfeld, Louis Rosenfeld, and Henry Rosenfeld, partners, trading as John Rosenfeld Sons." Discussing this question, *Morrow, Circuit Judge*, said: "It is contended that, as the Coal Dealers' Association is an unincorporated company, it cannot be brought into court by making it a party defendant by that name. In equity, the action must be against the individuals comprising such an association; but there is this exception: Where the parties are numerous, some of them may be brought in as representing the whole association. The title of this case is against 'The Coal Dealers' Association of California, and All the Members of Said Association,' and

also against 17 individuals, who are designated as 'Members and Officers of Said Association.' The return of the marshal shows that all these individuals have been served; that the president of the association has been served as an individual, and as president of the association; and he has appeared in the capacity of president in the affidavit filed by him, as has also the secretary of the association. This, I think, is sufficient, under the rule requiring sufficient parties, to represent all the adverse interests in the suit." Were this a proceeding in equity, there would be no question about the right of plaintiff to make certain of the members of the defendant organizations defendants for all their associates who had a common interest. This, however, is an action at law for damages, and the equity rule does not prevail unless made so by statute. Section 14 of the Civil Practice Act of this state (Comp. Laws, § 3109) provides: "Of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants; but if the consent of any one, who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. Tenants in common, joint tenants, or copartners, or any number less than all, may jointly or severally bring or defend or continue the prosecution or defense of any action for the enforcement of the rights of such person or persons." We think it was the intention of the Legislature, by this provision of the statute, to make the equity rule applicable to all proceedings in the courts of this state, whether the same be of a legal or equitable nature. Under our Code provision, there is but one form of civil action, and legal and equitable distinctions, so far as practice is concerned, are largely, if not entirely, done away with. To hold that the defendant organizations cannot be sued without including all members, which are so numerous, scattered and difficult to ascertain might cause such hardship and delay as would amount to a denial of justice. It is hard to conceive of any case to which the statute would be more applicable in its provisions than where the parties are numerous one or more may sue or defend for all.

This question came before the Supreme Court of Ohio in the case of *Platt v. Colvin*, 50 Ohio St. 703, 36 N. E. 735, and we quote with approval from the opinion in that case, as follows: "It was the general rule in chancery, before the adoption of the Civil Code, that suits must be prosecuted by the real parties in interest, and that all who were united in interest must be joined. There were, however, certain well-established exceptions to the rule, which, like the rule it-

self, were adopted for the convenient administration of justice. Among these exceptions, it is stated in Story's Equity Pleading, § 97, were '(1) where the question is one of a common or general interest, and one or more sue, or defend, for the benefit of the whole; (2) where the parties form a voluntary association for public or private purposes, and those who sue, or defend, may fairly be presumed to represent the rights and interests of the whole; (3) where the parties are very numerous, and although they have, or may have, separate, distinct interests; yet it is impracticable to bring them all before the court.' In speaking of the second class of exceptions above mentioned, it is said that 'In cases of this sort the persons interested are commonly numerous, and any attempt to unite them all in the suit would be, even if practicable, exceedingly inconvenient, and would subject the proceedings to danger of perpetual abate-ments, and other impediments, arising from intermediate deaths, or other accidents, or changes of interest. Under such circumstances, as there is a privy of interest, the court will allow a bill to be brought by some of the parties in behalf of themselves and all the others, taking care that there shall be a due representation of all substantial interests before the court.' So that the principle upon which that class of exceptions rested is not different in substance from that of the last class mentioned, namely, that the parties are numerous, and it is impracticable, in the convenient and speedy administration of justice, to have them all before the court; and the courts in many adjudged cases appear to have so regarded it. * * * *Taylor v. Salmon*, 4 M. & C. (18 Eng. Ch. R.) 134; *Walworth v. Holt*, 4 M. & C., 18 Eng. Ch. R. 619; *Small v. Atwood*, 1 Younge's R. 407; *Chancey v. May*, Prec. in Ch. Finch's Chan. Cas. 592. There are many English and American cases of like character. Those already adverted to sufficiently show the nature of the exceptions which obtained in chancery to the general rule in regard to parties, the principle upon which they were based, and the manner of their practical application. The rule, and its exceptions, in their breadth and substance, were adopted into our Code (sections 4993, 5007, and 5008, Revised Statutes) and by its provisions made applicable to the civil action which it substituted for what was theretofore known as the suit in equity, and the action at law. It is argued by counsel for the defendant in error that the provisions of section 5008, permitting one or more to sue or defend for the benefit of all, when the question is one of a general or common interest of many persons, or when the parties are very numerous and it is impracticable to bring them all before the court, apply only to actions of an equitable nature, because, before the Code, that manner of proceeding was allowed only in suits in equity. If that were a sufficient reason for

restricting the provisions of that section to such actions, the same reason would make it necessary to so restrict the general requirement of the Code that the plaintiffs must be the real parties in interest, and all must join who are united in interest; for that, as we have seen, was the general rule in equity, and not applicable to many actions at law; and so, with respect to the rule adopted by the Code, requiring the petition to state the facts constituting the cause of action, and others of its provisions. Indeed, the mode of procedure in the civil action is, in most respects, taken from, or assimilated to, that which prevailed in suits in chancery. One object of the Code in abolishing the distinction between actions at law and suits in equity, and prescribing the same method of procedure for the prosecution of both, evidently was to simplify judicial proceedings, and facilitate the administration of justice; and to accomplish that end, its provisions, and proceedings under them, should receive that liberal construction which it is expressly required shall be given them. To restrain the application of section 5008 to actions of a purely equitable nature would, we think, be at variance with its language, and the general spirit and purpose of the Code."

We are not called upon in considering the motion and order in this proceeding to determine whether the manner in which plaintiff has made the organizations in question defendants is subject to objection. If there is a defect or misjoinder of parties defendant, that question should have been raised by demurrer (Comp. Laws, § 3135), and plaintiff given an opportunity to amend. Wherever a pleading is defective, which defect may be cured by amendment, and such defect may be taken advantage of by demurrer, that course should be adopted. In discussing a similar question, this court, in *Treadway v. Wilder*, 8 Nev. 97, after saying that upon demurrer the pleading would have been bad, but the defect could have been remedied by amendment, said: "No such opportunity was given, and a technical judgment may have cut off a substantial right; such is not the spirit of the Code, nor, when properly interpreted, its practice." Section 71 of our Practice Act provides: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect." Comp. Laws, § 3166. We think, as the court did not and could not grant the relief demanded in the motion, it should have denied it *in toto*, leaving respondents to whatever remedy they may have been entitled by demurrer.

2. It appears from the order of the lower court that the attachment was only dissolved as against the voluntary unincorporated associations designated by name in the complaint, but as to the natural persons there-

in named it was not dissolved. From this it would appear that the trial court did not consider the writ as against the natural persons defendant to have been improvidently issued, and in this view the trial court was clearly correct. What we have said in reference to the voluntary associations as parties defendant applies with equal force to the order dismissing the attachment as to them. If the attachment is good as against any defendants, it is good as to all.

It is contended by counsel for respondents that the affidavit falls to sufficiently charge that the alleged obligation of defendants to pay damages to plaintiff was criminally incurred. The affidavit charges such liability in the language of the statute (Comp. Laws, § 3218), and, in addition, makes the complaint with its allegations a part of the affidavit. It is unnecessary for us to determine whether a bare allegation in the language of the statute would be sufficient, where, as in this case, the facts upon which the damage is alleged to have been occasioned, are fully set forth. If these alleged facts in themselves state a case that would be criminal, then the affidavit is unquestionably sufficient. There can be no question that a criminal conspiracy is alleged in the affidavit under all the authorities. The law, upon one portion of the case as it appears from the affidavit, is concisely stated in 8 Cyc. 639, as follows: "Neither at common law nor under statutes modifying the common-law doctrine is it lawful for workmen to combine to injure another's business by causing his employes to leave his service by intimidation, threats, molestation, or coercion. Such a combination constitutes an indictable conspiracy." Again, the same authority, in continuation of the same general topic, says: "This term (boycott) ordinarily means a confederation, generally secret, of many persons whose intent is to injure another, by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators. The character of agreement included in the term defined is highly unlawful and is an indictable conspiracy." Such a conspiracy is made punishable both by fine and imprisonment under section 4751 of the Compiled Laws of Nevada. See, also, Comp. Laws, § 4788; *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. —; 2 Wharton, Crim. Law, § 2322; 2 Bishop, Crim. Law, § 172; *Desty*, Crim. Law, § 11; 3 Chit. Crim. Law, 1138; 2 Russell on Crimes, 674; *McLain*, Crim. Law, §§ 955, 963; *Clark's Crim. Law*, 121; *Crumph v. Commonwealth*, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; *State v. Donaldson*, 32 N. J. Law, 151, 90 Am. Dec. 649; *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 783, and note; *State v. Stewart*, 59 Vt. 273, 9 Atl. 555, 59 Am. Rep. 710, and note 729; *People v. Kostka*, 4 N. Y. Cr. Rep. 429; *Emack v. Kane* (C. C.) 34 Fed. 47; *Hopkins v. Oxley State Co.*, 83 Fed. 912, 28 C. C. A. 99; *State v.*

Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; *Rex v. Eccles*, 1 Leach, 274; *Steamship Co. v. McGregor*, 15 Q. B. Div. 476; *Regina v. Drutt*, 10 Cox, C. C. 592. Many other cases, both English and American, state and federal, might be cited, but the foregoing are sufficient upon a question upon which there is little, if any, conflict of authority. Many decisions of a kindred nature, not criminal in their procedure, but in which the unlawfulness of certain conspiracies, considered with special reference to civil liability, may be found reviewed in the recent opinion of Farrington, J., in the case of the Goldfield Consolidated Mines Co. v. Goldfield Miners' Union No. 220 et al. (C. C.) 159 Fed. 500.

In this case Judge Farrington, in referring to the rights guaranteed to every citizen under section 1 of the fourteenth amendment to the Constitution of the United States (which is as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws") and article 1, § 8, of the Constitution of Nevada (which contains a similar provision as follows: "No person shall be * * * deprived of life, liberty, or property without due process of law"), very appropriately and correctly said and quoted: "The terms 'life, liberty, and property,' as used in the federal Constitution, embrace every right which the law protects. They include not only the right to hold and enjoy, but also the means of holding, enjoying, acquiring, and disposing of property. The right to labor is property. It is one of the most valuable and fundamental of rights. The right to work is the right to earn one's subsistence, to live and to support wife and family. The right of master and servant to enter into contracts, to agree upon the terms and conditions under which the one will employ and the other will labor, is property. The master has the right to fix the terms and conditions upon which he is willing to give employment; the servant has the right to fix the terms and conditions upon which he is willing to labor, and any statute which curtails and limits that right deprives the party affected of his property, and, in the same measure, of his liberty. Both parties are free to enter into, or refuse to enter into, the contract. Before the law, there is the same freedom to employ as to work, to buy as to sell, to choose one's employé as to choose one's employer. 'The liberty of contracting, relating to labor, includes both parties; the one has as much right to purchase as the other to sell labor.' *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; *Lochner v. New York*, 198 U. S. 45, 56, 25 Sup. Ct. 539, 49 L. Ed. 937. 'One citizen cannot be compelled to give employment to another, nor can any one be compelled to be employed against his will.' *Gillespie v. The People*, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176.

The right of an employer to refuse to employ any particular individual, or any class of individuals, is neither greater nor less than the right of a man to refuse to work for any particular individual, or class of individuals. The reason for the refusal can in no wise control, enlarge, or diminish the legal right of refusal, the right to employ, or the right to refuse to be employed. 'It is a part of every man's civil right that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts. 2 Cooley on Torts, 587.'

In *Ex parte Boyce*, 27 Nev. 229, 75 Pac. 1, 65 L. R. A. 47, we said: "Labor properly directed creates wealth, and all honest toil is noble and commendable. The right to acquire and hold property guaranteed by our Constitution is one of the most essential for the existence and happiness of man, and for our purposes here we may consider it to be the cornerstone in the temple of our liberties, and that it implies and includes the right to labor. It may also be granted that labor, the poor man's patrimony, the creator of wealth, and upon which all must depend for sustenance, is the highest species of property, and the right to toil is as sacred and secure as the millions of the wealthy; but individual rights, however great, are subject to certain limitations necessary for the good of others and the community, and inherent in every well-regulated government. * * * Broadly speaking, the right to acquire and hold property, which presupposes the one to labor at all ordinary pursuits, is subordinate to this greater obligation not to injure others, individually or collectively, and to contribute and aid in the support of the government in all its legitimate objects."

It necessarily follows that any attempt by conspiracy to interfere with these fundamental and essential rights or by threats, intimidation, and violence, to prevent the employer from hiring or the employé from laboring, is unlawful under our system of government by which all men are free and equal. No organization or combination of men or individuals can lawfully prevent the exercise of these constitutional rights by all others. If it were legal for the defendant organizations or the officers and members by force, threats, or intimidation to prevent the employés of plaintiff from continuing in their employment, it would be equally so for the unions to which plaintiff's employés belong and for owners' and operators' associations or for other organizations or the officers and members thereof by force, threats, or violence to prevent the members of the defendant organizations from working, even to the extent of starvation. As the law bears equally upon

all, it is self-evident that if any labor union or organization could by threats, force, and intimidation lawfully prevent the members of any other union or organization from laboring for employers, or could by force, threats, and intimidation prevent employers from hiring members of other unions or organizations, that every other union or organization would have the same and equal right, resulting eventually in control by the organization exercising the most force and violence, and in the overthrow and subversion of law and order.

In the case of *Hopkins v. Oxley Stave Co.*, supra, cited and quoted from by counsel for respondents in his brief, the court says: "While the courts have invariably upheld the right of individuals to form labor organizations for the protection of the interests of the laboring classes, and have denied the power to enjoin the members of such associations from withdrawing peaceably from any service, either singly or in a body, even where such withdrawal involves a breach of contract (*Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310, 25 L. R. A. 414), yet they have very generally condemned those combinations usually termed 'boycotts,' which are formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them, by means of threats and intimidation, of the right to conduct the business in which they happen to be engaged according to the dictates of their own judgments. The right of an individual to carry on his business as he sees fit, and to use such implements or processes of manufacture as he desires to use, provided he follows a lawful avocation and conducts it in a lawful manner, is entitled to as much consideration as his other personal rights; and the law should afford protection against the efforts of powerful combinations to rob him of that right and coerce his will by intimidating his customers and destroying his patronage. A conspiracy to compel a manufacturer to abandon the use of a valuable invention bears no resemblance to a combination among laborers to withdraw from a given employment as a means of obtaining better pay. Persons engaged in any service have the power, with which a court of equity will not interfere by injunction, to abandon that service, either singly or in a body, if the wages paid or the conditions of employment are not satisfactory; but they have no right to dictate to an employer what kind of implements he shall use, or whom he shall employ. Many courts of the highest character and ability have held that a combination such as the one in question is admitted to have been is an unlawful conspiracy, at common law, and that an action will lie to recover the damages which one has sustained as the direct result of such a conspiracy."

Referring to the section of the crimes and punishments act of Nevada relative to conspiracy, counsel for respondents in his brief

says: "The conspiracy statute, which was but declaratory of the common law, was amended in 1887, Compiled Laws, § 4751, and provides: 'That no part of this act shall be construed in any court of this state to restrict or prohibit the orderly and peaceably assembling or co-operation of persons employed in any profession, trade or handicraft for the purpose of securing an advance in the rate of wages, or compensation, or for the maintenance of the same.' * * * Whether the means by which labor combinations seek to effect its objects and purposes is criminal or not depends upon the lawfulness of the mode or action taken in and by which injury is inflicted or threatened—that is, whether it is an actionable wrong or is merely such as the law denominates *damnum absque injuria*."

According to the complaint and affidavit in this case, the defendants are not within the provisions of the amendment of the statute in any sense whatever. No question of an advance in the rate of wages paid employes, or the maintenance of the same, is here involved. Upon the contrary, the complaint alleges that plaintiff was employing "union" men and paying "union" wages. So far as the complaint now before the court is concerned, it appears that both the plaintiff and his employes were entirely satisfied with existing conditions. The damage alleged in this case to have been sustained was not caused by the employes of plaintiff seeking by peaceable means to maintain or better their condition, but by outsiders, who are alleged to have demanded of plaintiff that he compel his employes to become members of what would appear to be a rival labor organization, and, upon his refusal, entered into the conspiracy charged, to compel him to accede to their demands, or they would ruin his business. Nor is it charged even that defendants were seeking to accomplish their declared purpose by "orderly and peaceably assembling or co-operation"; but, upon the contrary, by means of intimidation, threats of violence and actual violence. Counsel for respondents has not cited us an authority, nor do we think one can be found, holding that what defendants are charged in the complaint with having conspired to accomplish by resorting to intimidation and acts of violence, did not state facts which constitute crime.

It is not necessary that all of the acts alleged to have been committed in pursuance of the conspiracy charged be, in themselves, of a criminal nature; and it is unnecessary to determine whether each and every specific act alleged is unlawful. Some of the acts charged are known by all men to be unlawful, and when they are performed as a part of the means to carry out the purpose which the complaint alleges the defendants combined to accomplish, a conspiracy, criminal in its nature, is sufficiently charged, at least

for the purposes of an affidavit for attachment.

Counsel for respondents in his brief says that the return of the sheriff shows that certain property was wrongfully attached under the writ. No question of that kind is presented in the record, and could not be upon the orders appealed from. If the sheriff has taken under his charge property not subject to attachment, the statute affords an appropriate and only remedy.

The briefs in this case have covered a much wider scope than the questions involved upon the record, and a considerable discussion has been indulged in, based upon the law controlling under a state of facts different from those alleged in plaintiff's complaint. We are governed in the law of this case by what is alleged to exist, not by some other state of facts which a trial may subsequently develop. It would, therefore, be of no value as a precedent, and of little other value, to enter upon a purely academic discussion of questions not now before the court.

In considering the order of the district court, similarly as questions upon demurrer, the charges and allegations of the complaint are assumed to be true for the purposes of the appeal, to the end that plaintiff may have an opportunity to present proof, but whether the defendants did in fact commit the unlawful acts charged by the complaint or not remains to be determined upon the trial, and by a jury, if any of the parties desire one, after defendants have been given an opportunity to make denial or answer setting up any defense they may have, and all parties have presented their evidence and been heard.

For the reasons given, the orders appealed from are reversed, and the cause is remanded for further proceedings.

(24 Utah, 1)

PAUL v. SALT LAKE CITY R. CO.

(Supreme Court of Utah. April 8, 1908.)

1. CARRIERS—ACTION FOR INJURY TO PASSENGER—RES IPSA LOQUITUR.

A recovery against a carrier under the rule *res ipsa loquitur* cannot be had by merely showing that an accident occurred and that an injury was sustained by a passenger, but it must further appear that the injury was caused by something which, at the time it occurred, was in the care, custody, or under the control of the carrier, or in some way connected with or related to his business in the transportation of passengers, and while there is no presumption that the particular things that caused the injury actually existed, if there is some competent evidence showing their existence and the occurrence of the accident caused by any one of them and the resulting injury, the law will presume that the accident was the result of the carrier's negligence, and the burden of proof is on it to show that it was not at fault.*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1283.]

*Dearden v. S. P., L. A. & S. L. R. Co. (Utah) 93 Pac. 271.

2. SAME—APPLICATION OF RULE RES IPSA LOQUITUR.

The rule *res ipsa loquitur* applies to the operation of street cars and to all passengers alike whether injured while riding in a car or in getting on or off.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1283.]

3. NEW TRIAL—GROUNDS—MISCONDUCT AFFECTING JURY—MISCONDUCT OF PRESIDENT OF DEFENDANT CORPORATION.

An affidavit supporting a motion for a new trial averred on information and belief that the president of defendant corporation was also the president, prophet, seer, and revelator of the Church of Jesus Christ of Latter-Day Saints, and at a secret priesthood meeting before the trial instructed his followers as to their duties if called upon to serve as jurors in cases against corporations, and especially street railway corporations, and stated that there were grafters seeking by trickery to obtain verdicts against corporations by means of damage suits, and that he regretted that Latter-Day Saints sitting as jurors had returned verdicts against corporations. The affidavit further averred that five of the jurors trying the case were members of the Church of Latter-Day Saints. It was not claimed that any of the jurors were present at the meeting or ever heard of what was alleged to have been said by the president of the church. *Held*, that the affidavit was insufficient, especially where the jurors assailed filed counter affidavits in which they denied knowledge of the alleged instructions by the president of the church, and alleged that they had never heard of them until informed of them by the affidavit, since in order to constitute misconduct which would affect a regularly returned verdict, it must in some way be made clearly apparent that the acts complained of reached the jurors or some of them.

Appeal from District Court, Third District; T. D. Lewis, Judge.

Personal injury action by Louisa B. Paul against the Salt Lake City Railroad Company. Judgment for defendant and plaintiff appeals. Affirmed.

S. P. Armstrong, for appellant. P. L. Williams, Geo. H. Smith, Jno. G. Willis, and H. B. Thompson, for respondent.

FRICK, J. This is the second appeal of this case. The opinion on the first appeal is reported in 30 Utah, 41, 83 Pac. 563, where judgment in favor of respondent was reversed upon the ground that the court committed error in its instructions to the jury. The facts developed on the second trial are practically the same as on the first, and they now appear to be as stated by Mr. Justice Straup on the former appeal.

The principal matters presented for review on this appeal, so far as they relate to the trial, involve the questions of contributory negligence on the part of appellant in alighting from a street car on which she was a passenger which was being operated by respondent, and the presumptions of negligence arising against the respondent by reason of the occurrence of the accident and injury to appellant. The court's instructions were very full and cover every phase of the case. Among other instructions, the court gave the following: "The mere fact that an accident has happened is not sufficient proof to charge the defendant with negligence nor the plain-

tiff with contributory negligence. The burden of proving negligence rests on the party alleging it, and when a person charges negligence on the part of another as a cause of action she must prove the negligence by a preponderance of the evidence. While the mere fact that an accident has happened is not sufficient proof to charge the defendant with negligence, yet, in this case, the court instructs you that if you find from the evidence that while plaintiff was a passenger on defendant's street car, and while she was attempting to alight therefrom, she was injured by the car starting and jerking her to the ground, the fact, if you find it to be a fact, that she was injured by such starting and jerking of the car constitutes prima facie evidence of negligence on the part of defendant, and casts on the defendant the burden of showing that such starting took place without its fault, or that the injury occurred through the contributory negligence of the plaintiff. But the court instructs you that the burden of showing that she was injured by reason of such starting of the car is on the plaintiff, and there is no presumption from the mere fact that she was injured that the car was not in motion when she attempted to alight, nor is there any presumption that the car was in motion when she attempted to alight from the mere fact of the injury. Whether or not the car was in motion is a fact that you must determine from the evidence." Appellant excepted to certain portions of this instruction and now urges the giving of these parts as error.

On the former appeal we announced the following doctrine: That respondent had made out a prima facie case upon proving that she was a passenger on one of appellant's cars. That she had indicated her desire to leave it, and that the car was stopped to enable her to do so. That while in the act of alighting and before she had done so the car started and caused her to fall. We further held that the instructions of the court were not in harmony with this doctrine, but in conflict therewith, and hence held the instructions erroneous. Counsel for appellant now asserts that the foregoing instruction in its effect is practically the same as the one condemned by this court and hence likewise erroneous. Counsel, as we understand him, contends the law as between carrier and passenger to be that, if an accident of any kind occurs, or, if a passenger is found injured or dead by the side of the track, or in a railway car, all that the plaintiff is required to prove is that the injured or deceased person was a passenger, and that while sustaining that relation was injured or killed. From such an injury or death it is contended the presumption arises that the passenger was injured or killed through the negligence of the carrier and the burden is cast upon him to explain the cause of the injury or death and thus purge himself of negligence. This, counsel says, is the neces-

sary result of the application of the maxim "*res ipsa loquitur*." Is this contention sound? We think not. It is quite true that, as between carrier and passenger, the maxim applies in most instances. But it does not go to the extent contended for by counsel. We have very recently had occasion to consider and pass upon the application of the maxim as applied to carrier and passenger in the case of *Dearden v. S. P., L. A. & S. L. R. Co.* (Utah) 93 Pac. 271. Mr. Justice Straup, in that case, at page 273, states the rule in the following language: "All that the plaintiff here was required to aver and prove to entitle him to recover was the relation of passenger and carrier; that the accident through which he received his injuries was connected with the means or instrumentality used by the defendant in the transportation, and an injury resulting therefrom. When such facts were shown, a prima facie presumption arose that the accident was occasioned by the defendant's negligence, and the burden was cast on it to show that it was not at fault, and that the accident was not caused by its negligence." This, we think, is a correct statement of the rule, as it is held to be by the great weight of authority.

In *Price v. St. L., I. M. & S. Ry. Co.*, 75 Ark., at page 491, 88 S. W., at page 578 (second column) 112 Am. St. Rep. 79, the Supreme Court of Arkansas adopts and quotes the following language which is termed to be the true rule: "The true rule would seem to be that when the injury and circumstances attending it are so unusual and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road, over which the company has entire control, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury." A large number of cases are cited which, it is claimed, support the text as quoted above. Under the rule, therefore, to show merely that an accident occurred, and that an injury was sustained by a passenger is not enough. It must further be made to appear that the injury was caused by something which, at the time it occurred, was in the care, custody, or under the control of the carrier, or in some way connected with or related to his business in the transportation of passengers. If one train collides with another, or if the train breaks through a bridge or culvert, or if it collides with some foreign object on the track, or is derailed, in all such cases, as between carrier and passenger, the rule is of easy application, and is generally enforced to its full extent. But if it is alleged that an accident has happened to a passenger through an alleged derailment of a car, or by a collision with some train or other object on the track,

or from any other cause, there is no presumption that the collision actually occurred, or that the particular thing that caused the accident actually existed. These must be proved. But if some competent evidence is adduced in support of the existence of the things enumerated, or any one of them, and of the occurrence and the accident caused by any one of them, and the resulting injury, then the law presumes that by the exercise of that high degree of care which it imposes upon common carriers the accident could have been averted, hence casts the burden on the carrier to show why it was not avoided.

Applying the rule to this case, there was no presumption that the car moved when the appellant alighted therefrom; but if it did move while she was in the act of alighting, the law presumes it was caused to move by the negligence of respondent's employees in charge of the car. It is sometimes held that in cases where injuries arise by reason of the alleged movement of a car while a passenger is in the act of stepping onto or in alighting therefrom, the question of whose negligence caused the accident may not always be free from doubt; that in such a case the passenger is also engaged in an act which requires the exercise of ordinary care for his own safety; that the act of the carrier in moving the car and the act of the passenger in getting on or off may thus combine to produce the result, and that the injury, if it arises from a fall under such circumstances, may thus as plausibly be attributed to the act of the passenger as to that of the carrier. It is for this reason that some very respectable courts have denied the application of the maxim "*res ipsa loquitur*" in cases of injuries which occur in attempting to get on or off street cars. The exception to the rule is well stated in the case of *Dresslar v. Citizens' St. Ry. Co.*, 19 Ind. App. 383, 47 N. E. 651. It seems to us, however, that this exception is not logical; at least in those jurisdictions where the plaintiff is not required to allege and prove affirmatively that he was in the exercise of ordinary care at the time of the injury. In Indiana and some other states where such affirmative allegations and proof are required, it may well be that where it appears from the complaint that the person was injured while in the act of alighting from a car, the proof required from the plaintiff that he was in the exercise of ordinary care at the time raises an inference rather than a presumption that the accident and consequent injury was caused by the negligence of the carrier. We think, however, that the weight of authority is in accordance with the rule as announced in this case on the former appeal, namely, that it applies to the operation of street cars and to all passengers alike whether injured while riding in a car or in getting on or off. A plaintiff may, by his own testimony, or by that of his witnesses, entirely overcome the presumption, or leave the proximate cause of

his injury, by reason of his own conduct, in such a state of doubt that the jury may be warranted in finding against him on the case as made by himself. We have carefully examined all the cases cited by counsel in support of his contention, and none of them goes to the extent that counsel claims. While in some of them general expressions are found that would seem to support counsel, still it is very clear that upon the facts stated the decisions all rest upon the principles that we have attempted to outline above and are in harmony with it. We think the court gave to appellant every benefit of the maxim "*res ipsa loquitur*," and therefore committed no error in giving the instruction.

Complaint is also made of the giving of instructions Nos. 19 and 20. These instructions were, however, based upon some issue in the case, and correctly stated the law applicable thereto.

The only other assignment that requires consideration relates to the alleged misconduct of the president of respondent. The verdict was returned on April 26, 1906, and just two months thereafter appellant's counsel asked and obtained leave of the court to amend his notice of motion for a new trial and to support such amendment by affidavit. The affidavit is made by counsel, and, in substance, states: That, subsequent to the trial, affiant learned of certain interferences by the president of respondent which tended to pervert the course of justice and prevented plaintiff from having a fair trial. That Joseph F. Smith was, at all times stated in the affidavit, the president of respondent and also the president, prophet, seer, and revelator of the Church of Jesus Christ of Latter-Day Saints, a religious organization with a large membership in Salt Lake City and county. Affiant, on information and belief, states that one of the cardinal doctrines of said church is obedience to the teachings, utterances, and instructions of its prophet, seer, and revelator; that affiant is informed and believes that the said Joseph F. Smith, the president of said church and of respondent, at a secret priesthood meeting held at the Tabernacle in Salt Lake City on the evening of April 7, 1906, took occasion to instruct his religious followers as to their duties if called upon to serve as jurors in the trial of cases against corporations, and particularly street railway corporations, and that he stated, in substance, "that there were grafters in the country seeking by every possible trick to secure verdicts against corporations by means of damage suits; that people would step off street cars and pretend to fall or suffer injuries which did not exist, and lawyers would take such personal injury cases and by trickery secure verdicts against corporations." He further stated that he regretted that Latter-Day Saints, sitting as jurors, have returned verdicts against corporations." It is further stated that if the utterances were not direct instructions

to his followers to refuse to return verdicts against corporations, the purport thereof "was at least an inducement that they, as jurors, should look with great suspicion on suits against corporations." Affiant proceeds further to state the reasons why he cannot state the foregoing matters positively, and that five of the jurors trying this case are members of, and one of them an official in, such church.

It will be observed that there is not a single fact stated positively, nor is it claimed that any one of the jurors was present at the meeting or ever heard of what it is alleged was said by the president of the church. The claims made in this affidavit—and it was the only one filed—were manifestly insufficient to warrant the granting of a new trial. If verdicts should be set aside upon such statements made merely upon information, and which in no way connect the jurors or any of them with the alleged misconduct and things set forth, then but few if any verdicts would be permitted to stand. Courts in this regard follow strictly the policy of the law, which in every possible way guards the purity of the jury box from undue influence and contamination. Every party who attempts to or does tamper with the jury does so at his peril, and if established he may not be heard to say that what he did had no effect upon the verdict. But, in order to constitute misconduct so as to affect a regularly returned verdict, it must in some way be made clearly apparent that the act or acts complained of reached the jurors or some of them. If we assume in this case that the president of respondent, as president of the church, said all that counsel states he said, how could it have influenced or in any way affected any one who did not hear of it or was not aware of what, if anything, had been said? Is it to be presumed that simply because a juror is a member of a certain religious organization and believes in its doctrines and tenets, therefore a court can assume that he hears and knows of all matters that may be said by any official of the organization upon any and all subjects, and further assume that he would follow and be controlled by what such official may have said of which the juror is supposed to be informed constructively merely? The things attributed to Mr. Smith he had a right to say at any proper time and place if he believed them to be true, or if he had any reason to believe them so. He had no right however to mention such matter to a juror, nor to any person who might become such, either for the purpose of influencing his judgment, or for any purpose. If he had discussed such matters in the presence of jurors the law would not permit him to say that he did not thereby intend to influence their judgment, but would require him to bear the consequences his acts may have produced. It is not alleged nor shown by

any evidence that Mr. Smith did any of these things. The claim is based upon the theory merely that the expressed wish or desire of the president of the church, upon all subjects, will be implicitly followed by all of the members of the church. If we assume this to be so in so far as it pertained to matters of religious doctrine, nevertheless it cannot also be assumed that it is true with regard to all other matters. Indeed it is a matter of universal knowledge that in matters such as are set forth in the affidavit, the effect upon the ordinary layman would be to arouse his opposition to them rather than cause him to meekly comply therewith. But apart from all this, the jurors who were assailed filed counter affidavits in which they denied all knowledge of the alleged instructions by the president of the church, and alleged that they never had heard of them before their attention was directed to them by the affidavit of affiant. The trial court therefore had positive and competent proof before him that the alleged misconduct never reached the jurors or any of them, and hence would not have affected their verdict. All of the cases cited by counsel for appellant upon this point to support his contention in this case rather manifest and make clear that the misconduct which affects a verdict must in some way reach the jurors or some of them. It may consist in what is termed "packing" the jury, or it may be by circulating papers or other documents to influence them, or by extending special courtesies to some of them, or by direct communication with one or more of their number. It must however affect a juror who sits in the case or some one who may act as a juror in a particular case. The principles involved here are fully discussed in Thompson & Merriam on Jurors in chapter 21, where the rule we have stated above is fully sustained by the authorities. Any other rule would destroy the integrity of verdicts and make a mere farce of jury trial. If all matters that may be published in a newspaper, or that may be said by men in authority at any time or place about courts, litigants, and the matters in litigation are to be presumed as having influenced or controlled verdicts, then no verdict in any case of any public interest can be permitted to stand. In all such cases a showing, perhaps much stronger than the one in this case, could be made that somebody who in some way is related to the case or to a juror has said or published something which may have influenced him or some of the jurors sitting in the case. The court was clearly right in refusing a new trial upon this ground.

The judgment is affirmed, with costs to respondent.

MCCARTY, C. J., and STRAUP, J., concur.

(34 Utah, 12)

STATE ex rel. EDLER v. EDWARDS, State Auditor.

(Supreme Court of Utah. April 6, 1908.)

1. STATUTES—SUBJECTS AND TITLES—CONSTRUCTION OF CONSTITUTIONAL PROVISION—AMENDATORY ACTS.

Const. art. 6, § 23, providing that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title, in so far as it applies to amendatory acts, should be liberally construed so as to guard against the real evil which it was intended to meet, and applied so as not to hamper the Legislature in adopting comprehensive measures covering a whole subject, the branches of which may be numerous, but all have some direct connection with or relation to the principal subject treated.

2. CONSTITUTIONAL LAW—STATUTES—VALIDITY—CONSTRUCTION IN FAVOR.

A statute will not be held unconstitutional unless its invalidity is clearly and manifestly established.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 46.]

3. STATUTES—SUBJECTS AND TITLES—NATURE OF CONSTITUTIONAL PROVISION.

The provision of Const. art. 6, § 23, providing that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title, is mandatory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 118.]

4. SAME—AMENDATORY ACTS.

If an amendatory act contains matter which might appropriately have been incorporated in the original act under its title, and identifies the original act by its title and declares the purpose to amend or supplement it, the provision of Const. art. 6, § 23, that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title, is sufficiently satisfied.

5. SAME—AMENDMENT OF SECTIONS OF A CODE.

Any one or more sections of a Code or Compilation may be amended by simply stating in the title of the amendatory act that it is to amend the sections designated, and all sections, the subject-matters of which are germane or related to each other, may be included in one amendatory act.

6. SAME—SUBJECT OF AMENDATORY ACT.

The subject of an act amending certain sections of a Code or Compilation, within the constitutional provision that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title, is contained in the statement which refers to the sections by numbers, and asserts a purpose of amending them.

7. SAME—SUBJECTS AND TITLE OF ACT.

An amendatory act was entitled, "An act to amend section 2583, Revised Statutes of Utah 1898, as amended by chapter 65, Laws of Utah, 1901, and section 2050, Revised Statutes of Utah 1898," Laws 1907, p. 30, c. 28, and the title contained, in addition, a synopsis of what the two sections contain. Section 2583 was referred to as creating a State Board of Equalization, including its organization and duties, and fixing the salaries of its members, and section 2050 was said to fix the salaries of certain other state officers. *Held*, that the whole title was contained in the quoted words, and the statement of the contents of the sections to be amended being a mere explanation, and not a restriction of the amendment to any particular part of the sections, left any part of them open to amendment under the general title, the matters therein contained being all correlated.

8. SAME—AMENDMENT OF PROVISIONS OF CODE—PLURALITY OF SUBJECTS.

A statute amended one section of a Code by increasing the salaries of the members of the State Board of Equalization, and amended another section by either increasing or diminishing the salaries of other appointive state officers named therein. *Held*, that the matters in the two sections amended were not incongruous, and did not make the subject of the amendatory act plural within Const. art. 6, § 23, providing that no bill shall be passed containing more than one subject, but it embraced the single subject of salaries or compensation.

9. SAME.

A section of the Code related to "the State Board of Equalization, and its duties and organization," and also dealt with their salaries. An amendatory statute increased the salaries of the members of the board, and also contained a provision requiring the board to inspect and examine annually all property it is required to assess. *Held* that, in view of the facts that the requirement as to inspection while not expressed in the original section was clearly implied from the quasi judicial character of the board, and that the provision was directory merely though mandatory in form, the assessment being equally valid with or without the inspection, the provision for inspection in the amendatory statute was immaterial, and did not render the statute objectionable, as embracing a plurality of subjects.

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Proceedings by the state, on the relation of A. B. Edler, against J. A. Edwards, as State Auditor, to determine the validity of a statute. Judgment for respondent, and relator appeals. *Affirmed*.

Goodwin & Van Pelt, for appellant. M. A. Breeden, Atty. Gen., and A. R. Barnes, Asst. Atty. Gen., for respondent.

FRICK, J. This is a proceeding to determine the validity of chapter 28, p. 30, Laws Utah 1907. Chapter 28, p. 30, Laws 1907, aforesaid, is an act which is amendatory of section 2583, Rev. St. 1898, as amended by chapter 65, p. 68, Laws Utah 1901, and section 2050, Rev. St. 1898. The principal change effected by the amendment of section 2583 was the increase of the salaries of the several members constituting the State Board of Equalization, and, so far as it related to section 2050, the increase of the salaries of some of the state officers and the reduction of the salary of the appellant as reporter of the decisions of this court. Appellant, as such reporter, and the respondent, as State Auditor, presented to the district court an agreed statement of facts from which that court was asked to determine the constitutionality of chapter 28, p. 30, Laws 1907, aforesaid, the appellant contending that the amendment of section 2050 was invalid, and that therefore he was entitled to receive a warrant for his salary from respondent at the old rate, while respondent contended that appellant was only entitled to a warrant for salary as fixed by the section as amended. The district court found for and entered judgment in favor of the respondent, and the

matter is now presented to this court on appeal.

Appellant's sole contention is that chapter 28, p. 30, Laws Utah 1907, in so far as it affects his salary, is invalid because the act covers more than one subject. In other words, it is contended that the subject-matter of section 2583 constitutes one subject, while section 2050 constitutes another subject, and that the two subjects are not correlated, but are incongruous, and cannot legally be united in one act without violating the provisions of section 23, art. 6, of the Constitution of this state, which, so far as material to this contention, provides: "No bill shall be passed containing more than one subject, which shall be clearly expressed in its title." In this case we are dealing entirely with an act by which it was sought to amend permanently numbered sections of the Revised Statutes of this state. Section 2583 was originally adopted in 1896 (Laws 1896, p. 446, c. 129, § 81), and was amended by an act known as chapter 65, p. 66, Laws 1901. In 1898 it was carried into the Revised Statutes as section 2583, and since then has retained its original number. Section 2050 was also originally passed in 1896, and incorporated into the Revised Statutes in 1898, and was also in some respects thereafter amended, but by implication merely in that such amendment was accomplished by separate, distinct, and independent acts by which the salaries of some of the officers mentioned therein, but not now in question, were changed. The question of titles to original acts, therefore, is not directly involved. Upon the question of titles to amendatory acts the cases are very numerous, but not always in strict harmony. The courts are, however, unanimous with respect to the following general rule to be observed: (1) That the constitutional provision now under consideration should be liberally construed; (2) that the provision should be applied so as not to hamper the lawmaking power in framing and adopting comprehensive measures covering a whole subject, the branches of which may be numerous, but where all have some direct connection with or relation to the principal subject treated; (3) that the constitutional provision should be so applied as to guard against the real evil which it was intended to meet; (4) that no hard and fast rule can be formulated which is applicable to all cases, but each must to a very large extent be determined in accordance with the peculiar circumstances and conditions thereof, and that the decisions of the courts are valuable merely as illustrations or guides in applying these general rules. Moreover, it is now established beyond question that unless the invalidity of a particular law in question is clearly and manifestly established the law must prevail as against such an objection. If, therefore, by any reasonable construction, the title of the act can be made to conform to the constitutional requirement, it is the duty

of the courts to adopt this construction rather than another (if the title be open to more than one construction) which will defeat the act. 1 Lewis' *Suth. Stat. Const.* (2d Ed.) §§ 115-127, and cases there cited. In case of doubt it must be assumed that the Legislature understood and applied the title so as to comply with the constitutional provision, and not contrary thereto. If, after applying such a reasonable construction the title is insufficient, or the subject is plural, then the law must fail. The provision is mandatory, and may not be ignored.

With these general rules in mind we will now proceed to an examination of the act in question, and briefly review the law applicable. As we have pointed out, the act which is assailed is amendatory merely of permanently numbered sections which form a part of the substantive law of this state. The rule applicable to the act in question is well and tersely stated in section 137 of 1 Lewis' *Suth. Stat. Const.* (2d Ed.), where the author, in referring to the constitutional provision now under consideration, says: "The constitutional requirement under discussion as applied to acts of this character (amendatory acts), when they contain matter which might appropriately have been incorporated in the original act under its title, is satisfied generally if the amendatory or supplemental act identifies the original act by its title, and declares the purpose to amend or supplement it. Under such a title, alterations by excision, addition, or substitution may be made, and any provision may be enacted which might have been incorporated in the original act." What has been said so far applies to the amendment of laws or acts which have not been made a part of or incorporated into a Code, nor sectionized and consecutively numbered and arranged in what are commonly designated as statutes or general statutes of a state. The text quoted above is sustained by the overwhelming weight of authority, and we refer the reader for the numerous cases upon the subject to the note under the section above quoted from.

Referring, now, to section 141 of the same volume, in speaking of the particularity required of titles in amending a particular section or sections, the author states: "It is held by the great majority of cases that it is sufficient for the title of an act to amend a Code or Revision to specify the section to be amended, without giving the title of the chapter or division to which it belongs or in any way indicating the subject-matter of the section. Under such a title any legislation is proper which is germane to the section specified." And in section 139 of the same volume, in referring to the plurality of titles, it is said: "An act to amend several sections of a Code, which are cognate or related to each other, is not open to the objection that it embraces a plurality of subjects."

From what has been said we may safely deduce the following propositions as guides,

namely: That any one or more sections of a Code or Compilation may be amended by simply stating in the title that the act is to amend the sections designated; that all sections the subject-matters of which are germane or related to one another may be included in one amendatory act specifying the sections to be amended; that the subject of such an act, within the constitutional provision, is contained in the statement which refers to the sections by numbers and asserts a purpose of amending them; that the legislators and all persons must take notice from such a title that the subject-matter of the sections specified is open for amendment by exclusion, by substitution, or by the addition of any new matter which is germane or directly related to the subject-matter of the sections proposed to be amended.

The title to the act in question stated the subject clearly and in unmistakable terms, but matter was added which, as we shall attempt to show, performed no function whatever, and was useless for any purpose. So that we may afford the reader a better conception of our meaning we shall not treat the title as a whole, but will segregate the real title from the other parts. The material and controlling part of the title is as follows: "*An act to amend section 2583, Revised Statutes of Utah, 1898, as amended by chapter 65, Laws of Utah, 1901, and section 2050, Revised Statutes of Utah, 1898.*" Then follows an epitomized statement or synopsis of what the two sections contain. Section 2583 is referred to as "creating a State Board of Equalization," including organization and duties and fixing the salaries of its members; and of section 2050 it is said that it fixes the salaries of certain other state officers. Considering it as a whole the title is profuse, but the extraneous matter added to what constitutes the actual title is harmless. The whole title is contained in the italicized words above given. What follows these neither adds anything to nor in any way restricts or modifies what is said in the title proper. It is merely a description of what is contained in the two sections sought to be amended. This was wholly unnecessary, and the elimination of this surplus matter is not only justified, but is required of us in order to preserve what we conceive to be a law constitutionally framed and passed. If what is contained in that part of the title which follows the italicized words had in any way restricted or modified the real title the case would be different. We would then have a case of a restricted title. To simply explain, however, what is contained in the sections sought to be amended without expressing a purpose to restrict the amendment to any particular part still leaves any part of those sections open to amendment under the general title. One of the matters contained in section 2583 was the salary provided for the several members of the State Board of Equalization, while the whole of section 2050

dealt with the salaries of some other appointive state officer. In amending section 2583 the salaries of the members of the State Board of Equalization were increased, while the salaries of the other officers mentioned in section 2050 were either increased or diminished with one or two exceptions. It is asserted that while it may have been proper to have dealt with the salaries of the members of the State Board of Equalization by amending section 2583 in that regard, to do this with respect to the other state officers named in section 2050 was improper, because the matters in the two sections were incongruous, and thus constituted a plurality of subjects. It cannot successfully be maintained that the salaries or compensation of a large or small number of state officers may not be fixed or changed in one act. In such an act the subject would clearly be salaries or compensation. Nor can we question the propriety of amending several sections in which the salaries or compensation of different state officers are designated, by one act amendatory of those sections. If this be so, why was it improper for the Legislature to amend in one act the two sections, one of which affected the salaries of the members of the State Board of Equalization, and the other one which affected those of other appointive state officers? Are the two so clearly incongruous or inconsistent as to make the subject plural within the purview of the constitutional provision? We think not.

But it is insisted that the subject of the amendatory act in question was not salaries; that it was, rather, "the State Board of Equalization and its duties and organization." It is with regard to this contention that the confusion, if any, arises. While it is true that section 2583 dealt with the organization and duties of the State Board of Equalization, it, however, also dealt with their salaries. Under a title to amend this section by its number any amendment germane to any matter in the section was proper, because the matters therein contained were all correlated. Under another provision of our Constitution, in order to change, add to, or eliminate a single phrase or word, the whole section as amended must be re-enacted. If it were intended to amend section 2583 by changing the salaries therein provided for, it would have been necessary to re-enact the whole section; and this would likewise be true if any other change were to be effected. The only material change the Legislature made in section 2583 by the act in question was to increase the salaries of the members of that board. It is true that an addition was inserted in the amendment which required that board to "inspect and examine annually all property it is required to assess." It requires no argument to demonstrate that all this, while not expressed in the original section before it was amended, was, nevertheless, clearly implied. As a general rule any board or individual in assessing—that is, in

valuing property for taxation—acts in a quasi judicial capacity. It is presumed, therefore, that the assessor inspects the property to be valued or assessed. The additional words, therefore, requiring inspection added no special duty which was not imposed by implication before.

But there is still another reason why the added words are of but small, if any, importance. These words were directory merely, although mandatory in form, for the reason that if an assessment were made without such inspection it would be as valid as one where the inspection was actually made. Would any one be bold enough to assert that an assessment made by the board without inspection would be void or vulnerable to attack for that reason alone? No such contention could prevail. It seems quite reasonable, therefore, that the subject-matter contained in the amendatory act is not so incongruous nor inconsistent as to prevent it from being incorporated in one amendatory act. This also disposes of the claim of duplicity or plurality of subjects. While it may be conceded that an argument could be presented from a different point of view from which one may reason out a plurality of subjects, yet, as we have pointed out, we are not permitted to indulge such an argument for the purpose of invalidating an act of the Legislature. This is but just and reasonable. Both officers and laymen usually act, and are justified in acting, upon the law as passed by the law-making power. We should not, therefore, for slight and unsubstantial causes, declare a law regularly passed invalid. To do this it should be clearly and unmistakably made to appear that the law is contrary to some constitutional requirement. This, in view of all the circumstances, we cannot say of the law in question.

The judgment is therefore affirmed, with costs to respondent.

MCCARTY, C. J., and STRAUP, J., concur.

WRIGHT v. CRUSE.

(Supreme Court of Montana. May 4, 1908.)

1. APPEAL—REVIEW—CONFLICTING EVIDENCE. A finding based on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

2. WATERS AND WATER COURSES—IRRIGATION—PRIORITIES—DOCTRINE OF "RELATION BACK."

Two persons began the construction of irrigation ditches before the enactment of the statute regulating the appropriating of water. One of them commenced two ditches about September 1, 1882, and September 5, 1882, respectively, and prosecuted the work with reasonable diligence to completion and the actual using of water. The other person commenced his ditch not later than October 1, 1882, and also prosecuted the work with reasonable diligence until water was brought through it. His ditch was completed before either of the other ditches. Held, that the one who began work on the two

ditches in September had the prior right, though his ditches were not first completed, since under the doctrine of "relation back" which obtained before the enactment of the statute, as between two persons digging ditches at the same time and prosecuting work thereon, with reasonable diligence, to completion, the one who first began work had the prior right though the other completed his ditch first.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

Action by George F. Wright against Thomas Cruse to adjudicate water rights. From a judgment establishing priorities and an order denying a new trial, defendant appeals. Reversed, with directions to modify judgment.

Frank E. Smith and T. J. Walsh, for appellant. Oliver W. Belden and M. S. Gunn, for respondent.

SMITH, J. This is a suit involving the right to the use of the waters of Flatwillow creek, in Fergus county. The respondent claims under an appropriation alleged to have been made November 10, 1881, through a ditch known as the "Samuel Welch ditch." The appellant claims under what is called the "Farm" or "lower Durfee creek" ditch, alleged to date from June 1, 1882, taken from Durfee creek, a tributary of Flatwillow creek; the South Fork ditch, of date August 1, 1882, from South Fork, another tributary of Flatwillow; the Half-breed ditch, of date September 1, 1882; the upper Durfee creek ditch, another ditch taken from Durfee creek, under date April 1, 1883; the Lucky Ford ditch, under date April 1, 1883; the Gallagher ditch, under date of July 1, 1883; and the Judd & Hackshaw ditch, under date August 1, 1884. Appellant also claims, in his answer, the right to the use of all of the waters of Flatwillow creek, since the year 1888, by adverse possession and user. The court by its decree gave the plaintiff a right to 222 inches of water, of date October 25, 1882, and found the defendant's rights to be as follows: The lower Durfee creek right, 81 inches, of date June 1, 1882; the upper Durfee creek right, 325 inches, of date May 15, 1883; the Gallagher ditch right, 200 inches, of date July 1, 1883; the Half-breed ditch right, 309 inches, of date September 1, 1883; the South Fork ditch right, 211 inches, dated May 1, 1884; the Lucky Ford ditch right, 208 inches, dated May 1, 1884; and one other right, of 195 inches, not designated by name, dated May 1, 1885. It will be observed that the court found that the defendant's lower Durfee creek right was prior to the Samuel Welch right of the plaintiff, and that all other rights of the defendant were subsequent thereto. The court made no finding on the question of adverse user. Defendant appeals from the judgment and an order denying a new trial.

Prior to the trial the defendant asked leave to file an amended answer, setting forth, in addition to the issues already tendered, that

In the year 1890 the Willowdale Ranch Company prosecuted to judgment an action against the defendant Cruse, similar to the present suit, claiming a priority of right to the waters of Flatwillow creek, basing its claims upon the Gallagher ditch (the right to which, it was asserted, was afterwards purchased by Cruse), and a certain Reeves ditch, alleged to be identical with the Samuel Welch ditch by reason of the taking out of which the plaintiff claims priority in this action; that Cruse defended by asserting a priority by virtue of the ditches referred to in his answer in this case, and others, and that a decree was rendered establishing the rights of the parties as follows: (1) The lower Durfee creek ditch, June, 1882, 81 inches; (2) the South Fork ditch, September 1, 1882, 300 inches; (3) the Half-breed ditch, September 1, 1882, 700 inches; (4) the Reeves ditch, belonging to the Willowdale Ranch Company, September 21, 1882, 320 inches; (5) the upper Durfee creek ditch, April, 1883, 400 inches; (6) the Lucky Ford ditch, April 15, 1883, 300 inches; (7) the Gallagher ditch, belonging to the Willowdale Ranch Company, May 29, 1883, 600 inches; (8) the Judd & Hackshaw ditch, August 12, 1884, 200 inches; (9) the Roberts ditch, January 5, 1885, 160 inches; (10) the Gray & Courtwright ditch, January 2, 1886, 1,000 inches; (11) the Doubelle & Rhole ditch, April 22, 1886, 1,000 inches; (12) the Parmelee ditch, October 15, 1887, 200 inches; (13) the Kelsey ditch, October 20, 1887, 200 inches; that all of these water rights were adjudged to belong to Cruse, save the ones designated as the property of the Willowdale Ranch Company. The court refused to allow the amended answer to be filed, and that ruling is alleged to have been error. But the decree was afterwards introduced in evidence without objection, and, in the view we take of the case, the action of the court in refusing to allow the amendment becomes immaterial. The matters above recited were pleaded in the proposed amended answer by way of estoppel, but in the reply brief of the appellant it is set forth that the primary purpose with which the decree was offered in evidence was in support of the claim of adverse user to establish that the appellant used the water, claiming the highest and best right to do so as against all other appropriators. This being the case, the appellant had the benefit of the decree. In this connection counsel for appellant say in their reply brief: "In that claim (that is, the claim of Cruse that he had the highest and best right), the predecessor in interest of respondent obviously acquiesced until his death, and for a period far beyond that of the statute of limitations, and until many of the most important witnesses by whom the appellant might establish his rights beyond question are dead."

It is fair to say that the appellant made rather a strong showing of adverse user, and that the testimony offered by the respondent on the subject was general in character and

not very definite as to how and when the continued adverse user testified to by appellant's witnesses was interrupted. In connection with the claim of adverse user we are asked to consider the decree in the Willowdale Ranch Company Case. The record in this case shows that many of the witnesses who ought to have the best knowledge as to when the Cruse rights were in fact initiated have died since the trial of that case. It will be noticed that in the Willowdale Ranch Company decree the so-called South Fork and Half-breed rights of the appellant are both dated September 1, 1882, while in the decree we have under consideration they are dated September 1, 1883, and May 1, 1884, respectively. The testimony shows that either one of these ditches is of sufficient capacity to carry all of the water in the creek at low-water season, and we can very well understand how Cruse, a layman, having this Willowdale Ranch Company decree in his favor, might assume that that decree correctly fixed the dates of the respective appropriations, even though it was not res adjudicata as to the plaintiff Wright. However, the district court is presumed to have found the issue as to adverse user against the appellant, and as there was some conflicting testimony on the subject, we are not disposed to interfere with that branch of the case.

The foregoing contention of the appellant being disposed of, leaves but one other question in the case, and that is this: Was the court right in holding that the defendant's South Fork and Half-breed rights were subsequent in time to that of the plaintiff? These water-right cases are peculiar in their nature, in that the parties are obliged to depend to so great an extent upon the memories of those who came to a new country in the early days. It is true that these water rights were taken out at a time long subsequent to the dates of the first settlements in the state, but persons who went to the Flatwillow country in the early 80's were none the less pioneers there. This record seems to disclose the fact that there existed in the minds of those who first went upon Flatwillow creek for the purpose of locating a sort of general plan to take up large areas of the public lands, together with the water necessary to irrigate the ground, so that they might afterwards dispose of the same to the larger land-owners. Almost every person whose name is mentioned in the testimony located a claim and took out a ditch. We have carefully examined the testimony offered by the plaintiff, and feel satisfied that his predecessor, Samuel Welch, began the construction of the so-called "Welch ditch" not later than October 1, 1882, and prosecuted the work with reasonable diligence until water was finally used through and by means of the same. On the part of the appellant, Cruse, testimony was produced, equally convincing to our minds with that relating to the Welch ditch, that the

predecessors in interest of the appellant began the construction of the so-called "South Fork ditch" about September 1, 1882, and the construction of the so-called "Half-breed ditch" about September 5, 1882, and prosecuted the work with reasonable diligence to completion and the actual using of water. The evidence also appears to justify the conclusion that the Welch ditch was completed before either of the other ditches was finished. The testimony is voluminous, covering almost 1,000 printed pages. We have examined it with great care and see no good reason for quoting it here. There are contradictions of the testimony offered by both parties. Many mistakes and inaccuracies are apparent on both sides, but there is no reason to believe that any witness willfully testified falsely.

These water rights were initiated a quarter of a century ago, and there is occasion for little wonder that the witnesses should not agree in their memories as to details. Nor is it of very great moment, when the main facts are as clearly established as they appear to us to be in this case. All of these three appropriations were made before the enactment of our statute regulating the appropriation of water. Therefore, as both parties were in the same situation, the case of *Woolman v. Garringer*, 1 Mont. 535, is directly in point, and the doctrine of "relation back," as therein announced, should have been applied. This theory of the case was evidently not urged upon or considered by the learned district judge, if, indeed, it was presented to him at all. But it was energetically argued and is earnestly relied upon in this court, and we shall apply the doctrine. In the case of *Woolman v. Garringer*, supra, the court said: "From the record it appears that the defendants pursued the work on their ditch * * * with such reasonable diligence as would undoubtedly make the appropriation date and relate back to the commencement of the same." In the case of *Murray v. Tingley*, 20 Mont. 260, 50 Pac. 723, the court, speaking through the late Justice Buck, used this language: "For years before the statute (regulating appropriation of water) was enacted the rule of law was 'that the appropriation of water by persons who prosecute the work on their ditch with reasonable diligence dates back to the commencement of the work.' Therefore, as between two persons digging ditches at the same time, and prosecuting work thereon, with reasonable diligence, to completion, the one who first began work had the prior right, even though the other had completed his first. This was the doctrine of 'relation back.'" If it be urged that the trial court impliedly found that plaintiff's predecessor prosecuted his work with reasonable diligence to completion, and that defendant's predecessors did not, we may say, in view of what has heretofore been said as to the theory upon which the case was decided below, that while we do not believe

the court intended to so find the latter finding would not be justified by the evidence.

The district court of Fergus county is directed to modify its judgment by dating appellant's South Fork right September 1, 1882, and his Half-breed right September 5, 1882, both prior in time and right to the Welch right of the respondent, and as so modified the judgment and the order denying a new trial will stand affirmed, except as to costs. That portion of the judgment awarding costs is reversed, and the cause is remanded with instructions to enter a judgment for costs in favor of the appellant. Appellant shall also recover his costs in this court.

BRANTLY, C. J., and HOLLOWAY, J., concur.

In re BELL'S ESTATE.

BELL v. THOMPSON et al. (S. F. 4,582.)
(Supreme Court of California. April 2, 1908.
Rehearing Denied May 1, 1908.)

1. JUDGMENT—CONCLUSIVENESS.

A judgment of a court having jurisdiction is conclusive not only as to the matter actually determined, but as to every other matter which the parties might have litigated as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1241.]

2. SAME.

The widow, appointed administratrix with will annexed, after the removal of the executor, filed her account in which she sought credit for a family allowance accruing between the date of the return of the inventory and an order granting an allowance entered October 14, 1895. On January 12, 1893, the court made an order for a family allowance. The inventory was filed June 17, 1893. On October 14, 1895, the court reduced the family allowance and on May 4, 1898, another order reducing the allowance was entered. Held, that a decision of the court denying the credit on the ground that the order of January 12, 1893, ceased to be operative on the return of the inventory, and that the allowance provided for by the orders entered had been paid, was conclusive, and the widow could not claim under an alleged order of May 1, 1894, granting an allowance, which order was not entered in the minutes and of the existence of which she had no knowledge at the time of the settlement of her account.

3. SAME.

A judgment determining the rights of parties to a controversy cannot be overcome by showing new or additional evidence which the party was unable to produce on the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1162.]

4. SAME.

The rule that a judgment rendered by a court having jurisdiction is conclusive is based on considerations of public policy, and the enforcement thereof is essential to the maintenance of social order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1150.]

5. SAME.

The general rule is that where it is sought to bind a person by a former judgment it is

necessary that he should have been not only a party to both actions, but must have appeared in both in the same capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1185, 1200.]

6. SAME.

A judgment denying the right of a widow to any credit for family allowances rendered in proceedings for the settlement of her account as administratrix is conclusive on her right to a family allowance in a subsequent proceeding therefor, instituted by her individually, she being in both proceedings the real party in interest, asserting individual, and not representative, rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1185.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Thomas Bell, deceased. From an order of the probate court giving an allowance to Teresa Bell, widow of decedent, Louisa J. Thompson and others, creditors of decedent, appeal. Reversed.

James M. Allen, Drown, Leicester & Drown, Garret W. McEnerney, W. B. Bosley, John S. Drum, and Maurice V. Samuels, for appellants. T. Z. Blakeman, for respondent.

LORIGAN, J. This is an appeal by some of the creditors of the estate of Thomas Bell, deceased, from an order of the probate court entered in said estate on February 24, 1905, nunc pro tunc as of May 1, 1894, directing that a family allowance of \$2,000 a month continue to be paid from June 17, 1893, to Teresa Bell, as widow of said deceased, till the further order of the court, and from a judgment and order that a balance due her under said nunc pro tunc order of \$32,665.80 be paid her from the estate of said deceased. A clearer understanding of the point involved in this appeal may be had by a preliminary statement of certain conceded facts.

Teresa Bell is the widow of Thomas Bell, who died October 16, 1892, and whose will was admitted to probate. On January 12, 1893, on petition of said widow an order of court was made for a family allowance of \$2,000 a month payable to her commencing from the date of the death of decedent till the further order of the court. The inventory in the estate was filed June 17, 1893. On October 14, 1895, the court made an order reducing the family allowance from \$2,000 to \$1,500 a month, and on May 4, 1898, made still another order reducing said family allowance to \$100 a month. On March 24, 1900, the powers of the executor of deceased—George Staacke—were suspended, subsequently revoked, and said Teresa Bell appointed special administratrix. After the order revoking his letters was on the appeal of said executor affirmed by this court (Estate of Bell, 135 Cal. 194, 67 Pac. 123), said Teresa Bell was appointed administratrix with the will annexed of said estate. She

subsequently, on February 10, 1902, filed her account as special administratrix in which she credited herself with payments of family allowance which she claimed were due and unpaid between June 17, 1893, and October 14, 1895. These items of credit were contested by the creditors of the estate, on the ground that no order for a family allowance prior to the order of October 14, 1895, except the order of January 12, 1893, was made; that the latter order became null and void on the return of the inventory of the estate on June 17, 1893, and that all the installments of family allowance accruing prior to June 17, 1893, had been paid her by the executor of the estate. The probate court overruled these objections of the creditors, and settled said final account of said Teresa Bell as special administratrix with said credits for family allowance after the return of said inventory and up to October 14, 1895, sustained and allowed. The creditors appealed from said order, and this court reversed it, holding (and this is all that it is necessary to be stated now) that the order of January 12, 1893, directing that a family allowance be paid, ceased to operate on the return of the inventory on June 17, 1893; that as the only order made subsequent to said June 17, 1893, was the order of October 14, 1895, the court erred in crediting said Teresa Bell with all items for family allowance under the order of January 12, 1893, subsequent to the return of said inventory and prior to the order of October 14, 1895. Estate of Bell, 142 Cal. 97, 75 Pac. 679. This decision was made in February, 1904.

Immediately following its rendition said Teresa Bell filed a petition in the probate court in the matter of said estate, in which she alleged (referring to the allegations in a general way) the making of the first two orders for family allowance above referred to; that no order for such allowance was made subsequent to the filing of the inventory on January 17, 1893, until October 14, 1895; that subsequent to the filing of said inventory it was considered and believed by the petitioner, the executors, the judge of the court, the creditors of the estate, and all the parties interested, that the order of January 12, 1893, continued in full force till the making of the subsequent order of October 14, 1905; that until January 1, 1894, the executors regularly paid said \$2,000 a month family allowance; that after the said month, on account of delay on the part of the executors in collecting the income of the estate, petitioner agreed with said executors to allow the ready money in the estate to be used by them in paying assessments on certain stocks owned by the estate for their preservation and for the benefit of the estate, and to await payment of her allowance until a later date, when it was agreed by the executors that all her accrued allowance should be paid her; that under this arrangement only certain amounts were paid on said

family allowance during the years 1894, 1895, 1896, 1897, and 1898 (the particular items for each year were set forth) aggregating \$29,213.59; that she was unable to support the family on the sums paid, and was compelled to borrow on the security of her separate estate certain amounts yearly (specified in the petition) aggregating \$25,000. It is then alleged that during all the time from June 17, 1893, to October 15, 1895, the estate was amply able to pay a family allowance of \$2,000 a month. The concluding allegations are that all arrears of family allowance had never been paid, but that a large portion had been paid by the executors subsequent to October 16, 1895, upon orders and judgments of the court in the matter of said estate recognizing said balance and arrears on October 14, 1895, and directing said payments to be made on account of said arrears, which said orders and judgments were not in the record upon which the Supreme Court decided that the order of January 12, 1893, became inoperative after June 17, 1893. The prayer of the petition was in the alternative, that an account be taken of the family allowance paid petitioner since October 15, 1895, and chargeable by the orders and judgment of the court made subsequent to October 15, 1895, to the balance of the family allowance due petitioner from the time prior thereto, and for an order directing the payment of any balance of said sums in arrears to petitioner, or for an order allowing and fixing the family allowance of petitioner for the period of time from June 17, 1893, to October 15, 1895, at the sum of \$2,000 a month as in accord with the purpose and intent of the court and all parties interested in said estate at that time, and after deducting the amounts paid by the executors from June 17, 1893, to October 16, 1895, for family allowance, the balance be paid to petitioner.

The appellants jointly demurred to the petition and moved to strike out certain portions of it which, being overruled and denied, they answered, denying the allegations of the petition save as to the orders of the court for family allowance and the allegation therein as to the matter decided by this court, and averred that all amounts due said petitioner for family allowance had been paid and exceeded the sum of \$88,541. As a further defense they set up the proceedings in the matter of said estate settling the account of George Staacke, the executor of the will of deceased as to the amount paid to petitioner by said executor for family allowance prior to August 6, 1898, which was contested between the creditors of the estate and petitioner; the order of settlement of said account by the probate court about January 5, 1900, and an appeal to this court by certain of said creditors and the decision of this court on said appeal, and pleaded said decision (*Estate of Bell*, 131 Cal. 1, 63 Pac. 81, 668) as barring and estopping petitioner in this pending proceeding from claiming that

the amount paid her up to said August 6, 1898, for family allowance was less than \$80,000. They likewise set up the proceedings for the settlement of the final account of petitioner as special administratrix of said estate filed February 10, 1902, to which we have heretofore referred, in which she sought credit for items of family allowance between the making of the order of January 12, 1893, and that of October 14, 1895, the objections and contests thereto by said creditors, the matter of the appeal to this court from the order settling said account by allowing such credits the decision and judgment of this court reversing said order (*Estate of Bell*, 142 Cal. 97, 75 Pac. 679), and pleaded such judgment of this court as final and conclusive and as barring and estopping petitioner from asserting any alleged right to a further family allowance as set forth and asserted in her pending petition. The statute of limitations was further interposed against the claim or right of petitioner to the relief demanded.

Upon the issues thus made the matter proceeded to a hearing, and while the petitioner was presenting her case to the court it developed from the evidence (at least that was the claim of petitioner and the court took that view of it) that the executors of the estate had on February 2, 1894, petitioned the court for a reduction of the family allowance, which petition was opposed by the widow; that the matter of the petition for said reduction coming on to be heard, the executors were examined, the condition of the estate inquired into, and thereafter the matter continued from time to time on the calendar of the court; that on May 1, 1894, the matter coming on again for further hearing, and the attorneys for the executors and for said widow having reached some agreement in the matter, they asked the court to dismiss the petition for a reduction. This the court declined to do, but ordered the application for a reduction of the family allowance by said executors off the calendar, and further ordered that the allowance of \$2,000 a month remain and continue until the further order of the court; that the clerk of the court had entered in the minutes the first part of the order directing the petition for reduction off the calendar, but had omitted to enter the balance of the order. Upon this showing from the evidence the petitioner immediately applied for and obtained, over the objection of appellants, leave of court to amend her petition to conform to the facts thus proven, and an amended petition was filed, it being stipulated that the answer to the former petition should stand as the answer to the amended petition, and that all new matters alleged in the petition should be deemed denied by the creditors who had answered. The amendment which was made to the petition by leave of the court and to meet the alleged proof of the making of the order of May 1, 1894, was

substantially as follows: The allegation in the original petition that no order was made by the court after the order of January 12, 1893, and until the order of October 14, 1895, was stricken out, and it was alleged that after the filing of the inventory it was believed by petitioner, the executors, the court, and the creditors that an order of court existed granting petitioner an allowance of \$2,000 from and after the date of the filing of the inventory, as well as prior thereto, and until the order of October 14, 1895. The prayer of the petition was also changed to conform to the amendment made, to the extent of asking that an order nunc pro tunc as of May 1, 1894, be entered in conformity to the order of the court made on that day but not entered, continuing the family allowance from June 17, 1893, to October 14, 1895, at \$2,000 per month. The amended petition being filed, the trial proceeded, and upon a submission of the evidence upon both sides the court made its findings of fact in favor of the petitioner, in accordance with the allegations of the amended petition and against the appellants as to all defenses interposed by their answer. The court specifically found that on the 1st day of May, 1894, the court had ordered and directed that the family allowance of \$2,000 a month should remain and continue and be paid to the said widow until the further order of the court, but that through the mistake or inadvertence of the clerk of the court, it had not been entered in the minutes of the court, and that there remained unpaid to the petitioner the sum of \$32,665.80 as a balance due her under said order.

The court further specifically found against the appellants on the defenses interposed by their answer, namely, that the petitioner was barred and estopped by the judgments of the Supreme Court, which were pleaded, from asserting a claim for family allowance based on said order of May 1, 1894, or from asserting that any family allowance accrued in her favor between the return of the inventory on June 17, 1893, and the order of October 14, 1895. As conclusions of law from the findings the court held the petitioner entitled to have an order nunc pro tunc as of May 1, 1894, entered, directing that a family allowance of \$2,000 a month remain and continue to be paid to said petitioner as widow of said deceased from the assets of said estate until further order of the court, and made a further order directing payment from said assets to her of the balance of family allowance due her under said order of court rendered on the 1st of May, 1894, and entered nunc pro tunc as of that date, amounting to the sum of \$32,665.80. An order to that effect was accordingly made.

Various points are urged by appellants for a reversal. The main attack, however, is directed against the findings, the claim of appellants being, in effect, that none of the essential findings of the court are supported by

the evidence, and it is particularly contended that this is true as to the findings with reference to the effect of the pleaded decisions of this court. As to them it is claimed that they are not only not sustained by the evidence, but that they are directly contrary to it, and that the conclusions of the trial court as to the effect of those decisions upon the present claim of petitioner are erroneous.

In the view we take of the sufficiency of the attack by appellants upon the findings relative to the prior decisions of this court pleaded by them as a bar, it will be unnecessary to discuss the many other findings which are also attacked. In fact, as far as the finding relative to the decision of this court in the Estate of Bell, 131 Cal. 1, 63 Pac. 81, 668, we shall not discuss it at all, because at most that decision bears only upon some of the minor matters involved in the present proceeding which are claimed to have been affected by it. Our consideration will be devoted solely to the findings in as far as they relate to the effect of the decision pleaded and reported in the Estate of Bell, 142 Cal. 97, 75 Pac. 879. We say the effect of the decision, because that is the question presented by the attack upon the findings relative to it. There is no question of conflicting evidence embarrassing the consideration. A transcript of the record on that appeal and the decision of the court based upon it were offered in evidence and constituted the evidence upon which this finding was made. The claim of the appellants under this evidence addressed to their answer pleading the decision in bar of petitioner's right to assert relief under the order of May 1, 1894, was, among other things, that the decision pleaded was a final and conclusive adjudication that there was no such order of May 1, 1894, or any order of the probate court in said estate making any family allowance, save the three orders of January 12, 1893, October 14, 1895, and May 4, 1898. The finding of the court respecting this decision was of a negative character; that it did not debar or estop the petitioner from asserting or enforcing any alleged right to a further family allowance, nor was the cause of action or relief set forth in the petition barred by such decision. So that, as we say, under this finding the question is what was the effect of that decision on the present asserted right of petitioner; what was decided by this court.

It will be observed that while this finding relates to the effect of the decision upon a further family allowance to petitioner, that proposition, while involved in the original, is not involved under the amended petition. Under the amended petition the right to the payment of the allowance was asserted to have accrued under the alleged existing order of May 1, 1894, an order which had been made but not entered, and which the court ordered entered nunc pro tunc, and upon which it based its award for an accrued allowance up-

on it of \$32,665.85. It is the effect of the decision of this court in the *Estate of Bell*, 142 Cal. 97, 75 Pac. 679, upon the right of petitioner asserted under this order which is to be determined, and we are satisfied that the position of these appellants with respect to it is correct; that that decision was final and conclusive against the existence of any other order than the orders of January 12, 1893, October 14, 1895, and May 4, 1898; that it was *res adjudicata* that no order for family allowance of May 1, 1894, or other order save these three above mentioned had been made prior to 1902 when the account of petitioner as special administratrix, in which she sought credit for family allowance between June 17, 1893, the date of the return of the inventory, and October 14, 1895, was contested and determined, and that all she was entitled to under any then existing orders had been fully paid her. This appears to us to be so clear from the record which was before this court on appeal from the order settling the account of petitioner as special administratrix, the decision of this court upon it, and the application of the doctrine of *res adjudicata*, that no extended elaboration of the matter is called for.

The general rule as to *res adjudicata* is that: "Matters which have been judicially determined cannot be again drawn into controversy between the same parties. The judgment of a court having jurisdiction directly upon the point in controversy is, as a plea, a bar; and, as evidence, competent and conclusive as between the same parties and their privies; not only where the subject-matter is in all respects the same, but where the point comes incidentally in question in relation to a different matter." *Garwood v. Garwood*, 29 Cal. 514; *Green v. Thornton*, 130 Cal. 482, 62 Pac. 750. "An adjudication is final and conclusive not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to, or essentially connected with, the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense." *Harris v. Harris*, 36 Barb. (N. Y.) 88; *Gray v. Dougherty*, 25 Cal. 266. "Where a court of competent jurisdiction had adjudicated upon a particular matter, that matter is not open to inquiry in a subsequent action for the same cause, between the same parties, notwithstanding the defendant may have discovered new evidence not in his power at a former trial." *Kilheffer v. Herr*, 17 Serg. & R. (Pa.) 319, 17 Am. Dec. 658.

Now, applying this doctrine to the matter under consideration, it appears from the transcript on appeal in the matter of the application of petitioner as special administratrix that she sought credit in the settlement of her account for items of family allowance aggregating the sum of \$20,000, payment of

which she had made to herself under a claim that they were due as such family allowance, and had accrued between the date of the return of the inventory and the order of October 14, 1895. Petitioner was appointed special administratrix in March, 1900, and her account was filed in February, 1902. The creditors of the estate (the same appellants here) filed a contest against the allowance of such items on various grounds, among others: (1) That no order making any family allowance out of said estate was given or made at any time subsequent to the filing of the inventory and prior to October 14, 1895; (2) that no order or orders making any family allowance out of said estate had at any time been given or made other than, or in addition to, the said three orders so made respectively on January 12, 1893, October 14, 1895, and May 13, 1898; (3) that the amounts of family allowance payable under said orders immediately referred to had been fully paid; (4) that all family allowance at any time ordered by said court had been paid in full prior to the appointment of petitioner as special administratrix. Upon these issues raised by this contest a trial was had culminating in an order overruling the objections of the contestants to the allowance of said items. An appeal was taken by the contestants from the order settling the account so far as it allowed the special administratrix said contested amounts of family allowance paid to herself and the order allowing them was reversed by this court in the decision referred to—*Estate of Bell*, 142 Cal. 97, 75 Pac. 679. An examination of that decision, demonstrates that this court decided that the orders of family allowance made by the probate court in said estate were those of January 12, 1893, October 14, 1895, and May 13, 1898; that the first order ceased to be operative on the return of the inventory on June 17, 1893; that all family allowance which had accrued under said three orders had been paid, and directed the court to settle the final account by rejecting the payments in controversy, which were amounts asserted to have accrued under the order of January 12, 1893, and between the return of the inventory and the order of October 14, 1895.

We perceive no ground for any claim that this decision is not conclusive upon the right asserted by petitioner in the present proceeding. Her claim under it now, and the right she presently asserts, is for an order directing the payment of these same items of family allowance—which this court decided on the appeal referred to she was not entitled to—by virtue of an order claimed to have been made on May 1, 1894, but never entered in the minutes, and of the making of which she claims she was not advised until during the hearing on the present proceeding. But the fact that such an order was made and was either forgotten or its making un-

disclosed to her by the attorney who represented her when it was made and who subsequently ceased to do so, cannot affect the conclusiveness of the judgment on appeal, which is in fact a determination that no order for the payment of family allowance was made or existed after the return of the inventory and up to the making of the order of October 14, 1895.

In her account as special administratrix she sought credit for the payment to herself of this allowance as having accrued in her favor between those dates. She could only have been entitled to such credits by virtue of the existence of some order of court making a family allowance which authorized the payments they represented. The contestants objected to their allowance expressly on the ground that there was no such order or any orders for family allowance, save the three which have been mentioned. There was, therefore, raised a direct issue as to what orders for payment of family allowance had been made which would support the claim to the credits asserted by petitioner. In support of her right to a credit for such payments, the administratrix offered the three orders above referred to, but no other. If the order of May 1, 1894, had then been made as found by the court in the present proceeding, it would have supported the claim petitioner asserted in her account as administratrix and which was contested for want of its existence, and it was essential to sustain such claim that she should have proved it. Whether that order, or any order authorizing their payment existed, was the issue in the contest and it was necessarily determined by the decision on appeal in that matter that no order, other than the orders specially referred to, was in force from the return of the inventory to October 14, 1895, under which any allowance asserted to have accrued during that period could be supported or sustained. If there was any order in force during that time, then the contested accounts were properly payable under it for that period, and instead of being rejected would have been allowed by this court by virtue of such order. In determining, however, that the amounts sought to be credited in her account were payments made to herself under the order of January 12, 1893, asserted to have accrued between the date of the return of the inventory and the order of October 14, 1895; that that order ceased to operate on the return of the inventory; that all allowance which had accrued under the orders of 1895 and 1898 had been fully paid; and that the account of the administratrix should be settled by the lower court by rejecting the contested items—this court decided that there was no order of court under which such contested payments could be sustained. That decision is final and conclusive against the existence of the order upon which petitioner now bases her right to the payment of these same amounts.

It is insisted by counsel for respondent that

the decision of this court referred to has no bearing upon the order of May 1, 1894, which he denominates a separate and distinct order, because that order was not before this tribunal for consideration. But if the order was separate and distinct that fact cannot affect the question of the conclusiveness of the decision under consideration, because, whatever its character, its existence was a point at issue in the contested account proceeding. The question directly at issue was whether there was any order of court which could sustain the contested items. It was not a question as to a particular order, but what orders had at any time provided for a family allowance which would support them. If the order of May 1, 1894, was made, it would have sustained their payment. It would have been direct, as it was in fact essential, evidence necessary to support them, and was evidence that existed and which might have been produced at the hearing of said contest. The most that can be claimed by respondent now is that she was not aware of this order when the contest over the account was being had. But this only amounts to an insistence that the conclusiveness of the decision against the existence of any other orders during the period involved in said contest, save the three orders mentioned, may be overcome by showing that new evidence—the existence of another and fourth order—can now be produced. But under the authorities the conclusiveness of a judgment cannot be avoided for that reason. A solemn judgment determining the rights of parties to a controversy cannot be overcome by showing that new or additional evidence can now be produced upon the issue there involved and decided, which the party was unable to produce upon the former trial. If such a rule could obtain, judgments would never be conclusive. The rule as to the conclusiveness of judgments is based upon considerations of public policy—that there may be an end to litigation. The Supreme Court of the United States in *Southern Pacific R. R. Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, referring to the general rule as to the binding effect of judgment on matters definitively put in issue and directly determined, says: "This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order, or the aid of judicial tribunals would not be invoked for a vindication of rights of persons and property, if, between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect to all matters of property put in issue and actually determined by them."

It is further insisted by respondent that the decision we have been discussing is not binding upon her in the present proceeding, because, here, she appears individually, and in the former proceeding she appeared as ad-

ministratrix; that where it is sought to bind a person by a former judgment it is necessary that he should have been not only a party to both actions, but must have appeared in both in the same capacity or character. As a general rule this is true, but it can have no application here. While it is true that petitioner was acting in her official capacity as administratrix when she was seeking to sustain her right to the payments involved in the contest over her account, it was for her own individual benefit and for her sole advantage that she was asserting it. It involved nothing with relation to her official capacity, save that she had paid it to herself individually. She was asserting her claim in her own right as the real party in interest; she was not asserting any right proceeding from her official capacity as administratrix. Both then, and now, she was insisting upon the right to the allowance upon exactly the same ground; that she was entitled to it as having accrued in her favor during the period between the date of the filing of the inventory and the order of October 14, 1895, under orders of the court awarding it. Under these conditions it cannot be said that she appeared in either matter in a different capacity or character. In both proceedings she was the real party in interest, asserting individual, and not representative, rights, and is bound by the judgment. 1 Greenleaf, Ev. § 535; 1 Freeman on Judgments (4th Ed.) § 174; Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556.

We have pursued this discussion sufficiently. The finding of the trial court as to what was determined in the decision in the Estate of Bell, 142 Cal. 97, 75 Pac. 679, and the conclusions of that court as to the effect of that decision, are erroneous. It decided, and was conclusive to the point, that no order of court, save the orders specially mentioned in it, existed making an allowance to petitioner between the return of the inventory and the order of October 14, 1895, and determines that all allowances under any order of court making them had been fully paid to respondent.

Under this view, it is, as we have said, unnecessary to consider any other of the various grounds urged by appellants for a reversal.

The order appealed from is reversed, with costs to the appellants.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.

153 Cal. 345

In re BELL'S ESTATE.

BELL v. NATIONAL BANK OF D. O. MILLS. (S. F. 4,583.)

(Supreme Court of California. April 3, 1908. Rehearing Denied May 1, 1908.)

ADMINISTRATORS—ALLOWANCE TO WIDOW—JUDGMENT—REVIEW.

A judgment denying to a widow a family allowance as prayed for by her in an amended

petition therefor, rendered on appeal by certain creditors of the decedent from a judgment awarding an allowance, precludes the widow from further proceeding under the original petition, and inures to the benefit of all creditors of decedent, and a creditor appealing generally from the judgment and order granting an allowance is entitled to a reversal though he stood on his demurrer to the original petition which was overruled, and took no further part in the proceedings, during which the petition was amended so as to withstand the demurrer, by alleging other distinct grounds for the same relief.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Thomas Bell, deceased. From an order giving Teresa Bell, the widow of the deceased, a family allowance, the National Bank of D. O. Mills appeals. Reversed.

James M. Allen, Drown, Leicester & Drown, Garret W. McEnerney, W. B. Bosley, John S. Drum, and Maurice V. Samuels, for appellants. T. Z. Blakeman, for respondent.

PER CURIAM. This is an appeal from the same judgment and order in favor of respondent for payment of family allowance as was involved in the appeal of Louisa J. Thompson et al. (S. F. 4,582 this day decided and reversed) 95 Pac. 372. Unlike that appeal, however, the present one involves the validity of an order of court overruling the joint, general demurrer to the original petition of respondent interposed by this appellant and the other creditors of the estate represented in the Thompson appeal, and the order denying their motion to strike out certain parts of the petition. This appellant rested on its demurrer and motion to strike out, and after the order of court respecting them, while the other demurring creditors answered, this appellant did not in any manner further appear in the cause by answer or otherwise, except to take this appeal after the proceeding had culminated in the judgment and order awarding petitioner her claim for a family allowance. The transcript on this particular appeal is identical with the transcript in the Thompson Appeal. It appears therefrom that the other creditors had answered, and during the trial of the proceeding the petition of respondent was amended, and the relief thereby asked was based on allegations substantially different from those contained in the original petition and were sufficient to withstand a general demurrer. See decision in the Thompson Appeal, supra.

In the Thompson Appeal we held that the decision in the Estate of Bell, 142 Cal. 97, 75 Pac. 679, was conclusive against the right of petitioner to recover upon the cause of action stated in her amended petition. Such reversal on that ground precludes petitioner from further proceeding under the present petition as it stands, and such reversal inures to the benefit of all the creditors of the estate, as well as this appellant, as the credi-

tors presenting the Thompson appeal. As far as the petition to which appellant demurred is concerned, it has no further legal existence as a petition, and no possible action can be taken on it which will affect this appellant. Under these circumstances, as appellant appeals generally from the judgment and order of the court, a general reversal of the order appealed from, as far as this appellant is concerned, should be had, and it is so ordered.

7 Cal. App. 622

PEOPLE v. WHITELOW. (Cr. 94.)

(Court of Appeal, First District, California.
March 3, 1908. Rehearing Denied by Supreme Court April 30, 1908.)

1. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY.

Defendant and three others were jointly charged with robbery committed March 4, 1903. A witness testified that on the evening of March 1st she heard N., one of the defendants, state to the others in front of a restaurant that she (N.) knew an old woman who had \$2,000 or \$3,000 and some diamonds that were easy to get, that the best time would be when the children were at school, and that witness saw three of the defendants together leave the premises where witness and some of the defendants resided on the afternoon of March 2d. Another witness who resided in the house that was robbed testified that on March 2d defendant followed her home, and pretended to have been sent by a real estate agent with whom witness was acquainted to sell witness a rooming house, on which subject witness had an interview with him in the house that was robbed, and that on the succeeding day defendant sent witness a message asking her to meet such real estate agent at 1 o'clock p. m. for the purpose of looking at another house, and while she was away on such errand defendant and two of the other conspirators entered prosecutrix's house and assaulted and robbed her. Held, that such evidence of the transactions on March 1st and 2d were admissible as showing a plan to rob prosecutrix's house, and to get the inmates other than prosecutrix away.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 764, 765.]

2. WITNESSES—CORROBORATION.

In a prosecution for robbery, it was proper to permit the physician who attended the victim for the injuries received at the hands of the robbers to fully describe such injuries, as corroborative of her evidence that force was used to consummate the crime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1287.]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Bernard Whitelaw was convicted of robbery, and he appeals. Affirmed.

Wm. S. Barnes, for appellant. Webb, Atty. Gen., for the People.

HALL, J. Defendant, Bernard Whitelaw, was jointly charged with Michael Nolan, John Davis, and Docia Nolan with the crime of robbery committed upon one Emma Mathews. Upon the trial of the defendant, Whitelaw, he was convicted of the crime as charged, and this appeal is from the judgment and the order denying his motion for a new trial.

The only points relied on for a reversal concern certain rulings of the court in admitting certain evidence over the objections and exceptions of defendant, and are utterly without merit. The salient facts of the case, as disclosed by the evidence, are as follows: In the month of March, 1903, Mrs. Emma Mathews resided at 543 Haight street in the city and county of San Francisco, with her son aged 13 years, her daughter, Mrs. Ida Tuttle, and her daughter's daughter aged 12 years. A witness for the people, Ruby Grills, testified that she heard defendant Docia Nolan say to the other three defendants in front of a restaurant on the evening of March 1, 1903: "I know an old woman out here who has \$2,000 or \$3,000 and some diamonds. Her husband died a short time ago, and it would be easy to get, and the best time would be when the children are at school." The same witness also saw the three defendants, Whitelaw, Davis, and Michael Nolan, together leave the premises, 413 O'Farrell street, where she and some at least of the defendants resided, on the forenoon of March 2, 1903. Mrs. Ida Tuttle testified: That on March 1, 1903, she resided with her mother, Mrs. Emma Mathews, her mother's little boy, and her own little girl, at 543 Haight street. That on the 2d day of March, 1903, she came down town about 11 o'clock to see Mr. Johnson, a real estate dealer, whose office was at Turk and Market streets, looked at a house in the Mission and visited other places, and started home between half past 12 and 1 o'clock, taking the Haight street car on Market street. While going out Market street she saw the defendant Whitelaw looking at her. He was standing on the rear platform of the car. She got off the car at Haight and Fillmore streets, passing said defendant on the platform in doing so, and went to her home. She had just taken off her hat when the door bell rang. She opened the door and found appellant at the door. He asked if Mrs. Tuttle was in, and she answered: "I am Mrs. Tuttle." He then informed her that he had a lodging house to sell, gave the location, price, number of rooms, etc., and informed her that he had been sent by Mr. Johnson. During this interview Mrs. Mathews also came into the room and saw appellant. Mrs. Mathews said to Mrs. Tuttle: "You don't want that house. You want a larger house." And Mrs. Tuttle told appellant to go back to Mr. Johnson and have him sell the house. Whereupon he left. In the forenoon of March 4, 1903, appellant sent to Mrs. Ida Tuttle by a messenger boy a message written by him as follows: "San Francisco, March 4th, 1903. Mrs. Tuttle, please be at house on N. E. corner Polk and Larkin street at one p. m., or as near that time as possible, to get first chance. Johnson." Shortly after receiving the message Mrs. Tuttle left the house at about 12:30 o'clock, and went to Mr. Johnson's office, thus

leaving Mrs. Mathews alone, the little boy and girl having also left the house. In about five minutes after Mrs. Tuttle left the house appellant, Davis, and Michael Nolan appeared at the residence of Mrs. Mathews, and, on the door being opened by Mrs. Mathews, stepped into the hallway, and informed her that they had been sent by "Johnson." They passed into the parlor, drew pistols, with which they threatened and struck her, demanded her money and diamonds, beat and maltreated her most brutally, and succeeded in getting away with \$60 in money and a watch. They escaped from the premises through the back door and yard.

The evidence connecting appellant with the crime is abundant, and the only points urged for a reversal, as we have before stated, concern the rulings of the court in admitting certain testimony. Appellant objected to the admission of the testimony given by Ruby Grills as to what she heard said by Docia Nolan to the other three defendants on the evening of March 1st, and also as to the fact that she saw the three male defendants together on the morning of March 2d. Appellant also objected to the admission of the testimony given by Mrs. Tuttle as to where she was on March 1st, and as to the happenings of March 2d. The objection to this testimony seems to be that it was no part of the *res gestæ*, and was too remote in point of time from the actual commission of the offense. But it is perfectly apparent that every word of it that was in any way prejudicial to appellant tended to connect him with the commission of a deliberate and carefully planned robbery. It shows that the crime that was finally committed on the 4th day of March was probably conceived by the appellant and his fellow defendants on March 1st, and more fully planned on March 2d by appellant. The testimony of Ruby Grills and Mrs. Tuttle as to what occurred on March 1st and 2d tended to support the manifest theory of the prosecution that the robbery was the consummation of a deliberate and previously concocted plan of defendant and his codefendants to entice Mrs. Tuttle away from her home, and then, while both she and the two children were away, to rob Mrs. Mathews and the house of such valuables as they could get. The admission of this testimony was clearly proper, and is fully supported by *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390. See, also, *People v. Kelly*, 146 Cal. 119, 79 Pac. 846; *People v. Linares*, 142 Cal. 18, 75 Pac. 308; *People v. Oldham*, 111 Cal. 648, 44 Pac. 312; and *State v. Ryan*, 47 Or. 338, 82 Pac. 703, 1 L. R. A. (N. S.) 862.

It was likewise proper for the court to allow the physician who attended Mrs. Mathews for the injuries received at the hands of appellant and his codefendants, to fully describe such injuries. It was corroborative of the evidence of Mrs. Mathews that force was used.

No other reason being suggested why the judgment or order should be reversed, both are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 626

PEOPLE v. AH LEAN. (Cr. 121.)

(Court of Appeal, First District, California.
March 3, 1908.)

1. RAPE—EVIDENCE—INCRIMINATING CIRCUMSTANCES.

In a prosecution for rape alleged to have been committed on October 8, 1905, it was error to permit a physician to testify as a witness for the prosecution that he examined prosecutrix on October 24th and found that she had venereal chancroids, which appeared to be about 12 days old, for the purpose of showing that the venereal disease was contracted by prosecutrix from defendant.

2. WITNESSES—CROSS-EXAMINATION.

On a prior trial of another for rape, alleged to have been committed on prosecutrix on September 26, 1906, a physician testified that he had examined the girl in October and found that she had venereal chancroids, and in the prosecution of defendant for alleged rape on the same girl occurring October 8th, the same physician testified that on October 24th the girl had chancroids of about 12 days' standing. *Held*, that it was error to refuse to allow defendant's counsel on cross-examination to ask prosecutrix whether or not she had chancroids or any sores inside her private parts on October 8, 1906.

3. CRIMINAL LAW—OTHER OFFENSES.

In a prosecution for rape it was error to permit the prosecution to prove by the prosecutrix that she had intercourse with defendant several times before the date stated in the indictment, and that the usual price he paid her was \$1.50, as showing other offenses than that charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 822-824; vol. 42, Rape, § 64.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Ah Lean was convicted of rape, and he appeals. Reversed.

E. L. Rhodes, for appellant. Attorney General Webb (B. A. Herrington, of counsel), for the People.

COOPER, P. J. The defendant is charged in the indictment with the crime of rape, in having had sexual intercourse on the 8th day of October, 1905, with one Lillie Ida Davis, an unmarried female under the age of 16 years. A trial was had before a jury, and the jury returned a verdict of guilty, with a recommendation of the defendant to the mercy of the court, and judgment was thereupon entered, sentencing the defendant to a term of eight years in the state prison. This appeal is from the judgment and from an order denying the defendant's motion for a new trial. The facts and circumstances surrounding this case, and the character of the girl Lillie Ida Davis, are fully set forth in *People v. Fong Chung* (filed May 27, 1907; Cal. App.) 91 Pac. 105, a case in which the defendant there was charged with rape upon the same

girl on the 26th day of September, 1905, and such facts and circumstances need not be here repeated. In the record of this case at least some of the matters held to be error in the Fong Chung Case are repeated.

The prosecution called Dr. McMahon, who testified that he examined the girl on the 24th day of October, 1905, and found at that time that she had venereal chancroids, which appeared to be about 12 days old. As this referred to a time only 16 days after the alleged rape, it is apparent that the object, and the only object, of the testimony was to give the jury the impression that the venereal disease was contracted by the girl from the defendant. The testimony certainly did not tend to prove the age of the girl, nor the fact that the defendant had had sexual intercourse with her, unless it had been proven that on the 8th day of October, 1905, the defendant had a venereal disease.

Dr. Cothran testified in behalf of the defendant that the day before the trial he examined the defendant, and that he did not have any venereal disease, and that if he had had chancroids or venereal warts at any time within the prior three months he would have been able to detect signs of such disease, but that he found no signs of any venereal troubles of any kind.

The defendant's counsel, in cross-examination, asked the prosecuting witness whether or not she had chancroids or any sores inside her private parts on the 8th day of October, 1905. The prosecution objected to each question asked in regard to such matter on the ground that it was immaterial, irrelevant, and incompetent, and the court sustained the objection. The rulings were clearly erroneous, and it is only necessary to refer to the Fong Chung Case as to the reasons. In that case the rape upon the same girl was alleged to have taken place on the 26th day of September, 1905, and the same physician was called to show that early in October the girl had a venereal disease or chancroids. In this case the alleged rape occurred on the 8th of October, and the same physician was again called to prove that on October 24th the girl had a venereal disease or chancroids of about 12 days' standing. In other words, in the Fong Chung Case the act of sexual intercourse was proven to have occurred on the 26th day of September, 1905, and the physician was called to prove that a few days afterwards the girl had chancroids. In the present case the act of sexual intercourse is proven to have occurred with the same girl and this defendant on the 8th day of October, 1905, and the same physician was called to prove that the disease was contracted soon after the act of intercourse with this defendant. It would certainly be a remarkably quick cure if the girl contracted a disease from Fong Chung on the 26th day of September, 1905, and was suffering from it early in October, 1905, and yet was well and cured of it on October 8, 1905, when the intercourse

that defendant is claimed to have had took place, and not only this, but that she again contracted it from this defendant.

Other questions were asked of the girl by defendant in cross-examination as to whether or not she had had intercourse with other Chinamen, and as to how many Chinamen she had accused of having raped her. The court sustained objections made by the district attorney to each of such questions.

The girl was also asked by defendant in cross-examination when she first told any one of having had sexual intercourse with the defendant. The court sustained the objection of the district attorney to the question.

Under the defendant's objection the prosecution was permitted to prove by the girl that she had had intercourse with this defendant several times before; that the usual price he paid her was \$1.50. The defendant was charged with only one offense, and that one alleged to have occurred on the 8th day of October, 1905. We know of no rule in cases of this class that will permit evidence to be introduced to show other and independent rapes to have been committed by the same defendant upon the same party.

It is useless to discuss the rulings further. Upon the authority of the case of *People v. Fong Chung*, supra, the judgment and order are reversed.

We concur: HALL, J.; KERRIGAN, J.

7 Cal. App. 613

PEOPLE v. BORREGO. (Cr. 78.)

(Court of Appeal, Second District, California.
Feb. 23, 1908.)

1. CRIMINAL LAW—INSTRUCTIONS—ACCUSED'S CREDIBILITY.

Where one accused of murder was a material witness in his own behalf, an instruction directing attention to the manner in which he would be affected by the verdict, and informing the jury that they should consider that in determining the weight to be given his statements and the likelihood of his coloring his testimony, etc., was prejudicial error as invading the jury's province.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1786-1789.]

2. HOMICIDE—APPEAL—FAVORABLE ERROR.

One may not complain of a conviction of manslaughter because the evidence warranted a conviction of murder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 722.]

3. INDICTMENT — MURDER — CONVICTION OF MANSLAUGHTER.

One accused of murder may be convicted of manslaughter.

[Id. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 593.]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Rafael V. Borrego was convicted of manslaughter, and he appeals from a judgment on the verdict, and from an order denying a new trial. Reversed, and new trial granted.

A. R. Holston, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Defendant was charged with murder, in the killing of one Juan Orosco, and upon trial found guilty of manslaughter. He appeals from the judgment on this verdict, and from an order denying his motion for a new trial.

Orosco, who was a deputy constable, gave a dance at a dance hall in Los Alamitos, in the county of Orange, on the night of August 25, 1907. Defendant, who had been drinking wine more or less all day, attended the dance, and while in the ballroom became involved in some trouble with one Arthur Murrietta, who was Orosco's helper or assistant. There was an exchange of opprobrious names and threats between defendant and Murrietta, and the latter grabbed defendant's hands to prevent him from pulling a weapon. Orosco came up, directed Murrietta to turn the defendant loose, and told the latter he was under arrest. Some of the witnesses for defendant testified that Orosco followed the direction to Murrietta with the further remark, "I will fix him"; and another witness testified that Orosco merely said to the defendant: "You are under arrest, and I will make it all right in the morning." Defendant thereupon went out of the room, Murrietta and Orosco remaining in the house. In about five minutes after defendant left the room he fired a pistol shot into the ground a short distance from the dance hall. Thereupon Orosco went out, followed by Murrietta. The former took a step or two from the platform in front of the door, and defendant shot him, death following immediately. Orosco half turned and fell into the arms of Murrietta, and then dropped upon the ground.

Orosco and defendant were friends, and had had no previous quarrels, and no motive for the shooting appears, except that derived from the statement by the defendant that Orosco was advancing toward him with a gun in his hand, and such motive as can be inferred from the foregoing facts. But one other witness testified that Orosco was advancing with a gun in his hand toward defendant when the shooting occurred, although there is evidence that a gun fell upon the ground where Orosco was shot and circumstances tending to corroborate this statement. Defendant was a witness in his own behalf, and one of but two witnesses who saw the gun in Orosco's hand, rendering his testimony of great moment to his defense. If the words "I will fix him" were spoken by Orosco, they were not heard by the defendant, and his justification of self-defense rests largely upon his own testimony as to Orosco's actions.

Under such circumstances the giving of the instruction (No. 30) calling the especial attention of the jury to the situation of the defendant and the manner in which he would be affected by the verdict, and informing

them that they should consider this in determining the weight to be given his statements, and the likelihood of his coloring his testimony, etc., was clearly prejudicial error. The criticism of this instruction by the Supreme Court in numerous cases, and its repeated cautioning against the giving of it having gone unheeded, it at last declared in *People v. Maughas*, 149 Cal. 263, 86 Pac. 187, that in all future cases its giving on behalf of the prosecution would be sufficient to justify a reversal of the judgment. The instruction is, in effect, an argument against the defendant upon a matter of fact delivered by the court. As said in *People v. Winters*, 125 Cal. 330, 57 Pac. 1067, the credit to be given to the testimony of the defendant, like that of any other witness, is a matter with which the court has nothing to do. To give such an instruction is to expressly disparage the defendant, "the very thing that a court has no authority to do, in view of our constitutional provision." *People v. Ryan* (Cal.) 92 Pac. 853.

In so far as they have been presented, we see no error in the refusal of the other instructions asked by the defendant and refused by the court.

No prejudicial error was committed by the trial court in its rulings as to the admission and rejection of testimony complained of, and the assignment of error based upon the misconduct of counsel is withdrawn by appellant in his reply brief.

It is true, as claimed by appellant, that the evidence in the case would have sustained a verdict of murder; but the appellant cannot be heard to complain of a verdict of manslaughter for this reason. Every charge of murder includes manslaughter, and the jury were properly instructed that they might render such a verdict. The doctrine is well settled that the defendant cannot complain because the verdict was more favorable to him than the evidence warranted. *People v. Muhlner*, 115 Cal. 305, 47 Pac. 128.

Judgment and order reversed, and new trial granted.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 600

HILL v. CLARK et al. (Civ. 418.)

(Court of Appeal, Second District, California. Feb. 28, 1908.)

1. APPEAL—HARMLESS ERROR.

Where a nonsuit was erroneously denied, after which sufficient evidence was admitted to supply the omission in plaintiff's proof, the error was cured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4210.]

2. CONTRACTS—SUBSTANTIAL PERFORMANCE.

Where plaintiff contracted to do certain grading according to specifications, a substantial performance only was required to entitle plaintiff to recover compensation for the work done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1361.]

3. APPEAL—FINDINGS OF FACT—CONCLUSIVE-NESS.

Where, in a suit to foreclose a lien for certain grading work, the court's findings in favor of plaintiff were not challenged as unsupported by the evidence, they were conclusive on appeal in favor of plaintiff's good faith and substantial performance of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1290, 1321.]

4. DISMISSAL AND NONSUIT — FINDINGS OF FACT.

While findings of fact are not proper on a motion for a nonsuit, yet, where the motion is denied and uncontested findings are subsequently made, they may be looked to to determine whether any omission in plaintiff's proof prior to the motion for nonsuit was supplied by subsequent testimony.

5. CONTRACTS — CONSTRUCTION — EVIDENCE—CUSTOM.

Where a contract required plaintiff to grade certain land in accordance with a specified grade, evidence was inadmissible to show that the term "grade" as used in the contract had by custom of business no other construction than to require plaintiff to take off the earth from the high places, and with it fill in the low places to the extent of the material within the lines of the work.

6. APPEAL—ADMISSION OF EVIDENCE—HARM-LESS ERROR.

Where, in a suit on a contract to grade certain land, the court found that there was sufficient dirt on the ground to bring the land to the precise grade fixed in the contract, defendant was not prejudiced by evidence that the term "grade" as so used only required plaintiff to take off the earth from the high places, and with it fill in the low places to the extent of the material within the lines of the work, and did not require him to haul dirt onto the property from outside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160, 4171-4177.]

7. SAME—DAMAGES.

Where, in an action on a grading contract providing a fixed sum as liquidated damages for delay, no issue was presented as to the amount of the liquidated damages or claim on account thereof, and the court found that the contract had been substantially performed, there was no room for an inquiry as to damages, and hence defendant was not prejudiced by the exclusion of a question as to the extent of his injuries by plaintiff's failure to complete the work.

8. MECHANICS' LIENS—FORECLOSURE—ATTORNEY'S FEE.

An attorney's fee cannot be allowed in the foreclosure of a mechanic's lien though provided for by statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 653.]

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by James A. Hill against Stephen A. D. Clark and others. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

M. W. Conkling and J. L. Fleming, for appellants. H. L. Dunnigan, Haas, Garrett & Dunnigan, and Borden & Carhart, for respondent.

ALLEN, P. J. This is an appeal from a judgment, the evidence taken at the trial being presented in a bill of exceptions. The action was one brought by plaintiff to foreclose a lien on account of certain work and labor performed in grading a tract of land

under a written contract with defendant, the owner. This contract specified the exact lines of grade to which the premises should be brought, and for which work the plaintiff was to receive \$1,000 upon completion. Upon the trial the plaintiff did not show that he had complied with the contract in any manner other than as required by his construction thereof, which was that, when he had taken off the earth from the high places, and with it filled in the low places to the extent of the material within the lines of the work, he had done all that was required of him by the contract; and the court permitted plaintiff, under objections, to introduce testimony tending to show that the word "grade," as used in the contract, had by the custom of business no other construction than that given it by plaintiff; that by the use of the word "grade" in the contract it was never intended to require that dirt should be hauled from the outside. At the conclusion of the plaintiff's testimony defendants moved for a nonsuit upon the ground that the plaintiff had failed to show that the contract set out in the complaint had been substantially fulfilled or completed, which motion was denied, with an exception. Thereupon defendants introduced testimony tending to show the extent to which the work had been done and the amount of labor and expense incident to its entire completion; and plaintiff was permitted to introduce testimony in rebuttal in connection with such question of completion and cost.

At the conclusion of the testimony, the court filed its findings of fact, wherein it found that plaintiff furnished and performed the labor agreed to be furnished and performed, and substantially performed said contract according to its terms; that in the performance of said contract plaintiff failed to grade the property exactly to conform to the lines specified in said contract; that plaintiff endeavored in good faith to perform said contract; that defendants would not permit plaintiff to cut certain high places to the specified grade, which, had he been permitted so to do, would have provided sufficient dirt on the property to bring the entire property to the grade specified in said contract; that plaintiff failed to bring in dirt to fill up the low places on said property; that the defect is one that can be remedied, and the damage caused by the failure of plaintiff to bring in dirt, including the cost of supplying the deficiency, amounts to the sum of \$150; that such sum would correct the work done by said contractor to make it conform to the contract aforesaid. And, as a conclusion of law, the court found that plaintiff was entitled to judgment for \$650, being the amount of the contract price less a payment of \$200 theretofore made and the \$150 necessary to an entire completion of the contract, together with \$2.45 paid for verifying and recording the claim of lien and \$50 for attorney's fees; and a decree for the sale of the property in

the ordinary way on default in the payment of such judgment. The findings are not attacked by any specifications of error relating to insufficiency of evidence for their support.

The principal contention of defendant upon this appeal is that the judgment should be reversed because of the action of the court in denying the motion for nonsuit. In a former opinion filed in this case this court reversed the judgment of the trial court upon the ground that such motion for nonsuit should have been granted. Upon a rehearing of the case, however, we are satisfied that we overlooked the effect which should be given the findings of fact. While it is true that the court would have been warranted in granting the motion for nonsuit when made, yet sufficient appears in the record to show that the omission of the requisite proof upon the part of plaintiff in the first instance was supplemented by subsequent evidence properly received upon the trial; and, under the well-established rule, such subsequent proof will have the effect to cure the error in denying the original motion. The rule is well established that in cases of this character the performance of a contract need not in all cases be literal and exact in order to entitle a plaintiff to compensation therefor; that a substantial performance is all that is required. *Harlan v. Stufflebeem*, 87 Cal. 512, 25 Pac. 686. "Whether the contract has been substantially performed is a question of fact which must be determined by the trial court in each instance from the facts and circumstances in that case, and the finding of the trial court upon that point is as conclusive as is its finding of any other fact." *Schindler v. Green*, 149 Cal. 755, 87 Pac. 627. The findings not being challenged as unsupported by the evidence, we must, therefore, accept the same as conclusive upon the question of good faith and substantial completion. While findings of fact are not proper on a motion for nonsuit, yet, under the circumstances of this case, in determining whether or not the subsequent proof has supplied any omission in the plaintiff's testimony, we may look into the findings to determine that fact, rather than into the evidence in the bill of exceptions to see whether or not those findings have support, other than to see whether or not there is some evidence tending in that direction. In the light of subsequent events, therefore, there was no prejudicial error in denying the motion for nonsuit.

It is further insisted by appellant that the court erred in admitting the testimony of witnesses as to the construction to be given the word "grade" in a contract where the same specifically states the exact grade to which the property should be brought. We quite agree with appellant in this regard. There was no room for construction. The contract was specific as to the lines to which the grade should be brought; but, looking again into the findings we see that the court

finds that there was sufficient dirt on the ground to bring the property to the precise grade fixed in the contract. Hence, the evidence offered as applicable to cases where there was an insufficiency of earth could not prejudice defendant in this case.

We perceive no error in the action of the court sustaining the objection to a question asked defendant, as follows: "Can you state to the court how much and to what extent you have been injured by the failure of the plaintiff to complete this work; the question is, can you tell?" The contract provided for a fixed sum as liquidated damages for delay in the completion of the work beyond the time specified in the contract. No issue was presented as to the amount of the liquidated damages, or claim on account thereof, and the question objected to could have no reference thereto; and the court finding that the contract was substantially completed there was no room for inquiry as to the damages, and no prejudice could result to defendant from such ruling.

The appeal from the judgment, however, presents the question involved in an allowance of attorney's fees. In *Bullders' Supply Depot v. O'Connor*, 150 Cal. 265, 88 Pac. 982, it is held that an attorney's fee cannot be allowed in the foreclosure of a mechanic's lien, even though provided by statute. The same reasons which impelled that decision are applicable here, and the court erred in awarding an attorney's fee.

The judgment of the superior court is therefore modified by striking therefrom the words "and for the further sum of \$50 hereby allowed said plaintiff for attorney's fees in this action"; and, as so modified, is ordered affirmed, appellant to recover costs on appeal.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 639

PEOPLE v. FOSSETTI. (Cr. 82.)

(Court of Appeal, First District, California.
March 3, 1908.)

1. HOMICIDE—TRIAL—QUESTIONS FOR JURY—PASSION.

In a prosecution for murder, the result of a quarrel, where the evidence showed that deceased had been drinking and had exhibited no weapon, and made no threat toward defendant, and that defendant deliberately left the room after saying that he would "fix" deceased, procured a pistol, returned, and without warning fired the fatal shot, the jury were the exclusive judges of the facts, and it was for them to say whether the killing was the result of malice or premeditation, or whether it occurred during a sudden quarrel or heat of passion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 565.]

2. SAME—MURDER—DELIBERATION AND PREMEDITATION.

Where the deceased and defendant were quarreling, and the deceased struck defendant, after which defendant left the room, procured a pistol, returned, and shot the deceased, no definite time was necessary after defendant was struck for his angry passion to cool so as to

make the killing a murder, and not manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 62-64.]

3. CRIMINAL LAW—APPEAL—REVIEW — QUESTIONS OF FACT—SUFFICIENCY OF EVIDENCE—DEGREE OF CRIME.

The question as to the sufficiency of the evidence and as to the degree of a crime, where an inference may be properly drawn from the facts, is peculiarly a question for the jury, with whose determination it is not the province of the appellate court to interfere.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

4. SAME—OPINION EVIDENCE—FACTS OR CONCLUSIONS.

In a prosecution for murder, a physician was asked by the prosecution to state the course of the bullet from its entrance to where it struck a bone, where it was changed out of the course it had first taken. *Held*, that the court did not err in permitting the witness to answer the question; its purpose being to show the jury the position of the wound and the course taken by the bullet, and not to secure an opinion with regard to the relative position of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1034-1036, 1062, 1063.]

5. SAME—TRIAL—ARGUMENT OF COUNSEL—INSTRUCTIONS AS TO DUTIES OF JURY.

In a prosecution for murder, the court did not err in refusing to strike out the district attorney's argument to the effect that instructions were prepared by counsel, and often stated hypothetical circumstances and conditions which made it necessary for the jury to look at them carefully and critically.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1680.]

6. SAME—APPEAL—ASSIGNMENT OF ERRORS.

On appeal from a conviction of murder, defendant assigned as error that an examination of the instructions refused would show that there seemed to have been a steady pressure in the lower court to bar out any verdict of manslaughter or acquittal, and that, if any of such instructions were refused on the ground that they had already been given, that reason should have been stated by the court. *Held*, that the assignment was not sufficient to justify the appellate court in examining the instructions; it being due to the court that, when counsel rely upon error in the refusal to give an instruction, they should state the instruction, and point out the reason why they think the court erred in refusing to give it, which rule also obtains in regard to the giving of an instruction to which objection is made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 2954-2961.]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Joseph C. Fossetti was convicted of murder in the second degree. From the judgment and the order denying a new trial, he appeals. *Affirmed*.

A. J. Hinds and Thos. D. Ingersoll, for appellant. Webb, Atty. Gen., for the People.

COOPER, P. J. The defendant was found guilty of murder in the second degree by the verdict of the jury, and upon the verdict judgment was duly entered. His motion for a new trial having been denied, he prosecutes this appeal from the judgment and from the order denying his motion for a new trial.

The main point urged by the defendant is

that the evidence shows that the crime was manslaughter, and not murder. It appears from the evidence in the case that the defendant (who is sometimes referred to as Chip Moran), was in charge of a roadside house near Fresno; that one Ollie Leighton was living at the place, and one Hattie Russell, at the invitation of Ollie Leighton, was visiting the roadside house referred to; that Moseley, the deceased, was a friend of Hattie Russell, and called upon her at the roadside house while she was stopping there, and that he with her had partaken of a meal at the house; that on the date of the homicide, about 6 o'clock p. m., defendant and other persons returned to the roadhouse, and soon thereafter defendant went into the kitchen. Deceased went into the room of Hattie Russell. He had been drinking. Defendant was called into the room of Hattie Russell where deceased was, and deceased then stated that defendant had accused Hattie Russell of having been out riding with deceased, and stated to defendant that defendant had told him so and had made said accusation. Angry words ensued, during which time defendant called Moseley a liar, and Moseley struck defendant on the cheek, and knocked him over on the bed. Defendant then went out and procured a revolver, and came back into the room and fired the fatal shot. The transaction is thus stated by the witness Hattie Russell: "There was just one blow struck. There was nothing more happened in the way of their scuffling, striking, kicking, or anything. When I got Barney (referring to Moseley) off, we were at the foot of the bed there. Chip Moran got up from the bed on the side next to the door and went out. I don't remember whether he got up on his feet or his knees, because as soon as I pulled Barney up he got right up and got out. Chip (the defendant) said that he would fix him just as he was going out the door. Nothing happened before he came back. I was just talking with Barney Moseley, trying to keep the peace with him. We were standing by the bureau, and Chip came in, and I heard him coming around, and I shut the door, and he slammed it back and shot. He was down the hall from the back way when I heard him coming. He didn't say a word when he came back to the door and shot. The bureau was where it was shown there [referring to a diagram], and Barney was leaning on it when the shot was fired. Chip was in the door when he fired the shot. From the time Chip Moran went out of the door and says 'I'll fix you' till the shot was fired was inside of a minute. When the shot was fired, Barney fell; just slipping down from the bureau into a cramping position." It is contended that the above testimony, although it does not show that the fatal shot was fired in self-defense, shows that it was fired during a sudden quarrel or heat of passion, and, at most, only constituted the crime of manslaughter. This contention cannot be maintained as a proposition of law. The de-

ceased had been drinking. He had exhibited no weapon, and made no threat toward the defendant. The defendant deliberately left the room, according to the testimony, after saying that he would "fix" deceased. He procured a pistol and returned, and, without warning, fired the shot that caused the death of Moseley. In such case the jury are the exclusive judges of the facts, and it is for the jury to say whether the killing was the result of malice and premeditation, or whether it occurred during a sudden quarrel or heat of passion. No definite time was necessary after defendant was struck for his angry passions to cool. The jury had the right to infer when he left the room to procure his pistol that he did so with the deliberate and willful intention of killing deceased.

The question as to the sufficiency of the evidence and as to the degree of a crime, where the jury have a right to draw an inference from the facts, is peculiarly a question for the jury. With the determination of the jury it is not the province of this court to interfere. *People v. Wright*, 4 Cal. App. 704, 89 Pac. 364; *People v. Fitzgerald*, 138 Cal. 41, 70 Pac. 1014; *People v. Buckley*, 143 Cal. 379, 77 Pac. 169. Dr. T. N. Sample was called as a witness on behalf of the people, and he testified to attending deceased as he was dying, and to the fact that he examined the body and the wound. He was asked by counsel for the prosecution to state the course of the bullet from the entrance to where it struck a bone where it was changed out of the course it had first taken. To this question the defendant objected, and now insists upon the objection. The witness was permitted to answer, and stated: "The bullet struck just on the anterior axillary line—that is, the straight up and down line from the point here—and passed inward and slightly backward and slightly downward, and struck the beginning of the lumbar vertebrae, and then was deflected slightly outward and downward. I got that bullet, and after handed it to the coroner at the coroner's inquest. In striking the arm the bullet made a hole underneath the skin, but not into the muscle. The wounds mentioned are the only ones I found on the body, and I found but one bullet." It was not error for the court to permit the witness to answer the question. The witness was not asked to give his opinion as to the position the person must have been standing in at the time he was shot with relation to the deceased, and therefore the question did not come within the ruling of *People v. Smith*, 93 Cal. 445, 29 Pac. 64. The object of the question was to show the position of the wound, the course taken by the bullet, and its place of entrance and exit; so as to show the jury the facts.

It is further claimed that it was error in the court to refuse to strike out some remarks made by the district attorney in his argument in regard to the instructions that would be handed to the jury in the case.

The argument of the district attorney upon this point was to the effect that instructions were prepared by counsel, and often stated hypothetical circumstances and conditions, which made it necessary for the jury to look at them carefully and critically. But the district attorney did not state that the jury must disregard the instructions, and we do not think that he went beyond the scope of his right to state, by way of argument and illustration, his views of the case and the manner of instructing the jury. The remarks do not come within the reason of the rule given in the various cases in which remarks of district attorneys have been held to be error.

Defendant finally claims that "an examination of the instructions asked for on behalf of the defendant and refused by the court will convince this court that there seems to be a steady pressure in the lower court to bar out any verdict of manslaughter or acquittal. If any of the instructions asked for by the defendant were refused on the ground that they had already been given, that reason should have been given by the court. The record shows no such compliance with the law by the court, and it is therefore error." This is not a sufficient assignment of error in the giving or refusing of an instruction or of instructions to justify us, under the well-settled rule, in examining the instructions given or refused. It is due to the court that, when counsel rely upon error in the refusal to give an instruction, they should state the instruction, and point out the reasons why they think that the court erred in refusing to give it; and the same rule obtains in regard to the giving of an instruction to which objection is made. *People v. Cebulla*, 137 Cal. 315, 70 Pac. 181; *People v. Monroe*, 138 Cal. 99, 70 Pac. 1072; *People v. Woon Tuck Wo*, 120 Cal. 298, 52 Pac. 833.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

7 Cal. App. 616

PEOPLE v. THOMPSON. (Cr. 57.)

(Court of Appeal, Third District. California.
Feb. 28, 1908.)

1. INFORMATION — FORMAL REQUISITES — VENUE.

Pen. Code, § 951, provides that an information shall contain the title of the cause and of the court in which it is filed. The caption of an information was as follows: "In the Superior Court of the County of Tuolumne, State of California, ———." The charging part did not specifically mention the county, the only language indicating the county in which the offense was committed being that accused on a specified date, "at the said county of ———, and before the filing of this information, did then and there ———," etc. Held that, while the caption of the information is no part of the information, viewed solely as a pleading, yet, inasmuch as the statute requires it to be made part of the instrument which constitutes the information, it may be considered in determining the question of venue where the body of the plead-

ing contains no direct allegation thereof, and hence the averment that the crime was committed in "said county of —" should be construed to refer to the county mentioned in the caption.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 239.]

2. CRIMINAL LAW—APPEAL—REVIEW—HARMLESS ERROR—FORMAL DEFECTS IN INDICTMENT.

Formal defects or imperfections in indictments or informations which have no tendency to prejudice accused or to deprive him of any substantial rights should be disregarded, Pen. Code, § 1404, expressly providing that neither a departure from the form nor mode prescribed in respect to any pleading, nor an error nor mistake therein, shall render it invalid unless it has actually prejudiced accused, or tended to his prejudice in respect to a substantial right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3101-3105.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Ross S. Thompson was prosecuted for assault with intent to commit rape, and from a conviction of assault he appeals. Affirmed.

J. B. Curtin, and R. J. White, for appellant. U. S. Webb, Atty. Gen., and Geo. Beebe, Deputy Atty. Gen., for the People.

HART, J. The appellant was accused by information of the crime of assault with intent to commit rape, and upon his trial in the superior court of Tuolumne county was convicted of an assault. This appeal is taken from the judgment upon the judgment roll alone. The only point made by the appellant is that the averments of the information fail to bring the case within the jurisdiction of the superior court of Tuolumne county, in that it is not specifically alleged in the charging part thereof that said alleged crime was committed in said county. In other words, the claim is that the information does not affirmatively show the venue, for which reason it is contended, the court did not acquire or have jurisdiction to try the appellant for the offense charged in the information.

The information, including the caption, which states the title of the court and cause, reads as follows: "In the Superior Court of the County of Tuolumne, State of California. The People, Plaintiff, vs. Ross S. Thompson, Defendant. Information for Assault with Intent to Commit Rape. Ross S. Thompson, accused by the district attorney of the said county by this information of the crime of assault with intent to commit rape, committed as follows: The said Ross S. Thompson, on the 10th day of July, one thousand nine hundred and seven, at the said county of — and before the filing of this information did then and there willfully, unlawfully and feloniously in and upon one E. W., a female over the age of sixteen years, and not the wife of said Ross S. Thompson, make an assault with intent then and there to ravish, carnally know and to commit rape upon the said E. W. by force and violence and against her will and against her resistance, contra-

ry," etc. Section 951 of the Penal Code provides that the indictment or information shall contain, among other things, the title of the cause and of the court in which the indictment or information is filed. The charging part of the information here does not, it is to be seen, specifically mention "Tuolumne County," where the cause was tried, and the only language in that part of said information indicating the county in which the offense was committed is to be found in the words "said county of —" and the words "then and there."

It is evident that the failure to insert in the information the name of the county in the blank space immediately following the words "said county of" involves purely a clerical misprision, and, while it is true, as contended by counsel for appellant, that the caption of an information or indictment is no part of the same, viewed solely as a pleading, it is nevertheless required by the statute to be made part of the document or instrument which constitutes such information or indictment; and, we think that, for the purpose of determining the question of venue, as to which the body of the pleading is silent so far as a direct allegation is concerned, the averment in the information or indictment that the crime was committed in "said county of —" should and may reasonably be construed to refer to the county mentioned in the caption as the name or title of the court, and, so construing it, the venue is sufficiently established in the accusatory pleading to invest the court with jurisdiction of the offense and of the person of the accused. Such has been the construction given indictments and informations similarly phrased by the appellate courts of many other states, and in none of the California cases cited by appellant have we been able to find language expressing an opinion in conflict with this conclusion.

In *People v. O'Neill*, 48 Cal. 259, the charging part of the indictment does not contain the words "said county" or "county aforesaid" or words of similar import. The same is likewise true of the case of *People v. Craig*, 59 Cal. 370. There it was charged that the defendant "did willfully and unlawfully resist, delay and obstruct" a certain public officer, to wit, "a duly elected, qualified and acting constable of Pajaro township, of the county of Monterey, of the state of California," in the discharge of his duty as such officer. While the name of the county—assuming that Monterey county was where the offense was committed—in which the alleged offense was committed is mentioned in the information as a part only of the description of the officer's official character and authority, there is no direct averment that the crime was committed in that county, nor are there elsewhere in the information any words or language which could be so construed as to fix the venue. In fact, there does not appear to be any attempt to allege the venue in the

information. The case of *People v. Wong Wang*, 92 Cal. 281, 28 Pac. 270, contains nothing at variance with the views expressed here. The facts of that case are different from those here. It is said among other things, in that case, that "it is a familiar and well-settled principle of law that the indictment must allege that the offense was committed within the jurisdiction of the court." No one would have the hardihood to attempt to dispute that elementary principle of law. And its violation in the case at bar, as we have before said, is not attempted. The statute, as we have seen, authorizes and requires the title of the court to be stated or set forth in the caption, and, although, as we have said, such caption is no part of the pleading proper, it is nevertheless to be considered, if necessary, in arriving at the meaning of the words of reference, "said county," in the charging part of the information, for the purpose of determining the question of venue.

We have been referred to no case in this state which has decided the precise question here; but, as before suggested, many cases directly in point can be found in other jurisdictions, among which may be mentioned the following: *State v. Hunn*, 34 Ark. 321; *U. S. v. Schneider*, 21 D. C. 381; *Rivers v. State*, 144 Ind. 16, 42 N. E. 1021; *State v. Muntz*, 3 Kan. 383; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; *Wright v. Commonwealth*, 82 Va. 183; *State v. Bell*, 25 N. C. 506; *State v. Shull*, 40 Tenn. 42; *Commonwealth v. Edwards*, 70 Mass. (4 Gray) 1. In the case of *State v. S. A. L.*, 77 Wis. 467, 46 N. W. 498, the name of the county in which it was claimed the offense was committed appeared in the information only as indicating the county of which the district attorney was the prosecuting officer, as follows (after the caption): "I, J. L. E., district attorney for Dane county, hereby inform the court," etc. The charging part of the information did not after the language quoted contain the words, "said county" or "aforesaid county," but did allege that the defendant "then and there" committed the crime charged. The Wisconsin Supreme Court held that the words "then and there" had reference to the county named in the caption, and also mentioned in the first part of the information for the purpose of indicating the county of which the accusing officer was district attorney, and that, therefore, the venue was sufficiently laid in the information. We quote from the opinion in that case: " * * * But in the second place, where the words are used that 'M. C. did then and there have carnal knowledge of her body,' they must necessarily refer to Dane county, which is previously mentioned or described. This is the plain, natural meaning and sense of the language used. The words 'then and there,' as used in the indictment, are words of reference, and when time and place have once been named with certainty, it is sufficient to refer to them afterwards by these words; and they have the

same effect as if the time and place were actually repeated"—citing *Whar. Crim. Law*, 74. Of course, if adding the caption to the information or indictment were the mere work of the clerk of the court, without any authorization or requirement of the statute to do so, a different question might be presented; but, as observed, section 951 of the Penal Code prescribes the form of an indictment and of an information by setting out such form, and among the requisites as to form thus set out is the caption setting forth the title of the court and cause. We are not to be understood as holding that an information or indictment, otherwise sufficient, would be fatally defective if the caption were omitted. All we hold is that the caption containing the title of the court and cause, being expressly authorized by the Code when referred to by appropriate words in the charging part of the indictment or information, has the effect, where the charging part thereof fails or omits to specifically allege the county, or fails to allege in some direct manner the venue, of sufficiently laying the venue to give the court jurisdiction to try the accused. "The name of the county being fully set forth in the caption thus returned as attached to the indictment," says the Massachusetts Supreme Court, 4 Gray, 1, "a reference thereto in the indictment, as 'in said county,' may properly be had, to find the county where the offense is alleged to have been committed; and, being thus made certain, the place of the commission of the offense is sufficiently charged."

We can conceive no reason upon principle why the rule as laid down in all the authorities cited herein is not sound and should not be sustained. Defects or imperfections in form in informations or indictments having no tendency to prejudice the accused, or to deprive him of any of his substantial rights, ought to be disregarded, and it seems to be the trend of modern decisions to disregard them. Form is now and for many years has been subordinated to substance in pleadings and practice in civil cases, and the same practice ought to be and can be, with equal reason, made applicable to indictments and informations and other proceedings in criminal cases, without impinging in the least upon the important and material rights of an accused. The Legislature of California has wisely recognized the justice of relaxing to some extent the strictness with which the rules as to form with reference to indictments and informations were formerly administered and enforced, by the enactment of section 1404 of the Penal Code, which reads: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." Of course, the offense should be alleged with reasonable certainty, as

should also the fact or facts essential to give the court jurisdiction to try the accused under the information or indictment filed or found against him.

We may, however, with propriety, suggest to district attorneys that it is well to bear in mind that it is far the better and safer practice to allege the venue with unquestionable certainty and directness. The venue, it seems to us, ought to be the least of the difficulties in the way of a proper preparation of an indictment or information.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(77 Kan. 597)

NORTON v. BRUCE.

(Supreme Court of Kansas. April 11, 1908.)
SALES — FRAUD — MISREPRESENTATIONS OF BUYER.

The maker of a bill of sale (a woman whose husband was in custody on a criminal charge at the time of its execution) testified that she signed it because the grantee told her that other persons were getting out papers to sell her out—take everything she had—and that he was her friend and would hold the property for her for a few days, and then return it. He kept it, however, for his own benefit. *Held*, that there was sufficient evidence to support a finding that her signature was fraudulently obtained.

(Syllabus by the Court.)

Error from District Court, Reno County;
P. J. Galle, Judge.

Action by Ida M. Bruce against C. N. Norton. Judgment for plaintiff, and defendant brings error. Remanded, with directions.

Prigg & Williams, for plaintiff in error.

MASON, J. Ida M. Bruce recovered a judgment in a replevin action against C. N. Norton for the return of two horses and for damages for their detention, and the defendant prosecutes error.

The plaintiff had executed a bill of sale to the defendant, which, if valid, was fatal to her recovery, but which she claimed had been fraudulently obtained. On review, it is maintained that there was no evidence whatever of any fraud having been practiced upon her. On the stand she gave this account of the transaction, which was practically all the evidence bearing upon the question of fraud: Her husband was in jail, charged with having stolen a horse which he had sold to Norton. The bill of sale purported to indemnify Norton against loss in that connection. Norton told her that there were other persons getting out papers to sell her out—take everything she had—and that he was her friend, and would hold the horses for her for a few days, and then return them to her. Under these circumstances, she signed the bill of sale and turned over the horses to Norton, who kept them for his own benefit. The defendant contends that the representations which the plaintiff

says were made to her were not of such a character as to vitiate the bill of sale if they were false, and that there was no evidence that they were not true. The contention is unsound. If the plaintiff told the truth, she was misled as to the purpose and effect of the instrument she was asked to sign. The transaction was wholly different from what she was led to believe. While there was no direct evidence that other persons were not in fact preparing to proceed against her, the jury were warranted in inferring from the subsequent conduct of Norton that the story to that effect was an invention.

The evidence showed that one of the horses had been returned to the plaintiff before the trial. Notwithstanding this the judgment, doubtless through inadvertence, was rendered for the return of both or for their value, which was fixed at \$125; the amount not being apportioned between the two animals. It is not clear that any prejudice could result to the defendant from a formal order for the return of the horse which he had already delivered, but the value of the one he retained should have been separately fixed, as a measure of the plaintiff's recovery in case no return of it could be had. This defect, however, can be remedied by a modification of the judgment upon the present record. The values of the horses were fixed in the replevin affidavit at \$75 and \$50, respectively. The only evidence on the subject of value corresponded with these figures. Manifestly, therefore, the jury in fixing the aggregate value at \$125 adopted these estimates, and, in effect, found that the animal still in the possession of the defendant was worth \$75.

The case is therefore remanded, with directions that the judgment be corrected so as to provide for the return of this animal, or for the recovery of \$75, if a return cannot be had.

(77 Kan. 779)

McINTYRE v. GELVIN.

(Supreme Court of Kansas. April 11, 1908.)
DESCENT AND DISTRIBUTION — CUSTODY OF CHILDREN—EFFECT.

A child of half blood can inherit property descending through her father, though the father has been deprived of her custody by a decree in a divorce proceeding.

Error from District Court, Norton County;
W. H. Pratt, Judge.

Action between C. O. McIntyre and Gertrude I. Gelvin. From the judgment, McIntyre brings error. Affirmed.

L. H. Thompson, for plaintiff in error. J. R. Hamilton, for defendant in error.

PER CURIAM. The only question presented for decision in this case is if a child of the half blood can inherit property descending through her father, when her father had

been deprived of her custody by a decree of court entered in a divorce proceeding brought against him by her mother.

The statute casting the descent of property uses the word "children." The relationship of parent and child determines the right of inheritance. The divorce of parents does not affect this relationship. No matter who may have her custody for purposes of nurture a daughter is still the child of her father, and by statute children of the half blood inherit equally with those of the whole blood.

The judgment of the district court is affirmed.

(77 Kan. 546)

ADAMS et al. v. CARLTON.

(Supreme Court of Kansas. April 11, 1908.)

FRAUDS, STATUTE OF—CONTRACT FOR SALE OF REALTY—EXECUTION BY AGENT.

A contract for the sale and conveyance of real estate made by an agent of the owner which the owner did not sign, and for the making of which the agent had no authority in writing from the owner, is void under the statute of frauds, as amended by chapter 266, p. 410, Laws 1905.

(Syllabus by the Court.)

Error from District Court, Crawford County; Arthur Fuller, Judge.

Action by Guy F. Carlton against Maggie J. Adams and others. Judgment for plaintiff, and defendants bring error. Reversed.

J. J. Jones and James E. Reld, for plaintiffs in error. B. S. Gaitskill, D. H. Wooley, and W. J. True, for defendant in error.

JOHNSTON, C. J. This was an action for the specific performance of a contract for the sale of two lots in Walnut, Kan., upon which there was a grain elevator. In July, 1905, Maggie J. (Parker) Adams, a resident of Waterville, Kan., was the owner of the property, and, learning that J. G. Nider, a neighbor, was going to southern Kansas, she asked him to look after her property and the collection of an outstanding rent account. He investigated, and made report, and, through his wife, entered into a correspondence with George Goff in regard to the care and disposition of the property. She wrote the following letter, to which she signed her husband's name: "Waterville, Kansas, July 7th, 1905. Mr. Geo. Goff, Walnut, Kansas—Dear Sir: Please find inclosed account against Chanute Grain Co. for rent due on elevator situated on Lots 5 & 6, B. 23, near Santa Fé depot. Please push this and collect at once. We inclose letter from J. M. Goff saying they would rent elevator at \$10.00 per month and do their own repairing. They owe rent on this to the inclosed statement. Please preserve this letter and return to me when you have collected same. If you think best, you can have the attorney make the collection through you. We also inclose deed. Have attorney look up matter and see if the gasoline engine was

in the elevator when the transfer was made. If Chanute Grain Co. will settle for \$600.00 net to Maggie J. Parker she will turn over deed to said property and receipt in full for rent on said property. You are to get your commission above this for collection. Please give us an early reply as to what you can do about this matter. Yours truly, J. G. Nider. P. S. All delinquent taxes will be paid, so there will be no incumbrance on said property. J. G. N." A few days later Mrs. Nider wrote another letter to George Goff as follows: "Waterville, Kansas, July 13th, 1905. Mr. Geo. Goff, Walnut, Kansas—Dear Sir: In reply to yours of the 12th inst., will say it seems to me that the letter of agreement in which they agree to keep elevator in repair and \$10.00 month rent would be proof enough that they should pay it. Mrs. Parker wishes you to get entire rent due, if you possibly can. In making the offer of \$600.00 she thought perhaps they would be more likely to purchase. Push the matter along, and get the best possible price for it. Yours truly, J. G. Nider." On July 27, 1905, Goff sent the following telegram: "J. G. Nider. Waterville, Kansas. Have purchaser for buildings and rent account. Six hundred. Will you take it? Answer quick. Geo. Goff." This telegram was received by Mrs. Nider, and, after a telephonic consultation with Mrs. Adams, she sent the following message: "7-25-05. Waterville, Kansas. Geo. Goff, Walnut, Kansas. Yes, will accept as per your message. J. G. Nider." Acting upon Nider's telegram, Goff entered into a written contract for the sale of the property to Guy F. Carlton, who paid \$100 as part payment, the balance to be paid upon the delivery of a warranty deed. On the following day Mrs. Adams sold the property to C. E. Benedict, who is made a party to this action, and executed a deed accordingly. In a trial, which was had without a jury, the court found in favor of Carlton, directing the cancellation of the Benedict deed, and directing Mrs. Adams to execute a warranty deed under the Goff contract.

The contention of Mrs. Adams in the district court was that the contract relied on by Carlton is obnoxious to the statute of frauds, and the same question has been presented here upon both pleadings and evidence. She rightly insists that, under the amended statute, she cannot be held upon any contract for the sale of lands, unless "some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized in writing." Laws 1905, p. 410, c. 266, § 1. It is conceded that the memorandum required by the statute may consist of several writings, of a number of letters and telegrams, if they are duly signed and sufficiently state the terms of the agreement. It will be observed that Mrs. Adams did not sign the contract nor any of the letters or telegrams connected with the contract. She

did not give any written authority to any one to sign her name, and no one did sign her name to the letters, telegrams, or agreement. The deed spoken of in one of the letters was the one conveying the property to her which appears to have been sent for purposes of identity. It is true that George Goff, who was looking after her property, undertook to make a contract of sale, and that he signed it as agent. If the writings under which he acted had been signed by Mrs. Adams, it might well be doubted whether he had authority to conclude a contract for the conveyance of the lots, or that it could be said that he had conferred upon him any power beyond that of finding a purchaser for the lots. In the recent case of *Brown v. Gilpin*, 75 Kan. 773, 90 Pac. 267, it was held that the ordinary transaction of listing land with a real estate broker under a direction to sell it upon stated terms does not imply a power to execute a contract for its sale. In one paragraph of the syllabus of the case formulated by Justice Mason it is said: "Communications from the owner to a real estate broker with respect to the sale of lands will be regarded as giving the agent only the authority usually incident to his employment—that is to say, to find a purchaser—unless a different intention is clearly shown, and no wider power than that is necessarily indicated by the use of the words 'to sell' or 'to make a sale' in describing the purpose for which the agent's services are engaged, inasmuch as in common parlance 'to sell' is often used as meaning to negotiate or arrange for a sale, and a sale is spoken of as made when its terms are said to be agreed upon." But, even if the letters and telegrams purported to authorize Goff to execute a contract, it was not such authority as is necessary to take it out of the statute. The amendment of the statute of 1905 in respect to the authority of an agent to bind a principal is important. It was changed from a provision requiring lawful authority, which did not prescribe the form, to one requiring lawful authority, in writing. Under the statute, as amended, it is just as important that the authority of the agent shall be in writing as that the contract which he makes shall be in that form. Before Goff, therefore, could make a contract binding upon Mrs. Adams, he must have had written authority directly from her, and such authority must have appeared on the face of the writings. The only writings received by him, which pretended to give authority, were from Nider, and not from her. Neither Mrs. Adams' name nor any abbreviation of it was attached to any writing in the transaction. While she had knowledge of the writings and some of them were prepared and sent under her direction, her signature was not attached to any of them, nor was the name signed one which she had ever adopted or used. If the writer of the letters or telegrams had attached her name in her presence or at her re-

quest, there would be room for the contention that the signature was her own, but there is no claim of an authorized use of her name. Under the statute of frauds a binding contract for the sale of real estate cannot be made by an agent unless such agent had written authority from his principal. Goff was in a way the agent of Mrs. Adams, but did not have the quality of authority necessary to the making of a binding contract for the sale of her lots. *Albertson v. Ashton*, 102 Ill. 50; *Kozel v. Dearlove*, 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416; *Newlin v. Hoyt*, 91 Minn. 409, 98 N. W. 323; *Thompson v. New South Coal Co. et al.*, 135 Ala. 630, 34 South. 31, 62 L. R. A. 551, 93 Am. St. Rep. 49; *Cockrell v. McIntyre*, 161 Mo. 59, 61 S. W. 648; *Trust Co. v. Garbutt*, 6 Utah, 342, 23 Pac. 758; *Clark & Skyles on Agency*, § 50. To whittle out the requirement that the authority of the agent shall be in writing would operate to nullify the recent amendment, and to defeat one of the main objects of the statute.

Neither the pleadings nor the evidence in the case disclosed a valid contract for the sale of the property in question; and hence the judgment of the district court will be reversed.

(77 Kan. 774)

STATE ex rel. BURTON, County Atty., v. CITY OF PARSONS et al.

(Supreme Court of Kansas. April 11, 1908.)

1. AFFIDAVITS — PLEADING — VERIFIED PETITION—USE AS AFFIDAVIT.

When a verified petition is used as an affidavit, its allegations must be construed as those of an affidavit, and must be such statements of fact as would be proper in the oral testimony of a witness. Allegations which are simply conclusions of law, whether sufficient or not as matter of pleading, are incompetent as testimony.

2. INJUNCTION—TEMPORARY INJUNCTION.

A temporary injunction is not a matter of strict right, its issue resting with the sound discretion of the judge or court, and before one is issued there should be such a full showing of all the facts that the judge may act with a thorough understanding of the entire case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 304.]

Error from District Court, Labette County; Thos. J. Flannelly, Judge.

Action by the state, on the relation of E. L. Burton, county attorney, against the city of Parsons and another. Judgment for defendants, and plaintiff brings error. Affirmed.

C. E. Pile and E. L. Burton (W. B. Glass and Jas. A. Plotner, of counsel), for plaintiff in error. J. W. Gleed and J. L. Hunt, for defendants in error.

PER CURIAM. The county attorney of Labette county brought this action in the name of the state to enjoin perpetually the defendant telephone company from constructing a telephone system in the city of Parsons under a franchise which had been granted by the

city for that purpose. A restraining order was granted by the probate judge; the district judge being absent from the county. Afterwards, on motion, the restraining order was dissolved, and an application for a temporary injunction refused by the district court. From this action of the court, the case has been brought here by proceedings in error.

The motion to dissolve reads: "Comes now said defendant, and moves the court to dissolve and set aside the restraining order heretofore granted herein, for the reason that the petition does not state facts sufficient to constitute a cause of action, nor facts sufficient to entitle plaintiff to the relief therein prayed, or to any relief, and shows no right in said plaintiff to maintain this suit." The decision of the court reads: "Now, on this 8th day of December, 1906, court being in regular session, this cause came regularly on for disposition and final order upon the motion of the defendant, the Missouri & Kansas Telephone Company, to dissolve and set aside the restraining order heretofore on the 29th day of October, 1906, by the probate judge of Labette county, Kan., granted herein. And the court, having heretofore, to wit, on the 7th day of November, 1906, at chambers in the city of Independence, Montgomery county, Kan., heard the argument of counsel upon said motion, and being fully advised in the premises, finds that the plaintiff is not entitled to equitable relief or any relief by injunction, and that such restraining order should and ought to be dissolved and set aside. It is therefore by the court ordered that the restraining order heretofore granted herein as before set forth be and a temporary injunction is refused, the same is hereby dissolved, set aside, and held for naught, to which order and ruling of the court in dissolving, setting aside, and holding for naught said restraining order, and refusing said temporary injunction, plaintiff at the time duly excepted and excepts." It is not clear whether this proceeding involved the sufficiency of the pleading merely or also included the denial of a temporary injunction for want of a satisfactory showing of facts therefor. In view of the record, however, we conclude that both these questions were considered.

Under the liberal rules followed in such cases, the petition as against a general demurrer was probably sufficient. There are some conclusions of fact contained in its allegations which are perhaps sufficiently broad, when considered in connection with the inference which may be drawn therefrom, to constitute a cause of action. *Long v. Thompson*, 73 Kan. 76, 84 Pac. 552; *Bowersox v. Hall & Co.*, 73 Kan. 99, 84 Pac. 557; *State v. Addison*, 76 Kan. —, 92 Pac. 581. The petition was verified and used as an affidavit in support of its averments as a pleading, and, when considered as an affidavit, an entirely different rule applies. *Olmstead v. Koester*, 14 Kan. 463. In that case Justice

Brewer said: "When a verified petition is used as an affidavit, its allegations must be construed as those of an affidavit, and must be such statements of fact as would be proper in the oral testimony of a witness. Allegations which are simply conclusions of law, whether sufficient or not as matter of pleading, are incompetent as testimony." "A temporary injunction is not a matter of strict right: Its issue rests with the sound discretion of the judge or court, and before one is issued there should be such a full showing of all the facts that the judge may act with a thorough understanding of the entire case." This verified petition was the only evidence presented in support of this application. In view of the weakness of the affidavit as evidence, and the large discretion lodged with the court in such cases, we are unable to say that the court erred in refusing to allow the temporary injunction.

The judgment of the district court is therefore affirmed.

(77 Kan. 540)

STATE ex rel. COLEMAN, Atty. Gen., v. FRY et al.

(Supreme Court of Kansas. April 11, 1908.)

1. COUNTIES — CONTRACTS — COLLECTION OF TAXES.

A contract by which a board of county commissioners undertakes to employ a private person or firm to render services in aid of the collection of taxes, which services the statute makes it the duty of certain township and county officers to render, is ultra vires, against public policy, and void.

2. SAME—COMPENSATION.

A person who has entered into such a contract with a board of county commissioners, and has, in part, rendered the specified services, is presumed to know the illegality of the contract, and that his performance of the services is against public policy. He cannot recover therefor on a quantum meruit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 197.]

(Syllabus by the Court.)

Error from District Court, Dickinson County; O. L. Moore, Judge.

Action by the state, on the relation of C. C. Coleman, Attorney General, against B. D. Fry and others. Judgment for defendants, and the state brings error. Reversed and remanded.

M. W. Moir, in the name of M. W. Moir & Co., presented to the board of county commissioners of Dickinson county, Kan., a written proposition as follows: "Gentlemen: We propose to assist the proper officers of your county to discover taxable property subject to taxation in your county that has not been listed and assessed as required by law. For our services therefor we will charge your county a sum of money equal to twenty-five (25) per cent. of the taxes paid into the county treasury of your county by reason of said discovery. We agree to commence said investigation within ninety (90) days from the date of our employment and to continue said investi-

gations with due diligence until the same is completed; commissions to be paid to us as fast as taxes are collected on omitted property disclosed by reason of said investigation. We ask that the county authorities use due diligence in the assessment and collection of any tax found to be due as found by this investigation. We also agree to file a bond acceptable to the county, in the sum of one thousand dollars, conditioned that we will faithfully and honestly discharge the duties of our employment. Respectfully submitted, M. W. Moir & Co., per M. W. Moir." On the same day the board of county commissioners, all being present and in session, formally accepted the proposition, and caused the contract to be entered at length upon the journal of their board and all of the commissioners signed the journal entry. Moir soon thereafter entered upon the execution of the contract and the proper county officers, through his assistance, collected about four thousand dollars additional taxes. The board of county commissioners had allowed a bill for the services of Moir under this contract when this action to enjoin the board of county commissioners from executing the contract was commenced in the name of the state on the relation of the Attorney General. The issues were made up and tried before the court without a jury, and resulted in a judgment in favor of the defendants denying the injunction. The state as plaintiff in error brings the case here.

F. S. Jackson (G. W. Hurd, of counsel), for plaintiff in error. C. C. Towner, M. A. Gorrill, and F. D. Parent, for defendant in error.

SMITH, J. (after stating the facts as above). Numerous errors are assigned, principally trial errors, but two questions of law will determine the case, viz.: (1) Was the contract a valid contract? (2) If not, was Moir entitled to recover upon a quantum meruit the value of the services he had rendered in view of the benefits the county had received? We will discuss these questions in order.

It must be conceded at the outset that the board of county commissioners are in a sense the general business agents of the county, and as such have charge of its financial affairs and business as to such matters as are not expressly or by necessary implication delegated by law to other officers of the county or are reserved to the people. See section 1621, Gen. St. 1901. Also *Stafford County v. State*, 40 Kan. 21, 18 Pac. 889. It must also be conceded that if the county has the power to make the contract in question the board of county commissioners was the only agency through which the power could be exercised. The general powers conferred upon counties and county commissioners by our statute are set forth in sections 1003 and 1621, Gen. St. 1901. If the power here contended for is embraced there-

in the contract is valid, otherwise, it is not. The two sections must be construed together. The fifth clause of section 1621 is restrictive of the powers conferred upon the county board. *Brown v. State*, 73 Kan. 69, 84 Pac. 549. It reads: "Fifth, to represent the county and have the care of the county property and the management of the business and concerns of the county, in all cases where no other provision is made by law." The statute has prescribed a complete and entire system of listing, valuation, and taxing of all real and personal property, and has also prescribed a procedure for discovering and listing property for taxation which has escaped the surveillance of the assessors and has assigned the several steps in the system and procedure to designated officers of the townships and counties of the state. It has imposed upon certain officers the very duties which, by the contract in question, the county commissioners undertook to employ Moir to perform. Articles 11 and 12, c. 107, Gen. St. 1901. It was beyond the power of the board of county commissioners to employ any other agency to perform these duties which had been imposed upon county officers, and the contract is therefore ultra vires and void. *Brown v. State*, supra; *Pomeroy Coal Co. v. Emlen*, 44 Kan. 117, 24 Pac. 340; *Waters v. Trovillo*, 47 Kan. 197, 27 Pac. 822. See, also, *Chase v. Commissioners of Boulder County*, 37 Colo. 268, 86 Pac. 1011; *Stevens v. Henry County*, 218 Ill. 468, 75 N. E. 1024, 4 L. R. A. (N. S.) 339; *Grannis v. Board of Commissioners of Blue Earth County*, 81 Minn. 55, 83 N. W. 495; *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23; *House v. Los Angeles County*, 104 Cal. 73, 37 Pac. 796; *Platte County v. Gerrard*, 12 Neb. 244, 11 N. W. 298.

The contract in this case grew out of an attempt to solve a problem in civil government which has vexed the ages since the dawn of history. The calling of the publican who sat at the receipt of customs furnished Hebrew literature with the most hated name it recorded. The question how to collect the necessary revenues to maintain the government was as distracting in the economy of Greece and Rome as it is in modern nations. In the Middle Ages the question was attempted to be met by reprisals in war or by arbitrary assessments upon wealthy subjects. Later the greater governments exploited their colonies and this was a deciding factor in the rebellion of the American colonies against Great Britain. The difficulties present led the founders of our government to the evasion of indirect taxation, without which, possibly, the union of the states had long since been dissolved. Even this evasion has evidently not eliminated all the difficulties as it has furnished the dominant questions in politics for two generations. Under all governments and in all times one of the greatest strifes has arisen

from attempts to shift the burden of taxation upon other shoulders. Men have sent their sons into battle or recklessly given their own lives to preserve their governments for the maintenance of which they had denied the payment of a small portion of their accumulated wealth. Our state has had equitable tax laws from its first organization which, if obeyed, would have fairly equalized the necessary burdens but, as administered, they have resulted in great injustice and dissatisfaction. Even the beneficent exemption from taxation of \$200 worth of property to the family has been abused. Assessing officers, sworn to perform their duties impartially have felt compelled to depart from the plain provisions of the law to avoid injustice to their respective townships. Men generally honorable and accounted good citizens have, in listing their property, done so in accordance with the general custom, and not at its true value. Indeed, so general has been the evasion of the law that the citizen has been compelled to choose between following the custom and suffering a wrong. Taxing officers have held conventions to agree upon a basis of assessment other than that provided by law. On the other hand the tax ferret, coming upon the scene with a contract for fat commissions, acquaints himself with the evasions that have occurred in past years, and by threats of public exposure and even criminal prosecution, in short by all the methods known to the blackmailer, forces from the citizen a statement of property to be taxed and even a payment of money for past delinquencies far beyond the requirements of the law. The situation has been such that it is not a wonder that boards of county commissioners should embrace almost any plan that promised a reasonably fair collection of necessary public revenues in proportion to the amount of property really owned by the citizens of their respective counties. Probably no board of county commissioners which ever made a contract such as is involved in this action anticipated the methods that would be employed under it. They probably had not studied the iniquities which have at all times grown up under every system that has been in vogue of farming out the collection of the public revenues. The experiences of the past, however, have been such that it is impossible to contemplate any civilized community, with a knowledge of its history, again reviving the odious practice. The contract is not only void for want of authority, but as being against public policy.

The question whether the defendant in error is entitled to recover in quantum meruit is if a contract, which the county commissioners had no power to make, should be implied. Such a contract will not be implied, especially in payment for services which were, as in this case, illegal in themselves. There are cases in which counties

and municipalities are, upon the avoiding of a contract, held under obligations to put the opposite party in statu quo or, if this cannot be done, to pay a reasonable price for the benefits actually received; but those cases are easily distinguishable from this. Here the services performed were illegal and against public policy as was the contract, and Moir will be presumed to have made the contract and to have begun performance with full knowledge thereof. The law will afford him no relief.

There is no dispute as to the contract upon which this action is based or as to the services rendered thereunder. Hence the conclusion at which we have arrived terminates the action.

The judgment of the court below is reversed, and the case is remanded, with instructions to grant a permanent injunction in favor of the plaintiff below as prayed for.

(77 Kan. 861)

MAKINS v. FRY et al.

(Supreme Court of Kansas. April 11, 1908.)

Error from District Court, Dickinson County; O. L. Moore, Judge.

Action by Edward Makins against B. D. Fry and others, as the board of county commissioners of the county of Dickinson. Judgment for defendants, and plaintiff brings error. Reversed.

Hurd & Hurd, for plaintiff in error. C. C. Towner, M. A. Gorrell, and F. D. Parent, for defendants in error.

PER CURIAM. The questions involved in this case are the same as those in *State v. Board of County Commissioners*, No. 15,207 (just decided) 95 Pac. 392, except as to the right of Makins to maintain the action. Under the authority of *State v. Board of County Commissioners*, supra, as to the illegality of the contract, and of *Water, Light & Gas Co. v. Hutchinson Interurban Ry. Co.*, 74 Kan. 661, 87 Pac. 883, *Bunker v. City of Hutchinson*, 74 Kan. 651, 87 Pac. 884, and chapter 334, p. 550, Laws 1905, as to the right of Makins to maintain the action, held, that the petition states a cause of action, and the ruling of the court sustaining the demurrer thereto is reversed, and the case is remanded, with instructions to overrule the demurrer and to proceed.

(77 Kan. 351)

KANSAS CITY ELEVATED RY. CO. v. GROFF.

(Supreme Court of Kansas. April 11, 1908.)

CARRIERS — INJURIES TO PASSENGER — QUESTION FOR JURY.

Evidence tending to establish the following facts held sufficient for presentation to a jury to determine whether the injury referred to was occasioned by the negligence of the defendant, an electric railway company: The plaintiff was waiting for a car in a place commonly used for that purpose. As the car approached, the trol-

ley left the wire, and flew up, striking and breaking the globe of an electric light, pieces of which fell upon plaintiff's wrist, causing the injury complained of. The rope by which the trolley pole was controlled was not fastened to the car, as the rules of the company required, but was hanging loose. The trolley had previously left the wire at the same place, and the globe of the same lamp had at least twice before been broken by a trolley, but perhaps not in the same manner.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; William G. Holt, Judge.

Action by Nona Groff against the Kansas City Elevated Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Miller, Buchan & Miller, for plaintiff in error. J. W. Jenkins and W. L. Wood, for defendant in error.

MASON, J. Nona Groff recovered a judgment against the Kansas City Elevated Railway Company on account of personal injuries claimed by her to have been occasioned by its negligence. The defendant prosecutes error.

The case turns upon the question whether there was any evidence to support the verdict. Testimony was given tending to establish these facts: The defendant's road is operated by electricity by means of an overhead wire. The plaintiff was standing by the side of the track, waiting for a car at a place ordinarily used for that purpose. As the car she intended to take reached the spot, the trolley left the wire, and the pole flew up, striking and breaking the globe of an electric light. The broken pieces of glass fell and cut the plaintiff's wrist, causing the injury for which she asked damages. The light was about 3 feet above and $7\frac{1}{2}$ feet to one side of the wire. The rope by which the trolley pole was controlled was not fastened to the car, as the rules of the company required, but was hanging loose. The car at the time of the accident had just been switched from one to the other of two parallel tracks, the trolley, of course, passing from one main wire to the other by a wire connecting them, and overhanging the cross-over track. Trolleys had previously jumped the wire at this point, and witnesses who testified to this also said that the globe of the same light had previously been broken by the trolley pole more than once. There was also evidence that a few years before the globe had been broken at a time when it was suspended only a foot and a half above the wire by a careless handling of the pole while the trolley was being turned to reverse the direction of the car, but it was not affirmatively shown that this testimony referred to the same incidents.

In *Nelson v. Union Railroad Co.*, 26 R. I. 251, 58 Atl. 780, the plaintiff brought an action against an electric railway company upon a very similar state of facts. At the conclusion of the plaintiff's evidence, the trial

court granted a nonsuit. On review, the plaintiff assigned as error the granting of the nonsuit and the rejection of evidence that electric light globes had previously been broken in the same manner at the same place and at other places. Both assignments were held to be well taken, although only the second was discussed in the opinion. The case is therefore an authority for the affirmance of the judgment here involved. Moreover, in an action brought against the electric light company for the same injury, the Supreme Court said: "Even conceding that the slipping of the trolley pole from the wire was a pure accident, as argued, yet it certainly cannot be said, as a matter of law, at any rate, that it was an accident for which no person was responsible; for the trolley pole was a mechanical appliance connected with the running of an electric car which was being operated by the Union Railroad Company, an undoubtedly responsible person. If this trolley pole had not slipped from the wire, the accident would not have happened. And as it was *prima facie* negligence on the part of the street railway company in not keeping it on the wire, where it belonged, or, at any rate, in not preventing it from coming in contact with said electric light globe, such negligence, being the independent act of a responsible person, and intervening between the negligence of the defendant (if it was negligent in the premises) and the happening of the accident, broke the causal connection between the two, and hence became and was the proximate cause of the accident." The facts testified to do not necessarily establish a liability against the railroad company, but with the inferences which may reasonably be drawn from them they make a fair case for presentation to a jury to determine the question whether any negligence of the defendant was the proximate cause of the injury to the plaintiff. The evidence on the subject is vague, but it seems sufficient to justify the belief that the globe of the same light had previously been broken in the same manner. That at the time of such earlier breakage the light was a little nearer the wire cannot be very important, for the trolley pole, when swinging free, could as readily reach it in one position as in the other. The trolley was abundantly shown to have repeatedly left the wire at this place, and, if unrestrained, it was manifestly likely to break any globe within the length of the pole; the probability of such occurrence depending somewhat upon the distance of the light from the wire laterally. True this distance in the present case was considerable— $7\frac{1}{2}$ feet. But even this distance cannot be said as a matter of law to be so great as to excuse the railroad company from anticipating that a loose trolley pole might reach the light. Certainly, if the lamp had been but a foot or two to one side of the wire, the fact would not have had this effect, and just what position could be re-

garded as insuring safety was a matter for the jury to determine. If the accident was one that could reasonably have been anticipated, the jury were warranted in finding that the defendant was negligent in not taking effective measures to prevent it, either by causing the rope to be tied to the car or in some other manner.

In defense, the company produced a witness who testified that the injury was the fault of a prospective passenger who attempted to climb upon the car before the gates were opened, and, losing his balance, grasped the rope, thus pulling the trolley off the wire and causing it to swing to one side and strike the lamp. The argument is made that, as this evidence was uncontradicted, the jury were bound to credit it, and that it was therefore fatal to the plaintiff's recovery. The jury, however, were the judges of the credibility of the witness; and, even if their verdict was necessarily inconsistent with his testimony, this court cannot on that account set it aside. *Harrod v. Latham Merc. Co.* (Kan.) 95 Pac. 11 (decided March 7, 1908).

The judgment is affirmed.

(77 Kan. 696)

BICHEL et ux. v. OLIVER.

(Supreme Court of Kansas. April 11, 1908.)

1. SPECIFIC PERFORMANCE—ENFORCEMENT OF CONTRACT.

Where a man and his wife, who have no children, orally agree that in consideration of a young girl becoming a member of their family and giving to them love, obedience, and service they would rear and treat her as their own child, and at their death leave her all of their property, and there is full and faithful performance of the agreement by the girl, such agreement will be enforced by a court of equity, providing there are no circumstances or conditions which would render enforcement inequitable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 113.]

2. SAME—ORAL AGREEMENT.

Before an oral agreement will operate as a transfer of land it must appear that it is certain and definite in subject-matter and purpose, and has been proven by clear and satisfactory proof, but it is not essential that it be established by direct evidence.

3. SAME—EVIDENCE.

If the facts and circumstances brought out in the evidence, including the acts of the parties, are such as to raise a convincing implication that the contract was actually made and to satisfy the court of its terms and performance, and that there would be no inequity in its enforcement, it is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 387, 389, 390.]

4. PLEADING—PETITION—DEMURRER.

The fact that more than one ground of recovery may have been pleaded in the petition, or that the grounds set up for recovery may not be entirely consistent with each other, affords no reason for sustaining a demurrer which challenges only the sufficiency of the facts alleged.

(Syllabus by the Court.)

Error from District Court, Washington County; W. T. Dillon, Judge.

Action by Anna Oliver against Jacob Bichel and wife. Judgment for plaintiff, and defendants bring error. Affirmed.

J. W. Rector and T. P. Roney, for plaintiffs in error. Charles Smith and Fred Powell, for defendant in error.

JOHNSTON, C. J. This was an action by Anna Oliver against Jacob Bichel and his wife, also Jacob Bichel as executor of an estate, and the Citizens' State Bank of Haddam to set aside certain instruments purporting to affect the title to a tract of real estate, formerly owned by Adolph Fredericks, and to quiet her title which was based on an oral agreement to transfer the property to her on certain conditions which she alleged had been substantially performed. On issues formed between the parties a trial was had, and the court in substance found that for a long time before his death Adolph Fredericks was the owner of a quarter section of land and occupied it as a homestead. His family consisted of his wife, Herman Fredericks, a brother, and the plaintiff, Anna Oliver, a granddaughter of his wife, whom they had taken into the family when she was only a few years old, but whom they had never formally adopted. His wife died in 1901, and his brother, who was an invalid during the last years of his life, died in 1903, leaving only Adolph and the plaintiff, and when he died in 1904 he left no wife, children, or known heirs to inherit his estate. He and his wife had frequently expressed to their neighbors an intention to leave all of their property to Anna because of their love for her and her faithfulness to them, but no contract to that effect was made with Anna's parents when she went to live with the Fredericks. Some time before Anna was married she had expressed an intention to leave the Fredericks' home because of a disagreement with Herman Fredericks, and then Adolph and his wife urged her to remain and expressly agreed that if she would do so they would give her all of their property at their death. Anna married L. E. Oliver in 1895 with the approval of the Fredericks, and lived for a time on the Fredericks farm, and continued to care for the old people as she did before her marriage. Later Anna and her husband moved to an adjoining farm about a quarter of a mile away and lived there until after the death of Mrs. Fredericks and until 1902. After her death Adolph and Herman continued to live on the farm, and in September, 1902, Herman being unable to leave his bed, Adolph renewed the agreement with Anna and her husband that if they would move upon the farm and care for him and his brother Herman as long as they lived Anna should have all of his property and should enter into possession of it at once. They accepted his proposition, and immediately took possession of the farm, and have continued in possession of it ever since. During the childhood of Anna the Fredericks sent her to the public school and bestowed on her love

and affection, and she in turn was obedient and kind to them, performing such household duties as are usually performed by girls of her years and sometimes working in the fields. After her marriage and while living on the farm she continued to work and care for them, and after moving on the adjoining farm she washed, ironed, and baked for the family and frequently performed other household duties. After Anna and her husband took possession of the farm in 1902 they cared for both Adolph and Herman, furnishing them the necessities of life until Herman died in 1903 and Adolph left their home in 1904. In April, 1904 and about eight months before Adolph died, he apparently became dissatisfied with their home and went to the house of Jacob Bichel, a brother of Anna, where he remained until his death. A few days before he died and on December 7, 1904, he executed a deed to Jacob Bichel for the farm in controversy, the consideration named being \$1, the support of the grantor during his lifetime, and a decent burial upon his death. On December 9, 1904, he executed a will purporting to give all of his property, real and personal, to Jacob Bichel except a horse which was given to others. He died on December 15, 1904, and the will was at once probated, and Jacob Bichel was appointed as executor. On January 23, 1905, Bichel and his wife executed a mortgage on the farm to the Citizens' State Bank of Haddam to secure a loan of \$600 and at that time Anna and her husband were in possession of the farm, a fact well-known to Bichel and the officers of the bank. On these facts judgment was rendered in favor of the plaintiff and against all of the defendants.

An attack was made on the sufficiency of the petition by a general demurrer which the court overruled, and it is renewed here upon the ground that the allegations as to the means employed by Jacob Bichel to induce Adolph Fredericks to execute the deed and make the will in his favor were not such as to constitute fraud or undue influence. In her petition the plaintiff set up an oral agreement between the Fredericks and herself under which she was to acquire the property, and also such performance of the agreement by herself as would take it out of the statute of frauds. These facts, if established by proof, were sufficient to warrant a recovery by her without regard to whether or not Jacob Bichel obtained the will and deed from Fredericks by fraudulent means. Fraud and undue influence in procuring the execution of these papers were set forth, it is true, but no question was raised by the defendants as to the propriety of coupling her claim, based on these averments, with her claim setting up the contract and its performance. No effort was made to have any of these allegations stricken out because of inconsistency or upon any other ground, nor was the petition challenged in any way except by the general demurrer for insufficiency of facts. That more

than one ground of recovery may have been pleaded or that the grounds set up may not have been entirely consistent did not constitute reasons for sustaining the demurrer.

The principal considerations in the case are, first, was there a contract to the effect that if plaintiff would live with the Fredericks and become one of their family, rendering them such love, obedience, and services as are due from a child, they would rear her as their own child, and at their death give all of their property to her; and, second, was the contract, although oral, of such an equitable character and so far performed as to be enforceable? The case as developed by the evidence falls fairly within the rule of *Anderson v. Anderson*, 75 Kan. 117, 88 Pac. 743, 9 L. R. A. (N. S.) 229, wherein Mr. Justice Porter fully states the reasons for the rule and cites many authorities sustaining it. If, as there held, the contract is sufficiently certain and definite in subject-matter and purpose, and has been clearly and certainly established by the evidence, and the facts are such as to take it out of the operation of the statute of frauds, and there are no circumstances or conditions which would make enforcement inequitable, courts do not hesitate to give effect to a contract, although it is not in writing. An oral agreement that operates as a transfer of land must, of course, be made out by clear and satisfactory proof but it is not essential that it be established by direct evidence. If the facts and circumstances brought out are such as to raise a convincing implication that the contract was made and to satisfy the court of its terms, and that there would be no inequity in its enforcement, it is enough. *Anderson v. Anderson*, supra; *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265. This is especially true where, as here, the parol evidence is supplemented and supported by the acts of the parties. Aside from the frequent statements of Adolph Fredericks and his wife as to the relations between them and the child which they had taken into the family and of their obligations to her there was the direct agreement with Anna herself at the time she had trouble with Herman Fredericks which made a reasonably clear and complete promise that Anna should have the land in consideration of the filial duties of love, obedience, and services which had been and should thereafter be rendered to the Fredericks. The defendants insist that there should be no relaxation of the rule requiring contracts of this character to be in writing, nor an exception made allowing the transfer of land upon oral evidence. It cannot be said, however, that the evidence herein rests wholly in parol. The acts of Anna, in performing her agreement, and of Fredericks, in partially carrying out his agreement by putting her in possession of the land, throw considerable light on the character of the contract, and strongly support the parol proof. Besides, the statute of frauds, invoked by defendants, should never be allowed to accomplish fraud, and according to

the facts and the findings of the trial court a failure to enforce this contract, after performance by the plaintiff, would be a fraud upon her. As to her the contract was fully executed. The services were rendered and her part of the contract performed during the lifetime of Adolph Fredericks. Her services in the family and her care and ministrations to the old people were not intended to be measured by any financial standard, and, as the court found, there is no measure by which she can be adequately compensated for the things she has done, nor would there be any estate from which she could be paid, if this action should fail. It is true there is some conflict in the evidence, some testimony that discredits that of the plaintiff and the theory upon which she recovered, but the testimony which the court appears to have believed and which in view of its finding must be accepted as true by this court abundantly justifies the decree enforcing the contract. There is nothing substantial in the objections made to the admission of testimony upon which the findings are based.

The bank, which holds the mortgage given by Jacob Bichel, is in no better position than he occupies. At the time the mortgage was given the plaintiff and her husband were in actual possession of the land, a possession which they had held for considerable time, and which was known to the officers of the bank. That open possession made it necessary for the bank to inquire as to the ownership of the land and the right of Bichel to execute a mortgage upon it. An inquiry would have disclosed that a binding contract had been made with the plaintiff, and that Bichel had no interest in the land nor any right to incumber it.

The judgment of the district court will be affirmed.

(77 Kan. 706)

CHUTE v. MOESER et al.

(Supreme Court of Kansas. April 11, 1908.)

MASTER AND SERVANT—WORK OF INDEPENDENT CONTRACTOR—NEGLIGENCE—CARE AS TO PERSONS ON ADJACENT HIGHWAY.

In an action brought by one who, while passing in front of a building, was injured by the falling of a cornice in the process of construction, against the owners of the property to recover for such injury, based upon two grounds of negligence, namely, (1) that an improper method of construction was used, not being one inherent in the plan; and (2) that sufficient precaution was not taken to protect passersby against possible injury during the progress of the work—*held*:

(1) That the defendants were relieved of liability upon the first ground of negligence by findings that the work was being done by a contractor, the owners having nothing to do with it, except to see that it was completed in accordance with the plans, notwithstanding it also appeared that the cornice was a part of a number of improvements being made, including the erection of a new story, only the brick and stone work being covered by this contract. That the owners furnished all the material and made payments upon estimates from time to time at an agreed price per cubic foot.

(2) That, irrespective of any question regarding the relation of independent contractor, the defendants were relieved of liability upon the second ground of negligence by findings that the cornice was of the usual kind. That its fall was occasioned by a workman accidentally stumbling against it while it was green, and that otherwise it would not have fallen. That a scaffold had been built below the cornice to intercept the fall of material, and thus protect persons using the sidewalk, which was sufficient to catch anything that might naturally be expected to fall, and made the walk reasonably safe for passersby. That this was the usual mode of affording such protection, and that the falling of the cornice was not naturally to have been anticipated as the result of making the improvements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1242, 1243.]

(Syllabus by the Court.)

Error from District Court, Shawnee County; A. W. Dana, Judge.

Action by Ralph F. Chute, a minor, against Charles P. Moeser and another. Judgment for defendants, and plaintiff brings error. Affirmed.

W. S. McClintock, Geo. Overmyer, and Edwin D. McKeever, for plaintiff in error. Hazen & Gaw, for defendants in error.

MASON, J. Ralph F. Chute, while upon the sidewalk in front of a building owned by C. P. and Wm. Moeser, to which a new story was being added, was injured by the falling of a portion of a brick cornice then in the process of construction. He brought an action against the owners to recover compensation therefor, but was denied relief, and now prosecutes error. Two forms of negligence were alleged and relied upon by the plaintiff: (1) The employment of an improper method in the construction of the cornice, in that too few headers were used to tie the brick veneer to the stonework back of it; and (2) the failure to erect barriers to warn pedestrians against the use of the walk during the progress of the work.

Besides returning a general verdict against the plaintiff, the jury found specially, among other matters, that the defendants, having procured from an architect plans and specifications for the desired improvements, let the contract for doing all the brick and stonework to one W. H. Keesee, at an agreed price per cubic foot, they furnishing all the material, but having nothing to do with the work except to see that it was completed in accordance with such plans and specifications, having no control over the workmen employed, and paying the contractor upon estimates made from time to time. These findings established that Keesee was an independent contractor, and thereby relieved the owners from any liability, so far, at least, as related to any negligence in the manner of performing the work. The exemption of the owners was no less extensive because they let a separate contract for the brick and stonework, or because they furnished the material, or because they paid upon estimates as the

work progressed according to an agreed price per cubic foot. None of these considerations affects the reason of the rule which ordinarily exempts an employer from responsibility for the negligence of an independent contractor. The injury had no connection with any part of the improvements except the construction of the cornice, and was not occasioned by any defect in the plans or material. The method of performing the work was as much out of the control of the defendants as though they had let to one person for a lump sum a contract for making all the contemplated changes in the building. The plaintiff contends that some of the findings upon this branch of the case are without support in the evidence; but an examination of the record convinces the court that the contention is not well founded. He also maintains that some of them are inconsistent with each other. This claim is based upon the fact that in answer to one interrogatory the jury said, in substance, that the contract between the Moesers and Keesee did not limit the control of the owners over the portion of the building being improved, and, in answer to another, said that the owners surrendered their right to the control of the building "so far as improvements were being made." Whatever conflict these answers exhibit is merely verbal. In view of the other findings, it is sufficiently clear that the jury meant that the owner retained control over the building itself, but not over the actual work of construction.

The plaintiff further contends that, even conceding Keesee to have been an independent contractor, that relation for various reasons did not relieve the Moesers from the duty of warning the public against the danger of using the sidewalk during the building of the cornice. It is not necessary to pass upon this question, for the jury further found, in effect, that there was no negligence on the part of any one in this respect. They found in express terms that the cornice was of the usual kind; that its fall was occasioned by a workman accidentally stumbling against it before it had had time to dry; that otherwise it would not have fallen; that a scaffold had been built below the cornice to interrupt the fall of any brick or other material, and thus protect persons using the sidewalk, which was sufficient to catch anything that might naturally be expected to fall during the progress of the work, and made the walk reasonably safe for passers-by; that this was the usual way of affording such protection; and that the falling of the cornice was not a thing naturally to have been anticipated as the result of making the improvements. It cannot be said as a matter of law that it was the duty of the defendants to have anticipated the accident that happened, or to have taken any specific precautions to guard against its consequences. These were matters for the determination of the jury. Their decision that proper meas-

ures had been taken to protect passers against any occurrences that could reasonably have been anticipated was conclusive against the liability of the defendants in this aspect of the matter. *Cleghorn v. Thompson*, 62 Kan. 727, 64 Pac. 605, 54 L. R. A. 402.

Portions of the instructions are objected to upon several grounds, but, as they could not have influenced the action of the jury in making the findings referred to, and as these findings compelled the judgment that was rendered, it is not necessary to discuss the assignments of error in this regard.

The judgment is affirmed.

(77 Kan. 754)

ROBY et al. v. SHUNGANUNGA DRAINAGE DIST. et al.

(Supreme Court of Kansas. April 11, 1908.)

1. DRAINS—FORMATION OF DRAINAGE DISTRICTS.

The drainage act (chapter 215, p. 306, Laws 1905) authorizes the formation of districts to include lands subject to injury and damage from overflow, as well as lands subject to actual overflow.

2. SAME.

The Legislature has power to provide for the organization of such districts, which may embrace parts of incorporated cities with other territory, for the purposes specified in the act (Act 1905, p. 306, c. 215).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Drains, § 7.]

3. SAME—ASSESSMENT—PROPERTY SUBJECT.

Lands included within such drainage districts which are not, never have been, and can never be subject to overflow may nevertheless be lawfully assessed in proportion to benefits to pay for improvements authorized by the act if they are subject to injury and damage from the overflow of other lands.

4. SAME—ENJOINING ASSESSMENT.

The collection of such special assessments, levied after notice and an opportunity given to the landowner to be heard thereon, as provided in the act, should not be enjoined where the property so assessed may possibly be benefited by the proposed improvement, and there is no claim that the board acted fraudulently or oppressively in determining the facts and making the assessment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Drains, § 102.]

(Syllabus by the Court.)

Error from District Court, Shawnee County; A. W. Dana, Judge.

Action by Sara E. Roby and others against the Shunganunga Drainage District and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Waters & Waters, for plaintiffs in error.
J. B. Larimer, for defendants in error.

BENSON, J. The plaintiffs are owners of several tracts of land within the Shunganunga drainage district, organized under the provisions of the drainage law (chapter 215, p. 306, Laws 1905), and seek to enjoin the collection of special assessments upon their property made by the district board under that

law. The plaintiffs allege that the assessments are void because the plaintiffs' lands, although situated within the district, "are not, never have been, and can never be subject to overflow," and lie from 20 to 40 feet above flood overflow, or high-water mark. The regularity of the proceedings for the organization of the drainage district is not questioned, and the only objections urged against the assessments are that the lands of the plaintiffs, not being subject to overflow, cannot be lawfully assessed for such improvements, and that the drainage act is invalid.

The act provides that the petition for the organization of a drainage district shall describe the territory to be included, and shall state "that the lands and property therein embraced are subject to injury and damage from overflow." On the rehearing, the county commissioners, before organizing the district, must find that the statements of the petition are true. The drainage board is given power to determine what improvements shall be made to protect the district from overflow, or damage resulting therefrom, and is authorized to make improvements that will prevent the overflow of natural water courses, and thereby protect all the lands within such drainage district from such injury, and will be conducive to the public health, convenience, or welfare. It provides that if, upon the report of the engineer, the board shall determine that a levee shall be constructed, or that other work shall be done, to protect land in any part of the district from overflow, and that the cost thereof ought to be paid by levying special assessments on the real estate to be benefited by such improvements, then it shall so declare, and shall appoint assessors "to assess all of the lands within the district which will, in their opinion, to any extent be protected from overflow, or be benefited by such work, and determine the proportion of the estimated cost of such work which each lot, piece, or parcel of land so benefited ought justly to be charged." The statute requires a notice of the filing of the report of the assessors and of a hearing thereon before the drainage board to be given, when all persons aggrieved may be heard to contest the justness of the same. The report may be amended as may be equitable, and, upon confirmation by the board, the amounts charged against each tract become special assessments thereon. Suits to set aside or enjoin such assessments are barred in 30 days after such confirmation. Section 2 of the act is as follows: "That any drainage district may include lands within the county subject to overflow from the same natural water course, whether the same be situated partly within and partly without or wholly within or without any incorporated city." Chapter 215, § 2, p. 306, Laws 1905. The primary purpose of this section was to authorize the formation of districts to include city property with other territory and the

expression "subject to overflow" is not, when considered in connection with other parts of the act, a restriction of the power to include lands which, although not subject to actual overflow, are nevertheless subject to injury and damage from the overflow of other lands. The property injured by the overflow, as well as that which may be submerged, is to be assessed for the proposed improvement, each tract in proportion to the benefits to be received. The fact as alleged that the plaintiffs' lands cannot be actually overflowed, considered alone, affords no ground for relief; and there is no direct averment in the petition that they will not be benefited by the improvement for which the assessments were made. It is alleged that the act in question attempts to place under contribution for improvements property which cannot be benefited thereby, but this is an attack upon the law itself, and not an averment that the improvement in question will not be beneficial in this instance to the property described.

The organization of the district having been, as we must presume, effected after due notice to the plaintiffs and others, it must be held that the plaintiffs' lands were properly included within its limits. *Reclamation Dist. 531 v. Phillips*, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335; *Commissioners of Highways v. Drainage Dist.*, 127 Ill. 581, 21 N. E. 206. The power of the Legislature to create districts for the purposes of drainage and to provide for assessments to be made therein by the drainage board to pay for such improvements cannot be successfully questioned. *Ross v. Supervisors*, 128 Iowa, 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431, and note. This may be done through a corporation, thus organized, or through county or township boards (chapter 34, Gen. St. 1901), or by creating sewer districts as provided in the laws governing cities. When the nature of the case does not conclusively fix it, the power to determine what shall be the taxing district for any particular burden is a legislative power, not restricted except by constitutional limitations. 1 *Cooley on Taxation* (3d Ed.) 234. The benefits of a highway, a levee, or a drain may be so peculiar that justice would require the cost to be levied upon a part of a township, or county, or upon parts of several subdivisions of the state. *Id.* 239; *In re Madera Irrigation District*, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; *State v. Freeman*, 61 Kan. 90, 58 Pac. 959, 47 L. R. A. 67; *Wulf v. Kansas City et al.* (Kan.) 94 Pac. 207. The law cannot be held invalid upon the claim that it permits the inclusion of land within the drainage district which cannot be benefited. That all the lands so included were subject to injury and damage from overflow was alleged in the petition to organize the district, and was found true upon the hearing after due notice; and that these particular tracts would be benefited by the specific improvement for which assessments were made, and the pro-

portion of the cost thereof justly chargeable thereon, were facts found by the assessors and confirmed by the drainage board. Drainage Act, §§ 18, 23, pp. 317, 320. We must presume that such determination was made by the board after such notice and hearing, or opportunity to be heard; and upon these proceedings the court cannot give relief to the taxpayers affected, unless it can be held as a matter of law that their property could not by any possibility be benefited by any improvements for which assessments could be levied, or unless the board acted oppressively and fraudulently so that their acts were an abuse, rather than a use, of the power conferred. *Coates et al. v. Nugent et al.* (Kan.) 92 Pac. 597. We cannot hold as a matter of law that the plaintiffs' lands could not be benefited, since injuries may occur from an overflow of lands within the district to other lands not subject to overflow, and the fact that the plaintiffs' lands might be so injured has been determined by the local tribunal appointed for that purpose. No charge of fraudulent or oppressive conduct being made, such finding must be accepted as true.

The constitutionality of the act in question is assailed upon several grounds. The objection based upon the fact that only resident taxpayers are allowed to vote in the district is answered in *State v. Monahan*, 72 Kan. 492, 84 Pac. 130, 115 Am. St. Rep. 224, where this provision of the law is upheld. The provisions giving to the drainage board the right to order the elevation of railway tracks, to change the channels of water courses, and to construct levees, drains, and the like, in cities, are also criticised as being in violation of the Constitution, but no specific provision of that instrument, supposed to be violated, is pointed out. Even if some of these provisions should be found invalid, it does not follow that the act in its general scope and operation is void. It does not appear that the plaintiffs will be injured by the exercise of such powers, and until some party injuriously affected presents the question we are not called upon to carefully examine all these provisions and determine their possible effect.

That the district includes a part of the city of Topeka affords no legal objection. The area of the state is divided into counties, townships, and cities; any system of drainage must include some of these subdivisions, or parts of them. The efficiency of drainage would be greatly impaired if the powers of the governing board were limited to the lines of existing governmental subdivisions. The city is the creature of the legislative will as well as the drainage district. Both are public corporations, and the Legislature may rightfully prescribe the powers of each, subject only to constitutional restrictions. *State ex rel. v. Hunter*, 38 Kan. 578, 17 Pac. 177; *Wulf v. Kansas City et al.*, supra; 1 *Cooley on Taxation*, 238.

The Supreme Court of California in considering the irrigation law of that state, and in

speaking of the legislative power, said: "It may create municipal organizations or agencies within the several counties, or it may avail itself of the county or other municipal organizations for the purposes of such legislation. * * * This principle is not contravened by the fact that it may operate injuriously upon some of the individuals or proprietors of land within the district, or by the fact that there may be some who for personal motives may wish to resist the improvement. Such result is only a sacrifice which the individual makes to the general good in compensation for the advantages enjoyed by virtue of the social compact." In *re Madera Irrigation District*, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. We do not mean to decide, however, that lands may be assessed which are not benefited by the improvement; such benefit has been determined in this case by the tribunal created for that purpose. "Drainage laws are closely akin to sewer laws. * * * If private property that is benefited by a sewer can be charged for the benefits it receives against the wishes of the owners, so also can the agricultural lands be charged for the benefits conferred upon them. * * * It is competent for the state to raise up a governmental agency for the enforcement of its police powers. * * * The agency thus created is an arm of the state—a political subdivision of the state—and exercises prescribed functions of government." *Land & Stock Co. v. Miller*, 170 Mo. 240, 70 S. W. 721, 94 Am. St. Rep. 727, 60 L. R. A. 190, and note. Similar acts have been generally upheld in other jurisdictions. *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707; *Badger et al. v. Inlet Drainage District*, 141 Ill. 540, 31 N. E. 170; *Reclamation Dist. 531 v. Phillips*, supra; *Zigler v. Menges et al.*, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357; *Donnelly v. Decker and Others*, 58 Wis. 461, 17 N. W. 389, 46 Am. Rep. 637; *Taylor v. Crawford*, 72 Ohio St. 560, 74 N. E. 1065, 69 L. R. A. 805; *Highway Com'rs v. Drainage Dist.*, supra; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *Wurts v. Hoagland*, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229.

The order refusing an injunction is affirmed.

(77 Kan. 778)

GRINSTEAD et ux. v. COOPER.

(Supreme Court of Kansas. April 11, 1908.)

1. TAXATION—TAX DEEDS—CONSTRUCTION.

A tax deed which has been of record less than five years when attacked is subject to strict construction, and its omissions cannot be supplied by inference, nor its defects cured by presumption.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1540-1543.]

2. SAME—DEFECTS.

A tax deed is invalid where the consideration therefor includes a fee of 10 cents per lot for printing the tax sale notices, when proof of the publication had not been returned and

filed with the county treasurer within the required time.

3. SAME.

A tax deed is invalid where it recites that the property was bid off by the county treasurer, but fails to state for whom or for how much it was bid off, and the defect is challenged within five years.

Error from District Court, Sedgwick County; Thos. C. Willson, Judge.

Action between Robert U. Grinstead and wife and S. W. Cooper. From a judgment for Cooper, the Grinsteads bring error. Affirmed.

J. P. Campbell & Sons, for plaintiffs in error. J. A. Brubacher, for defendant in error.

PER CURIAM. S. W. Cooper, having acquired the interest of the widow, A. Mary Franke, in the land, and also the mortgage which she and her husband had executed before his death, became vested with the legal and equitable title to an undivided half interest in the property. Robert U. Grinstead, who finally purchased the remaining half interest of the children, claims ownership of the whole through a tax deed made in September, 1896, based on a sale for the taxes of 1892. The tax deed was of record less than five years when it was attacked; and hence it is subject to a strict construction. Its omissions cannot be supplied by inference, nor its defects cured by presumption. It appears that the consideration for which the deed was issued included a fee of 10 cents per lot for printing the tax sale notices, when proof of the publication had not been returned and filed with the county treasurer within the required time. This invalidated the tax deed. *Douglass v. Walker*, 57 Kan. 328, 46 Pac. 318. The final redemption notice included the printer's fee of 10 cents per lot and the interest thereon computed to the last day of redemption. In the tax deed it was recited that the property was bid off by the county treasurer, but it failed to state for whom or for how much it was bid off, and this defect, having been challenged within the five-year period, is sufficient to overthrow the deed. *Penrose v. Cooper*, 71 Kan. 720, 81 Pac. 489, 84 Pac. 115.

There is nothing substantial in the questions of practice raised by plaintiffs in error. Judgment affirmed.

(77 Kan. 776)

JACKSON et al. v. McCARRON et al.
(Supreme Court of Kansas. April 11, 1908.)

1. TAXATION—TAX DEED—ATTESTATION BY OFFICIAL SEAL—NECESSITY FOR.

A tax deed bearing the county clerk's certificate that he affixed the official seal of the county, and having affixed a seal reading "County Clerk Seal Logan County, Kansas," is not void because not attested by the official seal of the county; the clerk's seal having been, with one exception, used by him and his predecessors for years to attest their official acts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1524.]

2. SAME—DEFECTIVE RECITAL.

A tax deed which has been on record less than five years, and which recites that the land was bid off by the county treasurer, but not showing for whom he bid it off, is invalid.

Error from District Court, Logan County; J. H. Reeder, Judge.

Action between J. R. Jackson and Charles H. Kemp and Rose McCarron, executrix, and others. From the judgment, Jackson and Kemp bring error. Affirmed.

Lee Monroe and Geo. A. Kline, for plaintiffs in error. John B. Ennis, for defendants in error.

PER CURIAM. Two questions are presented:

1. Is the tax deed void because not attested by the official seal of the county? The written certificate of the county clerk recites, "I * * * have hereunto subscribed my name and affixed the official seal of said county," and a seal is affixed with this device:

County Clerk

Seal

Logan County, Kansas.

And it is also shown that this seal had been used by the county clerk, with the exception of only one instance, and by his predecessors in office for years to attest all his and their official acts. The evidence, however, showed that the county had another seal which bore the device:

Board of County Commissioners

Seal

Logan County, Kansas.

—which seal the evidence tended to show had been used but once by the county clerks to attest an official act, and then by special request after the commencement of this action. We answer the question in the negative on the authority of *Clark v. Tilden*, 72 Kan. 574, 84 Pac. 139.

2. Is the tax deed valid? The tax deed had been of record less than five years, and the recital therein as to the sale for taxes is as follows: "And, whereas, at the place aforesaid, said property could not be sold for the amount of taxes and charges thereon, and was therefore bid off by the county treasurer for the sum of eleven dollars and twenty cents, the whole amount of taxes and charges then due thereon." It will be observed that the recital does not show for whom the treasurer bid off the land, and this defect is sufficient to overthrow the deed. *Penrose v. Cooper*, 71 Kan. 720, 81 Pac. 489, 84 Pac. 115; *Grinstead et ux. v. Cooper* (No. 15,449, just decided) 95 Pac. 401.

The judgment is affirmed.

(77 Kan. 610)

L. STARKS CO. v. BREWER.

(Supreme Court of Kansas. April 11, 1908.)
SALE—CONTRACT—ACCEPTANCE.

The defendant sent a letter to the plaintiff which reads: "Gentlemen: Kindly quote me your lowest price on a car of bright early Ohio

seed potatoes. I am not particular about the shipment being made for several weeks, but if the mild weather continues it will not be long before we will need them." Plaintiff answered by a letter which reads: "Referring to yours of 13th, beg to advise that we would quote you on a car or two of our Wisconsin-Ohio potatoes at 88c. per bushel sacked, delivered Abilene. Quote this price to you subject to your acceptance by Wednesday. If you wished us to hold the stock for you beyond the first of February we would sell you under contract, and ask you to carry \$100 per car of the cost." The defendant replied by the following telegram: "Letter received, accept for two cars, send along your contracts."

Held, that this correspondence does not constitute a contract for the sale of two car loads of potatoes at 88 cents per bushel delivered at Abilene, but the defendant, by his telegram, intended to accept the offer contained in the last clause of the plaintiff's letter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 39-48.]

(Syllabus by the Court.)

Error from District Court, Dickinson County; O. L. Moore, Judge.

Action by the L. Starks Company against J. E. Brewer. Judgment for defendant, and plaintiff brings error. Affirmed.

C. C. Towner, for plaintiff in error. S. S. Smith, for defendant in error.

GRAVES, J. This is an action to recover the price of two car loads of potatoes. The action was commenced in the district court of Dickinson county, July 11, 1906. A demurrer to the petition, on the ground that it did not state facts sufficient to constitute a cause of action was sustained, and the plaintiff brings that question here for review. The petition alleges a sale of the potatoes upon a written contract consisting of correspondence which reads:

"Abilene, Kansas, Jan. 13, 1906. L. Starks Co. Chicago, Ill.—Gentlemen: Kindly quote me your lowest price on a car of bright early Ohio seed potatoes. I am not particular about the shipment being made for several weeks, but if the mild weather continues it will not be long before we will need them. Yours truly, [Signed] J. E. Brewer."

A letter of January 15, 1906, signed by the plaintiff, L. Starks Company, a copy of which reads as follows: "Chicago, Jan. 15, 1906. J. E. Brewer, Abilene, Kansas—Dear Sir: Referring to yours of 13th, beg to advise that we would quote you on a car or two of our Wisconsin-Ohio potatoes at 88c. per bushel sacked, delivered Abilene. Quote this price to you subject to your acceptance by Wednesday. If you wished us to hold the stock for you beyond the first of February we would sell you under contract and ask you to carry \$100 per car of the cost. Yours truly, [Signed] L. Starks Co."

A telegram of January 18, 1906, signed by J. E. Brewer, the defendant, a copy of which reads as follows: "L. Starks Co., Chicago, Ill.—Letter received, accept for two cars, send along your contracts. [Signed] J. E. Brewer."

The foregoing letter of the Starks Company contains two propositions: One to deliver potatoes at Abilene for 88 cents per bushel, if the offer is accepted by Wednesday; and another, to sell under a contract, to deliver after February.

The telegram of the defendant was intended to accept one of these propositions, it is not very clear which; but the words "send along your contracts" indicate that it was the latter. These words respond directly to that part of the letter, and not to the other clause. Business telegrams, as a rule, contain as few words as possible, and each word is chosen with care by the sender so that he may be clearly understood. It seems reasonable, in this view, to assume that the word "contracts" was used in this instance to indicate an intention to purchase for delivery after February, as mentioned in the letter. The correspondence, all taken together, is too indefinite to indicate a contractual purpose under the other offer. If the defendant intended to avail himself of a delivery at 88 cents per bushel, it is reasonable to assume that instead of using the words "send along your contracts," which do not have an intelligible connection with such offer, he would have given the date when he wished the potatoes delivered. Considering the whole transaction, we conclude that no contract was consummated.

The judgment of the district court is affirmed.

(77 Kan. 771)

JENAL et al. v. FELBER et al.

(Supreme Court of Kansas. April 11, 1908.)

1. APPEAL—APPELLATE JURISDICTION—MOOT QUESTIONS.

The Supreme Court will not consider and decide questions, where it appears that any judgment rendered by it would be unavailing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 63-80.]

2. SAME.

In an action for damages and other relief on account of the fraudulent procurement of a conveyance of certain real estate, defendants had judgment, and thereafter one of them commenced an action to quiet title to the property. Plaintiffs in the former action, who were made defendants, filed an answer and cross-petition containing the same averments set out in their petition in the first action. The reply set up the judgment in the first action as a bar, alleging that it had become final. Judgment for plaintiff in the second action was rendered, and became final: no proceedings to reverse it being taken. Prior to the judgment plaintiffs in the first action filed a petition in error to obtain a reversal of the judgment therein. *Held* that, all questions involved having been conclusively decided, the Supreme Court would not entertain the case, although the question of who should pay the costs was undisposed of; the subject-matter of the litigation being ended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 63-80.]

Error from District Court, Neosho County; L. Stillwell, Judge.

Action by C. D. Jenal and another against John H. Felber and others. Judgment for de-

defendants, and plaintiffs bring error. Motion to dismiss petition in error sustained.

J. L. & C. S. Denison, for plaintiffs in error. Farrelly & Evans and T. F. Morrison, for defendants in error.

PER CURIAM. This action was commenced by the plaintiffs in error in the district court of Neosho county on January 1, 1906, to recover damages and other relief on account of the fraudulent procurement of a conveyance to certain real estate. A general demurrer to the petition was sustained March 9, 1906, and a judgment in favor of the defendants was entered thereon. April 26, 1906, George S. Wilson, one of the successful defendants in that action, who was in possession of the real estate in question, and claiming to be the owner thereof, commenced an action in the same court to quiet his title to the land. The plaintiffs in error were made parties defendant, and they filed an answer and cross-petition therein, which contained the same averments that were set out in their petition filed January 1, 1906, as before stated. August 2, 1906, a reply to this answer and cross-petition was filed, which set up the judgment in the former case as a bar, alleging that it had not been reversed, vacated, or modified, but had become final. October 22, 1906, the petition in error was filed in this court to obtain a reversal of said judgment. December 12, 1906, the action to quiet title was tried in the district court, and the plaintiff therein, George S. Wilson, recovered a decree against these plaintiffs in error, which has become final; no proceedings having been taken to have the same reversed. Upon these facts, the defendants in error have filed a motion in this case asking for a dismissal thereof.

It is urged by them that all questions involved in this case have been finally decided in the former action, and nothing remains to be determined. More than a year having passed since the judgment was rendered, no proceedings in error can be had in the future. This court has frequently held that it could not consider and decide questions when it appeared that any judgment it might render would be unavailing. *Ziegler v. Hyle*, 45 Kan. 226, 25 Pac. 568; *Ellis v. Whitaker*, 62 Kan. 582, 64 Pac. 62; *Parsons v. Tetrick*, 63 Kan. 879, 64 Pac. 1028; *Knight v. Hirbourn*, 64 Kan. 565, 67 Pac. 1104; *Crouse v. Nixon*, 65 Kan. 843, 70 Pac. 885; *Waters v. Garvin & Clyne*, 67 Kan. 855, 73 Pac. 902; *Stebbens v. Telegraph Co.*, 69 Kan. 845, 76 Pac. 1130. In the last-named case it was said: "The duty of the court is to determine real controversies, and to give judgment that are effective. It is not warranted in considering and deciding hypothetical questions or abstract propositions, or in laying down rules of law which cannot affect the matter in controversy between the parties." In this case all the questions presented have been finally determined by a court of competent

jurisdiction. The judgment is binding and conclusive upon all the parties interested. No decision of this court can affect any of these rights. It would, therefore, be useless to determine or consider the questions presented.

The plaintiff in error insists that the petition in error was filed in this court before the final determination of the action to quiet title, and, as the question of who should pay the costs which have accrued has not been disposed of, this court should determine the case on its merits for the purpose of ascertaining how the costs should be taxed. The case of *Gross v. Shaffer*, 29 Kan. 442, is cited in support of this contention. That case, however, is not different in principle from those above cited. A part of the original controversy remained undisposed of, which is shown by the fact that the case was reversed and remanded for a new trial. What is said in the opinion concerning costs, therefore, cannot be regarded as the sole reason for retaining the case for decision. If, in this case, it should be determined that the district court erred, there would be nothing relating to the controversy involved in the suit for which a new trial could be awarded, nor could this court order a change or modification of the judgment in any respect which would affect the merits of the controversy. In this respect it differs materially from the case cited. The subject-matter of the litigation here is ended. There is nothing concerning it left for determination.

The motion to dismiss is sustained.

(77 Kan. 589)

WILSON v. FIRST STATE BANK OF JETMORE.

(Supreme Court of Kansas. April 11, 1908.)

BANKS AND BANKING — DISSOLUTION — REPORTS OF FINANCIAL CONDITION—"DOING BUSINESS"—BRINGING SUIT.

In 1892 the First State Bank of Jetmore was chartered for all the purposes then permitted by law to banking corporations. It commenced business, and continued to operate as a banking corporation until 1897. It then went into voluntary liquidation, paid off its depositors, surrendered to the bank commissioner the certificate of authority to transact business which it had obtained from him, and ceased to transact any business except to collect what it could of the debts owing to it and to distribute the proceeds among its stockholders by way of closing up its affairs. In 1905 it brought a suit upon a promissory note given to it in 1896.

Held:

(1) The bank continued to be a banking corporation after the steps taken in 1897 as before.

(2) The period for which the bank was chartered not having expired, no forfeiture having been suffered, and no judgment of dissolution having been rendered against it, the corporation is still in existence.

(3) The bank had capacity to sue as a banking corporation when the action referred to was instituted.

(4) After the bank had paid its depositors and had surrendered its certificate of authority to do business, it was no longer subject to the provisions of the banking act, requiring reports

of its financial condition to be made to the bank commissioner.

(5) After the steps taken in 1897 the bank was not "doing business" within the meaning of section 1283, Gen. St. 1901, requiring financial statements to be filed with the Secretary of State as a condition precedent to the maintenance of an action or the recovery of a judgment.

(6) The bringing of the suit referred to did not constitute "doing business" within the meaning of the statute just cited.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 125.

For other definitions, see Words and Phrases, vol. 3, pp. 2155, 2160; vol. 8, pp. 7640, 7641.]

(Syllabus by the Court.)

Error from District Court, Hodgeman County; W. H. Sheldon, Judge pro tem.

Action by the First National Bank of Jetmore against T. C. Wilson. Judgment for plaintiff, and defendant brings error. Affirmed.

F. Dumont Smith, for plaintiff in error. T. F. Garver and R. D. Garver, for defendant in error.

BURCH, J. The First State Bank of Jetmore obtained a judgment against T. C. Wilson upon a promissory note, dated August 23, 1896, and given to the bank by a partnership, of which Wilson was a member. The validity of this judgment depends upon the following facts, found by the district court:

"(1) That the 'First State Bank of Jetmore,' plaintiff in this action, obtained a charter from the Secretary of State of Kansas, April 19, 1892. That its place of business was Jetmore, Hodgeman county, Kan., the purpose of the corporation being that of receiving money on deposits, and to allow interest thereon, giving to the person depositing credit therefor, and buying and selling exchange, gold, silver, foreign coin, bullion, current money, bonds of the United States and state of Kansas, bonds and warrants of cities, counties, and school districts in the state of Kansas, of loaning money on real estate, chattel and personal security, at a rate of interest not exceeding the legal rate allowed by law, of discounting negotiable notes and notes not negotiable, and to own a suitable building, furniture, and fixtures, for the transaction of its business, of the value not to exceed one-third of the capital of such bank, which was fixed at \$10,000, divided into shares of \$100 each—the duration of such banking corporation, as fixed in said charter, being 25 years. That it commenced business as such banking corporation in 1892, and continued to operate under said charter as a banking corporation until 1897.

"(2) In February, 1897, it voluntarily proceeded to liquidate and wind up its affairs as a bank, and on December 7, 1897, there was filed in the office of the Bank Commissioner of the state of Kansas an official statement, showing the financial condition of said bank at the close of business, November 29, 1897, and said bank surrendered to the Bank Com-

missioner of the state of Kansas its certificate to transact business as a bank, that had been issued to it by the Bank Commission January 4, 1892.

"(3) Since December 7, 1897, it has not made any reports to the Bank Commission of the state of Kansas, or to the Secretary of State, regarding its condition, and no requests have been made upon the officers of said corporation for a report as to the condition of the affairs of said corporation.

"(4) After said bank commenced to liquidate, in February, 1897, it did not receive deposits, and before December 7, 1897, it had paid all of its depositors in full, and since November 17, 1897, it has never received deposits, or paid out money on deposit or renewed any notes, in fact has not transacted any business as a bank, and since that time C. E. Wilson, who was then cashier of said bank, has transacted what business has been transacted; that is, collected such of the indebtedness due the bank as he could, and paid the proceeds so collected to the stockholders of the corporation in closing up the affairs of the bank."

The questions argued relate to the corporate character and existence of the plaintiff, to its capacity to bring suit, and to its right to sue without rendering statements respecting its financial condition either to the Bank Commissioner or to the Secretary of State.

The only way to determine the class to which a corporation belongs is to look at its charter. The very purpose of that document is to establish the nature and character of the corporation, and to fix its constitution as an organization for manufacturing, for banking, or for some other defined purpose; and so long as its charter stands unrevoked and unmodified, the intrinsic nature and character of the corporation remains unchanged. Reading the plaintiff's charter as epitomized in finding No. 1 with the banking act in force when the charter was granted (chapter 43, p. 85, Sess. Laws 1891), it is plain that the plaintiff organized as and actually became a banking corporation, and nothing else. So far as the findings of fact disclose, this charter has never been amended, and if the corporation is still in existence, it is still a banking corporation. At the time the plaintiff organized, and ever since, there have been but three ways in which the corporate existence of a banking corporation might be terminated—by expiration of the period for which it was chartered, by a judgment of dissolution in voluntary proceedings to that end, and by forfeiture and judgment of dissolution in an adversary proceeding. None of these things have occurred, and the plaintiff is still a banking corporation. Although organized and in existence from the date its charter is filed (section 3, c. 43, p. 86, Sess. Laws 1891; section 3, c. 47, p. 99, Sess. Laws 1897; State v. Mason, 61 Kan. 102, 107, 58 Pac. 978), a banking corporation can do nothing except to elect officers, approve bonds, receipt for

stock subscriptions, and the like, until it is authorized to commence the real business of banking by the certificate of the Bank Commissioner. So that, at the beginning we have a banking corporation chartered, existing, and organized for business, but unable to take a single step in the substantial attainment of its corporate ends. After a certificate has been secured from the Bank Commissioner, the corporation may do everything its charter and the law authorize, and it may continue to do this as long as it is in existence, is solvent, obeys the law, and retains the certificate given by the Bank Commissioner.

Of course the distinctive feature of the banking business is the receiving of other people's money on deposit, subject to check, or on certificates or other obligations of the bank; and it is this fact, and the using of such money by the bank to its own profit, which make regulation and supervision by the Bank Commissioner necessary. But a banking corporation may loan money on real estate, chattel and personal security, and may discount notes, negotiable and non-negotiable; that is, among numerous things which it may do is the power to conduct a loan and a discount business. In the course of time a banking corporation may desire to discontinue all business, except that of conducting a loan and discount business with its own money. If so, it may pay off its depositors, discharge all its liabilities, and surrender its certificate of authority to do a general banking business, whereupon it may continue to transact a loan and discount business. Section 30, c. 47, p. 111, Sess. Laws 1897. If a banking corporation do this, its charter powers are not affected, its corporate character is not changed, and its corporate organization is not modified. It is still a banking corporation, the most of whose powers are suspended, and whose remaining activities are restricted to a circumscribed field. If it should again desire to resume a general banking business, it would not be necessary for it to obtain a new charter. It would still possess that right as an original power. It would only be necessary for it to obtain a new certificate from the Bank Commissioner. If a banking corporation desire to give over the prosecution of all the purposes for which it was organized, and to wind up its affairs, it may do so. When all its liabilities have been paid, and its certificate from the Bank Commissioner has been surrendered, the Bank Commissioner has no further concern with it, but its corporate integrity remains unimpaired, and it may continue to collect its assets and to pay the proceeds to its stockholders, all as a banking corporation, until it has been dissolved or until its charter has expired. *Morawetz, Corp. §§ 411, 1003; Bank v. Sewing Society, 28 Kan. 423; Warner v. Imbeau, 63 Kan. 415, 419, 625 Pac. 648; Rosenblatt v. Johnston, 104 U. S. 462, 26 L. Ed. 832; Merchants'*

Nat. Bk. v. Gaslin, 41 Minn. 552, 43 N. W. 483.

There can be no doubt that the plaintiff had capacity to sue when this action was commenced. So long as a banking corporation is doing business under the supervision of the Bank Commissioner it reports to him. When it surrenders the certificate of authority given by the Bank Commissioner, its depositors having been paid, it ceases to be subject to the provisions of the banking act, except that the Bank Commissioner may make examinations to determine if all its liabilities have actually been paid. Section 30, c. 47, p. 111, Sess. Laws 1897. Therefore the plaintiff was not in default of statements to the Bank Commissioner when this action was instituted.

The general corporation law (section 1283, Gen. St. 1901) reads as follows: "It shall be the duty of the president and secretary or of the managing officer of each corporation for profit doing business in this state, except banking, insurance and railroad corporations, annually, on or before the 1st day of August, to prepare and deliver to the Secretary of State a complete detailed statement of the condition of such corporation on the 30th day of June next preceding. * * * No action shall be maintained or recovery had in any of the courts of this state by any corporation doing business in this state without first obtaining the certificate of the Secretary of State that statements provided for in this section have been properly made." It is not now necessary to determine the applicability of this statute to the case of a banking corporation which has surrendered to the Bank Commissioner the certificate received from him, and which then proceeds to transact a loan and discount business. In view of the general policy of both the banking and general corporation acts it might be easy to say that the words "banking * * * corporations" in the exception clause of the section just cited mean "banking corporations conducting a general banking business under a certificate of authority from the Bank Commissioner," but that lawsuit may wait until it is properly presented for decision.

We have here the case of a banking corporation which has paid its depositors, and has surrendered its certificate, which has not engaged in the loan and discount business, which has done no business since 1897, except to collect its assets and distribute the proceeds to its stockholders in the process of winding up its affairs, and which, as an incident to liquidation, brings a suit upon a promissory note given to it while it was a going concern. Was it "doing business" when the suit was brought, or was it "doing business" in bringing suit, within the meaning of the statute? The very terms of the statute discriminate between maintaining actions and doing business, and the only rational meaning of "doing business" is the carrying on of the operations of the corporation, or

some portion of them, in the usual and regular course of the prosecution of the corporate enterprise for profit. Corporations are organized to run, not for the purpose of being brought to an end, and it is the ordinary display of corporate life which the statute covers, not the necessary functions attending corporate extinction. The primary purpose of the financial statements required to be filed is the protection of those who may be financially interested in the solvency of the corporation. The members of the general public and the state are no longer concerned when the business of a corporation is reduced to matters between it and persons who are indebted to it and between it and its stockholders. The reason for the regulation then ceases to apply. The words "doing business" mean the same whether the corporation be domestic or foreign. Judicial interpretations, in cases where foreign corporations have been concerned, are very numerous and are substantially harmonious. Lists may be found in 19 Cyc. 1280, and in other parts of that work, indicated by the cross-references, in 13 A. & E. Encycl. of L. (2d Ed.) 869 et seq., and in 3 Words & Phrases, 2155. It is universally held that bringing or maintaining suits does not constitute the doing of business within the meaning of these provisions, and that the phrase is intended to comprehend only the exercise of corporate functions in the attainment of the ends for which the corporation was organized.

It follows that the plaintiff was not in default of statements of its financial condition to the Secretary of State when it sued the defendant; and from all that has been said it must be concluded that the plaintiff had the right to obtain the judgment which was rendered in its favor. Some arguments are advanced, based upon testimony in the case, respecting which the court made no finding of fact. They cannot be considered. *Shuler v. Lashhorn*, 67 Kan. 604, 74 Pac. 264.

The judgment of the district court is affirmed.

(77 Kan. 622)

WISWELL v. SIMMONS et al.

(Supreme Court of Kansas. April 11, 1908.)

1. LIFE ESTATES—ACQUISITION OF TAX TITLE —PERSONS WHO MAY ACQUIRE.

One who purchases the interest of the owner of a life estate in a tract of land, and goes into possession, cannot defeat the title of the remainderman by thereafter acquiring a tax title based upon a tax sale that was made before such purchase, and that resulted from the delinquency of the original owner of the life estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Life Estates, § 14.]

2. MORTGAGES—ABSOLUTE DEED AS MORTGAGE.

Where, at the same time a deed is made, the grantee executes a contract to reconvey upon the payment of an existing debt owing by the grantor, the transaction is in effect a mortgage, notwithstanding the grantee takes possession, and refuses to accept an ordinary mortgage,

giving as a reason that he does not wish to be at the expense of a foreclosure in case of a default.

3. LIFE ESTATES—ACQUISITION OF TAX TITLE —PERSONS WHO MAY ACQUIRE—MORTGAGEE OF LIFE ESTATE.

The mortgagee of a life estate who is in possession of the mortgaged property, enjoying the income thereof, cannot as against the remainderman acquire a tax title based upon taxes accruing during his occupancy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Life Estates, § 14.]

4. TAXATION—TAX SALE—ACQUISITION OF TITLE.

Where one who is disqualified to acquire a tax title based upon current taxes takes an assignment of an outstanding tax sale certificate as to which no such disqualification exists, and thereafter pays subsequently accruing taxes and causes them to be endorsed upon the certificate, a tax deed issued thereon will convey no title.

5. ADVERSE POSSESSION — HOSTILE CHARACTER OF POSSESSION.

The occupancy of realty by one who entered claiming under the owner of a life estate will not be converted into an adverse possession so as to set the statute of limitation in operation against the remainderman by the occupant's taking and recording a tax deed, where his relation to the property disqualifies him to acquire a title in that manner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 462.]

(Syllabus by the Court.)

Error from District Court, Cherokee County; C. A. McNeill, Judge.

Ejectment by Charles V. Simmons and others against John Wiswell. Judgment for plaintiffs, and defendant brings error. Affirmed.

A. D. Neale and E. L. Burton, for plaintiff in error. W. B. Glasse and C. D. Ashley, for defendants in error.

MASON, J. In 1881 the owner of a tract of land conveyed to H. L. Simmons a life estate therein, with the remainder in fee to the children of such life tenant. December 10, 1886, Simmons executed a quitclaim deed for the property to W. H. Layne, who on the same day gave him back a bond for a deed agreeing to reconvey upon the payment of \$603.25. Layne at once took possession, which he and his grantees have held ever since. The land was sold for the taxes of 1884 to a stranger, who paid the taxes of 1885. Layne bought the tax sale certificate after he had taken possession, and later paid the taxes of 1886 and 1887, and had them indorsed thereon. He received a tax deed upon this certificate in 1889. His title subsequently passed by mesne conveyances to John Wiswell. In 1906 H. L. Simmons died, and his children thereupon brought ejectment against Wiswell. The plaintiffs rested upon a showing of the facts above recited, which were agreed to. The defendant introduced oral evidence intended to show that the quitclaim deed from Simmons to Layne was executed as security for the payment of a debt, and therefore, with the bond for a deed, in effect constituted a mortgage. The

court made no specific finding upon this issue but rendered judgment for the plaintiffs, from which the defendant prosecutes error.

If the transaction between Simmons and Layne is regarded as a conveyance, the assignment of the tax sale certificate to the latter operated merely as a redemption from the tax lien; for the owner of a life estate is disqualified to take a tax title to the prejudice of the remainderman, even although the taxes upon which it is based accrued before he acquired any interest in the land, at least in any case where they became due after the creation of the life estate which he later obtained. This was expressly decided in *Lohmuller v. Mosher*, 74 Kan. 751, 87 Pac. 1140. There land was conveyed to Elizabeth Yambert for her life. She suffered the taxes to become delinquent, and one Durland obtained two tax deeds in consequence of such default. Later Elizabeth Yambert deeded to Laura E. Lohmuller, to whom Durland afterwards quitclaimed. The court said: "After Laura E. Lohmuller had purchased the life estate in the land, her acquisition of the Durland tax titles merely redeemed the land from taxes." The conclusion there announced was a necessary result of the application to the facts of that case of the general rule that a life tenant cannot acquire an outstanding title or incumbrance for his sole benefit as against the remainderman. 16 Cyc. 617, notes 23, 33. This rule was applied to tax titles in *Phelan v. Boylan*, 25 Wis. 679, and in *Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505, 32 L. R. A. 744, 63 Am. St. Rep. 584. See, also, *Crawford v. Mels*, 123 Iowa, 610, 99 N. W. 186, 66 L. R. A. 154, 101 Am. St. Rep. 337. In the Wisconsin Case cited it was said: "The complaint alleges as matter of law that it was the duty of the defendant to have redeemed the land by payment of the taxes. This may or may not have been so. If the tenant had chosen to let the land go for the taxes, so that valid title and possession would have been acquired by a stranger, thus forfeiting his life estate as well as the inheritance, it is possible that the heirs would have had no ground of complaint or cause of action against him. The taxes having accrued before the life estate arose or tenancy existed, it may be that the tenant was not chargeable, at all events, with the duty of paying them. But, be this as it may, there exist other grounds here for holding that he shall take no advantage as against the reversions of the title he has acquired. The taxes here were a charge upon the land, a lien, in fact, upon the life estate of the tenant as well as the fee of the reversions; and, where that is the case, a purchase of the tenant, or title acquired by him in pursuance of such charge, inures to the benefit of the reversions as well as himself. The established doctrine is that a tenant for life in possession in the purchase of an incumbrance upon the estate is regarded as having made the purchase for the joint

benefit of himself and the remainderman or reversioner, and cannot hold it for his own exclusive benefit." The effect of the decision in the Michigan case cited was thus stated in the sixth headnote prepared by the editors of the *Lawyers' Reports Annotated*: "A devisee of a life estate in remainder cannot cut off the remainders limited upon his life estate by purchasing the property at tax sales caused by default of the first taker."

It would be difficult to say that the quitclaim deed and bond to reconvey, considered alone, should be interpreted as a mortgage. That they bore the same date would doubtless justify regarding them as forming parts of the same transaction. But the prevailing rule seems to be that, where the papers show upon their face a purchase and agreement for a resale, there is no presumption that a mortgage was intended. It is so stated in 27 Cyc. 970. Of the cases there cited the one in which the point is most fully discussed is *Gassert v. Bogk*, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240. The decisions are there reviewed, and the conclusion is reached that, while the authorities are in conflict, the majority support the text statement. In the opinion it is said: "It will appear by cases hereinafter cited that the courts of last resort in Texas, Michigan, Illinois, Wisconsin, Indiana, and Tennessee have held that a deed with a contemporaneous contract to reconvey is not per se a mortgage. The third class of cases is that in which the courts hold that a deed and contract to reconvey are per se mortgages. This class includes the cases from Vermont, Maine, Massachusetts, and Pennsylvania." In this classification Michigan seems to be placed in the wrong category, for in *Jeffrey v. Hursh*, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7, it is said: "It is now settled, as well as any principle of law can be, that an absolute deed, with a bond or separate defeasance or agreement executed at the same time, to reconvey the estate upon payment of a certain sum of money, constitute a mortgage, if the instruments are of the same date, or are executed and delivered at the same time, and as one transaction; and, when this is the case, it is a conclusion of law that they constitute a legal mortgage." The Montana case was affirmed by the United States Supreme Court. *Bogk v. Gassert*, 149 U. S. 17, 13 Sup. Ct. 738, 37 L. Ed. 631. See, also, 1 *Jones on Mortgages* (6th Ed.) § 247a. In *Pope v. Nichols*, 61 Kan. 230, 59 Pac. 257, the inquiry being whether the contemporaneous execution by a grantee of a bond to reconvey gave notice to a third person that the transaction was intended as security for a debt, various grounds are suggested upon which such an inference might be drawn. In the present case the bond recited an agreement to reconvey upon the payment of a note for \$603.25 to one T. P. La Rue, but did not clearly show by whom such payment was to be made. It therefore

failed to disclose affirmatively the existence of a debt owing by Simmons. This omission, however, was supplied by the evidence. The defendant testified that the quitclaim deed was given as security for the payment of a note to La Rue, which he signed as surety for Simmons. In that case the transaction was in effect a mortgage, notwithstanding Layne went into immediate possession of the premises (Clark v. Landon, 90 Mich. 83, 51 N. W. 357), and had refused to accept a mortgage, giving as a reason that he did not wish to be at the expense of a foreclosure in the event of a default. An instrument which is in form a deed is in effect a mortgage, if it is intended as security for a debt which the grantor remains under an obligation to pay. The existence and continuance of a debt is the final test. *Fabrique v. Mining Co.*, 69 Kan. 733, 77 Pac. 585, and cases cited. The fact that one or both of the parties may have had a wholly mistaken idea as to their respective rights under it cannot change its essential character.

Conceding the transaction between Simmons and Layne to have been a mortgage, was Layne thereby disqualified to acquire a tax title against the remaindermen, the children of Simmons? This court is committed to the doctrine that the mere relation of mortgagee does not prevent the acquisition of a valid tax deed (*McLaughlin v. Acom*, 58 Kan. 514, 50 Pac. 441), although the rule is otherwise in many jurisdictions, perhaps in the greater number. See 27 A. & E. Encycl. L. 957, and dissenting opinion in *Jones v. Black*, 18 Okl. 344, 88 Pac. 1052, 90 Pac. 422. But the court has been careful to leave the question open with respect to a mortgagee who has possession of the property involved. Whether a mortgagee may ever assert a title under a deed based upon taxes that accrued while he was enjoying the rents and profits, it is clear that Layne, as the mortgagee of a life interest in the occupancy of the property, owed a duty to the remainderman to pay at least the current taxes out of its income. In this respect he stood upon no higher ground than the owner of the life estate, out of whose title his own interest had been carved. His rights with regard to taxes that had accrued or tax sales that had been made before he obtained possession need not now be determined. True, his tax deed was based upon a certificate that had been issued before he acquired any interest in the land, but after he had entered into possession, instead of paying the subsequently accruing taxes as one under an obligation to do so, he caused them to be indorsed upon the certificate as an increment to the lien evidenced thereby. Therefore the consideration for the tax deed which he received was made up in part of taxes which accrued while he was in possession, and which he owed a duty to the remaindermen to pay. In such a situation the deed cannot be upheld against them as a

conveyance of title in virtue of its being founded in part upon earlier taxes. For the purpose of determining his capacity to acquire a tax title, the consideration cannot be apportioned. It must be treated as an entirety. And, a part of it being composed of taxes which he was bound to pay, the transaction must be regarded as a redemption.

The defendant invokes the protection of the general statute of limitation, and also of that relating to actions against claimants under tax deeds. The plaintiff's right of possession did not accrue until the death of their father terminated the life estate. The general statute did not run against them while the defendant rightfully occupied the property, because, while that situation existed, no right to sue in ejectment could accrue to them. And even if, in the absence of a special statute, a remainderman may ever bring an action against the life tenant to settle the title and protect his interest, he cannot do so until his rights have been questioned or denied. Ordinarily one who takes a deed purporting to vest complete ownership in him may be deemed thereby to assert an absolute title, but here the recording of the tax deed by Layne did not convert his possession into an adverse holding against the children of Simmons because he was disqualified to acquire a title by that means. This follows from what has been decided heretofore with regard to the statute of limitation enacted for the protection of claimants under tax sales. Section 7680 of the General Statutes of 1901 provides that a proceeding for the recovery of lands sold for taxes must be brought within five years, and section 7682 that the recording of a tax deed shall be deemed such an assertion of title as to enable the owner to maintain ejectment, but in the third paragraph of the syllabus in *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 262, it was said of these sections: "Where the objection to a tax deed goes, not to the proceedings, but to the power of the party to take the title, and such party is not in a position to take anything neither the limitation in section 141 nor section 142 of chapter 107 of the Compiled Laws of 1879, has any application."

The judgment is affirmed.

(77 Kan. 736)

STATE v. MOORE.

(Supreme Court of Kansas. April 11, 1908.)

1. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY.

In the trial of criminal cases the evidence should be confined to the question in issue; facts collateral to and not connected with the subject being investigated are not admissible.

2. HOMICIDE—INSTRUCTIONS.

Instructions examined. and approved.

(Syllabus by the Court.)

Appeal from District Court, Cowley County; C. L. Swarts, Judge.

John C. Moore was convicted of murder, and he appeals. Reversed and remanded.

Adams & Adams and L. C. Brown, for appellant. F. S. Jackson, Atty. Gen., Ed. J. Fleming, A. M. Jackson, and A. L. Noble, for the State.

GRAVES, J. On December 27, 1906, J. C. Moore was convicted in the district court of Cowley county of murder in the first degree, by killing his wife, Clara C. Moore. A motion for a new trial was overruled, sentence pronounced, and the defendant being dissatisfied appeals to this court. Thirty-seven assignments of error have been presented, but, as several of them relate to the same questions, it will be unnecessary to consider them in detail.

Complaint is made of the district court for admitting evidence of domestic troubles between the appellant and deceased existing years prior to the homicide and in no way relating thereto. Mrs. Edith McCullough, a daughter of the deceased, and a stepdaughter of the defendant, testified to profane and vulgar language used by the defendant to her mother at different times during a period beginning more than twelve years before the commission of the crime charged; also, that in 1901 he put the witness and her mother out of the house onto the porch. Mrs. Moore was a member and regular attendant of the Baptist Church. This practice on her part was violently opposed by her husband. To prevent her church-going, he made threats of violence against her, and used vulgar and profane language concerning her and other church-going people. This conduct of the defendant became so persistent and violent that the deceased left him, and on March 27, 1901, she commenced an action for divorce and alimony, alleging extreme cruelty. The defendant answered and alleged that they had a family controversy concerning a "Carrie Nation Crusade" then being conducted in the city, in which he and the deceased with her daughter Edith were in opposition, and the conduct and talk of Edith so irritated him that he put her out of the house. On April 19, 1901, the plaintiff obtained a decree of divorce and alimony as prayed for. A motion for a new trial was sustained June 4, 1901. The case was then dismissed by the plaintiff, and the parties resumed their marital relations. The reason for this reconciliation is given by one of the witnesses as follows: "Why, I have heard her say before him that she came back because he promised to do what was right and to go to church with her. I have heard her ask him to go to church with her. I have heard her offer to go to other churches than the Baptist church with him; and I heard her say that he promised to, and heard him say he wouldn't go. I have heard her ask him to go a number of times, and told him that she came back to live with him because he promised to be a man and promised to do what was right." Some time

afterwards, and during the year 1901, Mrs. Moore, her daughter Edith, R. B. McCullough, who afterwards married Edith, and his sister started to attend an entertainment at Chilocco, an Indian school a few miles away. The defendant followed, overtook them, and compelled his wife to return. It appears that the defendant was very much opposed to the relations then existing between Edith and McCullough. The occurrence is described by McCullough thus: "My sister had come to town, and there was an entertainment at Chilocco; she drove in with a horse and buggy, and Edith Tombs proposed that we go to Chilocco, and that her mother would like to go. I had no objections, and I told her I would go with my sister. I took my horse and buggy down to John Moore's house, and Mrs. Moore and Edith Tombs—Tombs then—got in the buggy. Just as they were driving away John Moore came up and he hollered something at them—I don't just remember what it was—and they drove on in a way that they didn't hear him, or went anyway, and he then jumped onto me and cursed me and shook his fist in my face, and accused me of trying to take his wife out of town. I tried to argue the question with him. I told him I wasn't, and I supposed he knew she was going also, and they were just going to Chilocco to an entertainment and would be back, but he paid no attention to my plea, and I walked away and left him alone; went up town to my sister where she was in the buggy at a livery barn, I think, and we hitched up and drove on to Chilocco and overtook them, and passed them and was in the lead when some one drove up from behind and came around in front of Mrs. Moore and her daughter, and I drive on a little, not very far, and stopped. I heard him order her to get out of the buggy and go back to town with him, which she refused to do; but her daughter got out of the buggy and come and got in the buggy with me and my sister, and Mrs. Moore turned to go back to town. He also turned, and as he turned he put his hand on his hip pocket and turned to me as he said: 'For two cents and a half I would put a hole through you.' I drive on, and they drove back to town; and I seen no more of them that day." Minnie Tombs, another daughter of the deceased, testified substantially the same as her sister Edith, concerning the treatment of her mother by the defendant years before the homicide.

On January 1, 1906, another separation having taken place, the deceased caused the defendant to be arrested for the purpose of compelling him to give a bond to keep the peace. In her verified complaint she stated that the defendant had made threats to assault and kill her, and she was afraid he would do so. The state introduced in evidence the verified answer of the defendant in the divorce suit, the decree, the order granting a new trial, and the order of dismissal. The complaint in the peace proceed-

ings, the warrant issued therein with the return thereon showing the arrest of the defendant were also introduced. It was then shown by the statement of the justice of the peace that the defendant was committed to jail, but when the case came up for trial, the prosecutrix refusing to appear, it was dismissed.

It is urgently insisted that this evidence was irrelevant and prejudicial. We are unable to see the theory upon which it was admitted. The deceased was killed October 21, 1906, in open daylight on a public street in the very presence and sight of numerous people. The fact that the defendant did the killing in manner and form as charged was not disputed. It is difficult to see how the vulgar and profane utterances of the defendant made 12 years before would throw any light upon the homicide. When the decree of divorce was set aside in 1901, and the parties resumed their marital relations, it would seem that all past differences were reconciled and condoned. After the defendant had been arrested upon the complaint of his wife, and she refused to appear against him, there was another reconciliation, and they again resumed the relations of husband and wife, which continued until about a year before the homicide. How far collateral facts may be properly admitted in evidence depends upon the peculiar features of the case being tried. Usually such evidence is confined to cases where the prosecution is required to resort to circumstantial evidence to connect the defendant with the offense; in which case, motive, the former relations of the parties, threats, and admissions of the defendant are important; but no such necessity exists here. The proceedings in the divorce case and in the application to compel defendant to give a peace bond seem quite remote and foreign to the homicide. The natural effect of this class of evidence is to inflame and prejudice the minds of the jury against the defendant on account of former cruelty and brutality, in no way connected with the homicide, so that a fair consideration of his defense will be difficult, if not impossible. It is a familiar and elementary rule that evidence must be confined to the point in issue. Collateral facts not directly connected with the subject under investigation are inadmissible. 21 Cyc. 929-930; 1 Elliott on Evidence, 245; Sutton v. Johnson, 62 Ill. 209; Farris v. People, 129 Ill. 521, 21 N. E. 821, 4 L. R. A. 582, 16 Am. St. Rep. 283; Nickerson v. Gould, 82 Me. 512, 20 Atl. 86; State v. Brantley, 84 N. C. 766; People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851.

In the case of Raines v. State (Miss.) 33 South. 19, it is said: "In a prosecution for wife murder, evidence that the accused had for ten years before the alleged crime cursed and ill treated his wife and committed many

simple assaults upon her was improperly admitted." In the case of Billings v. State, 52 Ark. 303, 12 S. W. 574, it was held that "Evidence concerning a difficulty between the defendant and the deceased which occurred two and a half years before the homicide is irrelevant where no connection is shown between the two events, and being prejudicial to the defendant is reversible error." It was also said: "The general rule is well established, in civil as well as in criminal cases, that evidence shall be confined to the issue. It seems that the necessity for the enforcement of the rule is stronger in criminal cases. The facts laid before the jury should consist exclusively of the transaction that forms the subject of the indictment and matters relating thereto. To enlarge the scope of the investigation beyond this would subject the defendant to the dangers of surprise against which no foresight might prepare and no innocence defend. Under this rule, it is generally improper to introduce evidence of other offenses; but if facts bear upon the offense charged, they may be proven, although they disclose some other offense. The test of admissibility is the connection of the facts offered with the subject charged." The conduct of the defendant was consistent with the theory of insanity, and that was his defense. There was substantial evidence to sustain this claim, and we are unable to say that the jury was not influenced to the defendant's prejudice by this improper testimony.

We have examined the instructions requested by the defendant, and refused by the court, as well as those given by the court and objected to by the defendant, and are unable to find any error in the action of the court in respect to either. The instruction given by the court on the subject of insanity, to which objection is made, when taken in connection with the other instructions given upon that subject, is fairly in harmony with the rule followed by the courts generally, and as heretofore adopted by this court. State v. Mowry, 37 Kan. 369, 15 Pac. 282; State v. Nixon, 32 Kan. 205, 4 Pac. 159. The rule as to dying declarations was correctly stated by the trial court. State v. Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

We think substantial error was committed by the admission of evidence concerning remote and collateral facts as shown by the testimony of the witnesses Edith McCullough, Minnie Tombs, R. B. McCullough, G. H. McIntire, and the partial record in the legal proceedings.

This conclusion will require a reversal. The other questions presented need not be considered.

The judgment of the district court is reversed, and the case is remanded, with direction for a new trial.

(77 Kan. 702)

GRADEN v. MAIS et al.

(Supreme Court of Kansas. April 11, 1908.)
**EXECUTORS AND ADMINISTRATORS — SALE TO
 PAY DEBTS—VALIDITY.**

In an action of ejectment brought against the claimant under an administrator's deed by the heir of the deceased owner of the land, the entire record of the proceedings in the probate court was introduced in evidence. It disclosed no order requiring notice of the time and place of hearing the petition to sell and fixing the length of time and the manner in which notice should be given. A copy of a printed notice appeared in the files. The court ordered the land sold, confirmed the sale made, and ordered the deed to be executed. Section 2938, Gen. St. 1901, provides that an administrator's deed shall be presumptive evidence that the administrator observed the directions and complied with the requisitions of the law. *Held*, the record is conclusive evidence that no order respecting notice was made, the unauthorized notice was a nullity, the subsequent acts of the court did not cure the lack of jurisdiction to enter upon the proceeding, the statute cited does no more than dispense with the production of the record in the first instance, and the deed is void.

(Syllabus by the Court.)

**Error from District Court, Ellis County;
 J. H. Reeder, Judge.**

Action between Mary Graden and Frederick Mais and Agnes Mais. From the judgment Graden brings error. Reversed.

W. E. Saum, for plaintiff in error. A. D. Glikeson, for defendants in error.

BURCH, J. The question in this case is whether the anterior proceedings are sufficient to uphold an administrator's deed. The district court so held in an action of ejectment brought by an heir at law against a claimant under the deed.

The entire record of the probate court containing the proceedings upon which the deed in question is based was introduced in evidence. No order is disclosed requiring notice of the time and place of hearing the petition to sell, and fixing the length of time and the manner in which notice should be given. A copy of a printed notice appears in the files. The court made an order that the land be sold, and, after a sale had been made, confirmed it, and ordered the deed to be executed. The statute provides that an administrator's deed shall be presumptive evidence that the administrator observed the directions, and complied with the requisitions of the law. Gen. St. 1901, § 2938. Are these things enough? In this state proceedings by an administrator of the estate of a deceased person to sell real estate are regarded as adversary to the heir at law. The heir must be notified of the hearing upon the petition to sell, or the court has no jurisdiction to order a sale. It is the ordinary case of obtaining jurisdiction of a party before authority to proceed against him attaches. The manner in which notice shall be given, whether by personal service, by publication, or otherwise, and the length of time for which notice shall be given, must be directed by the court. Gen.

St. 1901, § 2923. An order prescribing these essentials of notice is an indispensable requisite to a valid notice. Without it there is nothing upon which notice can rest. A notice without an order for it in its pedigree avails nothing. In the case of Mickel v. Hicks, 19 Kan. 578, 21 Am. Rep. 161, it is said: "Where the court determines what kind of notice must be given, no right to give any notice exists until the court has made its determination. * * * A notice without an order prescribing the manner thereof has no force." In the case of C., K. & N. Ry. Co. v. Cook, 43 Kan. 83, 22 Pac. 988, the syllabus reads: "If notice to the heirs and persons interested of the time and place at which an application by an administrator to sell the real estate of the deceased will be heard is not ordered by the probate court, and is not given to such persons, the sale is void." There are therefore in proceedings of this kind two jurisdictional requirements: First, an order prescribing notice; and, second, a notice which fulfills the terms of the order, and the circumstance that a court proceeds to order a sale as if it had first obtained jurisdiction, and then confirms the sale, cannot supply the jurisdictional facts necessary to authorize it to enter upon a hearing of the petition to sell. In many instances, after a notice has been given or an act has been done which the court might have authorized, the notice or the act may be adopted and approved as if it had first been authorized. But this rule does not apply to jurisdictional matters. Unless there be jurisdiction to begin a proceeding, everything done in the course of the proceeding is void, including attempts at ratification. The terms of the statute relating to the presumptive evidence afforded by an administrator's deed go only to the extent of making the deed prima facie proof that the administrator complied with whatever lawful orders the court made, and with whatever requirements the statutes themselves placed upon him. It does not make the deed prima facie evidence of jurisdiction in the court to bind the heir. In this respect the statute is much narrower than the one prescribing the evidentiary effect of tax deeds. Gen. St. 1901, § 7676. If, however, the statute should be interpreted to mean that an administrator's deed is prima facie evidence of the validity of the entire proceeding upon which it is based, it would do no more than dispense with an appeal to the record in the first instance. Whenever the record is produced, it must control. If it should be shown that the required record is destroyed or has been lost, then, in the absence of secondary evidence, the presumption attending the deed might be allowed to prevail, as in the case of Morrill v. Douglass, 14 Kan. 293, 304. But, when the complete record is offered in evidence, it proves what steps essential to jurisdiction were in fact omitted, as well as what steps were in fact taken. It establishes the fact that nothing was done

except what it shows, and that whatever it shows to have been done was done in the manner it shows.

The foregoing propositions are not seriously contested in the brief for the defendant, but it is urged that the language of the statute contemplates that the requirements respecting notice of the hearing upon a petition to sell real estate may be imposed by mere verbal direction to the administrator, and need not appear on the journal of the court. The probate court is made a court of record for the very purpose of preserving indubitable and indisputable evidence of its acts. Proceedings whereby parties may be deprived of their real estate are among the most important which the probate court has to conduct. Without jurisdiction such proceedings are *coram non iudice*; and it would destroy the entire theory of judicial records if jurisdictional orders respecting such proceedings were left to depend upon the uncertain memory of spoken words. See 4 Wigmore, Ev. § 2450. It frequently occurs that the records of probate courts are carelessly made up, and do not in fact exhibit all that took place, or defectively express what actually occurred. In such a case the remedy of a party who is bound by the record is to have it corrected to speak the truth. But the record of a transaction in a court of record must supersede all other proof.

Many defects in the proceedings other than the one discussed are pointed out. Some of them are serious, but by liberal interpretation they may all be passed as irregularities.

The judgment of the district court is reversed, and the cause is remanded for a new trial.

(77 Kan. 577)

ERSKIN v. WOOD.

(Supreme Court of Kansas. April 11, 1908.)

1. TENANCY IN COMMON—CREATION OF RELATIONSHIP.

Where two persons settled upon a tract of school land at the same time, and each made the improvements and continued his residence thereon and acquired the right to purchase the same, and it was upon notice and hearing in the probate court determined that each had such right, and each of such settlers has made payment for the land and obtained a certificate thereof accordingly, the rights of such settlers appearing to be equal, they are tenants in common of such land.

2. SAME—RECOVERY OF UNDIVIDED INTEREST.

A tenant in common may recover his undivided interest in lands against his co-tenant who denies his right thereto.

(Syllabus by the Court.)

Error from District Court, Ford County; E. H. Madison, Judge.

Action by Henry B. Wood against Charles Erskin. Judgment for plaintiff, and defendant brings error. Affirmed.

Sutton & Scates and Albert Watkins, for plaintiff in error. L. A. Madison, for defendant in error.

BENSON, J. The plaintiff and defendant made simultaneous entries upon a tract of school land. Each made improvements exceeding \$100 in value, and each resided on the land more than six months. Each published a notice of his intention to purchase as provided by law, and the date of hearing upon each notice was for the same day. Mr. Wood presented his proofs, and a finding was made by the probate court of the facts entitling him to purchase. He then made payment of the appraised value to the treasurer and received a certificate of purchase, and subsequently a patent was issued to him for the land. Mr. Erskin, however, published another notice, and on a later date upon a hearing thereon in the probate court a finding was made in his favor of the facts entitling him to purchase, whereupon he paid one-tenth of the appraised value, and was given a certificate of purchase of the same land. He remained in possession and claimed to be the sole owner, when Mr. Wood commenced this action of ejectment claiming that he was the owner and entitled to possession. The court found, among other things, that: "There has been simultaneous settlements, improvements of practically the same character, and residence for the same length of time in the case of both parties. * * * Mr. Wood has a patent to this land, and the evidence shows that the defendant, Erskin, has not a patent, but that he holds a certificate of purchase, and that he has title to the land for the purpose of this case, of equal importance as the title of the plaintiff. Now, the question is whether or not the defendant, being in possession of the land, and the plaintiff, being out of possession, and the titles equal, the plaintiff is entitled to recover in this case. * * * They made improvements of the same character. Each understood that the other was there, and each understood when the other went there. Either party might have yielded his right to a portion of that land in consideration of the other party yielding his right to the other portion, but instead of doing that, each went ahead with the understanding that the other party was there, and with the understanding that it might prove true that each party had as much right there as the other." The court held that the parties were tenants in common of the land, and as the defendant, Erskin, had denied the plaintiff's right, and claimed to be the sole owner, the plaintiff should recover an undivided one-half to be held jointly with the defendant. The conclusion was correct. In Washburn on Real Property, 539, it is said: "In this country, wherever two or more persons acquire the same estate by the same act, deed, or devise, and no indication is therein made to the contrary, they will hold as tenants in common. Thus, where commissioners confirmed claims to the same land to two different persons, they took equal shares in common, and the same would be the effect to two simultaneous conveyances to different per-

sons. So where two creditors made simultaneous levies on land, as they took at the same time with equal rights, they were held to be tenants in common in equal shares." Section 878. Where two grants bear the same date, and the surveys were recorded and certified on the same day upon warrants issued at the same time, the grantees were held to be tenants in common. *Young v. De Bruhl*, 11 Rich. Law (S. C.) 638, 73 Am. Dec. 127. The same result was declared in Wisconsin where, under an act of the Congress to ascertain and decide upon the rights of certain settlers, the commissioners found and certified that each of the parties was entitled to a certain tract. Their action was confirmed by the Congress, and this was held to be a grant of the same land to each, although a patent was issued to but one, and that each took an undivided moiety of the land. *Challefoux and Grignon v. Ducharme et al.*, 4 Wis. 554.

It is claimed that the plaintiff's title is defective because of an insufficient publication of the notice for the hearing in the probate court. The record contains this admission: "It is admitted by the defendant that a notice was published which purports on its face to have been published on the 26th day of October, 1905, and that an affidavit by the printer was filed with the notice with the probate judge, and that the notice over the heading of it reads: 'First published October 26th, 1905.' And that the affidavit of the printer shows that it was first published in the issue of October 26, 1905." The paper was printed on Thursday, the 26th, and the testimony of the publishers on the trial was to the effect that the papers distributed through the mails were delivered at the post office, Friday or Saturday—that he was not sure that they were in on Friday. The assistant postmaster testified that he did not believe they were brought in until Saturday, and afterwards said that none were brought in on Friday. In addition to this testimony there was the finding of the probate court that due notice had been given (*Beedy v. The State*, 4 Kan. App. 575, 46 Pac. 65), and the fact that a patent had been issued to the plaintiff. Considering all the evidence along with the presumption of the regularity of the proceedings, we cannot overthrow the finding that proper notice was given. We do not now decide what would be the effect of a failure to seasonably mail that part of a newspaper edition circulated by that means, upon a legal notice otherwise properly published therein, as the question is not necessary to the decision of this case.

The plaintiff sued for the entire tract, but upon the findings of the court recovered an undivided one-half. There was no error in this. One of two tenants in common may recover his undivided interest against his cotenant who denies his right thereto. *Gatton v. Tolley*, 22 Kan. 678; *Everett v. Lusk*, 19 Kan. 195.

The judgment is affirmed.

(20 Okl. 192; 1 Okl. Cr. 145)

Ex parte CURLEE.

(Supreme Court of Oklahoma. April 27, 1908.)

CRIMINAL LAW—JURISDICTION—VENUE.

Where an indictment for the crime of embezzlement—an offense committed under the laws in force in the Indian Territory—is returned after the admission of the state into the Union, no prosecution whatever having been begun prior to the admission of the state into the Union, except the filing of a complaint with the United States Commissioner and the issuance of a warrant and the apprehension of the prisoner, said offense is cognizable in the district court of the state in the county in which the offense was committed.

(Syllabus by the Court.)

Application of J. W. Curlee for a writ of habeas corpus. Writ denied.

On the 26th day of December, 1907, relator filed his petition with the clerk of this court praying for a writ of habeas corpus, alleging that he was unlawfully imprisoned and restrained of his liberty by George B. Noble, sheriff of Le Flore county, Okl. The writ was issued returnable on the 11th day of January, A. D. 1908. Said respondent made return to said writ as follows: "The above defendant, J. W. Curlee, is detained by George B. Noble, as sheriff of said county, by virtue of a warrant of commitment charging him with the crime of embezzlement committed on or about the 1st day of September, 1907, which said warrant was issued by John R. Pollan, United States commissioner for the Central district of the Indian Territory, on or about the 7th day of November, A. D. 1907; and on the 11th day of January, A. D. 1908, it was stipulated as a matter of record that the said relator is charged with having embezzled from the Pioneer Telephone Company, in September, 1907, the sum of \$293, at Spiro, then Indian Territory, now Le Flore county, state of Oklahoma. That relator was arrested upon said charge upon a warrant regularly issued by John R. Pollan, United States commissioner, on November 7, 1907, and upon preliminary hearing before said commissioner on the same day was held to await the action of the grand jury, and committed to jail at McAlester in default of bond." Thereafter, on the 7th day of December, 1907, said relator was delivered by the United States marshal of the Eastern district of the state into the custody of the respondent, as sheriff of Le Flore county, state of Oklahoma. That on December 14, 1907, at the December term of the district court in and for Le Flore county, the grand jury returned an indictment against said relator, charging him with said offense. That since his delivery to the said George B. Noble, as sheriff, up to the present time, relator has been detained, and is in his custody on said charge.

Day & Du Bois, for relator. Chas. West, Atty. Gen., and W. C. Reeves, Asst. Atty. Gen., for respondent.

WILLIAMS, C. J. (after stating the facts as above). We have decided at this term of court in the case of *Ex parte Buchanan*, 94 Pac. 943, that an indictment for the crime of manslaughter—an offense committed in the Indian Territory prior to its admission into the Union, and returned after such time, where no prosecution whatever had been begun before such date of admission—is cognizable in the district court of the state in the county in which the offense was committed. See, also, *Ex parte Bailey* (Okl.) 94 Pac. 553; *Ex parte Brown* (Okl.) 94 Pac. 556; *Higgins v. Brown* (decided at this term, but not yet officially reported) 94 Pac. 703. The relator is prosecuted under section 1638, Mansfield's Digest of the Statutes of Arkansas, which were extended to and put in force in the Indian Territory by section 4 of an act of Congress approved March 1, 1895 (23 U. S. Stat. c. 145, p. 693); also section 33 of an act of Congress approved May 2, 1890 (26 U. S. Stat. c. 182, p. 81). In the case of *Merchants' National Bank of Bismarck v. Braithwaite*, 7 N. D. 358, 75 N. W. 246, 66 Am. St. Rep. 653, the court says: "Considering the provisions of the enabling act in connection with the failure of Congress to vest jurisdiction over territorial judgments in the federal courts, and the fact that Congress in passing the act must have contemplated that the state Constitution would create state courts having jurisdiction similar to that possessed by the territorial courts, and that these would be the better fitted to enforce judgments throughout the different counties in the state, we must infer an implied assent by Congress that jurisdiction over cases not pending should vest in state courts exclusively. Otherwise we must assume that those cases were to be left without any court possessing jurisdiction over them for any purpose whatever. For it is clear that no jurisdiction over them is vested by the enabling act in the federal courts." In line with this decision cases, not of a federal character, not pending, involving offenses committed prior to the admission of the state into the Union, should vest in the state courts. Of course, nonpending actions of a federal character would necessarily vest in the United States courts in the state erected out of said territories just as they do in United States courts in the other states. We had not found this case at the time the opinion was written in the case of *Ex parte Buchanan*, with which it is in harmony. The provisions of the Oklahoma enabling act being substantially those as contained in the enabling act for North and South Dakota, it is presumed that Congress in adopting the same for Oklahoma did it with a view of the construction that had been had thereon in North Dakota.

Under the authority of the *Buchanan* Case, which is supported by the case just cited from North Dakota, the writ of habeas corpus is denied. All the Justices concur.

HARN v. COLE.

(Supreme Court of Oklahoma. March 25, 1908.)

1. EVIDENCE—PRESUMPTIONS—FOREIGN LAWS.

Where the question arises as to what laws are in force in another state or territory, and the same are neither pleaded nor proved, it will be presumed that such laws are the same as those of our domicile.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 101.]

2. JUDGMENT—JUDGMENT BY CONFESSION.

Under sections 4592, 4594, Wilson's Rev. & Ann. St. 1903, judgment where there has not been any previous process or proceeding, upon confession by an attorney, can be entered only when authorized to that end by warrant of attorney acknowledged or proved as conveyance of lands, the defendant having previously filed before the court his affidavit, stating concisely the facts on which the indebtedness arose, and the amount of indebtedness justly due and owing by the defendant.

3. SAME—FOREIGN JUDGMENT.

Where judgment is sought upon the transcript of a judgment rendered in another state, and it affirmatively appears therefrom that the proceedings were not had in accordance with said sections (4592, 4594, Wilson's Rev. & Ann. St. 1903), there being no proof that the laws of the other state were different from those in force in Oklahoma Territory, no recovery can be had upon such judgment.

(Syllabus by the Court.)

Error from Probate Court, Oklahoma County.

Action by Luella Cole against W. F. Harn. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

On March 17, 1904, in the probate court of Oklahoma county, Okl. T., Luella Cole, as plaintiff, instituted an action against W. F. Harn, as defendant, on a transcript of judgment rendered in the court of common pleas for the county of Richland, state of Ohio, on a note bearing date of August 1, 1890, due 60 days thereafter, purporting to be signed by George U. Harn and W. F. Harn as makers. Said note was in words and figures as follows: "\$130.11 Mansfield, Ohio, August 1, 1890. Sixty days after date, for value received, we promise to pay to the order of Luella Cole one hundred and thirty and eleven one hundredths dollars, with interest at the rate of eight per cent. per annum, at Mansfield, Ohio; and we authorize any attorney at law to appear in any court of record in the United States, after the above obligation becomes due, and waive the issuance and service of process and confess a judgment against us in favor of the holder hereof, for the amount then appearing due, together with cost of suit, and thereupon release all errors and waive a right of appeal. George U. Harn. [Seal] W. F. Harn [Seal]." Said instrument, if it be treated as constituting a warrant of attorney, was neither acknowledged nor proved as conveyance of land. Said transcript shows that suit on said note was filed in said court on the 8th day of February, 1904; that W. S. Kerr, an attorney, acting under the alleged power of attorney in said note, filed an-

swer, in the absence of both defendants, confessing judgment in favor of said plaintiff against said defendants on said note for the sum of \$270.80, recited in said answer (being the amount herein due for principal and interest and also for costs of suit taxed and to be taxed), and without summoning the appearance of either defendant, and judgment was rendered the same day against both makers jointly. In the answer so filed by said attorney he releases and waives all exceptions, errors, and right of appeal, and the judgment entry in accordance with the recitals in said answer. In the original transcript the word "we" was omitted before the word "promise" in the first line of said alleged note, and the word "appear" after the word "law," and the words "to appear" after the words "attorney at law." Afterwards, by permission of the court, this transcript was withdrawn, and what purported to be a corrected transcript, duly certified, was filed in lieu thereof. Afterwards defendant moved to strike the same from the files, which was overruled, and exception duly saved. There is no allegation in the petition as to why George U. Harn, the joint maker with the defendant in said note and the joint defendant in said transcript, is not joined in the present action. Defendant in the court below demurred on the grounds of want of jurisdiction of the court rendering judgment in Ohio and consequently in the probate court, and defects in parties defendant, that the petition did not state facts sufficient to constitute a cause of action, and the action is barred by the statute of limitation. The Ohio judgment was rendered on the 4th day of February, 1904, and the action begun in the court below on the 18th day of March following.

The petition filed by plaintiff in the court of common pleas of Richland county, Ohio, on February 8, 1904, is in words and figures as follows: "The defendants, on the 1st day of August, A. D. 1890, executed and delivered to plaintiff their promissory note of that date, with the warrant of attorney annexed, which warrant and note, with all the indorsements thereon, are hereto attached, marked 'Exhibit A,' and made a part of this petition. Said note is unpaid, except as shown by said indorsements, and there is now due the plaintiff on said note the sum of one hundred and thirty dollars and eleven cents, with interest at the rate of eight per cent. per annum from the first day of August, A. D. 1890. Wherefore, plaintiff prays judgment against said defendants for the sum of one hundred and thirty dollars and eleven cents, with interest thereon from the first day of August, A. D. 1890, at the rate of eight per cent. per annum till paid, and for costs of suit." The accompanying affidavit made by plaintiff's attorney is as follows: "C. O. Sheller, being sworn, says that he is the attorney of said plaintiff; that this action is brought upon an instrument in writing for the unconditional payment of money only; that said instru-

ment in writing is in his possession, and that he verily believes the statements contained in the foregoing petition are true in substance and in fact."

W. F. Harn, pro se. Shartel, Keaton & Wells, for defendant in error.

WILLIAMS, C. J. (after stating the facts as above). Plaintiff in error contends as one of his grounds of demurrer that the Ohio court did not have jurisdiction of said cause, and consequently, such judgment being void, the probate court of Oklahoma county was without authority to render judgment thereon. In his answer he set up the same defense, alleging that no personal service was ever had upon him; he being at that time a resident of the territory of Oklahoma, and not a resident of nor within the state of Ohio. The statutes and laws of Ohio being neither plead nor proved in the court below, such laws are presumed to be the same as those of Oklahoma Territory. *Mansur-Tebbetts Implement Co. v. Willet*, 10 Okl. 383, 61 Pac. 1066; *Betz v. Wilson*, 17 Okl. 383, 87 Pac. 844. Section 4592, p. 1061, 2 Wilson's Rev. & Ann. St. 1903, provides: "Judgments may be entered upon confession by an attorney, authorized for that purpose by warrant of attorney, acknowledged or proved as conveyance of land, without any previous process or proceeding; and judgment so entered shall be a lien from the date of entry." Section 4594 of the same volume provides: "Before any judgment shall be entered by confession, an affidavit of the defendant must be filed, stating concisely the facts on which the indebtedness arose, and that the amount of such indebtedness is justly due and owing by the defendant to the plaintiff." From the transcript of the Ohio judgment, which appears in the record, it affirmatively appears that there was never any personal service or any authorized appearance on the part of the defendant other than the clause in the note upon which the action is based, which provides: "And we hereby authorize any attorney at law to appear in any court of record in the United States, after the above obligation becomes due, and waive the issuing and service of process and confess a judgment against us in favor of the holder hereof, for the amount then appearing due, together with costs of suit, and thereupon to release all errors and waive all right of appeal." The note containing this alleged warrant of attorney was neither acknowledged nor attested or witnessed, and does not comply with the provisions of the Oklahoma statutes relative to the acknowledgment or proving of conveyance of land. Undoubtedly the rule is that, where one seeks to have a judgment rendered against a person under a warrant of attorney, such warrant of attorney must be executed strictly in accordance with the provisions of the statute. It affirmatively appears herein—if it be conceded that the paragraph in the note is a warrant of attorney, though,

we are not prepared to so concede—that said note was neither acknowledged nor proved, as a deed of conveyance. It is therefore not in compliance with section 4502, Wilson's Rev. & Ann. St. 1903, supra. Further, section 4594, Wilson's Rev. & Ann. St. 1903, supra, provides that, before such confession can be entered, an affidavit of the defendant must be filed, stating concisely the facts on which the indebtedness arose, and that the amount of such indebtedness is justly due, etc. In the transcript of the record of the Ohio judgment it appears that one C. A. Sheller, as attorney for the plaintiff, deposes that said action "is brought on an instrument of writing for the unconditional payment of money only, that said instrument of writing is in his possession, and that he verily believes the foregoing statements are true in fact." This affidavit does not comply with the requirements of section 4594, supra. Further, said section provides that the affidavit shall be made by the defendant, not by the plaintiff or plaintiff's attorney.

It affirmatively appears that the judgment which was rendered by confession as aforesaid, and upon which this action is based, was not in compliance with the laws in force in Oklahoma Territory, and such laws on the record, are to be presumed to have been the same as those in force at that time in the state of Ohio. It is unnecessary to determine whether or not, had such judgment been valid under the laws of Ohio, the same could have been enforced in this state against the defendant, who was a citizen of Oklahoma Territory at the time the judgment was obtained. See, also, *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U. S. 293, 11 Sup. Ct. 92, 34 L. Ed. 670; *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 887; *Grover & Baker Sewing Machine Co. v. Radcliffe*, 66 Md. 511, 8 Atl. 265; *Thomas v. Pendleton*, 1 S. D. 153, 46 N. W. 180, 38 Am. St. Rep. 728.

The judgment of the lower court is reversed and remanded for new trial. All the Justices concurring.

(20 Okl. 654)

ST. LOUIS & S. F. R. CO. v. JAMIESON.
(Supreme Court of Oklahoma. April 13, 1908.)

1. CARRIERS—CARRIAGE OF FREIGHT—BILL OF LADING—CONCLUSIVENESS.

The statement on a receipt or bill of lading given by a railroad company that goods were received in "apparent good order" is not conclusive evidence to that effect, it being competent to show they were not in good order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 159.]

2. SAME—EFFECT AS TO DELIVERING CARRIER.

By such receipt or bill of lading issued by the initial carrier as agent for the delivering carrier, however, the onus is put upon the delivering carrier to show they were not in the condition stated in the receipt.

3. TRIAL—DEMURRER TO EVIDENCE.

When any competent evidence has been presented for the consideration of the jury rea-

sonably tending to prove the issues, it is proper to overrule a demurrer to the evidence or deny a motion for peremptory instruction; for in such a condition, under proper instructions from the court, the cause should be submitted to the jury for their determination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 338-340.]

4. CARRIERS—CARRIAGE OF FREIGHT—ACTIONS FOR LOSS OR INJURY—PRESUMPTIONS AND BURDEN OF PROOF.

Where several packages are delivered in one shipment and under a single entire contract to a carrier for shipment, not only over its own line, but also a connecting line, in an action by the consignee against the delivering carrier, from which he received a portion of the consigned goods, for injury and loss, on the introduction by the plaintiff of the bill of lading issued by the initial carrier to the effect that the goods were received by it "in apparent good order," the burden of proof was on it to rebut such prima facie presumption of delivery in "apparent good order," or to show that the alleged damage or loss occurred before it reached its line.

5. WRIT OF ERROR—REVIEW—QUESTIONS OF FACT.

Where the evidence in a case leaves it doubtful whether the particular carrier who is sued for a loss of goods, or another from whom that carrier received the goods, is liable, the Supreme Court will not disturb the findings in the court below.

(Syllabus by the Court.)

Error from District Court, Washita County; James K. Beauchamp, Trial Judge.

Action by H. L. Jamieson against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This action was begun in the district court of Washita county, territory of Oklahoma, on the 5th day of September, 1904. On the 20th day of March, 1905, plaintiff filed his first amended petition, upon which the cause was tried. For his first count he alleges that on or about the 7th day of July, 1904, plaintiff delivered to the defendant, as a common carrier for hire, certain goods, consisting of 1 barrel of drugs, 10 boxes of drugs, 14 boxes of drugs, 1 case of drugs, and 1 can of oil at Sapulpa, Ind. T., consigned to M. E. Dixon at Shawnee, to be delivered by the Chicago, Rock Island & Pacific Railway Company, a common carrier for hire, to said consignee; that said goods were accordingly delivered at Shawnee by the said Chicago, Rock Island & Pacific Railway Company in apparent good condition and placed in a proper place of storage. On the 16th day of August, 1904, the said goods, under instructions from the plaintiff, were redelivered to said railway company at Shawnee by the said M. E. Dixon and consigned to the plaintiff at Cordell, Okl., a station on the line of the defendant, the initial line issuing bill of lading for the entire shipment, reciting that the same were in apparent good order, and further stipulating that it should not be liable for damages or loss occurring on any connecting line. Plaintiff further alleges that a part of said shipment was lost and another

portion damaged in transit, and prays for damage accordingly.

In another count plaintiff alleged that a certain piano was delivered by him to the defendant at Sapulpa to be shipped over the defendant's line to him at Cordell, Okl., and that said piano, through the negligence of defendant, was damaged in transit, and he prayed damages therefor. On the trial of the cause, by consent of the plaintiff, this branch of the case was withdrawn from the jury. The proper freight charges were paid by or for plaintiff on said shipment at place of destination.

Plaintiff stated in his testimony that he shipped from Sapulpa a stock of drugs and druggists' sundries, consisting of packages and boxes of medicines, toilet articles, such as are ordinarily carried in a drug store, tooth brushes, combs, etc., the entire stock involving \$1,200; that he delivered same to defendant's station agent at Sapulpa, consigning same to Shawnee, Okl. T.; that when he received the goods at Cordell there were four packages missing, two cans missing, one box of drugs missing, and also one case of cigars. Afterwards the case of cigars and also the cans came in, but the box of drugs and the four missing packages were never delivered; also another box of drugs containing patent medicines and syrups were lost. Still another box was broken into the top through the center and the entire top taken off, bottles of drugs were broken, and the top just set down loose over the goods. One or two tops of other boxes were broken and medicine bottles were broken and the contents run out, and syrup run over the other goods and damaged the labels to a certain extent. Plaintiff stated further that he shipped a piano from Sapulpa, and also some household goods to furnish a suite of rooms, with furniture, beds, washstands, chairs, rocking chairs, tables, and the like. The value of all the goods were properly proved as well as the damages. Plaintiff further testified that the piano was in good tune and in good condition when he shipped it, but when he received it at Cordell it was damaged by dampness and rain, the sound board had gotten wet and the hammers dropped off and he had to get a piano tuner to tune it and put on a new hammer and safety weights; that it was so damp and swollen that the keys could not pass. He testified that the goods and chattels were packed in ordinary shipping boxes—heavy dry goods boxes; that he put excelsior and straw—mostly excelsior—around the bottles, and that the drugs and goods and sundries were shipped in first-class condition. He stated that the portion of the drugs that were received in Cordell were in a damaged condition; the box tops had been broken off, one broken into and some of the goods and sundries therein lost, the bottles therein broken, and the liquids run out. Plaintiff further stated that he discovered the damages to these goods when he opened the packages as

soon as they arrived; that he did not know they had been damaged until they arrived in Cordell. Plaintiff testified that the piano was shipped direct from Sapulpa to Cordell, and that the same was damp when he received it, but that the piano was dry and well packed when it was shipped. Mrs. M. E. Dixon on behalf of the plaintiff testified that as agent of plaintiff she received the goods consigned to her by plaintiff from Sapulpa, and had them brought from the depot in drays and had them put in dry storage, and that all that time they were dry and in good condition, except two little pieces of plank that were broken off of a box, and that she had that repaired. But afterwards, under instructions from the plaintiff, she reshipped the goods in question in good shape and well preserved, consigning them to plaintiff at Cordell, Okl. T.; that she did not know anything about the contents of the boxes; that she knew the piano was a nice piano, but she did not know anything about its condition. It was not shipped to Shawnee but shipped direct to Cordell. At the close of the testimony defendant demurred to the evidence on the ground that same was insufficient to entitle plaintiff to recover. The demurrer was overruled. To which action of the court defendant excepted. Thereupon the defendant moved the court for a peremptory instruction in its favor, which was denied, defendant saving its exception.

The jury returned a verdict in favor of the plaintiff for \$250, at the same time returning answers to the interrogatories submitted to them by the court at the request of the defendant as follows: "(1) Can you tell whether the damage to any of the goods and medicines in question were incurred before their arrival at Shawnee or after their shipment from there? Answer: We consider from the evidence that the damage was done after shipment from Shawnee. (2) What was the value of the drugs claimed to have been lost on the market at Cordell at the time they would have been delivered there? Answer: \$168.90. (3) Do you know whether or not any goods of plaintiff were broken or damaged before they were delivered to him at Shawnee? If you answer the last question 'Yes,' what goods were broken? Answer: No goods were broken on their arrival at Shawnee. (4) How many boxes of goods were delivered to plaintiff's agent at Shawnee? Answer: 26. (5) Did plaintiff or his agent inspect the goods at Shawnee to see if they had been damaged in shipment to that point? Answer: Yes."

Judgment was rendered upon said verdict; and thereafter, in due time, motion for new trial was filed, and this cause is now properly before this court on petition in error. Reference will be made to the parties herein as they appeared in the court below.

Flynn & Ames, for plaintiff in error.
James W. Smith, for defendant in error.

WILLIAMS, C. J. (after stating the facts as above). The defendant insists that the lower court should have sustained its demurrer to the evidence or granted its motion for a peremptory instruction. In order to recover it was necessary for the plaintiff to prove that the defendant received the property alleged to have been injured or lost in good condition, and that when delivered to the consignee it was damaged. The fact of loss and damage is not seriously denied, but it is contended that the record does not show that the goods, when delivered to the initial carrier, were in good condition. The bill of lading issued by the Chicago, Rock Island & Pacific Railway Company at Shawnee reads that the same were received in "apparent good order," and it certainly must be construed that the goods were delivered to the connecting carrier in apparent good order, for therein the initial carrier stipulates that "in like good order to the next carrier if the same are to be forwarded beyond the line of this company's road (same is) to be carried to the place of destination." This certainly evidences the fact that the initial carrier, when it received same, recognized the goods as in "apparent good order" and proposed delivering same in like "good order" at the final place of destination. When the connecting carrier accepted the shipment under the through rate under said bill of lading it thereby ratified the contract of the initial carrier, which, of itself, would have constituted such initial carrier the agent of the delivering carrier. When the goods were delivered to the consignee at the place of destination, the freight not having been paid, and the consignee paying same to the delivering carrier, no liability would rest upon such consignee to the initial carrier for the freight over its line. The delivering carrier would have the right to receive such freight and retain the goods until it is paid. Regarding such carrier as the agent for the other, the bill of lading to be given by the one is evidence against the other for the purpose of showing the goods delivered, their condition at the time of delivery, and the terms of shipment. If the carrier finally delivering the goods does not deliver them in the condition in which they were received by its agent, then it must account for the injury. The burden rests upon it to show that the injury occurred without its fault or negligence. To the extent of involving it in the liability of a common carrier after the goods shall come to its custody, the initial, or receiving carrier, of the goods had such authority. The burden of proof in cases of loss or injury rests upon the carrier to exempt itself from liability, the law imposing the obligation of such duty upon it. The failure to deliver, the carrier having received the goods, makes a prima facie case of liability. It appears that the goods were received by the Chicago, Rock Island & Pacific Railway Company, standing to the plaintiff in relation of agent, contracting for the plaintiff

for transportation along its line and delivery at the place of destination. There was but a partial delivery of the goods. Has the plaintiff in error delivered all it received from its agent? How did it obtain a part and not the whole, for the whole shipment was, by virtue of one contract and one bill of lading, made and issued by the initial carrier? These inquiries could certainly have been answered by the plaintiff in error; for it certainly possessed that knowledge or information, and until, by competent evidence, it shows the delivery of all it received, the presumption must attach that the loss or damage occurred by its default. Of course, the plaintiff in error is liable only for losses or injuries on its own line, but when a loss or injury is shown, and such could have occurred while it was in custody of the goods, and there is evidence the goods were delivered to it, it must account for the loss, for the loss or injury was a fact resting peculiarly within its own knowledge. Here, the entire shipment, consisting of about 27 packages, was delivered to the initial carrier under one entire contract, and all of said packages, except 4 or 5, were delivered to plaintiff at the place of consignment, but several of them in a damaged condition. How easy it would have been for the defendant to have shown that it did not receive all of those packages from the initial carrier, and, further, that those which it did receive were delivered to the consignee in the original condition when received from the initial carrier and by this means have discharged itself from liability? But the plaintiff in error stands upon the technical position that these goods which were shipped over the defendant's line from Sapulpa to the connecting point of the Chicago, Rock Island & Pacific Railway Company in transit to Shawnee might have been injured and damaged in that transit, notwithstanding the fact that the witness Mrs. Dixon, to whom these goods were consigned at Shawnee, testified that when received there they were in apparent good condition; that they were properly stored; and that when they were redelivered to the initial carrier for the last shipment they were in apparent good condition, and the initial carrier so recited in its bill of lading. Now, certainly these four or five packages were not lost in transit from Sapulpa to Shawnee, but were from Shawnee to Cordell. The delivering carrier in accepting this shipment from its agent, the initial carrier, because it was an entire shipment, is presumed to have received the entire shipment. If it did not, it had it within its power on the trial of this cause to have introduced proof to that effect. The law places that burden upon it. Both reason and authority sustain this presumption. The very uncertainty as to where the goods were or on whose line located, when damaged or lost, and the difficulty of ascertaining those facts by the consignor or consignee, renders this rule necessary. The

carrier, almost without exception, will be able to show the condition of the property when reaching its custody; the shipper or consignee can rarely, if ever, do so. This is a salutary rule, resulting in justice to the greatest number affected; leaving it also to the party to prove the fact in whose power it expressly lies. In addition to that, one of these packages or boxes when delivered to the plaintiff had been broken and the syrups run out. Upon examination this injury would have been necessarily obvious. The initial carrier is presumed to have made a reasonable examination, and if it had made such examination it would have discovered such condition of the packages shipped if, when they were delivered to it at Shawnee, they were in the same condition that they were in when delivered at Cordell. There was ample proof in this record to submit the issues to the jury. *Southern Express Co. v. Hess*, 53 Ala. 19; *Dixon v. Richmond & Danville R. R. Co.*, 74 N. C. 539; *Illinois Central R. R. Co. v. Cowles*, 32 Ill. 117; *Savannah, Florida & Western R. R. Co. v. Harris*, 26 Fla. 148, 7 South. 544, 23 Am. St. Rep. 551; *Gulf, Colorado & Santa Fé R. R. Co. v. Jones*, 1 Ind. T. 354, 37 S. W. 208; *Hutchinson on Carriers* (3d Ed.) vol. 3, § 1352; 6 Cyc. 490, 491, and authorities cited in footnote 40; *Am. Digest* (Century Ed.) vol. 9, pp. 743-750.

Plaintiff in error refers to the case of *Missouri Pacific Ry. Co. v. Breeding*, 16 S. W. 184, decided by the Texas Court of Civil Appeals, wherein it is said: "Unless it appears from the evidence that the machine claimed to have been injured was delivered to the defendant company or some connecting line of railroad in condition other than it was in when delivered at Rockdale, you may presume the defendant did its duty, and delivered the machine in the condition it was in when received." Now, in this record, it appearing that the initial carrier receipted for these goods as in "apparent good order," the carrier is presumed to have done its duty and to have examined these packages, and after such reasonable examination the recital is made in the bill of lading that the packages were in apparent good order. The testimony on the part of the plaintiff, by the person who handled these goods, is that at the time of shipment from Shawnee to Cordell they were in apparent good order. Of those packages that reached their final destination one had been broken in. By inspection that could have been discovered; and the bottles in others were broken and the liquids running out. Likewise, by reasonable inspection, that could have been and was discovered. Some of the packages of that whole shipment never reached their destination. Where the evidence in a case leaves it doubtful whether the particular carrier who is sued for the loss of goods, or another from whom that carrier received the same, is liable, the Supreme Court will not disturb the

finding of the jury. *Illinois Central Railroad Co. v. Cowles*, 32 Ill. 117.

The provisions in the rate bill as to the issuing of bills of lading by the initial carriers and liability for loss has no application to this case. Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1907, p. 909), First Session, Fifty-Ninth Congress, 1905-6.

There appearing no reversible error in the record, the judgment of the lower court is affirmed.

All the Justices concurring.

TERRITORY v. CHOCTAW, O. & W. RY. CO.

(Supreme Court of Oklahoma. April 13, 1908.)

1. PUBLIC LANDS—SCHOOL LANDS—TITLE OF TERRITORY.

The territory of Oklahoma received no title to sections 16 and 36 in each township in said territory by the provision of the Organic Act (Act May 2, 1890, c. 182, § 18, 26 Stat. 89) reserving said sections for the purpose of being applied to the public schools in the state or states to be created out of the territory, and could not recover the value of such land appropriated for railway purposes.

2. EMINENT DOMAIN—COMPENSATION TO TERRITORY.

The territory of Oklahoma could recover from a railway company that had appropriated a portion of the land reserved for school purposes by the provision of the Organic Act (Act May 2, 1890, c. 182, § 18, 26 Stat. 89) the rental value of the land so taken, and for the depreciation in the rental value of the remainder of the tract of land not taken resulting from the construction of the company's railroad over said land, for such a period of time as the territory of Oklahoma was entitled to use said land and collect the rents thereon.

3. APPEAL—REVIEW—INSTRUCTIONS.

An objection to an instruction to which no exception was saved in the trial court to the giving thereof will not be considered by this court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1516-1532.]

(Syllabus by the Court.)

Error from District Court, Lincoln County; John H. Burford, Judge.

Condemnation proceedings by the Choctaw, Oklahoma & Western Railway Company. From an award of commissioners of damages which the territory of Oklahoma would sustain the board for leasing of school lands appealed to the district court, and from a judgment for \$27.90 the territory brings error. Affirmed.

On the 5th day of September, 1903, the Choctaw, Oklahoma & Western Railway Company filed with the Governor of the territory of Oklahoma its petition for the appointment of commissioners or appraisers to condemn and appraise certain land lying in the northeast quarter of section 16, township 14 N., range 4 E. of the Indian Meridian, and being a part of the school lands located in the territory of Oklahoma, for the purpose of a right of way of said company's main line of railroad, and for side tracks, grounds, and

switches. On the same day the Hon. Thompson B. Ferguson, then Governor of the territory of Oklahoma, made his order appointing commissioners or appraisers as prayed for in the petition of said railway company; and thereafter, on the 12th day of September, 1903, said commissioners or appraisers filed with the Governor of the territory of Oklahoma its report, in which report they assessed the damages which the territory of Oklahoma would sustain by the appropriation of said land for railway purposes by the said Choctaw, Oklahoma & Western Railway Company at the sum of \$162. From this award of the commissioners or appraisers the Hon. Thompson B. Ferguson, as Governor, and Wm. Grimes, as Secretary, and L. W. Baxter, as Superintendent of Public Instruction, constituting a board for the leasing of the school lands of the territory of Oklahoma, appealed to the district court of Lincoln county. Thereafter, on the 20th day of October, 1904, the cause was tried before a jury, and verdict returned and judgment rendered in favor of the territory of Oklahoma for the sum of \$27.90, from which judgment of the court plaintiff in error appealed.

Charles West, Atty. Gen., and W. C. Reeves, Asst. Atty. Gen., for plaintiff in error. C. O. Blake, Thos. R. Beman, H. B. Low, Dale & Blerer, and Benj. F. Hegler, Jr., for defendant in error.

HAYES, J. (after stating the facts as above). It was agreed upon the trial that 3.1 acres of said quarter section of school land had been appropriated by the railway company. Several assignments of error are made by plaintiff in error. The only question, however, presented by said assignments of error and the record in this case is whether the territory of Oklahoma could recover the value of the 3.1 acres of land appropriated by the railway company and damages for the permanent injury to the remainder of said quarter section by reason of the company's constructing its line of railway and switches on and over same. The railway company insists that the territory of Oklahoma had no title to the land, was not the owner of the fee in the same, that said land was a part of the public domain of the United States, and that said railway company, having been granted by Act Cong. March 3, 1875, c. 152, § 1, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), the right to build its line of railroad through the public domain of the United States, the territory of Oklahoma could not recover in this action. Counsel for the territory of Oklahoma insist that the provision of the Organic Act of the territory of Oklahoma (Act May 2, 1890, c. 182, § 18, 26 Stat. 89) reserving sections 16 and 36 in each township in the territory of Oklahoma for the purpose of being applied to the public schools in the state or states thereafter to be erected out of said territory was a legislative

grant of said lands to the territory of Oklahoma, and that the territory had such title in said land as would entitle it to recover the value of any part of the same taken by the railway company for the purpose of constructing its line of railway. The trial court sustained the contention of the railway company, and instructed the jury that the only interest the territory had at the time the railway company appropriated said land and at the time of the trial of the case was the right of possession and user for the purpose of collecting the rents, and that such right would continue so long as Oklahoma remained a territory, and no longer, and that the measure of damages which the territory of Oklahoma was entitled to recover was the rental value of 3.1 acres taken by the railway company for its right of way, together with any depreciation in the rental value of the remainder of the quarter section of land by reason of the railway company's constructing its line of railway thereon from the time the same was taken by the railway company until such time as the territory of Oklahoma should become a state.

That portion of the Organic Act which reserves sections 16 and 36 in each township reads as follows: "That sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to public schools in the state or states hereafter to be erected out of the same." Counsel for the territory vigorously insist that title to the public domain of the United States may pass by legislative grant as well as by patent, and this contention, we think, is true; but this does not answer the question involved in this case. The question is, was there a legislative grant of sections 16 and 36 in each township to the territory of Oklahoma by virtue of the foregoing provision of the Organic Act? If there was, then the territory was vested with the title to said land, and could recover for the appropriation of the same. The Supreme Court of Kansas, in *State of Kansas v. Stringfellow*, 2 Kan. 263, construing the provisions of the Organic Act providing for the establishment of territorial government in the territory of Kansas, held that the provision therein reserving certain lands for school purposes was a legislative grant, and passed the title to the territory of Kansas. The section of the Organic Act of the territory of Kansas by which certain lands are reserved for school purposes reads: "And be it further enacted, that when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected out of the same." The Supreme

Court of Utah, in *United States v. Lewis A. Scott Elliot*, 7 Utah, 389, 26 Pac. 1117, in construing the school land provision of the Organic Act of the territory of Utah, which provision is in identical language of the provision of the Organic Act of the territory of Kansas, held that the language of said act reserving sections 16 and 36 in each township was a legislative grant, and that the title in the territory of Utah became complete as soon as the land was surveyed; but the same language has been construed by other courts as not creating a grant, but as having only the effect to segregate the lands described therein from the public domain in so far as the purpose of sale or homestead entry is concerned. *Barkley v. United States*, 3 Wash. T. 522, 19 Pac. 37; *United States v. Bisel*, 8 Mont. 20, 19 Pac. 251. Judge Brewer, now Associate Justice of the Supreme Court of the United States, as United States circuit judge for the Eighth circuit for the district of Nebraska, held in *Union Pacific Ry. Co. v. Douglas Co.*, 31 Fed. 540, that the effect of the provisions of the Organic Act of the territory of Nebraska (Act May 30, 1854, c. 59, § 16, 10 Stat. 283) reserving certain lands for school purposes (the language of which is the same as the corresponding section of the Organic Act of Utah, Washington, Montana, and Kansas) was only that, when such lands had been once reserved by Congress, Congress will not be presumed to have intended a disposal of them in any other way unless the intent is clearly expressed in the act of Congress, and he further held in that case that the grant of Congress to the Union Pacific Railway Company of a right of way by Act Cong. July 1, 1862, c. 120, § 2, 12 Stat. 491, gave to the company a right of way across the school lands of the territory of Nebraska reserved by the provision of the Organic Act of said territory of 1854; thus clearly holding that Congress had such control over the school lands of the territory of Nebraska after they had been reserved for the purpose of being applied to schools in the territory of Nebraska that it could grant to a railway company a right of way over the same.

It is urged by counsel for the territory that the opinion of Judge Brewer in that case is in contradiction with an opinion rendered by him while a member of the Supreme Court of Kansas in *Baker v. Newland*, 25 Kan. 25; but an examination of the facts show that such is not true. In *Baker v. Newland* the facts were that the land in controversy was a part of the land granted by an act of Congress to the state of Kansas after it was admitted into the Union, and such grant was accepted by the state—a condition entirely different from that existing in the case of *Union Pacific Ry. Co. v. Douglas Co.*, supra, and wholly unlike the condition existing in the case at bar. These five cases are the only cases to which our attention has been called in which the provisions of the Organic Acts of the various ter-

ritories reserving certain lands to be applied to the public schools of the territories or states to be created therein have been construed, and it thus appears that both the weight and greater number of authorities is to the effect that such reservation of public lands for school purposes does not amount to a grant. But it is not necessary to rest the case at bar upon the opinion of the court in those cases, for the reason that the language of the provision of the Organic Act of the territory of Oklahoma reserving certain lands for school purposes is quite different from the language of the corresponding provisions of the Organic Acts of the territories in which said decisions were rendered. In each of those cases the land was reserved for the purpose of being applied to schools in the territory, whereas by the provision of the Organic Act of the territory of Oklahoma the land is reserved for the purpose of being applied to the schools in the state or states to be thereafter erected out of said territory; and, if such language could be construed as a grant to the state or states thereafter to be erected out of the territory of Oklahoma, the state of Oklahoma would be the grantee, and not the territory of Oklahoma, and therefore the territory of Oklahoma was without title in said lands at the time the railway company appropriated a part of said section 16, and at the time of the trial of this case in the court below.

Vincennes University v. Indiana, 14 How. (U. S.) 268, 14 L. Ed. 416, has been cited as supporting the theory that, since there was no state government in existence at the time the land in controversy was reserved for the purpose of being applied to the public schools in the state or states thereafter to be created out of the territory, the territory of Oklahoma could recover for the land taken. A careful examination of the decision of the court in that case, however, does not support the theory in support of which it has been cited by counsel. The territory of Indiana was organized under Act Cong. May 7, 1800, 2 Stat. 58, c. 40. On 26th of March, 1804, Congress passed an act (2 Stat. 277, c. 35) providing for the survey and disposal of the public lands, and created three land districts within said territory, and by the provision of said act reserved an entire township in each land district, to be located by the Secretary of the Treasury, for the use of a seminary of learning. The district of Vincennes was organized, and the Secretary of the Treasury located therein a certain township for the use of a seminary in said district. Some two years afterwards Vincennes University was organized and incorporated. The Supreme Court of the United States held that upon the establishment of Vincennes University and its incorporation it became possessed of said township of land. The court held in that case that the reservation was in the nature of an executory devise, and no estate vested in any one at the

time of the passage of the act reserving said land, but was held in abeyance and vested in the University of Vincennes upon its organization and incorporation. The court used the following language: "There was no uncertainty in this appropriation. The township was designated and the purpose stated for which it was reserved. And there can be no doubt, from the authorities, that the right vested so soon as a capacity was given to the corporation to receive it. Prior to this it remained in the federal government. This is the settled doctrine on that subject." Applying this rule to the language of the provision in the Organic Act of the territory of Oklahoma, no estate in the school lands within the territory was vested thereunder in any one until the admission of the state into the Union, at which time the estate therein vested in the state of Oklahoma. The territory of Oklahoma was not the grantee, and no estate in the land was ever vested in it by virtue of the provisions of the Organic Act.

Minnesota Mining Co. v. National Mining Co., 11 Mich. 186, the opinion in which case was affirmed by the Supreme Court of the United States (3 Wall. 332, 18 L. Ed. 42), has also been cited by plaintiff in error as supporting its theory of the case, but a careful examination of the case fails to sustain its contention. That was an action of ejectment brought by plaintiff, who claimed under a patent from the United States, issued April 9, 1852, upon a pre-emption purchase under Act Cong. March 1, 1847, 9 Stat. 146, c. 32. The patent recited full payment made, but contained an express reservation "of any right which the state of Michigan may have" in and to the lands in section 16 mentioned in the patent under and by virtue of the provision of the first section of Act Cong. June 23, 1836, 5 Stat. 56, c. 117, which act of Congress was the act under which the northern boundary line of the state of Ohio was established, and the state of Michigan was admitted into the Union, and in which act of Congress the section of land involved in that action was reserved and granted to the state of Michigan for school purposes. The state of Michigan accepted the provisions of that act. The court did not rest its decision upon these acts and the acceptance thereof by the state of Michigan, but upon the fact that the land in controversy was expressly reserved by the provisions thereof from the operation of the act of Congress of March 1, 1847, under which plaintiff claimed title to the land.

Since the territory of Oklahoma at the time the land involved in this action was taken by the railway company had no title therein, it could not recover injury to the freehold; but subsequent to the passage of the Organic Act of the territory of Oklahoma an act of Congress was passed which provided that the school lands reserved in the territory by that and former acts of Congress might be leased

by the Governor thereof, under regulations to be prescribed by the Secretary of the Interior, for a period not exceeding three years, for the benefit of the school fund of said territory. The interest of the territory of Oklahoma in said section 16 at the time the railway company built its railroad thereon was such an interest as was given by the provision of said act and was in the nature of the interest of a tenant at will, whose term would not extend beyond the time of the admission of the state into the Union; and the measure of the plaintiff in error's damages for its interest taken by the railway company was the rental value of such land taken, and the damages, if any, to the rental value of the remaining portion of said quarter section of land not taken for the term plaintiff in error would be entitled to the use of the same, which could not extend beyond the time of the admission of the state into the Union. The trial court, upon the measure of damages which plaintiff in error might recover, gave the following instruction: "The land in controversy in this case is a portion of the northeast quarter of section 16, township 14 N., range 4 E., and is what is usually known as school lands. The title to this land is in the government of the United States, and the territory has no authority to deal with the title, or to compensation for the land itself. By act of Congress the territory is given the authority to rent this land and to use the rentals received therefrom for the support of the public schools. The land itself is reserved for the future state which may be created and embrace the land in dispute. The only interest the territory had at the time the railroad appropriated its right of way across this land or has at this time is the right of possession or user for the purpose of collecting the rentals, and this right will continue so long as Oklahoma remains a territory, and no longer. When we become a state, Congress will donate or grant these lands to the state, and the title will then pass to the state, and the disposition of the land will be subject to the state laws. How long we will yet remain a territory you will have to approximate by taking into consideration our population, wealth, improvements, and general advancement and the probable action of the Congress of the United States as shown from its past history, as well as your general knowledge of the present status of the statehood measure pending before Congress as appears from general notoriety." Counsel for the territory devote a great portion of their brief to a discussion of this instruction, and in insisting that it was error; but an examination of the record discloses that no exception was made to this instruction in the court below, and this court will not consider whether a given instruction is erroneous when no exception was saved to the giving thereof at the time of the trial. *Sparks v. Territory*, 16 Okl. 127, 83 Pac. 712; *Metz et al. v. Winne et al.*, 15

Okl. 1, 79 Pac. 223; Glasser et al. v. Glasser et al., 13 Okl. 389, 74 Pac. 944.

It is the order of this court that the judgment of the lower court be affirmed.

WILLIAMS, C. J., and DUNN, TURNER, and KANE, JJ., concurring.

(20 Okl. 672)

GRANT et al. v. MILAM.

(Supreme Court of Oklahoma. April 13, 1908.)

1. FRAUDS, STATUTE OF—RECEIPT OF GOODS.
Under the fourth subdivision of section 780, Wilson's Rev. & Ann. St. Okl. 1903, a contract for the sale and purchase of a quantity of corn of a value not less than \$50, of which no note or memorandum is made in writing, is not enforceable; and the vendee cannot be required to pay for any of such corn delivered, except such as he accepts or receives.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 141.]

2. APPEAL—REVIEW—EVIDENCE—CONFLICT.

Where there is a direct conflict in the evidence presented, and the trial court fairly submits the issues raised by the pleadings and the theories advanced by the parties in its instructions to the jury, and there is any competent evidence to sustain the verdict, appellate courts will not weigh the same and reverse the judgment, as the jury is the proper party to determine such disputed facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

3. TRIAL — INSTRUCTIONS — CONSTRUED TOGETHER.

It is not required that the entire law of the case shall be stated in a single instruction, and it is, therefore, not improper to state the law, as applicable to particular questions, or particular parts of the case in separate instructions, and if there is no conflict in the law as stated in different instructions, and all the instructions considered as a series present the law applicable to the case fully and accurately, it is sufficient.

4. SALE — ACTION FOR PRICE — PLEADINGS — EVIDENCE.

Where in a case the petition alleges the sale, purchase, delivery, and receipt of a quantity of corn, and the answer is a general denial, it is not error to exclude evidence of the inferior quality of some of the corn delivered and received.

(Syllabus by the Court.)

Error from District Court, Pawnee County; Bayard T. Halner, Judge.

Action by J. H. Milam against T. M. Grant and Frank Hudson. Judgment for plaintiff, and defendants bring error. Affirmed.

November 24, 1903, J. H. Milam, who will hereafter be denominated "plaintiff," filed his petition in the district court of Pawnee county, Okl. T., against T. M. Grant and Frank Hudson, individually and as partners in which it was alleged that in the month of July, 1903, they entered into a verbal contract whereby plaintiff agreed to sell, and defendants agreed to buy, all of the corn which the plaintiff then owned, which by the terms of the said contract and agreement was to be delivered by plaintiff on the cars at Skedee; that defendants agreed to pay a stipulated price for the said corn; that plaintiff sold and delivered, and the defendants received of plaintiff, the corn; that the total value

of the corn delivered by plaintiff and received by defendants was \$4,749.63, on which there was a balance due of \$1,911.48, for which, with his costs, plaintiff prayed judgment. To this petition defendants filed the following answer: "Answering plaintiff's petition herein, these defendants deny each and every allegation in said petition contained." Upon the issues thus framed, the cause was submitted to a jury, which found in favor of plaintiff in accordance with the prayer of his petition. A motion for new trial being filed and overruled, the case is before us on petition in error.

Biddison & Eagleton, for plaintiffs in error. Wrightsman & Diggs, for defendant in error.

DUNN, J. (after stating the facts as above). The plaintiff in this case pleads that he sold and delivered, and that defendants accepted from him under a parol contract, a certain quantity of corn. The defendants filed, as answer, simply a general denial. These pleadings made the issue which was submitted to a jury. Evidence was offered by both parties, and is conflicting in the extreme.

The plaintiff and his witnesses testified that he was a farmer living near the town of Skedee, Okl. T., and having a quantity of corn, something in excess of 10,000 bushels, which he desired to sell, he met defendant Grant in the month of July, 1903, in the city of Pawnee, and sold him 10,000 bushels or more. That he "was to shell the corn and put it on the track at Skedee." That he delivered all the corn as contracted for, putting it into the cars furnished him by the defendants or by their agent, located at Skedee, with the exception of one car load, which, owing to the lack of a car at the shipping point at the time the corn was loaded on the wagons ready to be placed in the car, was hauled to Pawnee and delivered to and received by the defendants at that place. That all the corn shipped was loaded into cars billed in the name of defendants by their agent at Skedee, two of them to Pawnee, one to Guthrie, and three to Purcell, to parties whose names were furnished plaintiff by the defendants, all of which plaintiff testified was in accordance with their agreement. That on one occasion the defendant Grant was at Skedee while the corn was being loaded, and two witnesses testify that he examined the corn and made the remark, "that he thought the corn would lose him some money when he bought it, but he believed that it would save him a dollar or two now, or save him something." Plaintiff claimed that all of the corn sold, involved in this suit, was sold by him to the defendants; that he sold none of it to any one else, and that defendants received it. Defendants, on the other hand, show by their evidence that they did not purchase the corn from plaintiff, but simply agreed to find him buyers for his corn;

that they were not responsible for its having been billed out of Skedee in their names; that their agent at Skedee had no authority to receive any of this corn for them; that they aided plaintiff in getting cars and placing this corn merely as an act of accommodation and without charge; that they bought and paid him for some of this corn, using it themselves, but that it was on a separate and distinct contract from the one pleaded by plaintiff; that they paid him for all they received, and did not owe him anything on the three cars shipped to Purcell, or any balance created otherwise.

Our statute provides (Wilson's Rev. & Ann. St. 1903, § 780) that: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent: * * * An agreement for the sale of goods, * * * at a price not less than fifty dollars, unless the buyer accept or receive part of such goods and chattels. * * *" The contract being, then, within the statute of frauds, could not have been enforced by the plaintiff or the defendant, nor could any damages or obligations have been predicated upon its breach by either of the parties unless a part of the goods were delivered by the plaintiff and received by the defendant. The question raised in the case at bar was whether or not, conceding the goods to have been sold and delivered by the plaintiff, they were received by the defendant. For a mere delivery by plaintiff will not suffice to take the case out of the statute; there must be a receipt by the vendee. *Jamison v. Simon*, 68 Cal. 17, 8 Pac. 502; *Stone v. Browning*, 68 N. Y. 508; *Shepherd v. Pressey*, 32 N. H. 49; *Dinnie v. Johnson*, 8 N. D. 153, 77 N. W. 612; *Jones v. Mechanics' Bank of Baltimore*, 29 Md. 287, 96 Am. Dec. 533. As is shown above, in a recitation of the proof offered by the parties, there was a direct conflict in the evidence submitted to the jury on this question, and in cases of this character the law is well settled that where there is a conflict in the evidence, and the trial court fairly submits the issues raised by the pleadings, and the theories presented by the evidence in its instructions to the jury, if there is any competent evidence to support the verdict, appellate courts will not weigh the evidence and reverse the judgment, for that the verdict in the estimation of such court may not be in accordance with the weight of the evidence nor such as the court itself would have rendered. For, as was said by Judge Caldwell in the case of *Gulf, C. & S. F. Ry. Co. v. Ellis*, 54 Fed. 481, 4 C. C. A. 454: "In common-law actions tried to a jury this court cannot review or retry the facts. If there is any evidence, direct or circumstantial, fairly tending to support the verdict, it must stand. Every presumption is in its favor, and all doubts must be resolved in its favor. This court will not weigh nor balance the evidence.

* * * It was because the people thought the judges were poor judges of the facts that they committed their decision to a jury. Undoubtedly juries sometimes err in deciding the facts, but their errors are trifling in number and extent compared with the errors of the judges in deciding the law. The numerous appellate courts of the country are engaged principally in correcting their own and the errors of other courts on questions of law. The mistakes of juries take up very little space, comparatively, in the enormous volume of law reports with which the country is being deluged. In their deliberations upon the facts of the case they are at liberty to exercise their common sense and practical experience and knowledge of human affairs, untrammelled by the excessive subtilty, over-refinement, and the hairsplitting of the schoolmen which have crept into the administration of the law by the courts to such an extent as to sometimes bring it into reproach. It is not by such modes of reasoning that the soundness of a verdict of a jury is to be tested. It is not, therefore, any ground for disturbing the verdict of a jury that the court would not have rendered such a verdict. It must appear that all reasonable men would agree that it was not supported by the evidence, and should be annulled. The constitutional right of the citizen to have the facts of his case tried by a jury must not be encroached upon by the courts under any pretext." In the case at bar, the defendants and their witnesses testified fully and denied specifically the evidence given to support the contract alleged in plaintiff's petition; denied that they bought the corn from the plaintiff, and that they ever received it under the contract pleaded. This having been submitted to the jury, and it with all the parties, witnesses, and evidence before it having found in favor of the plaintiff, and this court not being able to say that there is no "evidence direct or circumstantial fairly tending to support the verdict, it must stand."

The question now arises, were the theories of the parties fairly submitted to the jury by the instructions? Defendants in their brief insist that they were not, and quote instruction No. 5, and contend that under it the jury was authorized to find in favor of plaintiff and against the defendant on the sole ground that if the jury found that the plaintiff "did deliver the corn as therein alleged to the defendants, or the defendants' duly authorized agents, then the plaintiff would be entitled to recover," and argue that under this instruction the jury were authorized to find against the defendants, without reference to the question of whether the defendant ever received any of the corn or not, and that without such receipt the contract would be invalid under the statute of frauds. Instruction No. 5 is as follows: "You are instructed that if you find from the evidence in this case that on the ——— day of July, 1903, the plaintiff and defendants entered

into a verbal contract, as alleged in the plaintiff's petition, for the sale and purchase of a certain quantity of corn, as therein stipulated, upon the delivery of said corn, and that pursuant to said agreement the said plaintiff complied with the terms and conditions of said contract, and did deliver the corn as therein alleged to the defendants, or the defendants' duly authorized agents, then the plaintiff would be entitled to recover for such sum as still remains due and unpaid upon said contract." It will be noticed from the reading of it that it deals almost entirely with the duty of the plaintiff in this case; that is, that it was the plaintiff's duty, under his contract, to deliver the corn to the defendants. It does not undertake to specify any duty on the part of the defendants. This duty, however, was dealt with completely, and the claim and contention of defendants covered in instructions Nos. 6 and 8, which are as follows: "If you find from the evidence that the corn was delivered to the defendants' agent, and received by the defendants' agent at Skedee, and that the same was put on the cars at that point, and the same was received by the defendants, as alleged in the plaintiff's petition, then that would constitute a sufficient delivery, unless you find from the evidence that there was no contract between the parties to purchase the corn in question, but that the defendants were merely doing this as an accommodation for the plaintiff, and not for the use and benefit of the defendants, but merely acting as the agents of the plaintiff and performing these things as a matter purely of accommodation." "If you find from the evidence that the defendants did not agree to take any stipulated amount or quantity of corn, but the question was left open as to the quantity of the corn that was to be sold and delivered—that is, if there was no stipulated quantity agreed upon—then, of course, the defendants would be only liable for such quantity of corn or grain as they actually received and as was delivered to them. They would not be bound to receive more corn than they desired to, if there was no fixed and determinate contract as to the quantity of the corn to be received. In this case the plaintiff claims that he was to deliver all of his corn; that is over 10,000 bushels. If you find from the evidence that that was the agreement, that he was to deliver 10,000 bushels or more, and that he actually did deliver that quantity of corn to the defendants at the price stipulated in the plaintiff's petition, and that the full amount has not been paid, as alleged in the plaintiff's petition, then the plaintiff would be entitled to recover whatever balance is still due and owing upon the contract." These instructions so explain and so modify the fifth instruction that in our judgment the jury could not have been misled by it.

Each separate instruction in a case need not embody every fact or element essential to sustain or defeat an action. Each separate

instruction need not cover the entire case, provided there is no conflict in the law as stated, and the different instructions considered as a whole fairly present the law of the case. *A., T. & S. F. Ry. Co. v. Marks*, 11 Okl. 82, 65 Pac. 996; 11 Ency. Law & Proc. 288 et seq.; *Blashfield's Instructions to Juries*, §§ 61 and 385; *Chicago & E. R. R. Co. v. Hines*, Adm'x, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; *Wellman v. Oregon Short Line Ry. Co.*, 21 Or. 530, 28 Pac. 625. Mr. Blashfield in his work on *Instructions to Juries*, § 61, speaks as follows: "It is not necessary that every instruction should have embodied in it every fact of element essential to sustain the action, or that it should negative matters of defense. A single instruction need not cover the entire case. 'It is not required that the entire law of the case shall be stated in a single instruction, and it is, therefore, not improper to state the law as applicable to particular questions, or particular parts of the case, in separate instructions; and if there is no conflict in the law as stated in different instructions, and all the instructions, considered as a series, present the law applicable to the case fully and accurately, it is sufficient.'" Also to the same effect is section 385: "Instructions are to be considered together, to the end that they may be properly understood; and if, when so construed, and as a whole, they fairly state the law applicable to the evidence, there is no available error in giving them, although detached sentences, or separate charges, considered alone, may be erroneous or misleading." This rule is supported by many authorities, among which may be noted *Wellman v. Oregon Short Line Ry. Co.*, supra. The court in the syllabus holds as follows: "In determining whether there is error in the instructions to the jury, the whole charge will be considered together; and if it appear that the case has been placed fully, fairly, and properly before the jury by the entire charge the judgment will not be reversed, although it may appear that some one instruction taken by itself may not be entirely correct."

Defendants call attention to the sixth and eighth request made on their part, and except to a refusal of the court in giving them; but a careful reading of the instructions requested, and of the instructions given, taken in conjunction with the evidence, convinces us that while those given present the propositions with less detail, still, it seems to us, just as fully and as fairly. Such is the holding in the case of *A., T. & S. F. Ry. Co. v. Marks*, supra: "The refusal of the court to give an instruction which properly states the law is not reversible error if practically the same proposition of law is stated by the court to the jury in other instructions given, and if the charge of the court to the jury, as a whole, clearly states the law."

There is evidence to show that the plaintiff shipped three cars of corn to Purcell, and as

he states, "to wind up a car," he put in practically a half car load of corn which he procured elsewhere. Exception is taken by defendants to being charged with this extra corn as not within the contract pleaded on which plaintiff relied. The court did not instruct the jury specifically in reference to it, and defendants made no request for instructions in reference to it, but the instructions, as will be observed, fully cover the question of the receipt of the corn shipped by plaintiff and received by defendants in order to charge them with the liability, and, as the jury found on the evidence that defendants received this corn, there is no error in defendants being required to pay for it.

Certain depositions were offered in evidence to show that some of the corn alleged to have been sold under the contract pleaded was of an inferior quality, but, as the quality of the corn was not in the issues, the exclusion of the same was not error. The plaintiff had no notice by the answer of defendants that any reliance would be placed upon the corn not coming to grade, and, in the absence of such allegation in the answer as would make such evidence relevant, it was not error to exclude it.

There appearing no error in the record, the judgment of the lower court is affirmed. All the Justices concurring.

TINKELPAUGH-KIMMEL HARDWARE CO. v. MINNEAPOLIS THRESH- ING MACH. CO.

(Supreme Court of Oklahoma. April 20, 1908.)
FRAUDS, STATUTE OF—SALES—ACCEPTANCE.

In an action to recover \$220, the contract price of a Sattley Stacker, the petition, which states that the same on parol order of defendant was shipped by rail by plaintiff's principal to a third person at a certain place and there delivered as per order and direction and for and on behalf of defendant, and which had been ordered through and paid for by plaintiff, states a contract void under the statute of frauds (Wilson's Rev. & Ann. St. Okl. 1903, § 780), in that it fails to state that the stacker was accepted or received by the purchaser, and a demurrer thereto was properly sustained.

(Syllabus by the Court.)

Error from District Court, Canadian County; C. F. Irwin, Judge.

Action by the Tinkelpaugh-Kimmel Hardware Company against the Minneapolis Threshing Machine Company. Judgment for defendant, and plaintiff brings error. Affirmed.

On December 9, 1904, the Tinkelpaugh-Kimmel Company, plaintiff in error, filed its amended petition in the district court of Canadian county against the Minneapolis Threshing Machine Company, defendant in error, which, omitting the caption, is as follows: "Comes now the said plaintiff, and for cause of action against the said defendant alleges that the said Tinkelpaugh-Kimmel Company is a corporation organized and

existing under and by virtue of the laws of Oklahoma Territory. That the defendant, Minneapolis Threshing Machine Company, is a corporation, as plaintiff is informed and believes, organized and existing under and by virtue of the laws of the state of Minnesota. That heretofore, and on the 17th day of June, 1903, the said defendant being engaged in business, and having a place of business in the city of El Reno, its then manager in said place of business desiring to purchase a piece of machinery known as the 'Sattley Stacker,' called up by telephone the said plaintiff company, by its manager, at its place of business in the city of El Reno, and asked the said plaintiff company if it was the local agent for the said Sattley Stacker. That at the said time the said plaintiff was the exclusive agent of said Sattley Stacker in said city of El Reno, and so informed the defendant company. Thereupon the said manager of the said defendant company telephoned the said plaintiff company and asked him how much said plaintiff company would charge the said defendant company for a Sattley Stacker. Said plaintiff company then informed said defendant company that it, plaintiff company, would charge defendant company two hundred and twenty dollars (\$220), to which proposition said defendant company, by its manager, over the telephone, then assented, and thereupon instructed said plaintiff company to have said machinery, to wit, the said Sattley Stacker, shipped to Frank Binner, at Edmond, Okl. And thereupon the said plaintiff by telegraph ordered from the Sattley Manufacturing Company, at Springfield, Ill., said Sattley Stacker shipped to Frank Binner, at Edmond, Okl. T., for and on behalf of the said defendant company. The said Sattley Stacker was shipped to the said Frank Binner at Edmond, Okl. T., by rail, and was delivered at said Edmond, Okl. T., as per order and direction of the said defendant, Minneapolis Threshing Machine Company. That the said plaintiff company has paid the said Sattley Manufacturing Company therefor; that the price the said Minneapolis Threshing Machine Company promised to pay the said plaintiff therefor was two hundred twenty dollars (\$220). That by reason of said bargain, purchase and delivery, of the said Sattley Stacker by the said defendant, the Minneapolis Threshing Machine Company, from the said plaintiff, Tinkelpaugh-Kimmel Company, said defendant became indebted to the said plaintiff in the sum of two hundred twenty dollars (\$220). That said defendant has failed, refused, and neglected to pay the said sum, although often demanded, and yet neglects and refuses to pay therefor. Wherefore, etc." On December 21, 1904, defendant filed a general demurrer thereto, which was by the court sustained, and upon plaintiff electing to stand upon his pleadings and refusing to plead further, judgment was rendered in favor of de-

fendant, from which plaintiff appealed to this court.

Blake, Blake & Low, for plaintiff in error.
W. L. Buxter, for defendant in error.

TURNER, J. (after stating the facts as above). From the face of this pleading it appears that the contract therein set forth and sought to be recovered on was in parol and void under our statute of frauds, which reads as follows: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent. * * * An agreement for the sale of goods, * * * at a price not less than fifty dollars, unless the buyer accept or receive part of such goods and chattels. * * *" Wilson's Rev. & Ann. St. § 780.

It, therefore, only remains for us to determine whether it alleges sufficient matter to void the bar. In support of the contention that it does, plaintiff contends that the allegation, in substance, that the stacker was shipped on defendant's order to Binner at Edmond, Okla., for and on behalf of defendant, and by the carrier delivered at that place as per order and direction of defendant, is sufficient to entitle plaintiff to recover, contending that the delivery of the goods to the carrier was delivery to the purchaser and sufficient to pass the title to him. This may be true where the contract is valid as not within the statute, but, where it is invalid because of that fact, a very different rule obtains. All the cases agree that in such case delivery of itself is not sufficient to take the case out of the statute. In *Caulkins et al. v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461, the court said: "The instructions to the jury as to the legal effect of the delivery of the wine at Blood's Station in conformity with the terms of the verbal contract of sale were clearly erroneous. No act of the vendor alone, in performance of a contract of sale void by the statute of frauds, can give validity to such a contract. Where a valid contract of sale is made in writing, a delivery pursuant to such contract at the place agreed upon for delivery, or a shipment of the goods in conformity with the terms of the contract, will pass the title to the vendee without any receipt or acceptance of the goods by him. But if the contract is oral, and no part of the price is paid by the vendee, there must be not only a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee to pass the title or make the vendee liable for the price." In *Simmons Hardware Co. v. Mullen, Sheriff, etc.*, 33 Minn. 196, 22 N. W. 295, the court said: "The authorities are substantially uniform that delivery by the seller to a carrier selected by him, for the purpose of transportation, is not of itself an acceptance to take the case out of the operation of the statute. *Norman v. Phillips*, 14 Mees. & W.

277; *Hanson v. Armitage*, 5 Barn. & Ald. 559; *Maxwell v. Brown*, 39 Me. 98, 63 Am. Dec. 605; *Johnson v. Cuttle*, 105 Mass. 447, 7 Am. Rep. 545; *Grimes v. Van Vechten*, 20 Mich. 413; *Allard v. Greasert*, 61 N. Y. 1; *Kelwert v. Meyer*, 62 Ind. 587, 30 Am. Rep. 206; *Taylor v. Mueller*, 30 Minn. 343, 15 N. W. 413, 44 Am. Rep. 199." In *Johnson v. Cuttle*, 105 Mass. 447, 7 Am. Rep. 545, the court said: "Mere delivery is not sufficient; there must be unequivocal proof of an acceptance and receipt by him. Such acceptance and receipt may indeed be through an authorized agent. But a common carrier (whether selected by the seller or by the buyer), to whom the goods are intrusted without express instructions to do anything but to carry and deliver them to the buyer, is no more than an agent to carry and deliver the goods, and has no implied authority to do the acts required to constitute an acceptance and receipt on the part of the buyer and to take the case out of the statute of frauds. *Snow v. Warner*, 10 Metc. 132, 43 Am. Dec. 417; *Frostburg Mining Co. v. New England Glass Co.*, 9 Cush. 115; *Boardman v. Spooner*, 13 Allen, 353, 90 Am. Dec. 196; *Quintard v. Bacon*, 99 Mass. 185; *Norman v. Phillips*, 14 M. & W. 277; *Hicholson v. Bower*, 1 El. & El. 172. The steamboat company having no authority to receive and accept the goods so as to bind the buyer, and there being no evidence that the buyer, in person or by any authorized agent, ever had actual possession of the goods, or opportunity to see them or ascertain whether they conformed to his order, or ever exercised any control over them by sale or otherwise, or even received any bill of lading of the goods, the case is within the statute of frauds, and the action cannot be maintained." But we do not consider this an open question in this jurisdiction. In *T. M. Grant et al. v. J. H. Milam* (decided by this court at the present term) 95 Pac. 424, the court, speaking through Dunn, J., says: "The contract being, then, within the statute of frauds, could not have been enforced by the plaintiff or the defendant, nor could any damages or obligations have been predicated upon its breach by either of the parties unless a part of the goods were delivered by the plaintiff and received by the defendant. The question raised in the case at bar was whether or not, conceding the goods to have been sold and delivered by the plaintiff, they were not received by the defendant. For a mere delivery by plaintiff will not suffice to take the case out of the statute; there must be a receipt by the vendee. *Jamison v. Simon*, 68 Cal. 17, 8 Pac. 502; *Stone v. Browning*, 68 N. Y. 598; *Shepherd v. Pressey*, 32 N. H. 49; *Dinnle v. Johnson*, 8 N. D. 153, 77 N. W. 612; *Jones v. Mechanics' Bank of Baltimore*, 29 Md. 287, 96 Am. Dec. 533.

It follows that, as the petition fails to state that the stacker was either received or accepted by the defendant, it was fatally de-

fective, and the action of the trial court in sustaining the demurrer must be affirmed. It is so ordered.

REGENTS OF UNIVERSITY OF OKLAHOMA v. BOARD OF EDUCATION.

(Supreme Court of Oklahoma. April 14, 1908.)

1. SCHOOLS AND SCHOOL DISTRICTS—"PUBLIC SCHOOLS."

The term "public schools," as used in section 5, art. 13, of the Constitution of Oklahoma, does not include in its meaning the University of Oklahoma.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5821, 5822.]

2. SAME.

Said section 5, art. 13, of the Constitution, providing that the supervision of instruction in the public schools shall be vested in a board of education, does not vest the Board of Education of the State of Oklahoma with supervision of the University of Oklahoma.

3. SAME—CONSTITUTIONAL LAW.

There is no repugnancy between section 5, art. 13, of the Constitution, and article 17, c. 77, of Wilson's Revised and Annotated Statutes of Oklahoma for 1903 entitled "An act to establish and locate the University of Oklahoma."

4. COLLEGES AND UNIVERSITIES—GOVERNMENT.

Article 17, c. 77, Wilson's Rev. & Ann. St. Okl. 1903, is not locally inapplicable, and was, by section 2 of the Schedule to the Constitution, extended to and put in force in the state of Oklahoma until it expires by its own limitation or is altered or repealed by law.

(Syllabus by the Court.)

Petition by the Regents of the University of Oklahoma for a writ of prohibition against the Board of Education. Application denied.

Ledbetter & Moore, for plaintiff. Geo. A. Henshaw, for defendant.

KANE, J. This is an original proceeding by petition for a writ of prohibition, instituted by the Regents of the University of Oklahoma against the Board of Education of the State of Oklahoma, prohibiting said Board of Education from exercising any of the powers and duties imposed on the Regents of the University of Oklahoma by the Constitution and laws of the state, and from interfering with the government and control of the University of Oklahoma, and from exercising any control over said University or any department thereof, or any of the funds or instrumentalities thereof. And said plaintiff further prays for all such further and additional relief or orders and decrees as will fully and completely protect the plaintiff herein in the enjoyment of all the powers and duties conferred on it by law, and prohibiting the defendant from usurping any of such powers and duties.

The contention of the Regents is that among the laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which were extended to and remained in force in said state, are the provisions of article 17, c. 77, of Wilson's Revised and Annotated Statutes of Oklahoma for 1903. That it is provided by said article

17, c. 77, supra, that the government of the University of Oklahoma should vest in a Board of Regents, and that the plaintiff herein is the Regents of the University of Oklahoma, created by and referred to in said article and chapter of the Oklahoma Statutes, and that all of the provisions of said article and chapter are now the law of the state of Oklahoma, and no part of the provisions in said article and chapter are repugnant to any provisions of the Constitution of the state of Oklahoma, nor are any of the provisions in said article and chapter locally inapplicable. That the Regents of the University of Oklahoma, as a body corporate, by the statutes aforesaid, are authorized to exercise all the powers necessary or convenient for the proper care and maintenance of said University, and to have the custody of all books, records, buildings, and all the other property of the University. That it is further provided by said statutes that the plaintiff herein, the Regents of the University of Oklahoma, shall have the authority to elect a president and secretary of the Board of Regents, charged with the performance of such duties as may be prescribed by the Regents, and that such secretary shall be superintendent of buildings and grounds of the University, and that the Regents shall have authority to enact laws for the government of the University, and of all its branches, and to elect a president, and the requisite number of professors, officers, and employees, and to fix the salary and the term of office of each of them, and to determine the moral and educational qualifications of the applicants for admission to the various courses of instruction of said University. That the Regents are authorized to prescribe rules and regulations for the maintenance and control of the libraries, cabinets, museums, laboratories, and other property of the University, and of the several departments thereof, and for the care and preservation of the same, and to expend such portions of the University fund, as they deem expedient for the erection of suitable buildings and the purchase of appropriate cabinets and additions thereto. That the Regents are further authorized and empowered to draw warrants upon any University fund in the hands of the Treasurer of this state, and it is made the duty of the Treasurer of the state of Oklahoma to pay such funds on warrants drawn by the Regents, and all warrants drawn on the University fund shall be signed by the president of the Board of Regents. And the Regents are authorized and empowered to receive all grants, additions, bequests of money, or other property for the use and benefit of said University. It is alleged further that they are authorized and empowered to appoint a superintendent of buildings of said University other than the secretary of said board, and he shall have personal control and supervision, under the direction of the Regents, of all contracts for the construction of buildings

at said University. Then follows an allegation to the effect that the Regents, unless prevented by the wrongful acts and usurpations of the defendant, the Board of Education, and the members thereof, will continue to perform all the duties and exercise all the powers conferred on them by the provisions of article 17, c. 77, supra. They further allege that the defendant, the Board of Education, and the members thereof, acting upon advice of the Honorable Charles West, Attorney General of the state of Oklahoma, has usurped and assumed to exercise an important function, power, and duty of the plaintiff herein. After setting out in detail the acts and usurpations complained of, it is further alleged that unless prohibited by this honorable court the defendant herein will usurp and assume to exercise the powers and duties belonging to the Regents as prescribed by article 17, c. 77, supra, and wrongfully and unlawfully prevent them from exercising and performing the duties conferred on them by the provisions of said article 17 of chapter 77.

Upon filing the petition a citation to show cause was served upon the defendant, the Board of Education, who thereupon filed its answer, wherein it admits that the defendant is the Board of Education of the State of Oklahoma, and that the plaintiff is the duly organized Regents of the University of Oklahoma, a body corporate. It further admits that it was advised by the Honorable Charles West, Attorney General, that it had the power by virtue of section 5, art. 13, of the Constitution, to exercise such reasonable supervision over the public schools of the state of Oklahoma as may in the judgment of the board be to the best interest of the public. That section 5, art. 13, supra, provides, that: "The supervision of instruction in the public schools shall be vested in a Board of Education, whose powers and duties shall be prescribed by law. The Superintendent of Public Instruction shall be president of the board. Until otherwise provided by law, the Governor, Secretary of State, and Attorney General shall be ex-officio members, and with the superintendent, compose said Board of Education." The defendant further alleges in its answer that in its opinion the above section of the Constitution requires the Board of Education to exercise such reasonable supervision of the public schools of the state of Oklahoma as may be in its judgment for the best interest of the public. That the words "public schools" mean all public schools that are entirely maintained by public funds. That said board was so advised as above set forth by the Attorney General. The defendant alleges that it has not attempted to exercise further supervision or control of the University of Oklahoma, of which the plaintiff complains, other than to elect a president thereto. That by electing said president it has exercised a reasonable supervision and control as provided by said Constitution.

The defendant then prays that the court may construe the clause, "supervision of instruction of the public schools," and designate what is meant by "public schools," and what is a reasonable supervision to be exercised by the Board of Education created by the Constitution, to the end that the petition of plaintiff may be dismissed and the defendant properly instructed, by the exercise of the supervisory control given the Supreme Court by the Constitution over all inferior courts, commissions, and boards of the state of Oklahoma.

It is obvious from the above excerpts from the pleadings that the Board of Education concedes that article 17, c. 77, Wilson's Rev. & Ann. St. Okl. 1903, would confer all the power upon the Regents of the University that they claim it does, if it were not for its alleged repugnancy to section 5, art. 13, of the Constitution. It will therefore be necessary to apply the established rules of statutory interpretation to these two laws in order to determine if article 17, c. 77, Wilson's Rev. & Ann. St. Okl. 1903, is repugnant to the constitutional provisions above quoted, or so locally inapplicable that it was not extended to and put in force in the state of Oklahoma by section 2 of the schedule. Section 2 of the schedule to the Constitution provides that: "All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law." There is no contention, nor is there room for any, that article 17, c. 77, supra, is locally inapplicable, so if it is not in force in the state of Oklahoma it must be by reason of its repugnancy to section 5, art. 13, of the Constitution. As is well said by learned counsel for plaintiff in their brief: "The first paragraph of this section, that 'the supervision of instruction in the public schools shall be vested in a Board of Education whose powers and duties shall be prescribed by law,' makes it doubtful whether this board, in advance of legislation, possesses any power whatever. It is a new board, having no existence under the territorial statutes. Its name, and the fact that it is given supervision of instruction in the 'public schools,' may raise the presumption that it succeeds to the powers of the old Board of Education, but clearly no other powers are conferred upon it. If this is true, then there is no repugnancy between article 17, c. 77, of the Oklahoma Statutes, and section 5, art. 13, of the Constitution. They relate to entirely different subjects, the one to the University, the other to the public or common schools of the state. Every provision of article 17, c. 77, may be executed by the Regents of the University, and the University governed in all of its

branches and details without any conflict with any duty of the Board of Education."

But we cannot agree with the learned counsel for the defendant in his contention that the term "public schools," as used in section 5, art. 13, of the Constitution, means all schools that are entirely supported and maintained by public funds, including the University of Oklahoma. The term "public schools" has acquired a well-defined, popular signification in Oklahoma as well as elsewhere, and unless it is apparent from the nature and manner of its use, or it otherwise appears that it was intended to have another meaning, the inference is that it was used in its known and defined meaning and sense. The Century Digest, we think, gives the well-known, popular meaning of the term. It says: "Public schools, in the United States, means the same as common schools."

In the case of *Elberry v. Seay*, 83 Ala. 614, 3 South. 804, Mr. Justice Clopton gives the term the same meaning where it is used in the Alabama Constitution under somewhat the same circumstances as it is used in Oklahoma's Constitution. Section 1 of article 13 of the Alabama Constitution for 1875 provides that: "The General Assembly shall establish, organize and maintain a system of public schools throughout the state, for the equal benefit of the children thereof, between the ages of seven and twenty-one years; but separate schools shall be provided for the children of citizens of African descent." Under the above constitutional provision the General Assembly of the state sought to establish the Alabama University for Colored People and provide for its support and government. The question was raised that the act of the General Assembly was in conflict with section 1 of article 13 of the Constitution, *supra*, and therefore void. Mr. Justice Clopton in the Alabama case, *supra*, discussing this feature of the case, says: "The primary object of inquiry is the meaning and intent of the framers of the Constitution, and of the people in adopting it, as manifested by the terms employed, when considered in connection with the prior and existing state of things. When words and phrases are employed which have acquired a defined popular signification, the manifest inference is that they are used in their known and defined meaning and sense, no intention being apparent, from the nature and manner of use or otherwise, to attach any other signification." After a discussion of the Alabama public school system, Mr. Justice Clopton further says: "Controlled by the conservative principle that the diffusion of knowledge, at least elementary, is essential to the preservation of free government, and, as conducive to this end, the extension of the opportunities and advantages of education through the various parts of the state, the convention declared and incorporated in the organic law that a system of public schools shall be es-

tablished, organized, and maintained; but, for the first time in the state Constitution, specially designated its character, extent, and purposes. The constitutional system of common schools must extend throughout the state, and must afford equal benefit to all the children thereof, within the specified years. The General Assembly is without authority to establish a system of common schools which does not possess, in its entirety, those distinguishing features. It is more than a presumption that the term 'public schools' was employed in the Constitution in its popular meaning and sense, the system of public schools to which the people of the state had been accustomed, and as they would understand it, in adopting the Constitution."

In the case of *Jenkins v. Andover*, 103 Mass. 94, the decision turned on the definition of the term "public schools" as used in the eighteenth article of the amendment of the Constitution of the state of Massachusetts which is as follows: "All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such money shall never be appropriated to any religious sect for the maintenance exclusively of its own school." Another provision of the Constitution provided for the support of "public schools and grammar schools" in towns, etc. Construing the meaning of these terms, the Supreme Court of that state said: "'Public schools,' as those words are used in the Constitution and laws of Massachusetts, are not limited to schools of the lowest grade. The addition of 'grammar schools' in the article of the Constitution just quoted is rather by way of specifying one kind of public schools than by way of contradistinction. In the general laws of the commonwealth, for years before the adoption of the eighteenth amendment of the Constitution, the words 'public schools' were used as including all schools, from those lower than grammar schools to those commonly known as high schools, established and maintained in the several cities and towns as part of the general system of popular education. All these are included under the head of 'public schools' in the twenty-third chapter of the Revised Statutes. The words 'public schools' are synonymous with 'common schools' in the broadest sense, as used in this constitutional amendment, and in the statutes concerning the Board of Education and the distributions of the school fund."

That the term is not a local one, having one meaning in one state and another meaning in another, is quite apparent from the popular

signification of the term in the widely separated states of Alabama and Massachusetts. But if any stronger proof of the general popular meaning attached to the term throughout the United States is necessary, it may be found in section 7 of the Oklahoma enabling act, June 16, 1906, c. 3335, 34 Stat. 272, which provides: "There is hereby appropriated, out of any money in the treasury not otherwise appropriated, the sum of five million dollars for the use and benefit of the common schools of said state in lieu of sections sixteen and thirty-six, and other lands of the Indian Territory. Said appropriation shall be paid by the Treasurer of the United States at such time and to such person or persons as may be authorized by said state to receive the same under laws to be enacted by said state, and until said state shall enact such laws said appropriation shall not be paid, but said state shall be allowed interest thereon at the rate of three per centum per annum, which shall be paid to said state for the use and benefit of its public schools. Said appropriation of five million dollars shall be held and invested by said state, in trust, for the use and benefit of said schools, and the interest thereon shall be used exclusively in the support and maintenance of said schools." There can be no possible doubt but that the terms "common schools" and "public schools," as used in the above quotation, were intended to have the same signification, and using the terms interchangeably carries no sense of incongruity to the popular mind.

We are willing to agree with the learned Attorney General, in his letter to the Governor, that: "Oklahoma has reached the highest point of development as compared to any other state. There is a greater school fund, a more elaborate preparation, a larger opportunity, in this state. Free education is offered to all residents of the state, and a child may take its choice after it has completed its course in the graded schools or high school. It may go to the University Preparatory School, or, when it is qualified, to a Normal School, Agricultural College, or the University." But we do not believe that the term "public schools" has any different popular meaning or signification in this state than it has in the states of Alabama and Massachusetts or in the Congress of the United States, whose membership is made up from all the states of the Union.

We do not mean to lay down as a rule to which there is no exception that the terms "public schools" and "common schools" are

always interchangeable terms. There may be circumstances under which the term "public schools" might be conceived to include the University or other institutions of higher learning in the state. We believe, however, that the correct rule is the one laid down in the Alabama case, *supra*, that: "When words and phrases are employed which have acquired a defined popular signification, the manifest inference is that they are used in their known and defined meaning and sense, no intention being apparent, from the nature and manner of use or otherwise, to attach any other signification." There is nothing apparent from the nature and manner of the use of the term "public schools" as it appears in section 5 of article 13 to indicate that the constitutional convention, or the people when they adopted their Constitution, intended to attach to it any other signification than its well-known, popular one. We are, therefore, irresistibly led, by both reason and authority, to the conclusion that the term "public schools," as used in section 5, art. 13, of the Constitution of Oklahoma, does not include in its meaning the University of Oklahoma; that said section 5, art. 13, of the Constitution, providing that the supervision of instruction in the public schools shall be vested in a Board of Education, does not vest the Board of Education of the State of Oklahoma with supervision of the University of Oklahoma; that there is no repugnancy between section 5, art. 13, of the Constitution, and article 17, c. 77, of Wilson's Rev. & Ann. St. Okl. 1903, entitled "An act to establish and locate the University of Oklahoma"; that article 17, c. 77, Wilson's Rev. & Ann. St. Okl. 1903, is not locally inapplicable, and was, by section 2 of the schedule to the Constitution, extended to and put in force in the state of Oklahoma until it expires by its own limitation or is altered or repealed by law.

It follows that the plaintiff is entitled to the relief prayed for in its petition, but as the defendant, the Board of Education, by its answer, shows clearly that it intended no usurpation of the functions or duties of the Regents of the University of Oklahoma, and joins with the plaintiff in its prayer to this court for a construction of the law that it may know its duty in the premises, we will not at this time issue the writ of prohibition, nor will we dismiss the petition, but will take no further action, except upon additional showing by any of the parties in interest. All the Justices concurring.

ATCHISON, T. & S. F. RY. CO. v. BAKER.

(Supreme Court of Oklahoma. May 13, 1908.)

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE —
LAST CLEAR CHANCE.

Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident, yet the contributory negligence on his part will not exonerate the defendant and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 115.]

(Syllabus by the Court.)

Appeal from the United States Court for the Northern District of the Indian Territory; Hosea Townsend, Judge.

On rehearing. Reversed and remanded.

For former opinion, see 104 S. W. 1182.

KANE, J. This case was submitted to the Court of Appeals of the Indian Territory before statehood, and an opinion handed down reversing the judgment of the lower court. The opinion of the Court of Appeals is reported in 104 S. W. 1182. The statement of facts by Mr. Justice Townsend fully covers the case, and we will not repeat it here. A petition for rehearing was filed in due time, and was undisposed of when this court succeeded the Court of Appeals upon the admission of the Indian Territory and the territory of Oklahoma into the Union as the state of Oklahoma. This court sustained the petition for rehearing, and the cause was submitted to this court upon briefs and oral argument.

After a careful examination of the record and a review of the authorities cited by counsel in their briefs and very full and able oral arguments we are convinced that the judgment of the court below ought to be reversed and the cause remanded for a new trial. In order, however, that there may be no misapprehension when the cause comes on to be tried below, we wish to notice some features of the case which were apparently overlooked by our Brothers of the Court of Appeals.

We agree with the Court of Appeals that it was reversible error for the court below to submit to the jury the question of gross negligence or willful or intentional injury in that part of its instruction No. 9, which reads as follows: "The jury are instructed that, if they believe from the evidence in this case that plaintiff was guilty of negligence which materially contributed to the accident by driving upon the track of the railroad without first stopping and looking and listening to see if a train was approaching, then the defendant cannot be found guilty in this case, unless you believe from the evidence that the defendant's servants were guilty of willful or intentional acts, and the injury was occasioned by such willful or intentional acts of

omission or commission on the part of the defendant's servants or employes." There is no allegation in the complaint of willful or intentional acts of commission or omission on the part of the plaintiff in error, its servants, or employes; neither was there any proof that reasonably tended to indicate any willful or intentional acts of commission or omission. There being no allegation in the complaint or evidence in the record upon which to predicate such instruction, it was error to give it. The authorities cited by the Court of Appeals in its opinion, *supra*, to wit, East Tenn. Coal Co. v. Daniel, 100 Tenn. 65, 42 S. W. 1062, *Jacquin v. Grand Ave. Cable Co.*, 57 Mo. App. 320, *Greathouse v. Croan* (an Indian Territory case) 4 Ind. T. 668, 76 S. W. 273, fully support this proposition.

On the other instructions criticised we cannot agree with the Court of Appeals. The following instruction was requested by the plaintiff in error, and refused by the court: "The jury are instructed that, if they find from the evidence that the plaintiff, Baker, could have seen the train, and could have heard the train by looking and listening, and you find from the physical facts that he could have seen the train had he looked and heard the train had he listened, notwithstanding the fact that he has testified that he looked and listened and neither saw nor heard the approaching train, then you should find for the defendant." Another instruction requested is the following: "The court instructs the jury that, if plaintiff, Baker, saw the train approaching, and yet undertook to cross the track instead of waiting for the train to pass, and was injured thereby, you must find for the defendant." This the court refused, and gave to the jury the following instruction: "The court instructs the jury that, if the plaintiff, Baker, saw the train approaching in time to avoid the injury by the exercise of ordinary caution, and yet undertook to cross the track instead of waiting for the train to pass, and was injured thereby, you must find for the defendant." Of the first instruction quoted above the Court of Appeals says: "This instruction unquestionably states the law correctly"—and of the second: "This would imply, regardless of the question as to whether he had looked and listened for the train, if he did not see the train in time to avoid the injury after he saw the train by the exercise of ordinary care and caution, he was entitled to recover. This, in our judgment, would not be stating the law correctly." To our mind both of the instructions requested were properly refused, because they deprived the defendant in error of the benefit of the doctrine of the last clear chance. The instruction as modified and given is subject to the same criticism.

Let us now see what this doctrine of the last clear chance is, and if we are right in holding that the case at bar is one where it may properly be invoked. The Supreme Court of the United States, in the case of *Inland*

& Sea-Board Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, states the doctrine as follows: "There is another qualification of this rule of negligence which it is proper I should mention. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence." The qualification of the general rule as thus stated is supported by decisions of high authority, and was applicable to the case on trial." The Court of Appeals and all parties to this suit concede that the above doctrine was in force in the Indian Territory at the time this cause was tried; but counsel for plaintiff in error and the Court of Appeals in its opinion insist that there was no evidence reasonably tending to show a want of ordinary care on the part of the plaintiff in error after the dangerous situation of defendant in error was discovered. Mr. Justice Townsend in his opinion, *supra*, says: "There was not a particle of evidence to support the theory that the train could have been stopped before reaching the crossing and the accident avoided, and to submit to the jury a theory not supported by any evidence was error."

The evidence of the engineer is to the effect that when he was 300 or 400 feet from the crossing he saw the defendant in error acting as though he was deliberately approaching the crossing. The following is taken from his evidence as it appears in the record: "Q. Where were you with reference to this crossing—about how far were you north of the crossing when you first discovered Mr. Baker's team, according to your best judgment? A. We must have been 300 or 400 feet. Q. Where was Baker and his team with reference to the crossing when you discovered him? A. Him and his team and wagon and all was inside of the right of way. Q. Well, where did Mr. Baker seem to be going, driving along? A. He seemed to be deliberately driving over the crossing." There is no room to doubt that the engineer, when he first discovered the defendant in error, got the impression from his conduct that he was going to drive upon the railroad track ahead of his train. The engineer does not pretend that he was in any way deceived by appearances, but testified that he acted upon the impression that the defendant in error was deliberately crossing the track, and he testified that he acted on this impression and did all he reasonably could to stop his train and avoid the injury. If this evidence was uncontradicted, the Court of Appeals would have been right in its conclusion that a ver-

dict should have been directed. But to our mind there was evidence reasonably tending to contradict the evidence of the engineer on this point. This being so, it was proper to submit to the jury the question as to whether the plaintiff in error, after discovering the dangerous situation of the defendant in error, exercised reasonable care and prudence to avoid the injury. The engineer further testified on cross-examination that the train was made up of one combined coach and baggage car and one day coach; that the coaches were probably 70 feet long.

Mr. T. C. Connor, express messenger and baggageman on the train, called as a witness on behalf of plaintiff in error, testified, in part, as follows: "Q. Now, when the engineer put on the emergency brakes or the air, how long was that before he stopped? A. That puts on all the brakes, and the train slacks. I judge it would stop within the length of the train. There were only two coaches on. Q. That is your best judgment? A. Yes, sir." The answer to the first question may not be entirely responsive; but it was evidently given with deliberation after making a mental calculation to determine how quickly this train could, under the circumstances, be stopped, and his best judgment was that it could be stopped within the length of the train, which would not exceed 250 feet at the most. The witness was testifying in behalf of the railway company, and was telling of the effort the engineer made to stop the train. This evidence was introduced without objection, and certainly fairly tends to prove that if the engineer had applied the emergency brakes when he first saw defendant in error in a place of danger he could have stopped the train before reaching the crossing and avoided the injury, thus contradicting the engineer's evidence on this point. This evidence is not mentioned by counsel for defendant in error in his brief; but it was earnestly urged upon the attention of the court by oral argument. We believe it was sufficient to send the case to the jury on the question of the exercise of reasonable care on the part of plaintiff in error after it discovered the dangerous situation of defendant in error. Admitting the contributory negligence of the defendant in error may have had something to do in causing the injury, yet it would have been error for the court below to have directed a verdict for the plaintiff in error with this evidence in the record.

If plaintiff, injured in a collision at a railroad crossing, used due diligence after discovering his peril, he can recover, though he was negligent in not stopping and listening, provided defendant, after seeing the danger, failed to use due care. *Highland Ave. & B. R. Co. v. Sampson*, 91 Ala. 560, 8 South. 778.

A railroad company is liable for injuries received by one in attempting to cross the track in front of a moving train, even though such person is guilty of contributory negli-

gence, if, after discovering his perilous position, the employes having charge of the train failed or neglected to use all possible effort to avoid the injury. Maryland Cent. R. Co. v. Neubaur, 62 Md. 391.

With the foregoing modifications, we believe the opinion of the learned Court of Appeals states the law of the case.

It is therefore ordered that the judgment of the court below be reversed, and the cause remanded, with directions to grant a new trial. All the Justices concur.

(21 Okl. 33; 1 Okl. Cr. 148)

Ex parte WAGNER.

(Supreme Court of Oklahoma. April 27, 1908.)

1. CONSTITUTIONAL LAW — INITIATIVE AND REFERENDUM.

The initiative and referendum provisions in the Constitution (article 5, §§ 1, 2, 3, 4, 5, and article 18, §§ 4, 5) are not in conflict with the Constitution of the United States (section 4, art. 4), guaranteeing to every state a republican form of government.

2. SAME—ENFORCEMENT OF PROVISIONS.

Said provisions as contained therein are not self-executing, but are made effective by an act of the Legislature approved April 16, 1908.

3. MUNICIPAL CORPORATIONS—ORDINANCES—PETITION FOR REFERENDUM.

Until said provisions were made effective by legislation, a petition for a referendum filed with the chief executive officer of a municipality of the first class was of no effect.

4. HABEAS CORPUS—VIOLATION OF ORDINANCE—PETITION FOR REFERENDUM.

An ordinance having been passed and published, and thereafter a petition for referendum filed with the mayor of Kingfisher, and afterwards said relator being convicted in said municipal court for an alleged violation after the filing of said petition, he is not entitled to be discharged from said conviction.

(Syllabus by the Court.)

Application of C. L. Wagner for a writ of habeas corpus. Writ denied.

On December 5, 1907, the mayor and council of the city of Kingfisher, Okl., passed an ordinance, No. 118, entitled "An ordinance providing for a levy and collection of a license tax on certain trades, occupations, callings, businesses and avocations, and regulating the same and providing penalties for violations thereof." The ordinance provided for the punishment of persons engaged in business without having paid a license tax as prescribed by said ordinance. On December 12, 1907, the ordinance was published in the official organ of said city. On December 18, 1907, a petition signed by 25 per cent. of the qualified voters of said city, demanding a referendum vote on said ordinance, and requesting that same be held in abeyance until such election was held at which said ordinance could be voted upon and approved or rejected by the electors of said city, was filed with the mayor thereof. On December 20, 1907, relator, C. L. Wagner, was tried and found guilty of violating said ordinance, and adjudged to pay a fine and costs of the action. The relator refused to pay the fine,

and for that reason was committed to the city jail by the respondent, George H. Brown, the marshal of said city, under a commitment issued by the police court on the judgment rendered against said relator. The relator alleges in his petition that ever since that date he has been restrained of his liberty under said commitment. Thereafter, on the 2d day of January, 1908, application was made to this court for a writ of habeas corpus for the purpose of determining whether or not he was lawfully restrained of his liberty, and the same was issued on said date, made returnable on the 11th day of January, 1908. The ordinance was in due form, and there is no allegation against its invalidity, but the contention is that by virtue of said petition filed for a referendum vote that the same was held in abeyance until the next city election. George H. Brown, marshal of said city, as respondent, made his return to said writ, showing that he held the relator under a commitment issued by the police court of said city on a judgment of conviction for the violation of said ordinance. The facts as heretofore set out were admitted on a hearing of this cause.

C. G. Horner and P. S. Nagle, for relator.
John T. Bradley, Jr., for respondent.

WILLIAMS, C. J. (after stating the facts as above). The question raised in this case is whether or not a petition demanding a referendum vote upon an ordinance duly passed by a city of the first class after the same had taken effect and was in force, such demand having been presented to and filed with the chief executive officer of such city after such ordinance had been published, suspends the force and effect of said ordinance until the next municipal election. Of course, the question necessarily arises as to whether or not the different sections in the Constitution providing for the initiative and referendum are valid, and were in force and effect or self-executing on the 18th day of December, A. D. 1907, the date on which the petition demanding a referendum on said ordinance was filed with the mayor of the city of Kingfisher. The initiative and referendum provisions, relating, not only to the affairs of the state, but also to counties and cities, are taken substantially from the Constitution of Oregon. The Supreme Court of that state, in the case of Kadderley v. Portland, 44 Or. 119, 74 Pac. 720, 75 Pac. 222, has held that the same are not in conflict with section 4, art. 4, Const. U. S., guaranteeing to every state a republican form of government.

The next question is: Were said provisions self-executing on the 18th day of December, A. D. 1907? The Supreme Court of Oregon, in the case of Stevens v. Benson (Or.) 91 Pac. 577, held that the initiative and referendum provisions as contained in the Oregon Constitution were self-executing. The only difference between the provisions in that

Constitution and those of this state is that in the former it is provided that, in submitting such petitions to the people, the Secretary of State and all other officers shall be guided by the general laws and the act submitting the initiative and referendum amendment to the people for adoption or rejection until legislation shall be especially provided therefor—clearly indicating that it was the intention in adopting the Oregon amendment that the same should then and there become self-executing. This clause does not appear in the Oklahoma Constitution. Substantially such provision was contained therein prior to the time that the constitutional convention reassembled after the proposed Constitution had been provided to be submitted to the people for adoption or rejection. When the convention reconvened, in order to obviate any possible objection that might be made by the President of the United States to the same, wherein it was required by section 4, art. 4, Const. U. S., and the terms of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267) to be republican in form, and not in conflict with the provisions of said act, that part was eliminated, leaving it to the Legislature to carry same into effect. There was undoubted wisdom and precaution in that act. If the enemies of the principle of the initiative and referendum in popular government had been able to convince the department of justice of the federal government that such provisions of the initiative, and referendum, when adopted by a state, rendered such state government un-republican in form, still it remained that until the Legislature acted that the principle was not self-executing in the Oklahoma Constitution. And, until the Legislature enacted measures carrying it into effect, the federal government had less right or reason to complain, and that was one of the reasons for such action assigned at the time; for, if that contention against the provisions of the Constitution or to the initiative and referendum had been sustained, yet, as the same were not self-executing in that Constitution, reason and consideration of the rights of the people of the proposed state should certainly have impelled the promulgation of the proclamation of the admission of the state into the Union. For, when the act of the Legislature had been passed carrying same into effect, then the question could in due and proper time have been raised that such act was in conflict with section 4, art. 4, Const. U. S., and been declared void, and by such course preserved the supremacy of the Constitution of the United States, and at the same time vouchsafe the right of local self-government to over one million of citizens.

The Legislature, carrying out the intention of the constitutional convention with commendable fidelity, have enacted what is known as House Bill No. 174, entitled "An act to carry into effect the initiative and referendum powers reserved by the people in articles

5 and 18 of the Constitution of the state of Oklahoma, to regulate elections thereunder, and to punish violations thereof," which was approved by the Governor on the 16th day of April, A. D. 1908, thereby making absolutely complete and effective said provisions of said Constitution. See Reg. Sess. Laws Or. 1903, p. 244; Sess. Laws Or. 1907, p. 398. This is a very comprehensive act, providing fully for the forms of petition, both initiative and referendum, and for review of the action of the Secretary of State by the Supreme Court, whose judgment shall be final and binding upon such officer, and provisions in detail are contained for the holding of such election. Sections 17, 18, and 19 of the same act relate to municipalities. In said section 17 it is provided that in all cities, counties, and other municipalities which do not provide by ordinance or charter for the manner of exercising the initiative and referendum powers reserved by the Constitution to the whole people thereof, as to their municipal legislation, the duties required of the Governor and Secretary of State by this act, as to state legislation, shall be performed as to such municipal legislation by the chief executive and the chief clerk of such municipality; and the duties required in this act of the Attorney General shall be performed by the attorney for the county, district, or other municipality.

In the case of *Taylor v. Hutchinson et al.*, 145 Ala. 207, 40 South. 109, the court says: "Our Constitution contains many instances of nonself-executing provisions. In these cases there is always some indications that something is left for the Legislature to do, or there is something in the nature of the provision that renders such legislation necessary." In the case of *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 628, discussing the question as to whether or not a provision of the Constitution of that state was self-executing, the court said: "The question in every case is whether the language of a constitutional provision is addressed to the courts or to the Legislature. Does it indicate that it was intended as a present enactment, complete in itself as definite legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined both from a consideration of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing." See, also, *Acme Dairy v. City of Astoria (Or.)* 90 Pac. 153; *Swift & Co. v. City of Newport News*, 105 Va. 108, 52 S. E. 821, 3 L. R. A. (N. S.) 404; *Logan et al. v. Parish of Ouachita*, 105 La. 490, 29 South. 975. Section 3, art. 5, Const. (Bunn's Ed. § 55), relating to

the initiative and referendum provision, provides that "the Legislature shall make suitable provision for carrying into effect the provisions of this article." This especially indicates that it was not the intention of the constitutional convention that said articles should become effective until made so by act of the Legislature. In determining whether or not a provision of the Constitution is self-executing, we should consider the language in the light of the surrounding circumstances and conditions under which it was adopted, with a view of ascertaining the intention of the parties framing it. We accordingly conclude that on the 18th day of December, A. D. 1907, the provisions in our Constitution relating to the initiative and referendum were not self-executing, and that they did not become effective until the 16th day of April, A. D. 1908, when the act of the Legislature heretofore referred to was approved by the Governor of the state.

It is evident that if the provisions of article 5, relating to the initiative and referendum, were not self-executing on December 18, 1907, that section 4, art. 18, was also not self-executing, and it results as a matter of course that the petition demanding a referendum vote on the ordinance, filed with the mayor of the city of Kingfisher on the 18th day of December, A. D. 1907, was without effect, and did not operate to supersede or suspend any ordinance. The fact that since said date the Legislature of this state has enacted a comprehensive and valid law carrying into effect all of the provisions of the initiative and referendum as reserved and contained in the Constitution could not give any validity to such petition as that would have a retroactive effect or in the nature of an *ex post facto* law. Hence it is not necessary, in order to properly dispose of this case, to determine whether or not, after a city or municipality passes an ordinance and it becomes effective, a petition demanding the referendum on such ordinance thereafter being filed with the proper officer, in accordance with the charter or ordinance of said city, or with the general laws of the state, would have the effect to supersede or suspend the operation of such ordinance until the next municipal election. That question is not now properly before this court for determination; it being admitted that the ordinance under which this relator was prosecuted was properly enacted and published and otherwise valid. The only question before this court now is whether or not the demand for the referendum on such ordinance had the effect to supersede or suspend said ordinance. Having reached the conclusion that at the time such ordinance was passed and published the provisions in the Constitution relating to the initiative and referendum not being self-executing, although the same have since then been carried into effect by legislation, would not entitle the relator to the relief prayed for.

Writ of habeas corpus denied.

TURNER and DUNN, JJ., concur. KANE and HAYES, JJ., concur in the conclusion denying the writ.

(20 Okl. 263)

FRITZ v. BROWN.

(Supreme Court of Oklahoma. Feb. 18, 1908.)

1. CHATTEL MORTGAGES — FILING RENEWAL AFFIDAVIT — STATUTORY PROVISIONS — REPEAL.

Section 4751 of Mansfield's Digest of the Statutes of Arkansas of 1884 (Ind. T. Ann. St. 1899, § 3062), extended in force in the Indian Territory, was not repealed by Act Cong. Feb. 19, 1903, c. 707, § 2 Stat. 841, providing for the record of deeds of conveyance and other instruments of writing in the Indian Territory.

2. SAME—REQUISITES OF RENEWAL AFFIDAVIT.

The provisions of chapter 110 of said Mansfield's Digest of the Statutes of Arkansas (Ind. T. Ann. St. 1899, c. 51), extended in force in the Indian Territory, do not require an affidavit for the renewal of a chattel mortgage, before it is filed, to be indorsed, "This instrument to be filed but not recorded," and signed by the mortgagee, or his authorized agent.

3. SAME—EFFECT AS VALIDATING FILING OF MORTGAGE.

The filing of a renewal affidavit, regular in form, does not have the effect to validate the filing of a mortgage that was not filed in compliance with section 4750 of said Mansfield's Digest of Statutes of Arkansas (Ind. T. Ann. St. 1899, § 3061), extended in force in the Indian Territory.

4. SAME—SUFFICIENCY.

A renewal affidavit that is not made by the mortgagee, his agent, or attorney, and that does not state with sufficient clearness for a stranger to said mortgage to be able to ascertain therefrom whether the amount claimed by the mortgagee to be due by the mortgagor is due on the note secured by the mortgage, or is due on other indebtedness not secured by said mortgage, is insufficient to renew a mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 182.]

(Syllabus by the Court.)

Error from the United States Court for the Northern District of the Indian Territory; Wm. R. Lawrence, Judge.

Replevin by R. A. Brown against Margery R. Fritz. Judgment for plaintiff, and defendant appealed to the United States Court for the Northern District of the Indian Territory, in which court judgment was entered for plaintiff, and defendant appealed to the United States Court of Appeals in the Indian Territory, where the cause was pending at the time of the admission of Oklahoma, and it comes to the Supreme Court of Oklahoma under the terms of Enabling Act June 16, 1906, c. 3835, § 4 Stat. 267. Reversed and remanded.

This is an action in replevin, brought in the United States Commissioner's Court for the Fifth Division of the Northern District of the Indian Territory, on the 27th day of February, 1905, by R. A. Brown, appellee, who was plaintiff in the court below, against Margery R. Fritz, appellant, who was defendant in the court below, for the possession of one gray mare. The case was tried before the court sitting as a jury, and judg-

ment was rendered for the plaintiff for the possession of said mare of the value of \$85, and for the damages in the sum of \$2.85, from which judgment of the United States Commissioner's Court the defendant appealed to the United States Court for the Northern District of the Indian Territory, in which court the case was tried before the court, on an agreed statement of facts, and judgment was, on the 13th day of May, 1905, entered by that court in favor of the plaintiff against the defendant for the possession of said mare, whose value was fixed at the same amount fixed by the court below. From the judgment of the United States Court for the Northern District of the Indian Territory, defendant appealed to the United States Court of Appeals in the Indian Territory, where said cause was pending at the time of the admission of the state into the Union, and it comes to this court under the terms of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267).

The agreed statement of facts under which said case was tried, both in the United States Commissioner's Court, and in the United States District Court for the Northern District of the Indian Territory, is, in substance, as follows: That on the 16th day of March, 1903, one J. K. Richesin executed and delivered to the plaintiff, R. A. Brown, a chattel mortgage, a copy of which is attached as an exhibit to said stipulation, to secure the payment of a promissory note for the sum of \$191.25, due six months after date, by which mortgage the said Richesin conveyed to the plaintiff, R. A. Brown, the said mare in controversy; that said mortgage was duly filed on the 16th day of March, 1903, and that on the 12th day of March, 1904, plaintiff filed a renewal affidavit of said mortgage, a copy of which is attached as an exhibit; that on the 25th day of May, 1904, the said J. K. Richesin executed and delivered to the Farmers' National Bank of Vinita a chattel mortgage, by which chattel mortgage he conveyed to said Farmers' National Bank said mare, which mortgage was duly filed on the 27th day of May, 1904. The Farmers' National Bank, later in the year 1904, sold said mare under the terms of said mortgage to the defendant. It is agreed in said stipulation of facts that the value of said mare is \$85, and if the plaintiff is entitled to recover the possession of said mare, he is also entitled to recover damages in the sum of \$2.85. Said chattel mortgage, attached as an exhibit in said stipulation of facts, however, is a chattel mortgage from J. K. Richesin of the first part to the Citizens' Bank of Pryor Creek of the second part, conditioned that party of the first part shall pay or cause to be paid to said party of the second part a note for the sum of \$191.25. It nowhere appears in said record that plaintiff is a party to said mortgage. Said mortgage, however, bears the following indorsement: "Chattel Mort-

gage with Power of Sale. Appraisalment Waived. J. K. Richesin, Mortgagor, to R. A. Brown, of Pryor Creek, I. T., Mortgagee. This instrument to be filed but not recorded. R. A. Brown, Mortgagee."

Said renewal affidavit attached as an exhibit is, in other words and figures, as follows, to wit:

"R. A. Brown, being first duly sworn, states: That on the 16th day of March, A. D. 1903, J. K. Richesin executed and delivered to R. A. Brown one certain chattel mortgage, to secure the payment of \$191.25, and all other indebtedness due said R. A. Brown from J. K. Richesin. That said mortgage was filed on the 15th day of March, 1903, with the clerk of the United States Court at Pryor Creek, Northern District, Indian Territory. That there is yet due R. A. Brown from said J. K. Richesin the sum of \$81.25, and interest.

"[Signed] R. A. Brown.

"Subscribed and sworn to before me this 12th day of March, 1904.

"[Signed] C. J. Taylor, Notary Public.
"[Seal.]"

McCulloch & Probasco, for appellant. C. J. Taylor, for appellee.

HAYES, J. (after stating the facts as above). Appellant makes three assignments and specifications of error, as follows: First. That the court erred in overruling defendant's objection to the introduction by plaintiff of plaintiff's said chattel mortgage and renewal affidavit to sustain the title plaintiff depended upon to recover in this action as against the defendant, and holding that said renewal affidavit was sufficient to keep alive plaintiff's mortgage as against this defendant. Second. The court erred in overruling defendant's motion for a new trial. Third. The court erred in rendering judgment in favor of the plaintiff and against the defendant.

We shall consider all of said assignments of error together, and in doing so, three questions are presented to this court: First. Did Act Cong. Feb. 19, 1903, c. 707, 32 Stat. 841, entitled "An act to provide for the record of deeds and other conveyances of writing in the Indian Territory, and for other purposes," repeal chapter 110, on Mortgages, of Mansfield's Digest of the Statutes of Arkansas of 1884 (Ind. T. Ann. St. 1899, c. 51), put in force in the Indian Territory by an act of Congress of May 2, 1890? And, if not, did said act of Congress repeal section 4751 of said statutes contained in said chapter? Second. Do the provisions of chapter 110 of Mansfield's Digest of the Statutes of Arkansas (Ind. T. Ann. St. 1899, c. 51), require that affidavits for renewal of mortgages be indorsed, "To be filed but not recorded," and then signed by the mortgagee or his authorized agent? Third. Are the contents of said renewal affidavit sufficient

to renew said mortgage, and to convey notice of appellant's interest in said mortgage and of the amount due him on the indebtedness secured thereby at the time of filing said affidavit?

There are three modes of repealing a statute: By an express repeal, repeal by implication, and repeal by an act covering the same subject, which latter method is often called repeal by substitution. The act of Congress of February 19, 1903, contained no repealing clause, and did not by express provision repeal any statute in force in the Indian Territory. It results, then, that if said chapter 110, on Mortgages, was repealed by said act, it must have been repealed either by implication or by the fact that said act of Congress was passed as a substitute for said chapter 110 and the provisions contained therein. Repeals by implication are generally accomplished by the statute repealed, being in whole or in part repugnant to or inconsistent in whole or in part with the repealing act; but repeals by implication are not favored, and such repugnancy must be clear in order to effect a repeal, and where it is possible, the rule is to give both acts effect (*United States v. Tynen*, 11 Wall. [U. S.] 88, 20 L. Ed. 153; *District of Columbia v. Hutton*, 143 U. S. 18, 12 Sup. Ct. 369, 36 L. Ed. 60; *Iverson v. State*, 52 Ala. 170); and where an appeal is effected by implication, it will be measured and given effect only to the extent that there is conflict or inconsistency between the act effecting the repeal and the act repealed (26 Am. & Eng. Ency. of Law, 727). A repeal by substitution is effected where the latter of two acts covers the whole subject of the first, and plainly shows it was intended as a substitute for the first act. *District of Columbia v. Hutton*, supra.

Let us, then, examine said chapter 110, on Mortgages, of *Mansfield's Digest* of the Statutes of Arkansas, and the act of Congress of February 19, 1903, and ascertain whether the terms and provisions of the one are, either in whole or in part, repugnant to or inconsistent with the provisions of the other. The subject-matter of said act of Congress, in so far as it affects the matters under consideration, provides for recording places at each place where the United States Court is held in the Indian Territory, defines the duties of clerks and deputy clerks as recorders, and provides that certain instruments may be filed instead of being recorded. Section 4742 of said chapter 110, on Mortgages, provides how mortgages, whether for real or personal property, shall be proved or acknowledged, and when so proved or acknowledged shall be recorded, if for lands, in the county or counties in which the lands lie; if for personal property, in the county in which the mortgagor resided. This section, however, had by an act of Congress of February 3, 1897, been so amended that mortgages executed by mortgagors who were nonresidents of the Indian Territory should

be recorded in the judicial district in which the property was located. To what extent are the provisions of this section in conflict with said act of Congress? The act of Congress of February 19, 1903, is in conflict with said section 4742, to the extent that said act requires mortgages of personal property to be recorded in the district where said property is located, rather than in the district where the mortgagor resides, when the mortgagor is a resident of the Indian Territory, and to this extent said section is repealed by said act of Congress. But the language of said section 4742 that mortgages shall be proved or acknowledged in the manner that deeds for the conveyance of real estate are required to be proved and acknowledged, before the same shall be recorded, does not conflict with the language of said act of Congress of February 19, 1903, which says that it shall be the duty of the clerk or deputy clerk to record, in books provided for his office, all deeds, mortgages, et cetera, for the reason that the subject-matter and purposes of said sections of *Mansfield's Digest* is to prescribe how mortgages shall be proved or acknowledged, and what mortgages shall be admitted to record; whereas the evident purpose of said language of the act of Congress of February 19, 1903, is to prescribe and impose upon the clerks or deputy clerks of the courts of the Indian Territory a duty that had not hitherto been imposed upon them, and that it is not the purpose of said paragraph, of which said language is a part, to prescribe what mortgages or instruments shall be entitled to record.

Said act of Congress put in force in the Indian Territory chapter 27, on "Conveyance of Real Estate," of the Statutes of Arkansas of 1884, which said chapter provided how deeds and other instruments affecting real estate should be acknowledged or proved; and section 690 contained in said chapter is as follows: "All deeds and other instruments of writing for the conveyance of any real estate, or by which any real estate may be affected in law or equity, shall be proved or duly acknowledged in conformity with the provisions of this act before they or any of them shall be admitted to record." To hold that by using in said act of Congress the language, "It shall be the duty of each clerk or deputy clerk of said court to record, in the books provided for his office, all deeds, mortgages, * * *" rendered it unnecessary for mortgages to be acknowledged or proved in the manner prescribed by chapter 110, on Mortgages, in order to be admitted to record, would also force the construction that said language rendered it unnecessary for deeds and other instruments conveying real estate to be acknowledged or proved in the manner prescribed by said chapter 27 in order to admit them to record. That this was not the intention of Congress is further evidenced by the provision of said act, which provides before whom acknowledgments of deeds of

conveyance in the Indian Territory may be taken.

Section 4750 of said chapter of Mansfield's Digest (Ind. T. Ann. St. 1899, § 3061) provides that mortgages on personal property may be filed instead of recorded, upon the mortgagee's indorsing on said mortgage or instrument the following language: "This instrument to be filed but not recorded," when such indorsement is signed by the mortgagee, his agent, or attorney, and the filing of said mortgage shall have the same effect as if the same had been recorded. Section 4751 (section 3062) of the same statute provides that such mortgages indorsed and filed shall be void against creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith after the expiration of one year after the filing thereof, unless within 30 days next preceding the expiration of one year from such filing the mortgagee shall make an affidavit exhibiting his interest at said time, claimed by virtue of said mortgage, and if such mortgage is to secure the payment of money, the amount yet due and unpaid, which affidavit shall be filed with the instrument to which it relates. Under said section 4750 only mortgages on personal property could be filed, the filing of which would have the same effect as recording the same would have. The language of said act of Congress of February 19, 1903, which provides that all instruments limited on their face for a period of time shall be filed if the holder thereof desires, has the effect to modify said section 4750, and extend the provisions thereof to include, not only mortgages on personal property, but also on real estate; but said language of said act of Congress does not repeal said section 4750, for the reason there is nothing in said act that provides how the holder of such an instrument shall indicate his desire to the recorder that he desires the same filed and not recorded. There is nothing in said act in conflict with the provisions of said section that instruments that are to be filed and not recorded shall bear the indorsement aforesaid. Nothing in said act is repugnant to the provisions of sections 4750 and 4751, and it is our opinion that said act has only the effect to modify said section 4750 as herein stated, and, as modified, said sections 4750 and 4751 remain in force.

It cannot be successfully contended that said act of Congress repeals said chapter 110, on "Mortgages," by substitution, for the reason that, to effect repeal by substitution, the latter act must cover the whole subject-matter of the earlier one, and must plainly show that it was intended to be substituted for the earlier act. A mere similarity in their provisions, or in some of their provisions, is not sufficient to effect a repeal. *State v. Ogden*, 50 La. Ann. 982, 24 South. 593; *Adams v. People*, 25 Colo. 532, 55 Pac. 806. Said chapter 110, on "Mortgages," provides how mortgages shall be proved and acknowledged;

what mortgages shall be entitled to be recorded; the effect of recording the same; and when the same shall become a lien; provides how acknowledgment of satisfaction of a mortgage shall be made; that mortgages upon future crops may be made; provides not only what mortgages may be filed and not recorded, but the manner in which the request for such filing shall be made; that the filing may be extended, and the manner of extending same; how such mortgages filed may be used as evidence in the trial of cases; and in detail the kind of records the recorder shall keep, and the character of entries that shall be made therein at the time each instrument is filed; what the effect of giving a mortgage shall have upon the right of possession to the property when the property mortgaged is personal property; how filed mortgages may be canceled; how sales may be made under mortgages, and under what conditions the right of appraisal and redemption may be waived. An examination of the act of Congress of February 19, 1903, discloses that very few, if any, of these subjects provided for in said chapter 110 are covered by said act. We therefore conclude that such act is cumulative of said chapter on mortgages in so far as it affects the subject-matter therein covered, and does not have the effect of repealing said chapter by substitution, and that only such parts of said chapter on mortgages as are repugnant to or in conflict with said act are repealed thereby.

The contention of appellant that the renewal affidavit has to be indorsed, "This instrument to be filed but not recorded," and then signed by the mortgagee or his authorized agent is not tenable, since such is not required by the statute, nor supported by reason. The reason for requiring that chattel mortgages be thus indorsed before the same shall be filed and not recorded is apparent, for the reason that, if the filing of such mortgages is to have the same effect for a limited time as the recording of the same, and that the mortgagee is to be permitted to choose which method he shall select in establishing notice of his lien, some means should be provided by which he can indicate his selection to the recorder, and by providing, as was done in said section 4750, that, when the instrument is indorsed as therein prescribed, the same should be filed removes the question of whether a mortgage is to be filed or recorded, beyond confusion or misunderstanding. But this condition as to renewal affidavits does not exist, for there is no provision of the statute for them to be recorded, nor is there any necessity of a renewal affidavit where the mortgage which it seeks to extend has been recorded. The only thing required to be done by the recorder upon delivery of the renewal affidavit to him by the mortgagee is to file the same with the instrument which it seeks to extend. There is no provision authorizing same to be recorded, and no selection or choice to be expressed by the mortga-

gee in filing the renewal affidavit. Therefore no necessity exists for a method or manner of expressing any choice or selection. The statute requires none, and such an indorsement is not necessary.

We come now to consider the question whether the contents of said renewal affidavit are sufficient to comply with the requirements of said section 4751. Notwithstanding the mortgage, under which the plaintiff claims said mare was executed by J. K. Richesin to the Citizens' Bank of Pryor Creek, and it nowhere appears in the record that said mortgage was ever assigned by the Citizens' Bank of Pryor Creek to the plaintiff Brown, or that said mortgage was executed for the benefit of the plaintiff, attorneys for defendant agreed in the stipulation with attorneys for plaintiff that, by virtue of said mortgage, said mare was conveyed to plaintiff. While it presents a very peculiar state of facts in the record to have appear therein an agreement by which it is agreed that the legal effect of a certain instrument, so far as the facts disclosed in the record are concerned, is absolutely contrary to any construction that could be given it, owing to the fact that there may have been facts existing that do not appear in the record, but existed within the knowledge of the parties making the agreement, that controlled them in entering into such an agreement, we shall treat said mortgage as having conveyed said mare to the plaintiff under the terms of said mortgage. Said mortgage, however, was never filed in the manner provided by law, which requires that the same shall be indorsed as heretofore stated, and signed by the mortgagee, or his agent. This mortgage bears the indorsement: "This instrument to be filed but not recorded," but same is signed by R. A. Brown, who is not the mortgagee in said mortgage, and who is not shown in any way to have signed said instrument as the agent of the Citizens' Bank of Pryor Creek, the mortgagee therein. Therefore the filing of said mortgage, as aforesaid, was without any effect in law whatever, and was not sufficient to give notice to any one of the contents thereof. *Dedman v. Earle*, 52 Ark. 164, 12 S. W. 330.

Said renewal affidavit, if it had been regular in form and sufficient in contents, could not have had effect to keep alive said mortgage, for the reason that said mortgage was never properly filed. Said affidavit would be insufficient under the statute if the mortgage had been filed properly, for the reason that it describes the mortgage as being one in which J. K. Richesin is the mortgagor and R. A. Brown the mortgagee, which description does not apply to the mortgage in this case. Again, the statute requires that the mortgagee, in refiling a renewal affidavit, shall state therein his interest, claimed by virtue of said mortgage at the time of the filing of the renewal affidavit, and the amount yet due and unpaid on the indebtedness se-

cured by said mortgage. The renewal affidavit in this case stated that said chattel mortgage was to secure the payment of \$191.25, and all other indebtedness due by said J. K. Richesin to said R. A. Brown. An examination of the record in this case discloses that the mortgage secured no indebtedness, except one note for the sum of \$191.25, with interest after maturity. The language in the affidavit that "there is yet due R. A. Brown from said J. K. Richesin the sum of \$81.25 and interest" is not sufficient to show whether said sum claimed to be due is due on said note secured by said mortgage, or whether it is due upon other indebtedness referred to in said affidavit and not secured by the mortgage. For these reasons, it is our opinion that said renewal affidavit was not sufficient under the statute, and the filing of the same had no effect whatever upon said mortgage.

It follows that, said mortgage never having been properly filed, and the renewal affidavit being insufficient to extend or give validity to the filing of said mortgage, the appellee was a purchaser of said mortgaged property without notice, and the judgment of the trial court should be reversed, and the cause remanded, and it is so ordered.

DUNN, TURNER, and KANE, JJ., concurring. WILLIAMS, C. J., not participating.

LOGAN v. BROWN.

(Supreme Court of Oklahoma. March 9, 1908.)

1. LIMITATION OF ACTIONS — RELIEF ON GROUND OF FRAUD.

The statutory limitation of the time within which "an action for relief on the ground of fraud" must be commenced only applies when the party against whom the bar of the statute is interposed is required to allege fraud in pleading his cause of action, or to prove fraud to entitle him to relief.

2. TRUSTS—VALIDITY OF ORAL TRUSTS.

A petition for an accounting for the proceeds of the sale of certain real estate, title to which was placed in defendant under a verbal promise for this purpose, is not vulnerable on demurrer on the ground that a parol trust in real estate is declared on.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 589.]

3. SAME.

One who takes title to real property under a parol agreement to sell the same as an agent, and sells it and receives the money therefor, is liable to the grantor for the proceeds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 145, 148, 152.]

4. FRAUDS, STATUTE OF—CONTRACTS PERFORMED AS TO PART WITHIN STATUTE.

The provisions of the statute of frauds or of uses and trusts have no application where the agreement has been completely performed as to the part thereof which comes within the statute, and the part remaining to be performed is merely a payment of the money, the promise to do which is not required to be in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 293-298.]

5. APPEAL—REVIEW—HARMLESS ERROR—REFERENCE.

Where in a suit defendant denies any liability to plaintiff and any foundation for the suit, but agrees for a reference of the same for trial before a referee, it is not error for the court in its order to state, "it appearing to the court that this is a case involving an accounting," etc., in the absence of any evidence that the referee was influenced in his findings thereby.

6. APPEAL AND ERROR—PRESUMPTIONS—REFERENCE—OATH.

Where a record is silent upon the question of a referee having taken an oath as required by law, the presumption will be indulged that such oath was taken, and, even though omitted, it will be held an irregularity only, and waived by a party who proceeds to trial without objection on this point.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3726.]

Williams, C. J., and Kane, J., dissenting.

(Syllabus by the Court.)

Error from District Court, Kingfisher County; C. F. Irwin, Judge.

Action by Hattie A. Brown against G. H. Logan. Judgment for plaintiff, and defendant brings error. Affirmed.

On June 24, 1901, Hattie A. Brown, who will hereafter be denominated "plaintiff," filed her petition in the district court of Kingfisher county against G. H. Logan, who will hereafter be denominated "defendant," in which she alleged that she was a widow 65 years of age, and sister-in-law to defendant, and that on the 9th day of December, 1896, and for many months prior and subsequent thereto, was sick and infirm in body and mind, and unable both mentally and bodily to attend to her ordinary business affairs. That on said date defendant persuaded her to turn over to him her property and the management of her business and financial affairs, assuring her "that if she would do so he would handle and manage the same, and render her a strict account, and to turn over to her all rents and moneys that he could realize from her property"; and that she, trusting and confiding in him, made him her confidential and trusted agent for the purposes mentioned, and that the relations aforesaid between the plaintiff and defendant, and on the terms and conditions aforesaid, began between them on the 9th day of December, 1896, and continued until on or about the 1st day of January, 1900. That on January 2, 1897, she executed a deed to the defendant for lots Nos. 21, 22, 27, 28, 29, 30, 31, and 32, in block 39, Oklahoma City, Okl. T.; and that between the 9th day of December, 1896, and the 1st day of January, 1900, the defendant collected rents from the premises mentioned in the sum of about \$1,200. That, in addition thereto, he collected a judgment in the sum of about \$500 owned by plaintiff. That on October 4, 1898, he received from Pearl E. Stafford the sum of \$2,500 for lots Nos. 29, 30, 39, and 32, in block 39, Oklahoma City. That on the 18th day of April, 1899, he received from A. J.

Burnham the sum of \$1,250 for lots Nos. 21 and 22 in block No. 39, Oklahoma City. That on July 17, 1899, he received from Virginia R. Allen the sum of \$1,200 for lots Nos. 27 and 28 in block No. 39, in said Oklahoma City. That, during the time the relation above mentioned existed, the defendant had received the moneys of plaintiff from rents, collection of judgment aforesaid, and sales of real estate mentioned, to about the sum of \$7,650; averring that she was unable to give the exact amount by reason of the fact that he refused to give her any account thereof. "That on and since the 1st day of January, 1900, the plaintiff has repeatedly asked and demanded of the defendant that he render to her a full and correct account of all her business handled by the defendant as aforesaid, and asked and demanded of him that he turn over to her all moneys held by him as the proceeds of said collections of money had and received by the defendant in the capacity aforesaid, all of which the defendant refuses and neglects to do." That, since being vested with the authority and the property of plaintiff as aforesaid, the defendant has in no manner accounted to her for money received by him, except the sum of about \$1,450, the exact amount being unknown to plaintiff, by reason of the fact that defendant refuses to inform her thereof, which sum was used in payment of mortgage indebtedness on her property, and except the further sum of \$1,400 that the defendant has paid to her in money. "This plaintiff now avers to the court that the defendant caused her to turn over to him her business affairs as aforesaid, for no other reason than that of cheating and defrauding her out of her property, money, and effects, and that in procuring this plaintiff to so trust him as herein stated the plaintiff in her weak and sick condition was misled by the defendant, and led to believe that he was her friend, and would be her confidential adviser, and would aid her in all possible ways to conduct her business affairs in a careful and economic manner. That, as soon as the defendant obtained possession of her said property and business affairs aforesaid, the defendant at once began to treat the plaintiff in a harsh manner, and when the plaintiff would seek to advise with the defendant about her business matters the defendant would at once fly into a rage and abuse the plaintiff and inform her that it was none of her business what he was doing with her property or what he was doing with her business affairs, and for her to keep her mouth shut and let him alone—that he would neither advise with her as to said business matters, nor allow her to ask him about same." She then prayed the court to take an account of all the transactions had and done between herself and the defendant, and to compel him to render a full and complete account of all his doings in the matters set forth, and that she take

judgment against him for such sums of money as the court finds are due her.

To this petition the defendant filed a demurrer, which was overruled by the court, and to which ruling an exception was saved. He thereafter filed an answer in two counts, the first being a general denial, and the second alleging that the transfer of the real property by plaintiff to defendant was a bona fide transaction between them, and that he paid her a reasonable and fair price for the lots; that the same was true in reference to the assignment of judgment which he purchased at the same time. He further denied that he was in any way indebted to the plaintiff, or that he ever held any of her property as alleged by her.

On March 2, 1903, the court made an order based upon a written stipulation signed by the attorneys of the parties, referring the case to A. H. Huston to try on both law and fact. The reply, which was a general denial under the terms of the stipulation, was filed with the referee.

Thereafter, and in July, 1903, both parties appeared personally and by counsel, at the office of said referee, in the city of Guthrie, Logan county, territory of Oklahoma, and submitted their evidence, consisting of the testimony of themselves and one witness delivered orally, certain documentary evidence, and deposition of witnesses taken on both sides. On this evidence the referee made his findings, the salient and controlling portions of which are as follows:

"That in the year 1896 and prior thereto, plaintiff was the owner of several parcels of real estate in Oklahoma City, Oklahoma county, Okl. T., included in which were lots one (1) and two (2) in block forty (40), and lots twenty-one (21), twenty-two (22), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty (30), thirty-one (31), and thirty-two (32), in block thirty-nine (39).

"That the defendant is now, and was at all times mentioned in the pleadings, a brother-in-law of the plaintiff.

"That in the year 1896 the plaintiff, who was then an old lady of about 60 years of age, had become embarrassed with debt and worried over financial matters.

"I find from the evidence, and also from the appearance and demeanor of the plaintiff at the time of the trial, that she was in ill health, exceedingly nervous, and not capable of fairly and intelligently attending to the details of business transactions, and that such condition had existed during all the times mentioned and referred to in the pleadings and evidence in said case.

"That on the 2d day of January, 1897, the plaintiff conveyed to the defendant said lots 21, 22, 23, 28, 29, 30, 31, and 32 in said block 39, Oklahoma City, and that the consideration expressed in the deed was \$1,500, and that said premises were then of the value of \$5,000, but that the real purpose of said con-

veyance was to give the defendant control and management of the said property of the plaintiff in trust for her.

"That on the said 2d day of January, 1897, the plaintiff also assigned to the defendant a certain judgment which she had obtained in the district court of Oklahoma county against E. T. Wood and W. J. Wood. That this judgment was obtained upon a certain note, but that the lower court refused to decree the foreclosure of the mortgage securing the same, that plaintiff appealed to the Supreme Court of the territory, and that in the month of September, 1896, the Supreme Court handed down a decision reversing the lower court and ordered a decree of foreclosure, and it is found, that at the time of the assignment of said judgment the same was worth the sum of \$500, and it is further found that said assignment was made by the plaintiff for the purpose of giving to the defendant the control and management of the same and to collect the same and hold the proceeds in trust for her.

"That the plaintiff is entitled to an accounting with the defendant, and that in such accounting the defendant should be charged as follows:

To proceeds of sale of lots 29, 30, 31, and 32, block 39.....	\$2,000 00
To proceeds of sale of lots 21 and 22, block 39	1,250 00
To proceeds of sale of lots 27 and 28, block 39	1,200 00
To sum collected from rents and Wood judgment	936 88
Total	\$5,386 88

And the defendant is entitled to

Credits as follows:

By debts and expenses paid	\$1,399 00
By cash paid to plaintiff	1,500 00
By compensation for services rendered	250 00
Total	\$3,149 00
To balance	\$2,237 88

"I find that the plaintiff first demanded of the defendant a settlement and a payment to her of all moneys in his hands belonging to her on or about the 1st day of January, 1900, and that the defendant refused to comply with such demand, and that the plaintiff is entitled to recover interest of and from the defendant on the sum of money in his hands belonging to her from the 1st day of January, 1900."

From the findings of fact the referee concludes: "That the plaintiff is entitled to recover of and from the defendant the sum of \$2,237.88, together with interest thereon at the rate of 7 per cent. per annum from the 1st day of January, 1900, and costs of suit."

On returning the report, accompanied by the evidence, to the district court of Kingfisher county, the defendant filed a motion to set aside the report of the referee, setting

out numerous grounds therefor; those which are argued and relied upon in the brief being considered in the opinion.

On the 18th day of May, 1904, the court overruled said motion, confirming said report, and rendered judgment in favor of plaintiff and against the defendant in the sum of \$2,924. Motion for new trial was filed and overruled, and the case is regularly before this court for consideration, on appeal.

H. H. Howard and P. S. Nagle, for plaintiff in error. J. C. Roberts and Roberts & Bowman, for defendant in error.

DUNN, J. (after stating the facts as above). Under the demurrer filed by the defendant to plaintiff's petition, three propositions are argued: First, that the action herein was one for relief on the ground of fraud, and that the same was not commenced within two years of the discovery; second, that "inasmuch as it concerns an interest in land, and is in parol, it is void by the statute of frauds, and, appearing as it does on the face of the bill, the defense of the statute of frauds may be taken advantage of on demurrer"; and, third, under the allegations of the petition, defendant was constituted trustee of an express trust, and "that no trust in relation to real property is valid unless in writing"; and that under either or all of these contentions the petition showed that it did not "state facts sufficient to constitute a cause of action against the defendant and in favor of plaintiff."

We are unable to agree with defendant that this action is one for relief on the ground of fraud committed by the defendant against the plaintiff, and from which fraud she is seeking relief. The allegations of the petition in reference to the fraud are more in the nature of inducement and explanation than a statement of the grounds upon which she relied to recover. These are set forth to show the relationship existing between the parties, and the conditions under which she claims the contract was made, rather than a statement of the gist of her action. She alleges that the property which defendant secured from her produced a certain amount of money, that he received this money in the capacity of her agent, and that, having so received it, he was indebted to her in this sum, and then asked in her prayer for an accounting between them. She would be just as much entitled to recover without these allegations of the deceit as she is with them. They add nothing to her right to the money received by Logan on the sale of her property. It would be a sad commentary upon the law of our land if it were such that, leaving out all question of confidential relationship or deceit, a man dealing with another could receive from him on a verbal contract a deed to his real property for the purpose of sale and then sell it and appropriate the money, refuse it on demand, and the courts be unable

to assist the owner in getting it. Such is not the case, however, for they may do so, and that, too, when there is absolutely no fraud committed. The grantor cannot compel grantee to sell because of the written letter of the statute, but when he does sell and receives the money, the courts will compel him to account for it.

The limitation fixed by the statute for actions of this character comes within the provisions of the second subdivision of section 18, art. 3, c. 68, of the Code of Civil Procedure, which provides that such a cause of action can only be brought within three years after it shall have accrued, and not under the third subdivision, which provides "for relief on the ground of fraud," which can only be brought within two years. The limitation in the subdivision last mentioned is that "the cause of action in such case (fraud) shall not be deemed to have accrued until the discovery of fraud." In our judgment, the petition, even though it were strictly sounding in fraud, and sought damages by reason thereof, would not be barred under its allegations, as it alleges that "on and since the 1st day of January, 1900, the plaintiff has repeatedly asked and demanded of the defendant that he give to her a full and correct accounting," etc. There does not appear to have been any demand and refusal of accounting prior to this time. The discovery of fraud, if fraud existed, would not be concluded against plaintiff until a demand on her part for an accounting, and the refusal of the defendant, had transpired. The last sale of property was made July 17, 1899. This action having been begun on June 24, 1901, was within the two-year limitation, even though fraud was relied upon. But this is not an action sounding in fraud. Plaintiff was not required to allege fraud in her pleading, nor to prove fraud to entitle her to relief. In the case of *Brown et al. v. Cloud County Bank et al.*, 2 Kan. App. 352, 42 Pac. 593, the court held in the syllabus that: "The statutory limitation of the time within which 'an action for relief on the ground of fraud' must be commenced only applies when the party against whom the bar of the statute is interposed is required to allege fraud in pleading his case of action, or to prove fraud to entitle him to relief."

The defendant next contends that the petition fails to state a cause of action for the reason that it was based on a contract for the sale of real property or interest therein, and hence invalid unless in writing. An inspection and reading of the petition fails to disclose whether the agreement plaintiff contends for was in writing or was merely oral, and the rule seems to be that, "If the complaint fails to show whether the contract in suit was verbal or in writing, it will be presumed to have been in writing for all the purposes of the demurrer." *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384; *Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513; 20 Cyc. 308, and

cases cited. Hence the demurrer cannot be sustained on this ground.

The third proposition raised by the defendant is one most insistently argued and contended for both under the allegations of the demurrer and under the proof offered in the case, and the statute invoked is section 64, art. 4, c. 65, Willson's Rev. & Ann. St. 1903, under the title of "Uses and Trusts," which provides as follows:

"No trust in relation to real property is valid, unless created or declared:

"First: By a written instrument, subscribed by the trustee (trustor) or by his agent thereto authorized by writing.

"Second: By the instrument under which the trustee claims the estate affected; or

"Third: By operation of law."

If the petition was good against the demurrer under the statute of frauds, it was also good under the provisions of the statute of uses and trusts. The former statute provides that the contract shall be invalid, and the latter statute provides that no trust in relation to real property is valid unless in writing; but the statute last referred to provides, in addition thereto, "unless created or declared by operation of law." Under this last provision the courts have exercised very broad discretion in excepting and taking out of the operation of the statute many cases where accident, fraud, or mistake have intervened, and where it would be inequitable to allow the grantee to retain real property, title to which had been procured under a verbal promise. So that the demurrer must of necessity be overruled for the reason that the petition is not vulnerable owing to any of the deficiencies mentioned appearing on its face, as well as appearing that it is not a suit to enforce an unwritten trust in relation to real property.

The provisions of the two statutes last mentioned are again invoked by the defendant under the findings of the referee and are insistently argued and relied upon for a reversal; hence it becomes necessary to discuss them and the authorities cited in connection therewith. He assumes that this case is within the restricting provisions of the statute of frauds and the statute of uses and trusts, and that appellee cannot recover herein because the contract as shown by evidence was not reduced to writing; that it involved a trust for an interest in real estate and was void; and that the deed and conveyance made by Mrs. Brown to defendant, by reason of these facts, was absolute and valid. In support of this proposition he cites the Kansas case of *Gee et al. v. Thrallkill*, 45 Kan. 173, 25 Pac. 588, and so strenuously insists in his brief and oral argument that the case at bar is controlled by the principles involved in that case that we recite the facts on which it was decided for the purposes of distinguishing it. *Thrallkill* owned some real estate in the town of Harper, Kan., and conveyed the same in fee to his sister, Mrs. Gee,

by a general warranty deed, absolute on its face, with an expressed consideration of \$1,500, but with no actual consideration except a parol understanding between them that she would sell or mortgage the property and thereby obtain funds for the grantor, and would convey back to him, whenever he might so desire, any part of the property remaining in her hands. Under this state of facts, the grantee, neither selling nor mortgaging the land, and *Thrallkill*, demanding that she reconvey the same to him, on her refusal brought an action in the district court to obtain title to the property. The court held that the parol trust with respect to the real estate involved was void, and that the deed and conveyance was absolute and valid. The statutes of Kansas relating to frauds and perjuries (section 5, Gen. St. 1901, p. 674), and to conveyances (section 8, Gen. St. 1901, p. 274), and to trusts and powers (section 1, Gen. St. 1901, p. 1596), all carry with them substantially the same language that is contained in our statute of uses and trusts, which makes invalid any trust relation to real property unless in writing, except it be by operation of law. These Kansas statutes referred to were all cited by Justice Valentine in support of his opinion, and the force given them in the conclusion reached was practically a holding that the trust sought to be created was one in real property which must of necessity be in writing to be valid, and the circumstances surrounding the case were not such as to create a trust by operation of law. Three cases, namely, *Morrill v. Waterson*, 7 Kan. 199, *Knaggs v. Mastin*, 9 Kan. 532, and *Ingham v. Burnell*, 31 Kan. 383, 2 Pac. 804, are cited to support the text of the opinion, but a critical reading of them will readily show that they fail to support it. In neither of them do the controlling facts approach the condition in the *Gee v. Thrallkill* Case, and indeed we question very much whether it were possible to find any Kansas authority to support it. Under the facts of the case the holding is practically an exception to the rule, as the courts have nearly always granted relief in similar instances. Indeed this has so universally been done that the Supreme Court of Wisconsin in the case of *Rasdale v. Rasdale*, 9 Wis. 387, say: "It is impossible to reconcile with principle very many of the adjudications upon the statute of frauds. Courts seem to have been so intent upon administering justice in the particular case that they have frequently lost sight of its provision, and their action has often amounted to little less than the exercise of the right to repeal, or suspend its operation whenever they deemed that the real justice of the case required it." Hence the hard and fast rule adopted by the Kansas court in this case makes it virtually an exception among the adjudications. The courts very generally, under the power given them by virtue of the force of the provision, or by operation of law, and other similar

clauses, exercise the utmost liberality in extending a helping hand to those, who, through fraud, accident, or mistake, or even misdirected confidence, have been deprived of their real estate by virtue of a contract not reduced to writing. Indeed, as was said in the Wisconsin case, "they have been so intent upon administering justice in the particular case" that they have virtually made of it a statute to be followed only when it would not bring about the result of defrauding some one, and to ignore it when such result would follow. "The court will not allow the statute of frauds to be used as an instrument of fraud if it can prevent it." *Bork v. Martin*, 132 N. Y. 280, 30 N. E. 584, 28 Am. St. Rep. 570. But the facts in the case of *Gee v. Thrallkill* are not similar to the facts in the case at bar. In that case the deed was taken by the grantee under a parol agreement to sell or mortgage and to reconvey any overplus. Grantee refused to do either, and the court held that she could not be compelled to do so. An altogether different condition exists in the case at bar. Here the defendant took the deed to this property for the purpose of selling it, and he did sell it and has the money, and this suit is brought not to recover any interest in real property, nor to compel a reconveyance, but for the money received by an agent from its sale. If Logan had kept the property, no court could compel him to sell it. Whether he could have been compelled to account for its value or not is not in this case, but practically all of the authorities so hold. "Where lands are conveyed to defendant on his parol agreement to pay a mortgage thereon, sell the land and account to the grantor for the proceeds, and, after getting possession, defendant refuses to perform such agreement, plaintiff may recover the value of the property, even though the agreement is within the statute of frauds." *O'Grady v. O'Grady*, 162 Mass. 290, 38 N. E. 196. "If one convey land to another under an oral agreement which the other refuses to perform and cannot be compelled to perform on account of his setting up the statute of fraud, he who conveyed the land can recover its value from the grantee on the ground that the consideration for the conveyance has failed and he is entitled to be reimbursed." *Presbury Cromwell v. Susan Norton*, 193 Mass. 291, 79 N. E. 433. Also, *Peabody v. Fellows*, 177 Mass. 290, 58 N. E. 1019.

But we are not to deal with the situation suggested by either proposition above mentioned, but a situation where the grantee, under a parol contract to sell, has actually fulfilled that portion of the contract within the statute of frauds, and nothing remains to be enforced by a court but that part of the contract that never was in the statute and against which it does not operate. Volume 29 of Am. & Eng. Ency. of Law, p. 832, under the title of "Verbal Agreements," and the subtitle relating to lands, holds: "The statute of frauds has no application where the agree-

ment has been completely performed as to the part thereof which comes within the provisions of the statute, and the part remaining to be performed is merely to payment of money or the performance of some act the promise to do which is not required to be put in writing." The authorities seem to support this statement. The case of *Hays v. Reger*, 102 Ind. 524, 1 N. E. 386, was one which involved a parol agreement to convey real property. The trust had been executed, and the court said: "The trust having been executed, we need not determine whether it was one arising by application of law, or whether it was an express trust." So that in the case at bar, the trust having been executed, it is of no consequence whether the agreement between the plaintiff and defendant in reference to the land was a parol agreement or whether it had been reduced to writing.

The facts in a New York case, *Bork v. Martin*, 132 N. Y. 280, 30 N. E. 584, 28 Am. St. Rep. 570, are very similar to those in this case. *Martin* took the naked title to certain lots, agreeing at the time to convey the same upon grantor's request to such purchasers as could be procured, and pay over the purchase money received. He sold the lots and refused to pay the money, just as did *Logan* in this case. When he was sued, as was *Logan*, he set up the statute of frauds and of uses and trusts, just as does *Logan*, and the court, in passing on that case, said: "Assuming that the land was conveyed to the defendant upon an oral trust, invalid under the statutes of frauds and of uses and trusts (2 Rev. St. [1st Ed.] p. 134, § 6; 1 Rev. St. [1st Ed.] p. 728, § 51), yet it was lawful for him to perform it, and he has fully performed it so far as it required him to dispose of the land. The land is all sold, and he has the price of the last five lots in his pocket. The language of the cases is to the effect that he cannot, in good conscience, retain it, and that it belongs to the plaintiff. *Robbins v. Robbins*, 89 N. Y. 258; *Dunn v. Hornbeck*, 72 N. Y. 80; *Foote v. Bryant*, 47 N. Y. 544. Though the statutes might have justified the defendant's refusal to dispose of the land as he had orally agreed, yet having disposed of it, he has voluntarily emerged from the field of their protection, and exposed himself to the law, which deals with him as a trustee of personal property realized for plaintiff's benefit, by virtue of an agency for the plaintiff, which he has so far performed, pursuant to the plaintiff's instructions and his own agreement, as to obtain the moneys his agency was constituted to produce. Equity approves his performance, so far as he has performed, and, as the statutes referred to no longer apply, there is no law which he can invoke to shield him from the full performance of his duty. The court will not allow the statute of frauds to be used as an instrument of fraud if it can prevent it. Cases supra; *Ryan v. Dox*, 34 N. Y. 307, 90 Am.

Dec. 696; *Levy v. Brush*, 45 N. Y. 596; *Sie-mon v. Schurck*, 29 N. Y. 598."

A Michigan case, *Lasley v. Delano et ux*, 139 Mich. 602, 102 N. W. 1063, is one in some respects similar to the case at bar. When the grantor in that case attempted to compel the party taking the grant to account for the moneys realized from the sale of the real property based on a verbal agreement, defendant, as is done in this case, set up the statute of frauds, and of uses and trusts, and the court, in considering same, speaks as follows: "Neither the statute of frauds, nor that of uses and trusts, applies to this case. The parol contract between complainant and Mr. Delano has been performed, and the parol trust imposed upon him fully executed. No contract for the sale of lands is involved. The relation of vendor and vendee did not exist between them. Complainant conceded his right to sell and receive the money, and that he did sell and receive the money. The relation, then, between them was not other or different than it would have been if she had sold the lands herself and intrusted the money to him, to be disposed of as directed and agreed by her. *Petrie v. Torrent*, 88 Mich. 43, 49 N. W. 1076; *Carr v. Leavitt*, 54 Mich. 540, 20 N. W. 576; *Edinger v. Heiser*, 62 Mich. 598, 29 N. W. 367. If, however, the trust rested in parol, and while so resting could not be enforced as an executory contract, yet, when the parol agreement has been executed, neither party can invoke the statute. The courts have repeatedly held that a party may perform a promise which he could not legally be compelled to perform, and that, when so performed, it is binding upon him and the other party to it. *Moore v. Crawford*, 130 U. S. 122, 9 Sup. Ct. 447, 32 L. Ed. 878; *Desmond v. Myers*, 113 Mich. 437, 71 N. W. 877; *Collar v. Collar*, 86 Mich. 507, 49 N. W. 551, 13 L. R. A. 621; *Bork v. Martin*, 132 N. Y. 282, 30 N. E. 584, 28 Am. St. Rep. 570; *Gwaltney v. Wheeler*, 26 Ind. 415."

In a Connecticut case, *Collins v. Tillou*, Adm'r, 26 Conn. 368, 68 Am. Dec. 398, Collins owning some property near Chicago, Ill., made a warranty deed of the land to one John Tillou under a parol agreement that he should act as Collins' general agent in making a sale of the same. The deed recited the consideration as "a valuable sum in dollars, and other considerations received, to our full satisfaction," although there was no actual consideration. After selling the land, Tillou refused to make any accounting to Collins, and subsequently died, and this was a suit by Collins against his estate for the amount of money received for the land. The statute of frauds, and the rule that parol evidence was inadmissible to vary the terms of a valid written instrument, were both invoked, but the court held that there was no force in either objection, and gave judgment to Collins for the amount received, allowing Tillou's estate compensation for the services rendered,

just as was done by the referee in the case at bar.

The case of *Collar v. Collar*, 75 Mich. 414, 42 N. W. 847, 4 L. R. A. 491, was one wherein Hamblin D. Collar, under a parol understanding, received title to certain lands for the purpose of sale and accounting to the grantors. He sold the same, and this action was to compel him to pay the money to those to whom it belonged, the suit being for money had and received, and the court, under the facts stated, directed a verdict for the defendant. The theory presented by the appellant in the case at bar was urged and the Supreme Court, by Long, J., says: "It was not an interest in the land which plaintiff was seeking to recover, but his proportionate share of the fund growing out of the sale of the land." And the court in the syllabus holds: "That an action will lie for money had and received by a grantee on the sale of land conveyed to him under a parol trust to make such sale and distribute the proceeds among the grantors."

In the case of *Edinger v. Heiser*, 62 Mich. 598, 29 N. W. 367, a tract of land was conveyed to Andreas Heiser under a parol agreement that he would sell the same and use the avails as an investment for his support, and on his death that the same should go to the grantors. He sold his land for \$3,700 to one Vincent Greiff, and refused to make any account to the grantors of the proceeds. The grantors were his children by his first wife. The question of whether or not the children could recover the money paid by Greiff to their father for this land was disposed of by the court in the following words: "It is the same, in my opinion, as if the children had themselves deeded direct to Greiff and received the money into their own hands, and then afterwards placed it in the keeping of their father on the same terms as he now holds it—to use the interest, but to reserve the principal for them at his death. There is no question but that such a trust is valid and enforceable. See *Perry*, Tr. art. 86, and cases cited; *Chadwick v. Chadwick*, 59 Mich. 87, 26 N. W. 288; *Leland v. Collier*, 34 Mich. 418; *Ellis v. Secor*, 31 Mich. 186, 18 Am. Rep. 178."

See, also, to the same effect, *Bitely v. Bitely*, 85 Mich. 227, 48 N. W. 540; *Wiseman v. Baylor*, 69 Tex. 63, 6 S. W. 743; *Desmond v. Myers*, 113 Mich. 437, 71 N. W. 877; *Whipple v. Parker*, 29 Mich. 369; *Karr v. Washburn*, 56 Wls. 303, 14 N. W. 189; *Bourne v. Sherrill*, 143 N. C. 381, 55 S. E. 799.

It will thus be seen from the law as declared in the foregoing authorities that, where one takes title to real property under a parol agreement to hold the same and sell it as an agent for the grantor, after having sold it and received the proceeds, he is liable for the proceeds thereof to the grantor.

The other objections made are now considered. It was contended that it was error

for the referee to overrule the objection to the introduction of evidence for the reason that the petition did not state a cause of action. Appellant calls attention to the authorities cited in support of his demurrer to the petition, and, as we have dealt with them and held that the petition stated a cause of action, no error was committed by the referee in hearing the evidence thereunder.

The point is then made that the referee erred in proceeding to take an accounting between the parties, and allowing plaintiff to introduce depositions and certified copies of deeds before any testimony was introduced to show a trust; stating: "No testimony could be properly received by the referee in this case until the trust was first established and the fraud of Logan proved as a substantive fact." As the referee was authorized to try the case as a court, the order of proof was a matter clearly within his right to control, and the objection made by the defendant cannot be sustained, as no prejudice was shown by this procedure. Whether the deeds and depositions were introduced prior to the evidence given by the plaintiff and defendant, or subsequent thereto, was practically of no consequence.

The next point made is to the refusal of the referee to allow the defendant to answer the question, "I will ask you if you were not called down there by Mrs. Brown for the reason that he (meaning Riley) was demanding payment?" In view of the fact that this is immediately followed in the record by the statement of the witness, "She wrote for me to come and help her, * * * she wanted me to help her out," this error, if error it was, was not prejudicial, because, if the question to which objection was sustained were answered in the affirmative, it would not have proved more than the affirmative evidence given by the witness on the same point.

It is next contended that the referee erred in sustaining objection to the question asked by the defendant, "Did she at that time call for any statement or account of these lots?" The next question asked by counsel was, "You may state if any conversation was had," and the answer was, "I cannot recall any," so that here again the evidence asked for was secured under another question, and no error followed.

It is contended that the referee erred in not allowing Logan to introduce in evidence the \$1,000 in notes. The plaintiff testified that she never received these notes, and the referee specifically finds "that no notes were delivered to the plaintiff at the time of the conveyance and assignment of judgment referred to, and that the notes offered in evidence were retained by the agent of the defendant, R. C. Brennon." The objection made in the case of their being offered in evidence was that they were incompetent and immaterial, and the referee's ruling was, "The objection is sustained for the present,

excepted to by defendant." This ruling is followed in the record by a number of copied notes with the statement thereon, "The following are the notes offered in evidence." The testimony in reference to the notes by witness Brennon and the incorporation of them in the record, and a specific finding upon them by the referee, convinces us that they were afterward admitted in evidence and considered by the referee, and hence there was no error on this point. In view of the fact, however, that the referee finds that no notes were ever delivered to Mrs. Brown, we question whether error would have been committed even though they had been excluded altogether.

The next point made is that the referee erred in not allowing this question to be answered by the defendant: "Did you have any agreement with Mrs. Brown whereby you were to return this property to her?" Objection was urged and sustained. The most that appellant could expect from an answer to the question was a negative, and all that a negative would show in answer to that question was testified to, fully and completely, by defendant when he stated in his examination that he never had any of her property in his name, and that he did not owe Mrs. Brown anything then or at the time of the filing of her suit; and, furthermore, there is no allegation in the petition nor any evidence offered that defendant ever agreed that he was to return the property to her. The question was not within the issues of the case, and there was no error in not allowing it to be answered.

The point is also made that there was no formal or proper reference made in the case. Stipulation was filed by the parties as follows: "That said cause shall be referred, and that the referee shall make findings of fact and report his conclusions of law, and that the issue may be joined after such reference." On this stipulation the court made the following order: "It appearing to the court that this is a case involving an accounting and same should be referred, and both parties consenting thereto, it is ordered that said cause be and hereby is referred to A. H. Huston on law and facts as appeared by stipulation on file." Defendant argued that this reference was prejudicial, because, under the pleadings, it was necessary to find Logan guilty of a fraud before he could be compelled to account. While it is true before any accounting could be had it was necessary to find an indebtedness which was denied, it would not have been necessary to find fraud, and even though it were the entire matter, either of fraud or indebtedness, was before the referee, and we can hardly say, in the absence of any evidence whatever, that he was influenced by the language mentioned to find for the plaintiff and against the defendant.

The defendant next objects to the consideration of the report of the referee on the

ground that he was not sworn, and cites in support thereof *Province v. Lovi*, 4 Okl. 672, 47 Pac. 476. In that case it appears that an oath was taken by the referee, and it was contended that it was not in the form prescribed by the statute. In the present case the record appears to be silent on the question of whether the referee was sworn, and it is our judgment that in cases of this character the presumption would be upon such a record that the referee took the oath as prescribed by law, as all officers are presumed to do their duty. The failure of a referee to take the oath required by law is a mere irregularity which is waived by the parties proceeding to trial without objection on that ground. *Lamaster v. Scofield*, 5 Neb. 148; *Board of Supervisors v. Ehlers*, 45 Wis. 281; *Newcomb v. Wood*, 97 U. S. 581, 24 L. Ed. 1085. The referee Huston was agreed upon by the parties, and defendant appeared personally before him in his office in Logan county, outside the judicial district in which the case was pending, and submitted, without objection, his evidence, thereby waiving any irregularity either in the trial of the case at that place or the consideration thereof by the referee at such place, although there is nothing in the record to show that the same was considered and the conclusion arrived at outside of Kingfisher county.

It is next objected that motion of plaintiff to affirm the report of the referee was sustained by the court without reading the testimony in said cause, and this action of the court is urged as error. We know of no authority, and none is cited us by counsel, holding that it is error for a court to sustain the findings of a referee without reading the testimony introduced. Furthermore, the judgment rendered by the court herein contains a specific statement, "Thereupon plaintiff's motion for judgment upon the report of the referee coming on, and all parties being present, after due consideration thereof, the court finds that the acts and conduct of said referee in the trial of said cause are regular and legal in all respects." And, while the recital in the case-made contains the statement that the court sustained the report of the referee "without reading the testimony in said cause," this cannot overcome the specific finding of the court in the judgment of due consideration. See *Day v. Territory*, 2 Okl. 409, 37 Pac. 806; *Abel v. Blair*, 3 Okl. 399, 41 Pac. 342. In the case last cited, the court says in the syllabus: "The records of the court incorporated into a case-made cannot be contradicted by other statements contained in the case-made."

We see no reason to depart from the holding of this court in the case *In re Dossett*, 2 Okl. 369, 37 Pac. 1066, hence the objection made by defendant to the jurisdiction of the trial court to render judgment herein on the 18th day of May, 1904, the same being at an adjourned day of the March, 1904, term of the district court of Kingfisher county, and

this notwithstanding the fact that between the setting of the said March, 1904, term of said court and the reconvening of the said court in May of the same year, there had been held by the judge of said district one or more regular terms of court therein. Hence there was no merit in the objection urged.

The issues herein have been submitted to a referee, who heard the evidence and made his findings thereon. The district court to which he made report confirmed and approved such finding, and, there appearing no error raised by the appellant in this court, the judgment is accordingly affirmed.

TURNER and HAYES, JJ., concur. WILLIAMS, C. J., and KANE, J., dissent.

(21 Okl. 13)

SHAWNEE LIGHT & POWER CO. v. SEARS.

(Supreme Court of Oklahoma. April 17, 1908.)

1. TRIAL—DEMURRER TO EVIDENCE—OPERATION AND EFFECT.

A demurrer to the evidence admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn from the evidence. On a demurrer to the evidence, the court cannot weigh conflicting evidence, but will treat the evidence as withdrawn which is most favorable to the demurrant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 354-356.]

2. PLEADING—ISSUES, PROOF, AND VARIANCE—FAILURE OF PROOF.

A party will not be driven out of court simply because his petition alleges more than has been proven, when the unproven allegations are not necessary to authorize a recovery. Nor will his action be denied merely because the testimony offered does not support certain averments contained in the petition, when it does support others which are sufficient to authorize a recovery. Nor is this holding in disregard of the rule of pleading and practice which prohibits a variance between the allegations made and proof shown.

3. TRIAL—DEMURRER TO EVIDENCE—OPERATION AND EFFECT.

Where, in a case brought for damages for injuries incurred by coming in contact with defendant's appliances, part of the system in use by an electric light company, and there is a general denial to plaintiff's petition, and on a demurrer to plaintiff's evidence it is insisted that there is no evidence supporting the allegation that defendant was responsible for the condition of the appliance causing the injury, it is competent in determining this question to consider the entire conduct of the trial on the part of such defendant, its pleading, cross-examination of the witnesses, and admissions, and if these, coupled with the deductions which may be inferred and logically drawn from the evidence introduced, show to the satisfaction of the jury that it does not controvert a particular fact strictly within the issues, and establish the responsibility, it is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 354-356.]

4. ELECTRICITY—CARE REQUIRED.

An electric light company using the public streets of a municipality for its poles, wires, and appliances, in conducting its business, is required to exercise the highest degree of care, and to maintain in the best possible condition

the best appliances known to the science, to render its business safe, and to use that degree of care, caution, and circumspection in keeping with the dangerous character of its business; but it is not an insurer against unforeseen and unavoidable accidents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 7.]

5. SAME — PRESUMPTIONS AND BURDEN OF PROOF.

In consideration of the dangerous character of the element used in the business of an electric light company, and the high degree of care required of it to protect the public from injury by coming in contact with its appliances, when it is shown, in a case against it by the evidence, that one on the public streets in a proper place is injured without fault on his part by improper insulation or derangement of its appliances, a presumption of negligence arises which casts the burden on the defendant of showing that it exercised due care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 11.]

(Syllabus by the Court.)

Error from District Court, Pottawatomie County; B. F. Burwell, Judge.

Action by May Sears, by her next friend, F. M. Sears, against the Shawnee Light & Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This was an action brought in the district court of Pottawatomie county by May Sears, by her next friend, F. M. Sears, against the Shawnee Light & Power Company, to recover damages for injuries received by her in coming in contact with a guy wire and iron rod attachment, which were heavily charged with electricity, and which sustained a pole planted on one of the public streets of Shawnee and used by defendant in operating its plant. The case was tried to a jury, and on the plaintiff introducing her evidence the defendant demurred thereto, which demurrer was by the court overruled. The court then instructed the jury, which returned a verdict in favor of plaintiff for \$6,680. The defendant filed its motion for new trial, which was by the court overruled, and the case is before us on proceedings in error.

B. B. Blakeney and J. H. Maxey, Jr., for plaintiff in error. Woods & Biggers, for defendant in error.

DUNN, J. (after stating the facts as above). Six assignments of error are discussed in the brief of plaintiff in error. The first is: "The court erred in overruling the demurrer of plaintiff in error to the evidence offered by defendant in error." And in this connection insists there was a variance between the allegations and the proof. The balance of the assignments relate to the alleged errors in the instructions given by the court to the jury.

The petition of plaintiff in this case describes with much minuteness and detail the location and situation of the pole, guy wire, and iron rod attachment, and the connection thereof with the defendant company in its operation of its plant, and avers with particularity and minuteness the alleged negli-

gence and carelessness of the defendant company in its failure to provide and maintain proper means to keep the electricity, which it was using in its main wires which were attached to the pole above mentioned out of the said guy wire, and iron rod attachment, which supported the same, and charges that by virtue of this negligence and carelessness the guy wire and iron rod attachment became heavily charged with a deadly and dangerous current of electricity from the wires of the defendant company, and that, by virtue of this negligence, plaintiff was injured when she came in contact with it on the 1st day of May, 1904. The proof in the case showed substantially the following facts: That at the time of the injury, May Sears was a child of about 11 years of age, and on the morning of her injury left her father's house between 6 and 7 o'clock on an errand. That on her route was the pole with the guy wire and iron rod attachment situated near a foot-path at the edge of the place in the street where the sidewalk is usually placed. That on this morning, it having rained the night previous, the ground was muddy, and, as she approached the guy wire and iron rod attachment, her foot slipped on the soft ground, bringing her in contact with them. That she immediately fell insensible to the ground, and on being rescued it was found that she had sustained permanent and lasting injuries: the flesh and bone of one of her limbs being literally burned away, leaving her a helpless cripple. The evidence further disclosed that the wire and rod were charged with electricity, as it sputtered from there, and that a telephone wire which ran from this pole to the house of one of the neighbors was cut by him during the previous night, owing to the fact that his telephone kept constantly ringing, and that it ceased after the wire was cut. The answer of defendant in the case is a general denial and an allegation that: "If the plaintiff received any injury, it was because of her own carelessness and contributory negligence, or the carelessness and contributory negligence of her parents in permitting her to be in a place of danger, and in handling and playing with the wires of the plaintiff (defendant)."

On the introduction of the evidence before the jury, and just prior to the time when plaintiff rested, the defendant entered of record an admission "that the pole and the guy wire was a part of the system in use in Shawnee by the defendant, and that the pole testified to by the witnesses was used by the telephone company also, and that it had been erected by the light and power company." Defendant insists that, by reason of the failure of plaintiff to establish the details charged in her petition, there was a variance between the plea and the proof, insisting that, "if the plaintiff describes with needless particularity and minuteness a tort and the means by which it was effected, he

will be required to prove the same with more particularity than he would if he had pleaded his cause of action in more general terms." While it is conceded that this is the general rule of pleading, it is not without its exceptions, and in cases of this character, where the evidence introduced is not different than that charged and shown, a right in plaintiff to recover for the very injury and wrong complained of, and defendant is not confronted by a different case before the jury than faced him in the pleading, the variance, if any there be, is harmless. *Wilson's Rev. & Ann. St. Okl. 1903, par. 4337.*

On this point the Supreme Court of Missouri, in the case of *Gannon v. Laclede Gas-light Company*, 145 Mo. 502, 48 S. W. 968, 47 S. W. 907, 43 L. R. A. 505, spoke as follows: "A party will not be driven out of court simply because his petition alleges more than has been proven, when the unproven allegations are not necessary to authorize a recovery; nor will his actions be denied merely because the testimony offered does not support certain averments contained in his petition, when it does support others which are sufficient to authorize a recovery. Nor is this holding in disregard of the rule of pleading and practice that prohibits a variance between the allegations made and proof shown."

On this same point the Supreme Court of Oregon, in the case of *Boyd v. Portland Electric Co.*, 40 Or. 126, 66 Pac. 576, 57 L. R. A. 619, said: "Where plaintiff has made a prima facie case of negligence by showing that an action happened resulting in his injury, he is not obliged to prove any specific negligence, though it may have been alleged, since the presumption is that the accident would not have happened had proper care been taken." In the discussion of this case, Chief Justice Bean, who delivered the opinion of the court, says: "The defendant contends, however, that as the complaint in hand avers that the wire which caused the injury was weak and defective, and insufficiently stretched and fastened, the plaintiff was obliged to point out by his testimony some defects in the particulars alleged. But we are unable to concur in this view. The doctrine of '*res ipsa loquitur*' alluded to is a mere rule of evidence. 2 Thompson, Neg. 1227 et seq. It proceeds on the theory, as the term implies, that the happening of an accident under certain circumstances is of itself prima facie evidence of negligence, and, when it is evidence of the particular negligence charged in the complaint, the plaintiff is entitled to invoke the rule. Thus, in *Trenton Pass. Ry. Co. v. Cooper*, 60 N. J. Law, 219, 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592, with note, the negligence averred was the insufficient bending or fastening of the rails of a street railway, and it was insisted that the plaintiffs were obliged to point out and establish some particular defect or insufficiency as alleged. The court held, however, that the escaping of electricity from the rails was

presumptive proof of the negligence alleged, thus bringing the case within the doctrine of *res ipsa loquitur*. In *Snyder v. Wheeling Elec. Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922, with note, the negligence charged was insufficient fastening, and, although the court held that no evidence of other acts of negligence was competent, it ruled that the mere fact that the wire fell created a prima facie presumption of negligence, sufficient to support the action unless rebutted by something appearing in the case."

On both propositions, the question of variance and failure of proof, a case from the Supreme Court of Alabama (*McKay & Roche v. Southern Bell Telephone Co.*, 111 Ala. 337, 19 South. 695, 31 L. R. A. 589, 56 Am. St. Rep. 59) is particularly applicable to the case at bar. The court says in the syllabus: "The plea of the general issue puts in issue all the material allegations of the complaint, and imposes upon the plaintiff the necessity of proving them; but the defendant may, by his course of conduct on the trial, show to the satisfaction of the jury that he does not really controvert a particular fact strictly within the issue, but waives formal proof thereof, and in such a case it should be left to the jury to say whether it is waived or not." Mr. Justice Head, in his discussion of the point raised in that case which was similar to the one at bar, said: "There does not appear to have been any real question upon the trial as to the operation of the railway and telephone lines by the defendants, respectively, and the plaintiffs omitted to make direct proof thereof, at least as to the telephone company. * * * The conduct of the trial by these defendants from beginning to end, the character and manner of the development and production of the testimony, the cross-examination of the plaintiffs' witnesses, the absence of a suggestion, express or implied, in the conduct of the trial on the facts, that any other than the defendants maintained and operated the wires, respectively, all tended to show an implied admission that they were the parties, and authorized the jury so to infer. It is certainly true that the plea of the general issue puts in issue all the material allegations of the complaint, and imposes upon the plaintiff the necessity of proving them; but the rule is a reasonable one. No set form of proof is prescribed. The defendant may, by his course of conduct on the trial, show to the satisfaction of the jury that he does not really controvert a particular fact strictly within the issue, but waives formal proof thereof, and, in such a case, it should be left to the jury to say whether it is waived or not."

And so in the case at bar it may be said that, while it is true there is lacking in the record specific proof of many of the formal allegations in the petition put in issue by general denial, when the answer of defendant is considered in conjunction with the course

and conduct of the trial, taken in connection with the admission on the part of the counsel for defendant, and giving all of these matters the probative force that were given them by the trial court and by the jury, we are unable to say that there was lacking evidence to sustain the verdict. The rule of this court on demurrers to evidence has been laid down in a number of cases, and is as follows: "A demurrer to the evidence admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn from the evidence. On a demurrer to the evidence, the court cannot weigh conflicting evidence, but will treat the evidence as withdrawn which is most favorable to the demurrant."

The other questions urged and argued by defendant relate to the instructions given by the court in reference to the duty which defendant owed to the plaintiff and the public, and, as they all relate generally to this subject, we will discuss them together. Defendant takes exception to the giving by the court of instruction No. 3, which is as follows: "The jury are further instructed that it was the duty of the defendant to see that its electric light lines and appliances were in a safe condition for those who might be brought in close proximity to them in traveling along the public streets, and if you find from the evidence that the plaintiff, while traveling along the street, and without fault on her part, came in contact with one of the guy wires of the defendant, and that the same was charged with a current of electricity, from which the plaintiff sustained the injuries complained of, then the plaintiff is entitled to recover damages, in this action, for the injuries thus sustained as explained in these instructions, and no presumption will be indulged in that the plaintiff was guilty of contributory negligence, if there was nothing in the appearance of the wire or surroundings to indicate to the plaintiff its dangerous condition." And No. 4, which is as follows: "You are further instructed that if you find from the evidence that the guy wire of the defendant, with which the plaintiff came in contact (if you find from the evidence that she came in contact with it), was carrying a current of electricity, which caused the injuries complained of to the plaintiff, this fact raises the presumption that the defendant had failed in its duty to the plaintiff." Also, No. 9, which is as follows: "You are instructed, to entitle the plaintiff to recover, the burden is upon her to prove by a fair preponderance of the evidence, not only that she was injured, but also that the defendant had charged the wire with which the plaintiff came in contact with a current of electricity; and in this connection you are instructed that, if you find from the evidence that the wire with which the plaintiff came in contact was the property of the defendant, and then being used as a part of its electric

light system, and that the same was then charged with a deadly current of electricity, the presumption would be that the same was charged by the defendant." And that the court erred in refusing to give the following instructions which were offered by it: "No. 1. You are instructed that the defendant is not an insurer and is not required to keep its property in such shape that in no event can parties using the public streets be injured; but it is only required to exercise the highest degree of care known to man and to the science, in order to prevent such injury, and, when such care is exercised, it will not be liable for unavoidable accidents or injuries. No. 2. You are further instructed that if, from the evidence, you find that the current which charged the guy wire referred to in the evidence came from or was communicated by the telephone wires upon the pole referred to in the evidence, and that the same was not charged by the defendant, then, and in that event, the defendant would not be liable for the injury which the plaintiff received, unless you further find that the defendant assumed the same obligation to protect such wires from the negligence, if you find such to have been the case, of the telephone company. No. 3. You are further instructed that if you should find that the defendant did not charge the wire upon which the plaintiff was injured, but that the same was charged by an electrical storm, or otherwise than by the act of the defendant, then and in that event the defendant would not be liable."

The defendant contends that instruction No. 3 given by the court places too high a burden upon it, virtually making it an insurer against all accidents, and that for this it was erroneous, and that in lieu thereof the court should have given instruction No. 1, offered by it. We have carefully considered the effect of instruction No. 3, and while we are not fully satisfied of its correctness, if given on a full trial, we believe, when it is weighed in the light of this record, that it was not error. In order to intelligently discuss it and to consider its effect, it is necessary for us to look not only to the law governing the duties of defendant to plaintiff and the public generally, but also to consider the condition of the trial at the time this instruction was given. The court states in its opening statement to the jury that, "for a detailed statement of the issue, you will be permitted by agreement of counsel to take to your jury room the petition of the plaintiff, and the answer of the defendant," and instruction No. 1 states that, "under the issues as joined by the pleadings in this case, the burden is upon the plaintiff to prove her cause of action as alleged in her petition by a fair preponderance of all the evidence, and, unless she has so proven, it will be your duty to find for the defendant." This instruction is virtually a limitation upon all further instructions given by the court. In addition to this, at the time instruction No. 3 was given,

the plaintiff had offered her evidence and had rested; the defendant had offered no testimony, but had rested upon the evidence of the plaintiff. She had shown beyond dispute the injuries received, and how they had been caused by coming in contact with the guy wire and iron rod attachment of the defendant, and instruction No. 3, under the limitations mentioned, said to the jury that it was the duty of defendant to keep its appliances in a safe condition for those who might be brought in close proximity with them in traveling along the public streets, and if plaintiff, without fault on her part, was injured as complained of, then she was entitled to recover damages in the action.

That defendant is not an insurer, and that instruction No. 1 offered by it correctly states the law, is the holding of practically all the authorities upon this point. 20 Cyc. p. 471; *New Omaha Light Co. v. Anderson*, 73 Neb. 84, 102 N. W. 89; *Knowlton v. Des Moines Edison Light Co.*, 117 Iowa, 451, 90 N. W. 818; *Norfolk Ry. & Light Co. v. Spratley*, 103 Va. 379, 49 S. E. 502; *Citizens' Ry. Co. v. Gifford*, 19 Tex. Civ. App. 631, 47 S. W. 1041; *City of Denver v. Sherret*, 88 Fed. 226, 31 C. C. A. 490. While the defendant is not an insurer, still it is held to the highest degree of care in keeping its appliances "safe," and we believe the correct rule to be as is said by Justice Cook, speaking for the court of North Carolina in the case of *Mitchell v. Raleigh Electric Co.*, 120 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735: "The defendant company was engaged in the business of manufacturing, producing, leasing, and selling light made from the use of electricity, which is the most deadly and dangerous power recognized as a necessary agency in developing our civilization and promoting our comfort and business affairs. It differs from all other dangerous utilities. Its association is with the most inoffensive and harmless piece of mechanism, if wire can be classified as such, in common use. In adhering to the wire it gives no warning or knowledge of its deadly presence; vision cannot detect it; it is without color, motion, or body; latently and without sound it exists, and, being odorless, the only means of its discovery lie in the senses of feeling, communicated through the touch, which, as soon as done, becomes its victim. In behalf of human life and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition." The rule is well laid down in the case of *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114, as follows: "An electric company, in using the dangerous force of electricity not generally used, is required to use very great care to prevent injury to person or property, and it is sufficient proof of negligence for it

not to raise its wires so high above a roof on which they are placed that those having occasion to go there will not come in contact with them." Speaking on this point, the Supreme Court of Colorado, in the case of *Denver Electric Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 506, says: "A person carrying on a business perilous to the public is bound to exercise that reasonable care and caution which would be exercised by reasonably prudent and cautious persons under the same or similar circumstances. The care should increase as the danger does, and, when the business is attended with great peril to the public, the care to be exercised is commensurate with the increased danger." The Supreme Court of Kentucky goes even further than either of these in the case of *McLaughlin v. Louisville Electric Light Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812, and says: "At places where people have the right to go for work, business, or pleasure, electric light companies are required to afford them perfect protection from its wires, by having them perfectly insulated."

While we do not agree in its entirety with the Kentucky case, we do hold an electric light company, using the public streets of a municipality for its poles, wires, and appliances in conducting its business, is required to exercise the highest degree of care, and to maintain in the best possible condition the best appliances known to the science, to render its business safe, and to use that degree of care, caution, and circumspection in keeping with the dangerous character of its business; but it is not an insurer against unforeseen and unavoidable accidents. At the time instruction No. 3 was given by the court, plaintiff's evidence had shown that without fault on her part, proceeding on the public highway in a place where she had a right to be, she came in contact with the appliances of the defendant company at the edge of the foot walk; that the appliance was one in a most exposed place, and where people were liable to come in contact with it, and one which in the operation of its plant the defendant did not use for the transmission of its current, and in which its current would not then have been except for the want of due care and regard for safety on its part or its servants. Under these circumstances, this instruction was given, and the question arises: Was the company liable from a showing of those facts? We hold that it was, and that this is sustained by a great weight of authority in this country and in England. *Hammon on Evidence*, p. 270, § 66; *Joyce on Elect. Law*, § 1048; *Cooley on Torts*, p. 798; 2 *Jaggard on Torts*, pp. 864, 938; *Shearman & Redfield on Law of Negligence*, § 60; *Suburban Elect. Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700; *Newark Elect. Light & Power Co. v. Ruddy*, 62 N. J. Law, 505, 41 Atl. 712, 57 L. R. A. 624; *Brown v. Edison Elect. Co.*, 90 Md. 400, 45 Atl. 182, 46 L. R. A. 745, 78 Am. St. Rep. 442; *Western*

Union Tel. & Tel. Co. v. State, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; Larson v. Central Ry. Co., 56 Ill. App. 263; Ennis v. Gray, 87 Hun, 355, 34 N. Y. Supp. 379; Arkansas Tel. Co. v. Ratteree, 57 Ark. 429, 21 S. W. 1059; Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; Howser v. Cumberland & Penn. R. R. Co., 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332; Uggla v. Street Ry. Co., 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481; Snyder v. Wheeling Elect. Co., 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922.

A quotation from the text-books cited above, and from the courts whose opinions are noticed, will best elucidate the rule we have laid down. Mr. Hammon, in his work on Evidence, *supra*, says: "Persons licensed to maintain overhead wires in public places for the transmission of electricity for power, illumination, or other purposes, are bound to use a high degree of care for the protection of the public; and if, by reason of imperfect insulation or derangement of the wires, any one is injured in person or in property through contact therewith, a presumption of negligence arises, which casts on the defendant the burden of showing that he exercised due care." Jaggard on Torts, at page 864, says: "A live wire is exceedingly dangerous. So that proof of contact therewith and consequent damages makes out a complete case of *prima facie* negligence, and throws the burden on the defendant to show that such wire was in the streets without fault on his part." And further, at page 938: "While it is true, as a general proposition, that the burden of showing negligence on the part of the one occasioning an injury rests in the first instance upon the plaintiff, yet, * * * when he has shown a situation which could not have been produced except by the operation of abnormal causes, the onus rests upon the defendant to prove that the injury was caused without his fault." Shearman & Redfield on the Law of Negligence, *supra*, says: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

The case of Suburban Electric Company v. Nugent, *supra*, was one decided by the Supreme Court of New Jersey. Christian Otto was a member of the police force of the city of Elizabeth. His dead body was found lying about three feet from the base of one of the electric light poles of the plaintiff in error. No one was present when he came to his death, and there was no direct evidence to show how it was caused; but it appeared from plaintiff's proofs that there was fastened upon the pole at the foot of which decedent's body was found a reel, around which

was wound a wire rope used for the purpose of raising and lowering one of the defendant's arc lamps, that the reel was about on a level with the top of a man's head, and that the wire rope around it was practically uninsulated and was heavily charged with electricity. There was upon his left hand a freshly made burn, and his blood was found in an abnormal state, such as is found in the bodies of persons who have died from electric shock. This was the evidence on which the court denied a nonsuit requested by defendant, and the court, by Gummere, J., on these facts, said: "These facts, unexplained, not only make it reasonable to suppose that the decedent came to his death through having touched with his hand the uninsulated wire upon the reel which was fastened to the defendant's electric light pole and thereby received a fatal shock, but exclude any other inference. For such a death the defendant was plainly responsible. It was using, in the public streets of Elizabeth, an agency dangerous to human life, and it was bound to take every reasonable precaution to protect the public, while using those streets, against injury from that agency. The maintaining upon a reel, which was fastened to an electric light pole so near to the ground as to be within easy reach, of an uninsulated wire heavily charged with electricity, was, in my judgment, a gross neglect of the duty which it owed to the public."

The case at bar is a stronger case, for in the case cited the wire touched by decedent was as high as the top of his head. He apparently had no duty to perform in connection with it, and the liability of the defendant grew out of the fact, and that fact alone, that it was its duty to have kept its current out of appliances of that character, and that the decedent was not guilty of contributory negligence in his reliance upon the performance of such duty. The guy wire and iron rod attachment in the case at bar were the appliances of the defendant company which were not used by them in conveying electricity. They were not constituted for this purpose and were no part of the company's plant or system designed for that purpose. No one would be presumed to regard it necessary to beware of appliances of this character located along the highway, as were they, or to suspect that they would be charged with electricity. They had nothing to do with the transmitting of either light or power. They were simply placed in aid and support of the pole from which the other wires were suspended. No possible degree of negligence could be imputed to one in coming in contact with them and being injured because of their condition. A higher degree of care and responsibility by reason of these facts was upon the defendant to make them safe, than existed in reference to that part of the system used for transmitting electricity, and yet the courts have uniformly held that, where the wires of an electric company used for the

current become out of order, broken, disarranged, or, through lack of insulation, parties by coming in contact therewith are injured, that the injury itself is *prima facie* caused by negligence, and the establishment of it then places the burden upon the company to show that it was not occasioned through its fault or negligence.

Such is the holding in the case of *Western Union Telegraph & Telephone Co. v. State*, *supra*. The court holds in the syllabus: "That the defendants, using on the highway dangerous agencies, were bound so to manage them as not to injure persons lawfully upon the streets, and if, because their appliances are not in good order, a person is injured, a *prima facie* presumption of negligence arises in the absence of evidence showing that the defect originated without the fault of the defendants." In the discussion of this case, Page, J., who wrote the opinion, speaking for a unanimous court, speaks as follows: "The privileges so granted, thus to incumber the public highway with appliances so likely to become dangerous to the public safety unless properly employed and controlled, imposed upon them, and each of them, the duty of so managing their affairs as not to injure persons lawfully on the streets. They owed it to Nelson that his lawful use of the street should be substantially as safe as it was before the telegraph and railway plants had so occupied it. It was their plain duty, not only to properly erect their plants, but to maintain them in such condition as not to endanger the public. It follows from this that, if the property of the defendant was not in proper condition and by reason thereof Nelson was injured, these facts alone, in the absence of other evidence to show that the defect originated without the fault of the companies, afford a *prima facie* presumption of negligence. In such a case the doctrine of '*res ipsa loquitur*' (a simple question of common sense,' Whittaker's *Smith on Neg.* 423) fairly applies. In the leading case of *Kearney v. London, etc., Railway Co.*, L. R. 5 Q. B. 411, affirmed in the Exchequer Chamber, L. R. 6 Q. B. 759, and cited approvingly in *Howser's Case*, 80 Md. 148, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332, Cockburn, C. J., said: 'Where it is the duty of persons to do their best to keep premises or a structure in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to show that they used that reasonable care and diligence which they were bound to use, and the absence of which, it seems to me, may fairly be presumed from the fact that there was the defect from which the accident has arisen.'"

To the same effect is the holding of the Supreme Court of North Carolina in the case of *Haynes v. Gas Company*, *supra*: "Negligence being a failure of duty, proof that a 'live wire' carrying a deadly current of electricity was hanging over and lying upon a sidewalk, and that it had been placed above

the street by and was the property of the defendant corporation and was under the control of the servants of the latter, and that by contact with such wire a person, having a right to be on the street, was killed, constituted a complete *prima facie* case of negligence, and the burden was put upon the defendant to show that the wire was not down through any negligence of itself or its servants or agents."

The Supreme Court of the state of West Virginia, in the case of *Snyder v. Electrical Co.*, *supra*, says: "There must be reasonable evidence of negligence. But where a thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." It is a well-considered opinion, and Justice Brannon, speaking for the court, uses the following language: "Suppose there is no evidence of negligence on the part of the defendant, does the mere fact that the wire fell create a *prima facie* presumption of negligence, sufficient, in the absence of something appearing in the case to repel that presumption, to support the action? This involves the rule or principle of *res ipsa loquitur*—the thing itself speaks. A wire charged with a deadly current of electricity falls from its proper place of elevation above the street to the surface of the street, and there, by contact with a man lawfully passing along the highway, kills him with its current. Are we to presume that its fall came from some negligence of the owner, unless the circumstances of the case or facts shown by him shall show that its fall is not attributable to his negligence, but from some defect which that reasonable care and prudence proper in the case of such deadly wire was unable to discover, or some accident beyond his control; in other words, from inevitable accident? I answer that the law raises a *prima facie* case of negligence."

The Supreme Court of Massachusetts, speaking on this point, says, in the case of *Ugla v. Street Railway Co.*, *supra*: "If a piece of iron, forming part of the overhead apparatus of an electric street railway, breaks and falls upon a traveler on a highway, injuring him, in an action against the corporation for such injury, if no evidence is offered to explain the breaking, or to show that pains had been taken to make the apparatus safe, the jury will be warranted, from the happening of the accident itself, in finding negligence on the part of the corporation."

To the same effect is the declaration of the Appellate Court of the state of Illinois in the case of *Larson v. Central Ry. Co.*, *supra*, which speaks as follows: "The proof of an injury occurring as the proximate result of an act which under ordinary circumstances

would not, if done with due care, have injured any one, is enough to make out a presumption of negligence. So when a company permitted a broken electric wire to hang loose in the streets, proof of an injury resulting makes out a *prima facie* case."

The case of *Ennis v. Gray*, supra, from the Supreme Court of New York, is in point on the proposition raised. This was a case where the plaintiff, who was a roofer by trade, and being at work on the cornice, came in contact with defendant's converter or transformer used to change a high-tension electrical current of 1,000 volts to a lower tension current, maintained and operated by the defendant. No one observed the accident, and plaintiff was found with his clothes in flames lying upon the wire between the converter and the wall. A demurrer was interposed to the evidence, which showed substantially the foregoing facts. The court held that: "Evidence that the primary wires of a converter used to change a high tension current to a low tension, placed by an electric light company on a house which it supplied with electric light, were improperly placed and improperly insulated, and exposed to contact by any one going near it, is sufficient to prove negligence on the part of the company so as to render it liable to a person who, while repairing roof for the owner of the house, was injured by coming in contact with the wires." In the consideration of the case, Justice O'Brien speaks as follows: "A further question is presented, considering the nature of the accident, whether, merely from its happening, a presumption of negligence did not arise. As said in *Breen v. Railroad Co.*, 109 N. Y. 300, 16 N. E. 61, 4 Am. St. Rep. 450: 'There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under the control of a defendant, and the accident is such as in the ordinary course of business does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part.' And, as said in *Millie v. Railway Co.*, 5 Misc. Rep. 301, 25 N. Y. Supp. 753: 'Since every man is presumed to discharge his duty, it results that whoever asserts negligence in another must prove the fact, and must prove it by a preponderance of evidence. But there are cases in which the maxim "*res ipsa loquitur*" applies; that is to say, in which the very occurrence itself imports negligence. The specific question here is whether the occurrence in controversy carries with it an imputation of negligence against the defendant with the effect of imposing upon the appellant the burden of repelling this *prima facie* presumption of negligence.' So here we might ask whether the happening of this accident does not carry with it an imputation of negligence; it being self-evident that, if the wires had been properly insulated, it would not have

occurred, and it being equally clear that with the exercise of ordinary care defective insulation could be avoided."

Weighing the terms of instruction No. 3 by the rules enunciated in the foregoing authorities, and taking into consideration the instructions preceding it and the fact that it was offered to a jury, on a demurrer to plaintiff's evidence, and the further fact that there was no evidence of any kind or character offered on the part of defendant, tending in any wise whatsoever to explain or to show that the injury happened notwithstanding any care exercised on its part, and when in connection with this the court further instructed, as in No. 6, that defendant "must be required to exercise the utmost degree of care in the construction, maintenance, and care of their wires and poles, and in keeping out of their guy wires dangerous currents of electricity," we hold that it was not error to give instruction No. 3, nor to refuse No. 1, offered by defendant. Certainly it was the duty of defendant to see that its "electric light lines and appliances were in a safe condition for those who might be brought in close proximity to them in traveling along public streets," and the degree of care and the burden borne by it in putting them in this safe condition is plainly set out in instruction No. 6, in which it is held that it must be "required to exercise the utmost degree of care," and this we hold is the proper measure of responsibility. It is bound to exercise the highest degree of diligence and is liable, as a corollary thereof, for the slightest degree of negligence.

In giving instruction No. 9, the court substantially covers the proposition urged by defendant in instruction No. 2, which was offered, and which was refused. In the ninth instruction, the jury were charged that plaintiff must establish "by a fair preponderance of the evidence, not only that she was injured, but also that the defendant had charged the wire with which the plaintiff came in contact with a current of electricity." This precluded a finding against the defendant on evidence deficient of proof that defendant itself, and not some one else, was liable for the condition of the guy wire and iron rod attachment, and that portion of the instruction in which the jury were charged that, "if you find from the evidence that the wire with which the plaintiff came in contact was the property of the defendant, and then being used as a part of its electric light system, and that the same was then charged with a deadly current of electricity, the presumption would be that the same was charged by the defendant," is not erroneous under the authorities above cited, for as was said by Shearman & Redfield on the Law of Negligence, supra: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management

use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

We find no error either in the balance of the instructions which are given, nor in the refusal of those denied defendant, and having fully considered herein all the propositions raised by defendant in error, and no error being found in the record, the case is accordingly affirmed.

(20 Okl. 274)

WILLIAMS et al. v. FIRST NAT. BANK OF PAULS VALLEY.

(Supreme Court of Oklahoma. Feb. 18, 1908.)

1. INDIANS—ALLOTMENTS—NOTES—LEGALITY OF CONSIDERATION.

A complaint which states that at the time of the execution of the note sued on a contest was pending before the Commission to the Five Civilized Tribes between the payor and payee to determine which one of them had a right to take in allotment a certain tract of land, and that the consideration of said note was the abandoning of said contest by the payee, who was contestant, and permitting one of the payors, who was contestee, to file thereon and take the same as her allotment, which was done, and the same thereby became her separate property, does not state a contract void for illegality, and a demurrer thereto was properly overruled.

2. SAME—CONSIDERATION—COMPROMISE OF DISPUTED CLAIM.

A complaint which states that at the time of the execution of the note sued on a contest was pending before the Commission to the Five Civilized Tribes between the payor and payee to determine which one of them had a right to take in allotment a certain tract of land, and that the consideration of said note was the abandoning of said contest by the payee, who was contestant, and permitting one of the payors, who was contestee, to file thereon and take the same as her allotment, which was done, and the same thereby became her separate property, states the compromise of a disputed claim sufficient as a consideration to support an express promise to pay, and a demurrer thereto upon the ground that it failed to state a sufficient consideration for the note sued on was properly overruled.

3. SAME—LEGALITY OF CONSIDERATION.

An answer which states that the "sole and only consideration" of the note sued on was the illegal sale of certain lands in the Chickasaw Nation by the payee to one of the payors, and the exhibit filed "as part thereof," and alleged to be a copy of said illegal conveyance, shows that the payee only intended thereby to "bargain, sell, and convey and relinquish all my right, title, or claim which I have in any way in and to the possession of the lands and improvements situated upon" certain lands (describing them), and to "relinquish" unto said payor and her husband "all right which I have in and to the proceeds due or to become due from the sale of town property, or any interest in said town site located on the above-described premises," fails to state facts sufficient to show an illegal sale of lands or an illegal consideration for said note, and a demurrer thereto was properly sustained.

4. BILLS AND NOTES—DEFENSES—FAILURE OF CONSIDERATION.

A demurrer to an answer which alleges that the "sole and only consideration" of the note sued on was a certain conveyance from the payee to one of the payors of said note, and that the consideration therefor had "totally fail-

ed" for the reason that at the time said conveyance was made the payee "did not have the possession, right, or title to the premises in said conveyance described, and did not own the improvements situated thereon, and had no interest therein which she could convey" to said payor, was properly sustained, where from a copy of said conveyance "made a part" of said answer and marked "Exhibit A" it appeared that the payee simply relinquished "all my right, title, or claim which I have in any way in and to the possession of the lands and improvements situated upon" certain lands (describing them), and also relinquished to said payor and her husband "all right which I have in and to the proceeds due or to become due from the sale of" other property without covenants of warranty or other covenant.

(Syllabus by the Court.)

Error from the United States Court for the Southern District of the Indian Territory, at Pauls Valley; Hosea Townsend, Judge.

Action by the First National Bank of Pauls Valley against Jennie Lee Williams and others. Judgment for plaintiff, and defendants bring error. Affirmed.

On June 29, 1904, the First National Bank of Pauls Valley, Ind. T., defendant in error, plaintiff below, filed its complaint in an action at law in the United States Court in the Indian Territory, Southern District, at Pauls Valley, against the plaintiffs in error, defendants below, Jennie Lee Williams, S. L. Williams, and S. T. Williams, to recover on a certain promissory note of \$5,000 made and delivered by plaintiffs in error, hereafter called defendants, to Susan E. Mays, on February 4, 1904, payable in 90 days, and by her indorsed to defendant in error, hereafter called plaintiff, for value. After much pleading, on January 6, 1905, plaintiff filed its "first amended complaint," to which defendants demurred, and, upon the same being overruled, filed a joint answer, and, upon a demurrer being sustained thereto, filed an "amended answer to first amended complaint." On April 14, 1905, there was by plaintiff filed to this pleading a "demurrer to amended answer to first amended complaint," which was sustained, and, upon defendants electing to stand on their answer, judgment was rendered for plaintiff and against defendants for \$5,572, which judgment defendants have brought to this court for review by writ of error.

George W. Miller, O. L. Herbert, and L. C. Dolman, for plaintiffs in error. W. A. Ledbetter, S. T. Bledsoe, J. B. Thompson, and Dorset Carter, for defendant in error.

TURNER, J. (after stating the facts as above). Plaintiffs amended complaint, after formally declaring on the note, says: "Plaintiff further alleges and charges the truth to be that the said note was executed by the said Jennie Lee Williams for the benefit of her separate estate; that at the time of the execution of said note a contest was pending before the Commission to the Five Civilized Tribes, which said body, at the time, under

the law, had authority to entertain and hear the same between the said Jennie Lee Williams, one of the makers of said note, and Susan E. Mays, the payee therein, to determine which of the said parties had a right to take in allotment a certain tract of land adjacent to the town of Maysville, Ind. T.; that said note was executed by the said Jennie Lee Williams, S. L. Williams, and S. T. Williams in consideration of the abandoning of said contest by the said Susan E. Mays, the payee therein; that after said note was executed the said Susan E. Mays did abandon her contest and permitted the said Jennie Lee Williams to take said land in allotment, which she did, and the land thereby became her separate property"; that the said note had been transferred to it by the said Susan E. Mays for a valuable consideration; and that it is now the legal and equitable holder of the same, etc., and pray judgment on the note. On January 26, 1905, defendants demurred to said complaint, which was overruled by the court and exceptions noted, and the first assignment of error which we shall consider is: "(1) The court erred in overruling and denying the general and special demurrers of the defendants to the plaintiff's first amended complaint, for the reason stated in said demurrers; the said amended complaint upon its face having shown that the plaintiff seeks judgment against the defendants upon an illegal and void contract."

The first question, then, is whether the facts set forth in said complaint show that the contract entered into between Susan E. Mays and Jennie Lee Williams was illegal and void. In other words, had these parties the right to enter into a contract of settlement between themselves of a contest pending before said Commission? Let us inquire into the nature of such a contest. The acts of Congress approved March 3, 1893 (27 Stat. 645, c. 210, § 16), and March 2, 1895 (28 Stat. 897, c. 188), created what is known as the "Commission to the Five Civilized Tribes." After directing that said Commission compile a roll of the citizens of the various tribes, the act of June 28, 1898 (30 Stat. 497, c. 517), known as the "Curtis Bill," provided: "Sec. 11. That when the roll of citizenship of any one of said nations or tribes is fully compiled as provided by law, * * * the Commission heretofore appointed under acts of Congress, and known as the 'Dawes Commission' shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof. * * *" It is further provided under the heading "Allotment of Lands": "That each member of the Choctaw and Chickasaw tribes * * * shall, where it is possible, have the right to take his allotment on lands, the improvements on which belong to him." And further: "That all controversies arising between the members of the said tribes as to their right to have certain lands allotted to them

shall be settled by the Commission making the allotments." Pursuant to power vested in it, said Commission promulgated certain rules of practice and procedure applicable to contests before it, which were approved by the Secretary of the Interior January 27, 1903, and entitled "Rules of Practice," wherein it provided: "Rule 1. Contests may be initiated by or on behalf of an adverse claimant against any party by or for whom a selection of land has been made in the Choctaw, Chickasaw or Cherokee Nations for any sufficient cause affecting the right of possession of the land in controversy, by selecting the same land, and by filing a complaint with the Commission to the Five Civilized Tribes at the land office in the nation in which the land lies." After providing for service of process on the defendant and getting him into court and providing for a manner of forming an issue between the contesting parties, it is further provided: "Rule 17. * * * And upon the trial of the contest the Commission will, in all cases when it may be deemed necessary, personally direct the examination of the witnesses." Rule 19 provides: "* * * Upon the day originally set for hearing and upon any day to which the trial may be continued the testimony of all the witnesses present shall be taken and reduced to writing." Rule 20 provides for reinstatement of dismissal for want of prosecution within 20 days from service of the notice provided in rule 14 upon application of either party. "Rule 14. Dismissals. Cases will be called for trial on the day and at the hour fixed for hearing, and if the contestant makes no appearance the case will be dismissed for want of prosecution, in which event, written notice of such action, by personal service or registered letter, shall be given by the Commission to the parties at interest, or their attorneys." Thus it will be seen from the complaint in this case that the contest mentioned therein for and in consideration of the abandonment of which the note was given was, in effect, a suit pending before the Commission to the Five Civilized Tribes which Susan E. Mays had brought against Jennie Lee Williams to determine which of the two had a right to take in allotment a certain tract of land located adjacent to the town of Maysville.

Now the question is whether the abandonment of this contest, or rather the compromise of this suit for the possession of this land thus pending and the contract made pursuant thereto, is illegal and void. In the support of the contention that it is, defendants rely upon the last section of the act cited, supra, and upon section 24 of the Supplemental Agreement, which provides that "exclusive jurisdiction is hereby conferred on the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of lands," and contend that inasmuch as the former section provides that all such contests shall be settled by the Com-

mission, the word "shall" is mandatory; that the latter section excludes any other tribunal or person from determining any matter relating to an allotment of land; and that the settlement made by which Susan E. Mays "permitted Jennie Lee Williams to take the said land in allotment" was made without consulting the Commission, and was therefore void. In support of this contention it is urged that it has been many times decided that any agreement made by the parties to an allotment contest regarding the disposition of a contest may be ignored by the Commission to the Five Civilized Tribes and several cases alleged to be so decided by the Secretary of the Interior are cited, but which are not before us. Be that as it may, those decisions do not seem to be in point as holding that such a contract is void for illegality; and, as the proposition seems to be unsupported by other authorities cited, we will not enter into an elaborate discussion of the matter, but think it will be sufficient to say that as Susan E. Mays was the contestant in this case she had a perfect right at any time to abandon her contest and permit her adversary to prevail and take the property in controversy for her allotment, which she did, and the dismissal for want of prosecution seems to have been provided for in rule 14, *supra*. It follows that, as the contract under consideration, so far as we are advised, violated no rule of either common or statutory law, and did not contravene any rule of public policy, the same was not illegal and void.

Another rule involved in the discussion of this demurrer in the trial court was whether the complaint stated facts sufficient to show a consideration for the note sued on. The trial court in overruling the demurrer in effect held that it did, and this is alleged as error. The question, then, presents itself, is the compromise of a disputed claim sufficient consideration to support an express promise to pay?

In the case of *Buckner v. McIlroy*, 31 Ark. 634, the court said: "While it is true a right of action does not arise on a mere naked promise, yet, if there be any legal consideration for the promise, the court will not inquire into its adequacy; the law having no means of deciding upon this matter, and it being considered unwise to interfere with the facility of contracting and the free exercise of the judgment and will of the parties by not allowing them to be judges of the benefits to be derived from their bargains, provided there be no incompetency to contract and the agreements violate no rule of law. It is indeed necessary that the consideration be of some value, but it is sufficient if it be of slight value only; e. g., the compromise or abandonment of a doubtful right is a sufficient consideration for a contract, even when it turns out that the point given up was in truth against the promise—citing 1 Chitty on Contracts (11th Ed.) 29; Parsons

on Contracts, 436; Story on Contracts, 431. So an agreement to forbear to institute or prosecute legal or equitable proceedings, or to enforce either a legal or equitable demand, either absolutely or for a time, is sufficient consideration for a promise. Chitty on Contracts, 35. In general a waiver of any legal or equitable right at the request of another is sufficient consideration for a promise. Parsons on Contracts, 444."

Burton & Townsend v. Baird & Bright, 44 Ark. 556, was a suit upon a promissory note, and the defense was no consideration. The evidence tended to prove that the makers of the note had by letter ordered of Baird & Bright, dealers in machinery at Little Rock, one 30-inch Bradford cornmill, with directions to ship same by river to Cates' Landing on the Arkansas river; that the mill was shipped in good order from Little Rock by steamboat consigned to the defendants at Cates' Landing, and was put off at its destination on a sand bar about 40 yards from the main bank of the river, that being the usual place for putting off freight for that landing. Afterwards, by a rise in the river, the mill was washed away and lost. The loss would not have happened if the carrier had deposited the mill on the bank of the river out of the reach of high water, nor if the parts of the mill had been fastened together and the rocks fastened in the frame. Six months after the loss occurred, and when all the facts were known to the defendants and a voluminous correspondence had ensued between the parties as to the liability of the defendants to pay for the mill, they made the note in suit for the payment of the mill. The verdict and judgment were for the plaintiffs both in the justice court, where the cause originated, and in the circuit court, where it was taken on appeal. On appeal the Supreme Court said: "The compromise of a disputed claim is a sufficient consideration to support an express promise to pay the sum agreed upon, as was determined in *Richardson v. Comstock*, 21 Ark. 69, which was similar in some of its features to the present case"—and affirmed the judgment of the lower court.

In *Mason et al. v. Wilson et al.*, 43 Ark. 172, Mayfield Bros., merchants at Little Rock, had purchased of Mason & Trusdell of St. Louis a lot of butter of the value of \$109.52, but had not paid for the same. The order was countermanded after shipment, and before it was delivered Mayfield Bros. failed. The transfer agent at Little Rock, without authority, received the goods, and took it upon himself to transport it from the depot to their place of business. And finding the stores closed he deposited it in a certain warehouse in Little Rock, where it was attached as the property of Mayfield Bros. at the suit of W. T. and R. J. Wilson. The shippers thereupon brought replevin against the constable for the butter and obtained judgment against him, but afterwards made

an arrangement with the Wilsons by which the butter was turned over to them with the understanding that they were to account to the shippers for its value, less amount of the claim of the Wilsons against Mayfield Bros. Before the excess in the hands of the Wilsons had been paid over, another creditor of the Mayfields caused a writ of garnishment to be served on them to answer as to what effects of the Mayfields they had in their hands. Judgment was rendered against the garnishees for the surplus. The Wilsons then refused to account to the shippers for this sum, and the shippers sued them before a justice of the peace for the value of the butter and recovered. In the circuit court of the plaintiffs claimed judgment for \$59.52 according to their agreement of compromise with the defendants. The court decided that the right of stoppage in transitu had been lost, and that the butter was the property of Mayfield Bros. when the writ of attachment and garnishment were sued out and served, and gave judgment for the defendants. The Supreme Court, in reversing the case, after holding that the butter was the property of Mason & Trusdell, and not the property of Mayfield Bros., at the date of the service of the attachment and garnishment, and that they might have recovered the whole of it or its value, said: "But to avoid litigation they have agreed that the Wilsons might deduct their debt of \$50 against the Mayfields out of the proceeds of its sale. And the compromise of a disputed claim is a sufficient consideration to support an express promise, although there may have been no merit or foundation for any such claim,"—citing *Richardson v. Comstock*, 21 Ark. 69; *Snow v. Grace*, 29 Ark. 131; *Livingston v. Dugan*, 20 Mo. 102.

Atchison, Topeka & Santa Fé Railway Co. v. A. D. Starkweather, 21 Kan. 322, was a suit to quiet title. It seems that theretofore plaintiff and defendant had a controversy pertaining to their respective rights to the land in controversy before the Commissioner of the General Land Office and the various departments, including the Secretary of the Interior, and that the said controversy was finally decided in favor of the defendant to whom was issued the patent to said land; that at the time plaintiff made the contract hereinafter found to have been made the defendant was then the holder of the legal title to the land in controversy, it being the grantee in the patent of the same; that the defendant advertised the land in controversy for sale, and plaintiff, in order to prevent the land from being sold, and being in want of means to prosecute his case, entered into a written contract with defendant whereby he agreed to purchase the land in controversy; that the plaintiff made the contract with full knowledge of all the proceeding had in the controversy between him and the defendant in the Department of the Interior, and with full knowledge that said land had been

awarded to the defendant. The contract recited the sale, the receipt of part of the purchase money, time for subsequent payments, etc., and the agreement on the part of the company to make a deed upon a full compliance with all the conditions of the sale, etc. The contract was signed by both parties. "Now, conceding all the plaintiff claims concerning his title and interest in the land; * * * in other words, he had an equitable interest which might be made to ripen into a full equitable title, while the company on the other hand held but the naked legal title. With full knowledge of these respective rights and titles, and of the further fact that in a controversy before the officers primarily authorized to examine and decide upon the conflicting claims of himself and the company to the land they had decided against him and in favor of the company, he makes this contract of purchase. Without the means to carry on further litigation, he contracts to purchase the antagonistic title. He agrees with the owner of that title as to price, pays a portion thereof, and promises to pay the balance. * * * May he now come into a court of equity and obtain a decree canceling and destroying the title which he has thus contracted to purchase? We think not. The contract was valid and binding upon both parties. It was a compromise of contesting claims, the termination of litigation, and the purchase of an outstanding and rival title. It will not do to say that the plaintiff had the better right, that it was the duty of the defendant, having only a naked legal title, and holding the same simply in trust for the owner of the full equitable title, to convey the same to such owner, and that therefore a conveyance or promise to convey was no consideration for a promise on the part of such owner; for the plaintiff was not in fact the owner of the full equitable title, and might never become such, and again and chiefly after a compromise, made with full knowledge and without fraud or deception of a bona fide controversy, the courts will not inquire which of the two contestants had the better right. It is enough to say that they had a controversy and have settled it, and the fact of the dispute upholds the settlement and its various stipulations. Upon such a settlement the court does not inquire what the facts really are. It accepts the statements which the parties have made as conclusive upon them." So it seems to be immaterial what the promisor got or did not get on the compromise, or whether the disputed claim was in or out of court. The only question is, did he get a compromise of a disputed claim? If so, is it sufficient to support a promise to pay? See, also, *Geo. W. Knotts et al. v. Chas. H. Preble*, 50 Ill. 226, 99 Am. Dec. 514.

In view of the fact that defendants concede "the allegations to establish these facts—there was a contest pending between the parties; that plaintiff's assignor abandoned the

same; that she permitted Jennie Lee Williams to take the said land in allotment—now, if it is in the power of a party to contest to surrender rights to the other, a consideration undoubtedly passed," we will say that under rule 14, cited, supra, when the contestant Susan E. Mays made no appearance, according to her stipulation, and the case was dismissed for want of prosecution, and Jennie Lee Williams prevailed in that case, and was permitted to file on the land in controversy, that thereby there was settled by compromise a question of doubtful rights there pending such as was sufficient to support the promise to pay sued on in this case. It follows that the demurrers to plaintiff's complaint were properly overruled.

On the overruling of their demurrers defendants filed an "amended answer to first amended complaint" wherein they "allege and charge the truth to be that the sole and only consideration of said note as aforesaid was the pretended and illegal sale of certain lands situated near Maysville in the Chickasaw Nation, Ind. T., by said Susan E. Mays to said Jennie Lee Williams; that said pretended sale was illegal, fraudulent, and void, * * *" and as evidence thereof filed a copy of said alleged pretended and illegal conveyance as part of their answer and marked it "Exhibit A." Still further answering in the third paragraph "defendants say that the plaintiff ought not to further prosecute and maintain this action against them, because they allege and charge that at the date of the execution of said conveyance from Mrs. Susan E. Mays to Jennie Lee Williams as aforesaid said Susan E. Mays did not have the possession, right, or title to the premises in said conveyance described, and did not own the improvements situated thereon, and had no interest therein which she could convey to the defendant, Jennie Lee Williams, and that the consideration of the note herein sued on for that reason has totally failed," and ask to be discharged with their costs. To this pleading plaintiffs filed general and special demurrers, which were sustained.

And the next assignment of error which we shall consider, is: "(2) The court erred in sustaining the general and special demurrers of the plaintiff to the amended answer of the defendants to the first amended complaint, and in dismissing this cause from the docket of the court, in that the said amended answer contains statements constituting a good and valid defense to plaintiff's alleged cause of action as shown by its first amended complaint." We will consider this together with the next assignment of error, which is: "(3) The court erred in sustaining the plaintiff's general and special demurrers to paragraph 3 of defendants' amended answer to the first amended complaint, in that in said paragraph the defendant states that at the execution of the conveyance from Mrs. Susan E. Mays to Jennie Lee Williams that the said Susan E. Mays did not have the possession, right, or

title to the premises described in said conveyance, and did not own the improvements situated thereon, and had no interest therein which she could convey to the defendant, Jennie Lee Williams, and that the consideration of the note sued on for that reason totally failed." The exhibit attached to the pleading reads as follows: "That I, Susan E. Mays, of Maysville, Ind. T., for and in consideration of the sum of one dollar (\$1.00) cash in hand to me this day paid by Samuel L. Williams and Jennie Lee Williams, the receipt of which money is hereby acknowledged, and the further consideration of the sum of five thousand dollars (\$5,000) to be paid by Samuel L. Williams and Jennie Lee Williams on the 4th day of May, 1904, which indebtedness is evidenced by a promissory note of even date herewith, due on the 4th day of May, 1904, bearing interest at the rate of 8 per cent. per annum from date, signed by S. L. Williams, Jennie Lee Williams, and S. T. Williams, I hereby bargain, sell, and convey and relinquish all my right, title, or claim which I have in any way in and to the possession of the lands and improvements situated upon [describing the lands] Chickasaw Nation, Ind. T.; relinquishing unto the said Samuel L. Williams and Jennie Lee Williams all rights which I have in and to the proceeds due or to become due, or from the sales of town property or my interest in the said town site located on the above-described premises; hereby relinquishing to them any claim that I have by any former agreement pertaining to any town site on said lands above described. Witness my hand this, the 4th day of February, 1904. [Signed] Susan E. Mays." Without passing upon the question as to whether or not the facts set forth in this exhibit can be properly considered by us in reviewing the action of the lower court, or whether they could have been properly considered by the lower court in passing upon this demurrer, we will say that it clearly appears from the statements thereof that they do not bear out the statements made in the complaint. Instead of the "sole and only consideration of said note" being "the pretended and illegal sale of certain lands," the exhibit shows that it was only intended by Susan E. Mays to "bargain, sell, and convey and relinquish all my right, title, or claim which I have in any way in and to the possession of the lands and improvements situated upon" certain lands, and that she was simply, in addition thereto, "relinquishing unto Samuel L. Williams and Jennie Lee Williams any right which I have in and to the proceeds due or to become due from the sales of town property, or any interest in the said town site located on the above-described premises." Thus it would appear from the complaint, if said exhibit is to be considered a part thereof, that the "sole and only consideration of said note" was not "the pretended and illegal sale of certain lands situated near Maysville in the Chickasaw Nation, Ind.

T., and that the court committed no error in sustaining a demurrer to that plea.

The third paragraph of the answer reads as follows: "(3) And still further answering herein the defendants say that the plaintiff ought not to further prosecute and maintain this action against them, because they allege and charge that at the date of execution of said conveyance from Mrs. Susan E. Mays to Jennie Lee Williams as aforesaid said Susan E. Mays did not have the possession, right, or title to the premises in said conveyance described, and did not own the improvements situated thereon, and had no interest therein which she could convey to the defendant, Jennie Lee Williams, and that the consideration of the note herein sued on for the reason has totally failed"—and ask to be discharged with their costs. To this paragraph of the answer plaintiff demurs "* * * because the matters therein set forth are wholly irrelevant, and immaterial to the issues, and constitute no defense to plaintiff's cause of action, or any part thereof." The court sustained this demurrer, and the question now is whether this paragraph states facts sufficient to constitute a plea of total failure of consideration. Mansfield's Digest, § 5033 (Ind. T. Ann. St. 1899, § 3238), provides: "* * * The defendant may set forth in his answer as many grounds of defense, * * * as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered." Bliss, Code Pleading, § 346, says: "This requirement to state each defense separately is substantial as well as formal, and involves the obligation to embody in each statement every fact which is necessary to constitute the defense." See, also, *Calro & Fulton R. R. Co. v. Parks*, 32 Ark. 131; *Taylor v. Purcell*, 60 Ark. 611, 31 S. W. 567. In speaking of pleas of failure of consideration, 8 Cyc. 161, says: "These pleas when permissible should be framed on the theory that originally there was a consideration which wholly or partially fails because of something occurring subsequently, and must state facts sufficient to defeat or diminish a recovery." 14 Enc. Pl. & Pr. p. 635, says: "Where the alleged failure consists in the nonperformance of plaintiff's reciprocal promise or duty, the allegation and breach thereof must be distinctly alleged, showing with certainty that defendant has suffered damage directly resulting from the alleged breach." Now, giving this plea every intendment gathered from the entire answer, which we are not compelled to do, where is alleged the nonperformance of plaintiff's reciprocal promise and the breach thereof? In other words, where in this plea is alleged a duty and a breach thereof on the part of plaintiff which he has not performed resulting in damage to this defendant? It is simply alleged that "said Susan E. Mays did not have the possession, right, or title to the premises in said conveyance described, and did not own the improvements situated thereon, and had no interest therein which she could convey to the defend-

ant Jennie Lee Williams." Does the plea show that Susan E. Mays so represented? Did she purport to convey the title to this property to Jennie Lee Williams? It does not so appear from the face of the plea. To aid it, if possible, let us turn to the exhibit. That only purports to "bargain, sell, and convey and relinquish all my right, title, or claim which I have in any way in and to the possession of the lands and improvements situated upon (describing the land), and relinquishing to the makers of this note 'all rights which I have in and to the proceeds due or to become due' of other property. There was no warranty of title here. *Ray et al. v. Woolfolk, Use, etc.*, 1 Smedes and M. (Miss.) 523, was an action in assumpsit on a promissory note executed by plaintiffs in error, the defendants below. Besides the general issue they filed a special plea to the effect following: "That the note sued on was executed for and in consideration of a certain town lot in Brandon, sold to Charles S. Woolfolk, as executor of William R. Woolfolk, deceased, to the defendants, and for no other consideration; and they aver that the whole consideration has failed, because neither the said decedent nor his said executor ever had any title to said lot which they could communicate to the defendants." To this plea there was a demurrer. Passing on it the court said: "It does not disclose enough to enable the court to determine whether the consideration has failed or not. It states no warranty of title, and for aught that appears the purchaser might have agreed to run the risk of the title. It is therefore defective." So we say in this case this plea states no warranty, but from the exhibit it does affirmatively appear that the purchaser, the defendant in this case, did agree to run the risk of the title to the property therein set forth, and cannot now be heard to say that the consideration of the note given in purchase of that property failed by reason of plaintiff's failure of title therein. Nowhere is it alleged that she did not derive the benefit of that compromise, or is not in full and undisputed possession of everything involved in that controversy. Nowhere is it alleged that she has in any way been disturbed in her possession in anything thereby acquired, or has suffered any damage by reason of the alleged failure of title; but it is conceded on both sides that she took the property in controversy in allotment. In support of the doctrine that a breach of the reciprocal promise must be distinctly alleged showing with certainty that the defendant has suffered damage, we call attention to *Taylor v. Purcell*, 60 Ark. 612, 31 S. W. 568, where the court said: "In the first paragraph of the supplemental answer he alleges in substance that the plaintiff, to induce him to execute the note sued on, agreed to release all claims under a certain deed of trust upon defendant's property, and that they had failed to comply with such agreement, and that the trust deed was still unsatisfied, etc. But he

does not state * * * that he was damaged in any way by the failure to satisfy said deed. He does not allege that plaintiff afterwards made any claim to the property described in the deed, or disturbed his possession or right thereto to any extent, * * * and held that this paragraph constituted no plea of failure of consideration for the note sued on."

It follows that the court did not err in sustaining the demurrers to the defendants' amended answer to the first amended complaint, and, as the facts set forth in plaintiff's first amended complaint were sufficient to state a cause of action, that the judgment of the lower court must be affirmed.

STATE ex rel. STEVENSON v. RUSSELL,
Judge.

(Supreme Court of Oklahoma. May 13, 1908.)

1. MANDAMUS—WHEN LIES.

The writ of mandamus will not lie except to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

2. SAME—TO JUDGE—ADMISSION TO BAIL.

The writ of mandamus will not lie to compel a district judge to enter of record in the district court of a certain county in his district an alleged order admitting defendant to bail, where it appears that the same is not there properly entitled to record.

(Syllabus by the Court.)

Application by the state, on the relation of James Stevenson, for writ of mandamus to S. H. Russell, judge of the district court of Carter county. Writ denied.

Prewitt, Cardwell & Sniggs, for relator.
S. H. Russell, pro se.

TURNER, J. On February 19, 1908, the petitioner, James Stevenson, brought an original proceeding in this court for a writ of habeas corpus to secure his release from custody on bail. The petitioner urged two grounds on which he claimed his right to the writ; the first being that after his indictment for a capital offense he applied to the Honorable Hosea Townsend, who at that time was judge of the United States Court for the Southern District of the Indian Territory, for bail, and that said judge admitted the petitioner to bail in the sum of \$5,000, and that after the transition of said court into the district court of the state of Oklahoma the said court of said district refused to admit the petitioner to bail under said order. That petitioner thereafter applied to the Honorable R. McMillan, judge of the Fourteenth judicial district of the state of Oklahoma, to be admitted to bail, and a hearing of said application was had; that upon considering the testimony the said judge of said court committed petitioner to the common jail of Cleveland county to be held upon said indictment without bail; that said restraint was illegal; that peti-

tioner was not guilty of the crime of murder or any crime, and the proof of guilt was not evident, nor the presumption thereof great. An alleged copy of which said order was filed with his said petition. His contention was that said order admitting him to bail was res adjudicata as to his right thereto. But it appeared on that application that no order granting bail was ever entered of record on the journal of either the United States Court for the Southern District of the Indian Territory or the said district court of Carter county, Okl., or, indeed, of any court whatever, and for that reason the writ of habeas corpus in that case was denied.

This is an original application for a writ of mandamus filed herein on April 22, 1908, by said petitioner to require the Honorable Stillwell H. Russell, judge of the district court of Carter county, to pass judgment upon an application to supply the record in said cause and have said order entered therein, a copy of which is alleged by petitioner to have been presented to him as an exhibit to said petition, and which it is alleged he refused to do or consider. On April 30, 1908, respondent filed answer to the alternative writ of mandamus issued herein, and the cause came on for hearing upon an agreed statement of facts. During the hearing it developed that the alleged original order of Judge Townsend admitting defendant to bail in the sum of \$5,000 was on file in this court with petitioner's application for bail aforesaid, but had never been entered of record, either in the district court of Carter county or in the district court of McLain county where the indictment is pending, or anywhere else, so far as this court is advised. It does not clearly appear to this court from the testimony submitted on this application whether this alleged order was made as a court order or a chambers order by Judge Townsend at Ardmore; but from the face of a copy of the alleged order it appears to be a court order made by him at Purcell.

The court is therefore of the opinion that said order is in no event properly admissible of record in the district court of Carter county, and for that reason the peremptory writ of mandamus in this case is refused. All the Justices concur.

**FAUROT v. OKLAHOMA WHOLESALE
GROCERY CO.**

(Supreme Court of Oklahoma. May 13, 1908.)

**NEGLIGENCE—DANGEROUS PREMISES—UN-
GUARDED ELEVATOR.**

A person injured, although an infant, by falling down an elevator shaft in a wholesale grocery which was left unguarded, in order to recover must show the owner of the premises was under obligations to protect him from the injury; and the owner of such premises is liable for an injury occurring therein through his negligence only when the injured person comes up-

on them by invitation, express or implied, of the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 45-47.]

(Syllabus by the Court.)

Error from District Court, Oklahoma County; B. F. Burwell, Judge.

Action by Henry Faurot, by his next friend, Anna Faurot, against the Oklahoma Wholesale Grocery Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Fred S. Caldwell, for plaintiff in error. Shartel, Keaton & Wells, for defendant in error.

KANE, J. This was an action for damages for personal injuries alleged to have been sustained by plaintiff in error, who, for convenience, will hereafter be called the plaintiff, by reason of the negligence of the defendant in error, who, for convenience, will hereafter be called the defendant, in leaving unguarded an elevator shaft on the premises occupied by it in Oklahoma City where it conducts a wholesale grocery business. In the court below a demurrer to the evidence of the plaintiff was interposed by the defendant and sustained by the court, and judgment entered for the defendant. To this ruling of the court below plaintiff duly excepted, and the cause is now in this court on appeal.

The defendant raises some objections to the court going into the merits of the cause on account of alleged defects in the record; but we prefer to pass over these objections without deciding them, and try the case on its merits.

The facts, as shown by the evidence, were substantially as follows: At the time of the accident the defendant, a corporation, was occupying and had under its care and control and was conducting its business of a wholesale grocery in a certain brick building in Oklahoma City. In the rear of the building there was a platform where goods were loaded and unloaded. The plaintiff was a boy about 9½ years old at the time of the accident, and his father was conducting the meat department of a retail grocery store in Oklahoma City known as "Brown's C. O. D." Plaintiff's father frequently required him, when not in school, to come to said store and deliver meat orders that came in too late to be delivered by the grocery wagon. On the day of the accident plaintiff was so required to be at said store. The said Brown's C. O. D. was one of defendant's retail customers in Oklahoma City, and at about the time of the accident the defendant had purchased a load of empty boxes from Eli Brown, the proprietor of Brown's C. O. D., promising to send its own team for them. Before the defendant sent for the boxes Brown, without any instructions from the defendant in error to do so, the boxes being in his way, deliver-

ed them to the defendant. This delivery of the boxes to defendant on the part of Brown was made by one of Brown's employes named Baker. The plaintiff accompanied Baker to the defendant's place of business at the request of one of Brown's clerks to show the driver where the wholesale house was. When the boy and the driver came to defendant's place of business they drove in the west side and to the rear of the building, this being the proper place to make delivery of said boxes. The rear door being fastened, and there being no person there to receive the boxes, plaintiff, by said Baker's direction, went to the front of the building, passed around on the west side thereof, and entered defendant's place of business through the large double door in the front entrance thereof for the purpose of finding some person to receive the boxes. Upon entering said building plaintiff saw some persons working in the light of some electric lights burning in the rear part of the building. He walked down a passageway, having boxes of goods, etc., piled high on either side. In proceeding down said passageway he walked into defendant's elevator shaft, which was open and without any railing or guard of any sort, and received injuries of a serious nature.

The foregoing are, in substance, the facts upon which counsel for plaintiff claims his right to recover. He insists that his client comes within the rule laid down in *Bennett v. Louisville & Nashville R. R. Co.*, 102 U. S. 577, 26 L. Ed. 235: "The owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation." The facts in the United States Supreme Court case above cited are: That the plaintiff was injured while passing over the customary and only available and convenient route for persons passing from the railway depot to the steamboat landing. That the custom of travelers to use such passageway as a footway was not only a necessary one, but was known to and permitted by the company. There was no safe and convenient way except the one pursued by the plaintiff, and he was injured while going to the steamboat for the purpose of prosecuting his journey. The difference between the facts in this case and the case at bar are too obvious to need extended discussion. There the plaintiff was on business with the defendant, and was traveling the only convenient and available route, and the passage of passengers over such route was known to and permitted by the company. Here the plaintiff was acting for the accommodation of a third person

without the knowledge or consent of the defendant, and was injured while upon the premises of the defendant without an invitation, express or implied. In *Toledo, Wabash & Western Railway Company v. Grush*, 67 Ill. 262, 16 Am. Rep. 618, another case cited by plaintiff, Grush brought suit against the railroad company to recover for an injury received in stepping through a hole in the platform at the railroad company's station. Grush obtained judgment in the lower court, and the appellate court in sustaining the judgment of the trial court speaks as follows: "In the case under consideration the plaintiff lawfully entered upon the platform by the direction of his employer to see that certain freight belonging to the latter, and which had arrived at the station by appellant's road, was properly taken care of, and while upon the platform between 5 and 6 o'clock p. m. for that purpose and looking for the agent he accidentally stepped through a hole in the platform, causing a severe internal injury." The Grush Case is clearly distinguishable from this one. The plaintiff there was upon a depot platform where the railroad company impliedly invited people having business with it. Here the plaintiff was upon the premises without invitation. Other cases are cited; but none are stronger in favor of plaintiff than the foregoing, and clearly his case does not fall within the rule laid down in them.

By no rule of interpretation could the plaintiff's presence on the premises of the defendant be construed to be by invitation, express or implied. The nature of defendant's business was not such as to be an implied invitation to the general public to enter its place of business, nor is it pretended that Mr. Brown was acting at the request of defendant in delivering the boxes, nor that the defendant was in any way responsible for the presence of plaintiff on the premises. The evidence shows that the defendant was going to deliver the boxes itself, but that Brown voluntarily delivered them because they were in his way, and the boy went along by request of Brown's clerk to show Brown's driver the way to the defendant's premises. We have very carefully examined the authorities cited by plaintiff, and do not find among them a single case where a recovery has been had under a statement of facts similar to the facts in the case at bar.

In the case at bar it does not appear from the evidence that there existed any obligation or duty towards the party injured which the defendant had left undischarged or unfulfilled. "In every case involving actionable negligence there are necessarily three elements essential to its existence: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure by the defendant to perform that duty; and (3) an injury to the plaintiff from such failure of the defendant. When these elements are brought together,

they unitedly constitute actionable negligence. The absence of any one of these elements renders a complaint bad or the evidence insufficient." *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261. Another Indiana case states the rule thus: "A person entering a warehouse as a licensee merely and falling down an unprotected elevator shaft to his injury has no cause of action against the owner of such warehouse. It is only when the injured party comes upon the premises of the owner or proprietor by invitation, express or implied, that the latter assumes the obligation of providing safe and suitable means of ingress and egress, and of moving about the premises." *The South Bend Iron Works v. Larger*, 11 Ind. App. 367, 39 N. E. 209. The case of *Hargreaves v. Deacon*, 25 Mich. 1, is strongly in point here. It is in point not only on the propositions of law involved, but the person injured in that case was also a child of tender years, making the language of Mr. Justice Campbell particularly applicable to the case at bar: "The plaintiff below sued as administrator of his son, a child of tender years, who was killed by falling into a cistern on the premises of plaintiffs in error, which had been, as was claimed, left uncovered. * * * There is some danger in dealing with these questions of confounding legal obligations with those sentiments which are independent of the law, and rest merely on grounds of feeling or moral considerations. We feel, usually, more indignation at wrongs done to children than at wrongs done to others. But the law has not usually given them civil remedies on any such basis. Nor does it usually, if ever, impose any duties on strangers towards them, resting entirely on the fact that they are children. * * * If, for example, a grown person coming upon the premises simply by the permission of the occupants had fallen into this cistern without any negligence by stepping where there was no apparent danger, he would in law have stood just where this child did. The injury might have happened, as in *Fisher v. Thirkell*, 21 Mich. 1, from the insecurity of an apparently safe covering. We have searched diligently, and perhaps a little anxiously, to find legal support for a distinction, but there is no foundation for any in law, and we think there is none in any reason which should govern the action of courts of justice. * * * We express no opinion concerning cases where the nature of the business is such as to present peculiar attraction to children beyond other kinds of occupation. A person incurs no duties towards persons by not warning or driving them from his premises, and they go there, if mere volunteers and without invitation, at their own risk."

From the foregoing authorities it is deducible that a person injured, although an infant, by falling down an elevator shaft in a wholesale grocery, which was left unguarded, in order to recover must show the owner of

the premises was under obligation to protect him from the injury; and the owner of such premises is liable for an injury occurring therein through his negligence only where the injured person comes upon them by invitation, express or implied, of the owner.

We express no opinion concerning cases where the nature of the business is such as to present peculiar attraction to children, as that question is not in this case.

No matter how much we may regret the accident to the plaintiff, it seems clear that it is one of those for which the law entitles him to no relief against the defendant. He was upon the premises of the defendant without invitation under such circumstances that the defendant owed him no duty to protect him from the injury of which he complains. This being so, it follows that the demurrer to the evidence was properly sustained, and the judgment of the court below must be affirmed. All the Justices concur.

MAGGERT v. KEELE.

(Supreme Court of Oklahoma. April 13, 1903.)

1. JUSTICES OF THE PEACE—APPEAL—FINAL JUDGMENT.

An order of a justice of the peace sustaining a motion to retax the cost, made on motion after judgment has been rendered in an action, is not a final judgment from which an appeal may be taken and a trial de novo had as provided by section 5044, Wilson's Rev. & Ann. St. Okl. 1903.

2. SAME — FINAL ORDER — RETAXATION OF COSTS.

An order rendered by a justice of the peace sustaining a motion to retax the cost and retaxing the same is a final order, which may, under section 4732 of Wilson's Rev. & Ann. St. Okl. 1903, be reviewed by the district court upon petition in error setting forth the errors complained of.

(Syllabus by the Court.)

Error from District Court, Garfield County; J. L. Pancoast, Judge.

Action by W. W. Keele against Charley Maggert before a justice. Motion to retax costs, and defendant appealed. Appeal dismissed, and defendant brings error. Affirmed.

Moore & Moore, for plaintiff in error.
Houston & Buckner, for defendant in error.

HAYES, J. This action arose before Frank J. Feger, a justice of the peace of Enid City township, Garfield county, in which court defendant in error was plaintiff and plaintiff in error was defendant. Plaintiff in error on the 29th day of September, 1904, filed before said justice of the peace his motion to retax the cost in said cause, and on the same day said motion was sustained by the court, and the cost was retaxed, but not, however, as prayed for in said motion. Plaintiff in error appealed from the order of the justice court sustaining his motion to retax the cost to the district court of Garfield county, in which court there was filed, on the 20th day of October, 1904, a transcript of the record of said justice of the peace before whom said mo-

tion was heard, which said transcript sets out the proceedings had upon said motion and the order made thereon, and with said transcript was filed the motion to retax the cost, also a receipt executed by the said Frank J. Feger, justice of the peace, acknowledging receipt of the sum of \$12 paid by plaintiff in error to be applied on the payment of the judgment in said cause and in payment of a portion of the cost therein, but no part of said amount to be applied upon the cost not mentioned in said receipt. At the same time there was also filed in the district court a bill of costs in the justice court. No appeal was taken from the judgment in the main action. On the 23d day of May, 1905, the cause came on to be heard before the district court of Garfield county, and plaintiff in error objected to the introduction of any testimony on the ground that the order of the justice of the peace sustaining said motion to retax the cost and retaxing the same is not an appealable order, which motion the court sustained, and the appeal was dismissed, to which order of the court the plaintiff in error saved his exceptions. The action of the court in dismissing said appeal is the only question presented to this court for consideration.

Section 5044 of Wilson's Revised Statutes of Oklahoma provides: "In all cases, not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered."

Section 5053 of said statutes is as follows: "An appeal may be taken from the final judgment of a justice of the peace in any case, except in cases hereinafter stated, in which no appeal shall be allowed: First, on judgments rendered on confession. Second, in jury trials, where neither party claims in his bill of particulars a sum exceeding twenty dollars."

Under the provisions of these sections of the statute, an appeal may be taken by the defeated party from the final judgment in any action before a justice of the peace except judgments rendered on confession, or in actions where the amount claimed in the bill of particulars is a sum not exceeding \$20.

Section 5046 of Wilson's Rev. & Ann. St. 1903 provides that an appeal taken under section 5044, supra, may be perfected upon the filing and approval of an appeal bond, and that upon such appeal a trial de novo shall be had. It is the contention of plaintiff in error that the order of the justice of the peace sustaining his motion to retax costs and retaxing the same is a final judgment from which an appeal may be taken as provided in section 5044 et sequentia; and, having filed his appeal bond, contends that he is entitled to a trial de novo on his appeal in the district court.

No brief has been filed by the defendant in error, but the record discloses that the trial

court did not regard said order as a "final judgment" from which an appeal could be taken as provided by said section 5044. The Code of Civil Procedure, of which said sections form a part, was adopted by the territory of Oklahoma from the state of Kansas, and said section is in the exact language of the section of the Kansas statute upon the same question. Mr. Justice Valentine, in *Roll, Thayer, Williams & Co. v. Murray*, 35 Kan. 171, 10 Pac. 472, in discussing what judgments or orders of a justice of the peace are included in "final judgments," as used in section 5044, said: "It will be seen that an appeal can be taken only from a 'final judgment,' and the appeal can be taken only after the 'judgment' has been rendered, and only within ten days after the 'judgment' has been rendered, and the amount of the appeal bond must not in any case be 'less than double the amount of the judgment and costs.' And when the case is taken to the district court on appeal, it 'shall be tried de novo in the district court upon the original papers on which the case was tried before the justice, unless the appellate court, in furtherance of justice, allow amended pleadings to be made or new pleadings to be filed.' Justices' Code, No. 122. There is no provision in the statutes for taking an appeal from the order of a justice of the peace in any provisional remedy or in any ancillary proceeding, and no provision anywhere for retrying in the district court upon an appeal from a justice of the peace, any question that pertains only to some provisional remedy, or to some ancillary proceeding. The appeal is from a final judgment only, and from a judgment on the merits only, and the trial afterward to be had on the appeal is only upon the merits."

It cannot be contended that the order of the justice of the peace in this case sustaining the motion to retax the costs and retaxing the same is a judgment upon the merits of the case in which said motion was filed. Section 4732 of Wilson's Revised Statutes of Oklahoma is as follows: "A judgment rendered, or final order made, by a justice of the peace, or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court."

Sections 5034, 5035, and 5036 of said statutes of Oklahoma provide that in all cases which shall be tried by a jury or before a justice of the peace, without a jury, either party shall have the right to except to the opinion of the justice upon any question of law arising during the trial of the cause, and that the justice shall allow and sign, upon request from either party, a bill of exceptions containing such exceptions, and it is provided by said sections what said bill of exceptions shall contain.

Section 5113 of said statutes provides: "The provisions of an act entitled 'An act to establish a Code of Civil Procedure,' which

are, in their nature, applicable to the jurisdiction and proceedings before justices, and in respect to which no special provision is made by statute, are applicable to proceedings before justices of the peace."

It has been held by the Supreme Court of Kansas, from which state the territory of Oklahoma adopted this statute, that under sections 5034, 5035, 5036, and 5113, a judgment or final order of a justice of the peace may be reviewed by proceedings in error from the courts of the justices of the peace to the district court upon the appealing party's filing in the district court his petition in error with his bill of exceptions thereto attached. *Burdick on New Trials and Appeals*, 18; *Jackson v. Stoner*, 17 Kan. 605; *Sawyer v. Forbes et al.*, 36 Kan. 612, 14 Pac. 148; *Rice v. Harvey*, 19 Kan. 144; *C. v. R. I. & P. Ry. Co. v. Tompkins*, 15 Okl. 595, 82 Pac. 832.

The Code of Civil Procedure of the territory of Oklahoma therefore provides two methods of appeal from a final judgment rendered by a justice of the peace, except from the judgments excepted by section 5053, *supra*. An appeal may be taken under section 5044, *supra*, and a trial de novo had, or an appeal may be taken by petition in error, and the errors of law appearing upon the face of the record may be inquired into and the judgment of the justice court may be reversed, modified, or affirmed.

In *Healey v. Deepwater Clay Co.*, 48 Kan. 617, 29 Pac. 1088, the Supreme Court of Kansas held that there is no appeal from a final order under section 5044, *supra*, but that an appeal from such order must be taken under section 4732. If the order of the justice of the peace in the case at bar, sustaining the motion to retax the costs and retaxing the same, is a final order instead of a final judgment, then no appeal from the same could be taken in the manner that was attempted by plaintiff in error, and the action of the district court in dismissing same was not error.

Section 4732 of the statutes of Oklahoma defines the term "final order," as used in the article on Civil Procedure, in the following language: "An order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this article."

In the case of *Board of Commissioners of Wilson County v. Thomas McIntosh et al.*, 30 Kan. 234, 1 Pac. 572, plaintiffs had commenced two actions to have certain tracts of land subjected to sale for taxes, penalties, and cost. After judgment and sale in such actions, the sheriff claimed and appropriated certain of the money received as his cost. The plaintiff filed a motion in each action to have the cost retaxed, which motions were overruled, but no effort was made on the

part of the plaintiffs to have the action of the court overruling the same reviewed, but they instituted an independent action against the defendant for the amount. Defendant pleaded that the order of the court overruling the motion to retax the cost was res judicata in the independent action. Mr. Justice Brewer, who delivered the opinion of the court sustaining the contention of defendant, speaking of the effect of said motions to retax the costs and of the action of the court thereon, said: "Again, the decision of the motion was an order affecting a substantial right made upon a summary application in an action after judgment, and therefore a final order and subject to review in this court." By this decision an order of the court upon a motion to retax the cost in an action after judgment is brought within the language of section 4735, *supra*, defining "final order," as used in the article on Civil Procedure of Wilson's Revised Statutes of Oklahoma, and is not an order from which an appeal would lie and a trial de novo be had in the district court on such appeal, but is one which could be reviewed by the district court upon a petition in error.

We are aware of the fact that some courts have defined a motion to retax cost as being neither a "special proceeding" nor a "summary application" in an action after judgment (*Ernst v. The Steamer Brooklyn*, 24 Wis. 616); but it is held in that case that such a motion or an order thereon does not involve the merits of the action, and hence is not such a judgment of the justice of the peace as, under the rule announced in *Roll, Thayer, Williams & Co. v. Murray*, *supra*, and *Healey v. Deepwater Clay Co.*, *supra*, would be appealable under section 5044, and if the plaintiff in error desired the same reviewed in the district court, his remedy was to take the same to the district court on petition in error.

Plaintiff in error has cited many authorities in his brief to support his contention in this case, all of which we have carefully reviewed. Most of the cases cited, however, are based upon statutes, the language and provisions of which are not the same as the statutes governing in this case, and since the decision of the Supreme Court of Kansas, from which state said statutes were adopted, should govern in this case, we find no error in the record, and the judgment of the district court dismissing the plaintiff in error's appeal is affirmed.

WILLIAMS, C. J., and DUNN, TURNER, and KANE, JJ., concurring.

ALLSMAN et al. v. OKLAHOMA CITY.
(Supreme Court of Oklahoma. May 13, 1908.)

1. INTOXICATING LIQUORS—LICENSE FEE—RECOVERY BACK—ACTION—PETITION.

In an action to recover a sum certain, the unearned portion of a license fee paid by li-

censees to licensor while a city of the first class, organized and existing under the laws of the territory of Oklahoma, for a license duly issued to sell malt, spirituous, and vinous liquors, the petition, which states that by reason of the ratification and adoption of the Constitution of the state, together with the "prohibitory clause" as part thereof by vote of the qualified electors of said proposed state on September 27, 1907, prohibiting the sale of such liquors within said territory upon its admission into the Union, and that said city had since that time, without fault of the licensee, forced said licensees to close their place of business and cease to sell such liquors under their said license under threats of prosecution, sufficiently states a cause of action, and a demurrer thereto was improperly sustained.

2. MONEY HAD AND RECEIVED—WHEN ACTION LIES.

An action will lie to recover a sum certain whenever one has the money of another which he in equity and good conscience has no right to retain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Received, §§ 1-13.]

(Syllabus by the Court.)

Error to Oklahoma County Court; Sam Hooker, Judge.

Action by Frank P. Allsman and others against the city of Oklahoma City. Judgment for defendant, and plaintiffs bring error. Reversed and remanded.

On December 4, 1907, Frank P. Allsman and C. F. Reynolds, partners, doing business as Allsman & Reynolds, plaintiffs in error, plaintiffs below, sued the city of Oklahoma City, defendant in error, defendant below, in the county court of Oklahoma county to recover \$341.61, the unused portion of a license issued by defendant in error to plaintiffs in error as retail liquor dealers in said city. The petition, in substance, alleges that defendant in error is a city of the first class, organized and existing under and by virtue of the laws of the territory of Oklahoma; that on June 29, 1907, plaintiffs in error, as petitioners, applied to the board of county commissioners of Oklahoma county, territory of Oklahoma, for a license to sell malt, spirituous, and vinous liquors at retail at 113 West Grand avenue, on lot 32, block 33, in Oklahoma City, Oklahoma county, for a period of 12 months; that on July 22, 1907, said license was issued according to law upon plaintiffs in error paying into the treasury of the county the sum of \$200, which was done, said license to run for 12 months from that date; that in accordance with an ordinance duly passed by the city council of defendant in error, plaintiffs in error applied to said city council for license to sell within said city at said place malt, spirituous, and vinous liquors for a period of 12 months from July 22, 1907, until July 22, 1908, which was granted upon petitioners paying the city clerk of said city \$500, which was done, and turned into the treasury of defendant in error, and expended in paying the salaries of the mayor, city council, auditor, and other employes of said city of Oklahoma City; that by virtue of the terms of the enabling

act (Act June 16, 1906, c. 3335, 34 Stat. 267) the constitutional convention submitted to the qualified electors of the proposed state of Oklahoma a Constitution for said proposed state, together with a separate measure, known as the "prohibitory clause" of said Constitution, which said Constitution and said proposed separate measure were voted on by the qualified electors of said proposed state on September 27, 1907, and by them ratified and adopted as a part of the Constitution of the state of Oklahoma; that said separate measure, as aforesaid, prohibits the sale of malt, spirituous, and vinous liquors upon the admission of said territory into the Union as a state; that since the admission of the state into the Union, to wit, on November 16, 1907, the chief of police of said city of Oklahoma City forced and compelled plaintiffs in error, without fault on their part, to close their said place of business and to cease the sale of malt, spirituous, and vinous liquors under said license under a threat of prosecution; that by reason thereof the license of plaintiffs in error aforesaid has been canceled and revoked without fault on their part; that by reason of said change of a territorial form of government to a state form of government, and by reason of the adoption of the Constitution aforesaid and said act of defendant in error, city of Oklahoma City, plaintiffs in error have been deprived of their rights under said license, and have been and are now prohibited from selling malt, spirituous, and vinous liquors in said city under and by virtue of said license, and have been deprived of the use of said license from November 16, 1907, until July 22, 1908, and by reason thereof defendant city of Oklahoma City has collected of and from the plaintiffs in error on said license the sum of \$341.61, the amount paid to it by plaintiffs in error for the use of the same for that time, the repayment of which has been refused on the part of the city upon demand—and prays judgment against the city for said amount. On December 30, 1907, the defendant in error, city of Oklahoma City, filed a general demurrer to said petition, which was on January 17, 1908, sustained by the court, to which plaintiffs in error duly excepted and declined to plead further, and, electing to stand upon their petition, judgment was rendered in favor of defendant, from which plaintiffs appealed to this court, and the same is now before us for review.

E. G. McAdams, Giddings, Giddings & Lindsay, and Harris & Wilson, for plaintiffs in error. E. E. Reardon, Co. Atty., James S. Twyford, and John H. Hayson, Asst. Co. Atty., and W. R. Taylor, City Atty., for defendant in error.

TURNER, J. (after stating the facts as above). The only question for us to decide is whether the licensee may recover back the unearned portion of the license fee where

the license falls without fault of the licensee. It would seem that this should be answered in the affirmative on the plainest principles of natural justice. It is contended, however, that this is an action in the nature of assumpsit, and as such it can only be based upon some contractual liability arising out of property rights, and that, as such licenses are not contracts (Prohibitory Amend. Cases, 24 Kan. 700), nor property in any legal or constitutional sense (Board v. Barrie, 34 N. Y. 659), this action will not lie. It is true that at common law assumpsit would not lie except upon a parol or simple contract, but we think the modern rule well settled and more in keeping with the spirit of the law is that the action will lie whenever one has the money of another which he in equity and good conscience has no right to retain. *Lawson's Ex'r v. Lawson*, 16 Grat. (Va.) 230, 80 Am. Dec. 702; *S. F. Gas Co. v. San Francisco*, 9 Cal. 453; *Lime Rock Bank v. Plimpton*, 17 Pick. (Mass.) 159, 28 Am. Dec. 286.

In looking over the wide field of adjudication, we find that in no state does the question herein propounded seem to be settled, except in Nebraska, from which the territory of Oklahoma adopted its statutes regulating the license and sale of intoxicating liquors, and, while we are not bound to follow the decisions of the Supreme Court of that state on this subject, yet, "so far as these decisions are consistent with logic and reason, we feel constrained to follow them." *Swan v. Wilderson et al.*, 10 Okl. 547, 62 Pac. 422.

Turning to those decisions, we find that in *Lydick v. Korner*, 15 Neb. 500, 20 N. W. 26, plaintiff had obtained a license from the proper authorities to sell intoxicating liquors during the fiscal year. Remonstrance was filed and overruled, and, no appeal having been taken, the license issued. At the next term of the district court the transcript was filed therein, the remonstrance sustained, and the license canceled. The Supreme Court reversed the judgment of the district court. Upon the cancellation of the license, plaintiff closed his saloon and brought this action to recover the money paid for the license. The court below dismissed the suit. The Supreme Court said: "He was entitled either to a license or a return of the money paid for the same, at least pro tanto for the unexpired time upon the cancellation of the license, and the court should have directed its repayment. This is but justice"—citing *State v. Cornwell*, 12 Neb. 470, 11 N. W. 729.

In *State of Nebraska v. Cornwell*, supra, relator paid the necessary fee for a license to sell intoxicating liquors, and one was issued. Through certain omissions of the corporate authorities required by law the license was void. "Subsequently the required steps were taken, whereupon relator applied for a license on the credit of his former payment and for the unexpired term for which he paid, so far as it would go," the money not being

returned to him, and the court held that he was entitled to it.

In *City of Auburn v. Mayer*, 58 Neb. 161, 78 N. W. 462, a license was issued, and an appeal then taken, and the license was suspended. The appeal was finally determined in favor of the applicant, and the license re-issued. It was held by the court that the licensee was entitled to repayment of such portion of the license fee as the time when his enjoyment of the license was suspended bore to the license year. In passing the court said: "It has been too long and too well settled by decisions of this court to permit of any change, except through legislation, that the license fee is not paid for the privilege of asking for a license, but for the license itself, and that, where the license fails through no fault of the applicant, he is entitled to have refunded the unearned portion"—citing *State v. Cornwell*, 12 Neb. 470, 11 N. W. 729; *Lydick v. Korner*, 15 Neb. 500, 20 N. W. 26; *State v. Weber*, 20 Neb. 467, 30 N. W. 531; *Chamberlain v. City of Tecumseh*, 43 Neb. 221, 61 N. W. 632; *School District v. Thompson*, 51 Neb. 857, 71 N. W. 728.

In *School District No. 34 of Thayer County v. Thompson*, 51 Neb. 857, 71 N. W. 728, the court in its syllabus, in part, says: "Where a liquor license has been issued and is thereafter canceled without fault of the licensee, he is entitled to a repayment pro tanto of the sum paid for the unexpired time."

In *Pearson v. City of Seattle*, 14 Wash. 438, 44 Pac. 884, the city after issuing the license authorizing the licensee to conduct public amusements in connection with his saloon, passed an ordinance prohibiting such amusement, and the court held that the licensee was entitled to recover the unearned portion of the money paid for his license. In passing the court said: "Conceding that the city, in the exercise of its police power, had a right to revoke respondent's license, as it did virtually revoke it by Ordinance No. 3,152, yet it does not follow that it has a right to retain the money received for a license for a time during which such license was rendered valueless by its own act. The respondent paid his money for a consideration which he has, in part, failed to receive, by reason of the act of the city. On the other hand, the city has received money for the granting of a privilege which it has repudiated and annulled. It is therefore in justice and equity bound to repay it"—citing *Lydick v. Korner*, 15 Neb. 500, 20 N. W. 26; *State v. Cornwell*, 12 Neb. 470, 11 N. W. 729. Also, *Martel v. City of East St. Louis*, 94 Ill. 67.

In *Hirn v. State of Ohio*, 1 Ohio St. 15, the court says: "The court is not disposed to question the power of the Legislature in a matter of this kind, connected as it is with the public policy and domestic regulations of the state. Upon the ground of protecting the health, morals, and good order of com-

munity, we are not prepared to say that the Legislature does not possess the power to revoke such license. But where there has been no forfeiture of the license by abuse or violation of its terms, common honesty would require that the money obtained for it should be refunded in case of its revocation. The act of March 12, 1851, did not, by its terms, take effect until the 1st of May of that year, up to which period licenses could have been granted under the law of 1831. It is not reasonable to presume that the Legislature would, after authorizing a license and allowing the granting of it till a particular period, and after obtaining thereby the payment of many thousands of dollars into the treasury, revoke the license before the expiration of the term for which it was granted, without reimbursement. At least the court will not presume any such act of bad faith from mere implication."

We are not unmindful of the force of defendant's contention that the license tax, being legal at the time it was paid, and being paid voluntarily by the licensee, cannot be recovered, and we have carefully noted authorities cited in support thereof, especially *Peyton v. Hot Springs Co.*, 53 Ark. 236, 13 S. W. 764, where the court, in effect, held that where a petition for the prohibition of intoxicating liquors within certain limits, under the "three-mile law," was denied by the county court, and on the same day a license to retail liquors within the limit was granted, and subsequently, upon appeal to the circuit court, the prohibitory petition was sustained, the licensee, who thereupon desisted from the sale of liquors, could not recover from the county so much of the tax as was proportioned to the remainder of his unexpired license. We also note that the court in its opinion does not cite a single authority to sustain it.

Directly in conflict with that opinion is *R. M. Sharp, Appellant, v. City of Carthage, Respondent*, 48 Mo. App. 26, where a similar contention was made. In that case appellant had a county dramshop license expiring November 1, 1887, and a city license expiring October 1, 1887. A city election had been called to be held on September 2, 1887, under the provisions of the local option law, for the purpose of submitting the question to the qualified voters of the city whether or not intoxicating liquors should be sold therein. One day previous to the election appellant made application to the city for a dramshop license for one year, which was issued upon his paying the sum of \$800 into the city treasury. A city ordinance provided that no dramshop license should issue for a less or greater period than one year. On November 1st, his county license having expired, he applied to the county court of the county for a county license, which was refused him for the reason that the city had adopted the local option law. Failing to procure the-

county license, he closed his saloon and demanded of the city the return of \$600 of his money, paid September 1st, and upon its refusal sued to recover the same. The lower court held that he was not entitled to recover. The Supreme Court reversed the case, and in passing said: "Money illegally or erroneously, but voluntarily, paid for license taxes cannot be recovered back. *Grimley v. Santa Clara Co.*, 68 Cal. 575, 9 Pac. 840; *Mays v. Cincinnati*, 1 Ohio St. 268; *Cook v. City of Boston*, 9 Allen (Mass.) 393. And the decisions in this state are to the same effect, although they recognize a moral duress as sufficient to constitute involuntary payment. *Maguire v. Savings Ass'n*, 62 Mo. 344; *Wolfe v. Marshall*, 52 Mo. 167. But that is not the question which governs the decisions in this case. The controlling question here is: Can money be recovered back when the object for which it is paid is frustrated, not by accident nor by the act of the party paying it, but by the act of the party to whom it is paid? * * * The plaintiff did not pay \$800 for a piece of worthless paper, but for the privilege of carrying on a dramshop within the city for a period of one year without interference by the city while he complied with the other legal requirements. When the city thereafter immediately voted against the sale of intoxicating liquors within its boundaries, it thereby effectually prohibited the county court from granting a license to plaintiff, and rendered its own license worthless. The case is not distinguishable on principle from one where the city, having power to revoke a license, would on one day issue license for a year, pocket the proceeds, and then revoke it the next day without cause, because the case concedes that the only reason why the county court failed to issue a license to the plaintiff was that the city by its vote had prohibited it from so doing. The principle governing an action for money had and received is that the possession of money has been obtained which cannot be conscientiously withheld. Such an action is designed for the advancement of justice, and it is applicable where a person receives money which in equity and good conscience he ought to refund. *Supervisors v. Manny*, 56 Ill. 160."

This same contention was made in *Marshall v. Sneidker*, 25 Tex. 460, 78 Am. Dec. 534. There the court said: "It is contended that the payment of the license tax imposed by the city was voluntarily made by the defendants, and that for that reason they cannot recover back the money so paid. * * * The ordinance of the city council required the defendants to obtain a license before retailing liquor, and imposed a heavy penalty for its violation. The defendants, by refusing to pay, would have placed themselves in the attitude of resisting the public authorities, and would have exposed themselves to the certain harassment of litigation, and to the great hazard of ruinous loss, if they

should fall in that resistance. * * * It has often been held that if a party pay money voluntarily, in ignorance of law, but with a knowledge of all the facts, he cannot recover it back. *Bible v. Lumley et al.*, 2 East, 469. *Contra*, *Warder v. Tucker*, 7 Mass. 449, 5 Am. Dec. 62. And see *Mowatt v. Wright*, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508. This rule cannot obtain, however, where the parties are not upon equal terms in the transaction. 'If one party has the power of saying to the other, "That which you require shall not be done except upon the conditions which I choose to impose," no person can contend that they stand upon anything like an equal footing.' Here the defendants were merely passive, and submitted to pay the sum claimed, as they could not otherwise procure the license required by the city ordinance. *Morgan v. Palmer*, 2 Barn. & Cres. 319-321. If, also, the city council exceeded its authority in making this assessment of tax, and demanded and received from the defendants more than the charter permitted, and it was paid under pressure of the summary remedies prescribed for its collection, and of the heavy penalty for retailing without its payment, it was against good conscience to retain it, and there is an additional reason why the action for it can be maintained. *Brisbane v. Dacres*, 5 Taunt. 90."

Hence we say that this is not a case of money illegally or erroneously, but voluntarily, paid for a license tax, but one in which it has been paid strictly in conformity to law the object of which has failed without fault of either party resulting in a change of governmental policy in which the voters of the city of Oklahoma City participated. It follows that defendant in error has received money belonging to plaintiffs in error to the amount set forth in their petition, which it is not in equity and good conscience entitled to retain, for which this action will lie, and that the trial court erred in sustaining the demurrer thereto.

The cause is reversed and remanded. All the Justices concur.

BRYAN v. MENEFFEE, State Treasurer.

(Supreme Court of Oklahoma. April 27, 1908.)

1. STATUTES—ONE OR MORE SUBJECTS—APPROPRIATIONS.

Before provision can be made in the general appropriation bill for the compensation of any officer or employé in the executive, legislative, or judicial departments of the state, the office must first have been created and the salary or compensation fixed, or the employment authorized, and the compensation provided for either therein or in a separate bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 128.]

2. SAME.

An appropriation to cover compensation of employés in the executive, legislative, or judicial departments of the state, where such employment had not been authorized by statute and their compensation fixed prior to the passage of

such general appropriation bill, can only be enacted as a separate appropriation bill, embracing but one subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 128.]

3. SAME.

An appropriation made by a separate bill containing but one subject, providing for the contingent expense of a state officer, is valid and a warrant properly drawn against such contingent fund to pay for clerical assistance for such officer is valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 128.]

4. STATES—ISSUANCE OF WARRANT—EFFECT AS CREATING DEBT—"INDEBTEDNESS."

Where a warrant issued for the payment of money by the proper officer by virtue of a valid appropriation, where the money is already in the treasury, or where the tax levy has already been made, with provision for the collection of same, and such warrant was issued on such fund in the treasury and would be supplied by such tax, the issuance of such warrant did not create an indebtedness within the meaning of section 29, art. 10, of the Constitution.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3528, 3536.]

5. SAME—"EVIDENCE OF INDEBTEDNESS."

The words "evidence of indebtedness," as used in section 29, art. 10, of the Constitution, mean such indebtedness as is usually evidenced by a bond.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2524, 2525.]

(Syllabus by the Court.)

6. WORDS AND PHRASES—MEANING OF WORD "OR."

The word "or" in statutes is often used in the sense of "to wit"—that is, in explanation of what precedes—and gives to that which precedes the same signification as that which follows. Citing 6 Words and Phrases, pp. 5014, 5015.

Original proceeding for mandamus by A. D. Bryan against J. A. Menefee, State Treasurer. Writ awarded.

This is an application for writ of mandamus to compel the respondent, J. A. Menefee, State Treasurer, to pay auditor's warrant No. 839 for the sum of \$50, issued to the relator by the State Treasurer, the respondent herein, for payment of salary as bookkeeper in said Treasurer's office. The Treasurer refused to pay said warrant for the reason that the Attorney General of the state had not certified that the warrant was a valid indebtedness against the state as required by section 29, art. 10, of the Constitution.

The relator in his petition alleges that on the 17th day of January, 1908, M. E. Trapp, Auditor of State, made, issued, and delivered to the relator his warrant No. 839, Series A, for the sum of \$50, directing the respondent, the Treasurer of the state of Oklahoma, to pay the sum named in said warrant to himself for services rendered as bookkeeper in the office of said respondent. That said warrant was presented to the respondent, Treasurer as aforesaid, January 17, 1908, and the same was "not paid for the want of funds," as claimed by said Treasurer. A copy of said warrant is attached to said ap-

plication and made a part thereof, and marked "Exhibit A," and is in words and figures as follows: "Warrant. No. 839. Series A. Claim No. 413. \$50.00. Treasurer of the State of Oklahoma. Auditor's Office, Guthrie, Okla., Jan. 17th, 1908. Great Seal of the State of Oklahoma. Pay to A. D. Bryan, _____ or bearer the sum of fifty and no/100 _____ dollars per salary part payment bookkeeper for Treasurer out of any funds appropriated for such purpose. By order of the State Auditor. M. E. Trapp, Auditor. Carl L. Rice, Assistant Auditor." Said warrant is indorsed on the back with words and figures as follows, to wit: "Register No. 669. Presented and not paid for want of funds. January 17th, 1908. J. A. Menefee, State Treasurer."

That on April 7, 1908, plaintiff again presented the said warrant to respondent at his office in the city of Guthrie, and demanded payment of same and payment thereof was refused by the respondent, as such Treasurer, in a letter addressed to relator, a copy of which is attached to relator's application and designated as "Exhibit B," and made a part thereof. Said letter is in words and figures as follows: "Mr. A. D. Bryan, Guthrie, Oklahoma—Dear Sir: I regret to inform you that I cannot honor and pay Auditor's warrant No. 839 issued to you January 17th, 1908, for the sum of fifty dollars and payable out of the General Revenue Fund belonging to the state. Ample funds are in my custody to pay the same, but I am compelled to refuse payment for the reason that the warrant is not approved or countersigned by the Attorney General of the state, as is required by the Constitution, otherwise, the warrant is in due form, and if not for this omission I would have been more than pleased to have honored and paid the same. Very respectfully, [Signed]

J. A. Menefee, State Treasurer."

Relator further alleges that respondent has ample funds in his custody as such treasurer to pay said warrant, and that it was his plain duty under the law to pay said warrant, but that the respondent wrongfully and unlawfully and to the great and irreparable injury of the relator failed and refused and still fails and refuses to pay said warrant. Relator further alleges that he has no adequate remedy in the ordinary course of law to compel the respondent to discharge his plain duty as enjoined by law. This action was instituted on the 7th day of April, and on the same date respondent entered his appearance and as a matter of record agreed that all process and notice should be waived, and because of the general public importance of an early determination of the question involved the court is hereby requested to advance said case on the docket and set the same down for hearing at as early a date as convenient. Afterwards respondent filed a demurrer to re-

lator's petition, and on the 10th day of April this cause was heard in this court on demurrer.

Joseph Wisby, for relator. G. A. Henshaw, Asst. Atty. Gen., for respondent.

WILLIAMS, C. J. (after stating the facts as above). 1. The first question that would necessarily arise is whether or not the State Auditor had authority to issue this warrant. It appears from the relator's petition that the warrant was issued in part payment of the services of the relator as bookkeeper in the office of the State Treasurer. The position of bookkeeper for the State Treasurer's office is not one that is created by virtue of the Constitution or any statute in force in this state. Section 56, art. 5, of the Constitution (Bunn's Ed. § 129), provides: "The general appropriation bill shall embrace nothing but appropriations for the expenses of the executive, legislative and judicial departments of the state, and for interest on the public debt. The salary of no officer or employé of the state, or any subdivision thereof, shall be increased in such bill, nor shall any appropriation be made therein for any such officer or employé, unless his employment and the amount of his salary, shall have already been provided for by law. All other appropriations shall be made by separate bills, each embracing but one subject." Under this provision the office or position of bookkeeper for the State Treasurer not having been created by the Constitution or laws now in force in the state of Oklahoma, no provision could be made to cover the compensation therefor in the general appropriation bill until such office shall have been created or such employment provided for by law, and the amount of salary or compensation likewise provided in such act, or in a separate act therefor. Section 56, supra, of the Constitution is taken literally from the Alabama Constitution. See section 71, art. 4, said Constitution 1901. Whilst such provision has never been construed as we are able to find by the Supreme Court of said state, a legislative construction has been made in said state to the same effect. By reference to the acts of the Legislature subsequent to the adoption of said Constitution, it will be observed that before appropriations for the compensation for any officer or the employment of any person in any department is made in the general appropriation bill, the office must first be created and the salary fixed, or the employment or compensation provided for. See General Acts Ala. 1907, pp. 130-135, inclusive.

It was evidently the intention of the constitutional convention that the general appropriation bill, excepting interest on the public debt, should embrace nothing but items for the executive, legislative, and judicial departments, covering the officers and

employés thereof, where the office or employment had already been provided for, and the salary or compensation fixed by law prior to the passage of such general appropriation bill. An appropriation to cover compensation of employés in the executive, legislative, or judicial departments, not prior to that time authorized by law and their compensation also fixed, can only be enacted as a separate appropriation bill embracing but one subject.

On December 21, 1907, an act entitled, "An act making appropriation for the payment of salaries and contingent expenses of the state officers" with an emergency declared, was passed, section 1 of which is in words and figures as follows: "There is hereby appropriated out of any money in the State Treasury not otherwise appropriated to pay the salary of state officers as provided by the Constitution, and for contingent expenses, the sum of twenty-five thousand dollars, to be paid by the State Treasurer by warrant drawn by the Auditor in such sum as shall be fixed by the Governor." Emergency Laws, 1907-08, p. 74, House Bill No. 147.

If this warrant, and we so assume, was issued for the payment of relator's salary as bookkeeper as a part of the contingent expenses of such state officer out of this appropriation which is made by a separate bill, it would be valid, unless it was further necessary for the Attorney General to certify that the warrant is issued pursuant to law and is within the debt limit.

2. The next question arising is whether or not a warrant drawn by the proper officer on the Treasurer of the State under an appropriation by law is an evidence of indebtedness. In the case of *In re State Warrants*, 6 S. D. 521, 62 N. W. 102, 55 Am. St. Rep. 852, in construing sections 1 and 9 of article 11, and 1 and 2 of article 13, of the South Dakota Constitution, the court held: "Appropriations from the assessed but uncollected revenues of the state, and the issuance of warrants in pursuance thereof to defray current expenses, is not the incurring of an indebtedness, within section 2, art. 13, Const., which provides that to make public improvements, or to meet extraordinary expenses, or deficits or failure in revenue, the state may contract debts never to exceed, with previous debts, \$100,000, and no greater indebtedness shall be incurred, except to repel invasion, suppress insurrection, or defend the state or United States in war."

Section 23, art. 10, of our Constitution (Bunn's Ed. § 289), is substantially the same as section 2, art. 13, of the South Dakota Constitution, and in the same case the court further held: "The fact that warrants issued in anticipation of such assessed revenues draw interest does not make the issuance of the warrants an incurring of indebtedness to the extent of such interest, within article 2, § 13, of said Constitution, where such warrants, with respect to interest, are not different

from other warrants which may properly be drawn and issued."

Section 29, art. 10, Const. (Bunn's Ed. § 295), is substantially taken from the Constitution of North Dakota, with the exception that the Attorney General is inserted in our Constitution in lieu of the Secretary of State in the Constitution of that state.

In the case of *Darling v. Taylor*, 7 N. D. 540, 75 N. W. 768, the court says: "Section 183 provides that the debt of a county shall never exceed 'five per centum of the assessed value of the taxable property therein'; and section 187 provides that 'no bond or evidence of debt of any county * * * shall be valid unless the same have indorsed thereon a certificate signed by the county auditor, or other officer authorized by law to sign such certificate, stating that said bond or evidence of debt is issued pursuant to law and is within the debt limit.' In the application of these provisions of the organic law to the facts in this record we are confronted with two questions, namely: First. Has the indebtedness of the county reached and already passed the constitutional limit? Second. Would the warrant in question, if issued, augment the indebtedness of the county, within the meaning of the constitutional inhibition? The first of these questions is answered in the affirmative by the conceded facts in the record. The limit of indebtedness has been already reached in Kiddger county. Referring to the remaining question, it would seem at first blush that, if the county auditor should issue an additional warrant upon the treasurer, the same would necessarily augment the outstanding indebtedness of the county. But would this conclusion be true, within the meaning of the constitutional restriction upon county indebtedness? There is considerable authority, at least, which requires this query to be answered in the negative. The Supreme Court of Iowa has said: 'This right to thus apply the current revenues to the defraying of ordinary expenses is grounded upon the fact that such a course is absolutely necessary to the life of the municipality and the successful accomplishment of the purposes of its creation. * * * And, if the appropriation was made in advance of the receipt of the revenues, the action would be just as legitimate, because that the revenues will be received is a legal certainty.' The court further says: 'The right of the city to thus further apply its revenues notwithstanding its indebtedness is a part of the well-settled and expressly adjudicated law of the state.' *Grant v. City of Davenport*, 36 Iowa, 396, and cases cited. In *Spilman v. City of Parkersburg*, 35 W. Va. 605, 14 S. E. 279, referring to a constitutional restriction on municipal indebtedness similar to that of this state, the court uses this language: 'If it is an item of current expense or anything else for the payment of which provision has already been made by levy laid, then it needs no other provision for its payment, and is not within

the letter of the Constitution. Neither is it within its true meaning, for a draft on a fund already in hand, or by levy already made and provided meets it and discharges it, so that no indebtedness arises.' The precise question presented in this case has been repeatedly decided in South Dakota in harmony with the principle laid down in the cases cited. In *Lawrence County v. Meade County*, 10 S. D. 175, 72 N. W. 405, referring to an act of Congress which placed a restriction upon the indebtedness of territorial counties, the court says: 'Nor did it prevent a county, whose indebtedness exceeded the four per cent. limit when such an act was approved, from levying such taxes as it was authorized by law to levy, and issuing its warrants within the limits of such levy, in anticipation of their collection. If the warrants issued were within the amounts lawfully levied, they did not increase the municipal indebtedness, within the meaning of such act. Unless it affirmatively appears that the warrants issued in any year exceed in amount the levy for such year, they must be regarded as lawful claims against the county.' This language was used by the court with respect to county warrants which were issued after the county had reached the legal maximum of county indebtedness, and said warrants were declared to be valid nevertheless. The court cite in support of its views *Shannon v. City of Huron*, 9 S. D. 356, 69 N. W. 598. In *Re State Warrants*, 6 S. D. 518, 62 N. W. 101, 55 Am. St. Rep. 852, the court announces the same rule of construction in its opinion touching the constitutionality of a statute of South Dakota whereby certain state officials were expressly authorized to issue and sell state warrants to be drawn upon the assessed but uncollected revenues of the state, and the proceeds of which were to be applied to the discharge of necessary current expenses of the state. In the course of its opinion in the case last cited, the court uses this language: 'It being once established, as we think it is, by the authorities already cited, that the revenues of the state assessed, and in process of collection, may be considered as constructively in the treasury, they may be appropriated and treated as though actually and physically there; and an appropriation of them by the Legislature does not constitute the incurring of an indebtedness, within the meaning of Const. art. 13, § 2.'"

All of article 10 of our Constitution pertaining to "public indebtedness" is substantially taken from the Constitutions of North and South Dakota, and the Supreme Court of each of those states has uniformly held that when a warrant was issued for the payment of money by the proper officer by virtue of an appropriation where the money was already within the treasury of the state, or where a tax levy had already been made, and provision made for the collection of same, and such warrant was issued on such fund in the treasury as would be supplied by such

tax, that the issuance of such warrant did not create an indebtedness within the terms of the Constitution limiting indebtedness.

This warrant having been issued by the State Auditor by virtue of the appropriation bill of December 21, 1907, supra, and it appearing that the funds are in the State Treasury to meet same, it was not an "evidence of indebtedness" within the meaning of section 29, art. 10, Const.

Section 58, art. 5, of the Constitution (Bunn's Ed. § 131), provides: "No act shall take effect until ninety days after the adjournment of the session at which it was passed, except enactments for carrying into effect provisions relating to the initiative and referendum, or a general appropriation bill, unless, in case of emergency, to be expressed in the act, the Legislature, by a vote of two-thirds of all members elected to each house, so directs. * * *"

This affords a pertinent reason why only appropriations for salaries of officers already created by law, and which was already fixed, should be included in the general appropriation bill. The officers created by the Constitution were necessarily ratified by a vote of the people. If the offices are created by and their compensation fixed by the Legislature, the same will not become effective until 90 days after the adjournment of the Legislature, unless an emergency is declared by a two-thirds vote of all the members elected to each house. So you can see that it is contemplated that no appropriation, without the declaring of an emergency, shall be included in the general appropriation bill, except when the creating of the office and the fixing of the salary has either been adopted by a vote of the people or when they have had an opportunity to invoke the referendum upon it.

The foregoing is one of the most powerful reasons that leads us to reach this conclusion. We are not unmindful, however, of the cause that probably induced the late constitutional convention which assembled in Alabama in 1901 to insert this provision in their Constitution. The initiative and referendum is not incorporated in that Constitution. Unquestionably, the moving cause in that body was the consideration of the necessary number of employes required in the various subdivisions of the executive, legislative, and judicial departments, and the combined energy and pressure that could be brought to bear for the passage of the general appropriation without any constitutional restrictions, by them and their friends, might become a menace to the interest of the taxpayer of the state, thereby rendering necessary the placing of this safeguard around the Legislature in making such appropriations. We have been unable to find a provision substantially the same as this one in any other Constitutions, except in that of Alabama. However, Colorado (article 5, § 27) and Wyoming (article 3, § 2) have provisions limiting expenditures in the legislative department by

placing a limitation to the effect that no payment shall be made from the State Treasury or in any way authorized to be paid by any person except an acting officer or employe elected or appointed in accordance with law; and we have a similar provision in ours. Section 49, art. 5, Const. (Bunn's Ed. § 133).

The term "evidence of indebtedness" certainly means a bond or such indebtedness as is usually evidenced by a bond, but which may be evidenced by a certificate of indebtedness not under seal, or instruments executed without the formalities of a bond, under the common law. It is a rule of construction that where a specific term is used, in the statute, as well as in the Constitution, that it governs and controls and gives color and meaning to the general term following, when it relates to the same class or species of things as the specific term.

In the case of *People v. Nordheim*, 99 Ill. 533-560, "the word 'or,' in Township Organization Act, art. 7, § 7, requiring judges of an election to make a written statement 'or' certificate of the number of votes cast, is to be construed in the sense of 'to wit,' or 'that is to say,' and operates to make the words 'written statement' of the same meaning as the word 'certificate.'" "Or" may be used in the sense of "to wit," explaining what precedes. The word "or" in the statutes is often used in the sense of "to wit—that is, in explanation of what precedes—and gives to that which precedes the same signification which follows it." *People v. Latham*, 203 Ill. 9, 67 N. E. 408; *Commonwealth v. Grey*, 68 Mass. 501, 61 Am. Dec. 476; *Brown v. Commonwealth*, 8 Mass. 59; volume 6, Words and Phrases, pp. 5014-5015.

The same rule applies to the construction of the Constitution, the generally accepted rule being "where the language of the statute, in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. Endlich on Interpretation of Statutes, § 295. The same author, in section 296, says: "A doubtful clause will be controlled by the general intent of the lawmaking power, rather than to the literal meaning of the language. Where the language of the act itself points to the associated words as interpreting the more general ones, the application of the rule is obvious. Thus, where an act imposes a tax on all real estate, to wit, on various specified kinds of real estate, and from such specification shown to be private property, it is clear that the general words are to be controlled by the specifications, and that the broad phrase embracing all real estate, nevertheless does not include property of the United States, within the territory to which the tax applies. But, even in the absence of

such a clear manifestation of intent, associated words are understood to be used in their cognate sense. They take, as it were, their color from each other; that is, the more general is restricted to a sense analogous to the less general. The expression, for instance, of "places of public resort," assumes a very different meaning when coupled with "roads and streets," from that which it would have if the accompanying expression was "houses." In an enactment respecting houses "for public refreshment, resort and entertainment" the last word was understood, not as a theatrical or musical or other similar performance but as something contributing to the enjoyment of the "refreshment." *Endlich on Interpretation of Statutes*, § 400, p. 651.

We conclude that section 29, art. 10, Const., was intended to cover bonds and all instruments executed as evidence of indebtedness which was usually evidenced by a bond or such instruments executed and entered into by such formalities.

We further conclude that where funds are in the treasury to satisfy a warrant, or where a tax levy has been laid, and an appropriation has been duly made against such fund in the treasury, or such fund as will be raised by such tax levy, it is simply an order upon the treasurer to pay an audited and allowed claim out of a fund that had been set aside and appropriated. *State ex rel. Ash v. Parkinson*, 5 Nev. 17; *Darling v. Taylor*, 7 N. D. 538, 75 N. W. 766; *In re State Warrants*, 6 S. D. 518-522, 62 N. W. 101, 55 Am. St. Rep. 852; *Sackett v. City of New Albany*, 88 Ind. 473-477, 45 Am. Rep. 467; *Valparaiso v. Gardner*, 97 Ind. 6-11, 49 Am. Rep. 416.

The relator is entitled to the issuance of the writ prayed for, but as the respondent especially indicates that it is his disposition to follow the law as it is interpreted, the writ of mandamus, though awarded, will not be issued. The relator being privileged, however, to renew this application in the event that respondent does not honor and pay said warrant.

Writ of mandamus awarded. All the Justices concur.

BULLEN v. ARKANSAS VALLEY & W. RY. CO.

(Supreme Court of Oklahoma. April 14, 1908.)

1. APPEAL—REVIEW—PLEADING—AMENDMENT—PRESUMPTIONS.

In an action where, after defendant filed a demurrer to plaintiff's evidence, plaintiff obtained permission of the court during the argument of counsel on the demurrer to amend his petition to conform to the proof, and where his request to amend specifically stated to what proof the petition was to be amended to conform, and the argument of counsel upon said demurrer is thereupon concluded, it will be considered on appeal, where such amendment was in furtherance of justice, and no motion was made by defendant to strike from the record the evidence to which said amendment was to make

the petition conform, that such amendment was made, although the record does not disclose that it was filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3710.]

2. MUNICIPAL CORPORATIONS—VACATION OF STREETS—RIGHTS OF ABUTTING OWNERS.

An ordinance vacated certain streets of a city for the use of a railway company as its right of way and against public use and travel, except such streets as are otherwise excepted in said ordinance, and reserved the right of the public to travel over and across some of said streets, but not others. *Held* that, as to one of the streets not excepted and the right to travel over and across which is not reserved to the public, it is vacated by said ordinance, and attaches itself in the nature of an accretion to the adjacent real estate in proportion to the frontage, and becomes private property of the owner of the adjacent property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1439.]

3. SAME—EFFECT OF VACATION.

Whenever any street is vacated by the common council, the land embraced in said street at once attaches itself in the nature of an accretion to the adjacent real estate in proportion to frontage, and becomes private property, and cannot be taken for railway or other public purposes without just compensation being made to the owner thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 217; vol. 36, Municipal Corporations, § 1439.]

4. EMINENT DOMAIN—RIGHT TO DAMAGES.

Where a railroad company, after an ordinance has been passed vacating a street in a city, enters upon a strip of land formerly embraced in the street and appropriates the same, or any portion thereof, for its right of way, without the consent of the abutting landowner, such company is liable in damages for any depreciation in the value of the property not taken, by reason of such railway use and improvements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 237½.]

(Syllabus by the Court.)

Error from District Court, Noble County; Bayard T. Hainer, Judge.

Action by H. B. Bullen against the Arkansas Valley & Western Railway Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Doyle & Cress, for plaintiff in error. Jas. B. Diggs and Flynn & Ames, for defendant in error.

HAYES, J. The plaintiff in error, H. B. Bullen, brought this action against the Arkansas Valley & Western Railway Company in the district court of Noble county, Okl. T., to recover damages for the depreciation in the value of his property occasioned by the company's construction of its railroad beds and tracks in front of his lots and interfering with the use of them. Plaintiff alleges in his petition that he is the owner of lots 1, 2, 3, and 4 in block 46 of the original town-site of Perry, Okl.; that each of said lots is of the dimensions of 50 feet by 175 feet, and abuts upon the south side of A street, a public street in the city of Perry, Noble county, Okl.; that defendant, without the consent of plaintiff, on or about the 1st day of October, 1903, erected a large fill in front of said prop-

erty, and constructed in front of same a steam railway track, consisting of three tracks at a distance of about ten feet from the curb line of plaintiff's property, thereby wholly obstructing the means of ingress and egress to and from said property, and rendering it wholly unfit for the purposes for which plaintiff had been using it; that, by reason of such acts of the defendant, his property had been rendered practically valueless; and that plaintiff had been damaged in the sum of \$7,200.

Defendant filed its answer to plaintiff's complaint, and the cause was tried before a jury. After plaintiff had introduced various witnesses to support his cause of action and rested his case, defendant interposed a demurrer to the evidence submitted by plaintiff. After counsel had proceeded with the argument on the demurrer, plaintiff was permitted by the court, without objection on the part of the defendant, to reopen his case for the purpose of offering proof to show that the street in front of his property had been vacated, and plaintiff, without objection on the part of the defendant, then offered in evidence Ordinance No. 415 of the city of Perry, Noble county, Okl. After counsel had again proceeded with the argument on defendant's demurrer for a time, plaintiff asked leave of the court to amend his petition to conform to the proof as to the vacation of the streets, and, without objection on the part of defendant, plaintiff was given permission by the court to so amend his petition; but the record in this case does not disclose that such amendment was ever made. The court sustained defendant's demurrer to plaintiff's evidence and entered judgment for the defendant for its costs, to which action of the court plaintiff excepted, and this case was taken by writ of error by plaintiff to the Supreme Court of the territory of Oklahoma, which court, on September 5, 1907, rendered judgment reversing the court below and remanding said cause to the trial court. Petition for rehearing was filed by defendant in error on September 18, 1907, and rehearing was granted by the Supreme Court of the territory of Oklahoma, and this cause is before this court on rehearing.

This court has reached the same conclusion that was reached by the Supreme Court of the territory of Oklahoma, but, owing to the fact that some matters on rehearing have been emphasized by counsel for both parties in the case to an extent not emphasized by them in the original hearing, we have found it necessary to rewrite the opinion in this case, but in part have adopted the opinion and language of the Supreme Court of the territory of Oklahoma, as announced by Mr. Chief Justice BURFORD.

The theory of plaintiff's case, as presented by the allegations in his complaint and the evidence introduced upon the trial of the case up to the time of the introduction of said ordinance, was that A street was a public

street in the city of Perry, and that the defendant built its railroad tracks upon the street, and that plaintiff's right of action was for obstructing his means of ingress and egress to and from his property, and that his injury consisted in the depreciation in value of his property resulting from such obstruction of plaintiff's means of ingress and egress to and from his property, and defendant in error insists that this was the sole theory upon which the case was tried, and that no other issue was presented by the pleadings in the case, and that plaintiff cannot be permitted on appeal to shift the theory of his case to a different one from that relied upon in the trial court. Such was the theory of the plaintiff's case as set forth in the allegations in his complaint and established by the evidence introduced up to the time of the introduction of said Ordinance No. 415 of the city of Perry, entitled "An ordinance granting to the Arkansas Valley & Western Railway Company, its successors and assigns, the right to use and occupy certain of the parks, streets and alleys of the city of Perry, Noble county, Oklahoma Territory, and the subdivisions thereof, and vacating certain of the parks, streets and alleys of the city of Perry for the use and occupancy of the said railway company, its successors and assigns, and fixing the manner, terms and conditions upon which the railway company, its successors and assigns, may use the parks, streets and alleys of the said city of Perry, and for other purposes." If the introduction of said ordinance for the purpose of showing the vacation of the streets, and the granting of the court to the plaintiff permission to amend his petition to conform to the proof as to the vacation of the streets, did not operate to present to the trial court the issue whether or not A street was vacated prior to the location and building by the defendant of its line of railroad upon the same, defendant's contention that plaintiff cannot rely, on appeal to the Supreme Court, upon the theory that said street was vacated, and the portion of the same abutting plaintiff's property thereby became the property of plaintiff, prior to the time the defendant company constructed its line of railroad, must be well taken, for it is well settled that, where a cause has been tried in the lower court upon a specific theory and decided upon such theory, the court on appeal will not permit the defeated party to present and rely upon another theory, which may be more favorable to him, but which was not presented to the trial court. *Overstreet v. Citizens' Bank*, 12 Okl. 383, 72 Pac. 379; *B., E. & S. Ry. Co. v. Gist*, 18 Okl. 516, 90 Pac. 880.

Defendant in error insists that the record shows that plaintiff did not amend his petition pursuant to his leave granted by the court to amend the same, and therefore the case went to final determination upon the original petition and upon the original theory that A street was not vacated, but was a pub-

lic street at the time of the trial, and that the cause of action was for the obstruction of plaintiff's means of ingress and egress to and from his property. It is a general rule that permission to amend does not amount to an amendment, but the amendment must be actually made by either altering the pleading or by filing or serving a new one. 1 Ency. Plead. & Prac. p. 640. But under certain circumstances an amendment may be implied. In *Kelsey v. Chicago & Northwestern Ry. Co.*, 1 S. D. 80, 45 N. W. 204, after the trial of the case had begun, the plaintiff offered evidence in support of the allegations in his complaint. Defendant objected to the evidence on the ground that the complaint did not state a cause of action. Plaintiff moved to amend his complaint, which motion was allowed over the objection of the defendant. The trial then proceeded. The record did not disclose that the amendment was ever made, nor did it disclose in what particular it was to be amended. Mr. Justice Bennett, speaking for the court, said: "A motion was made to amend, but in what particular is not shown. The motion was allowed, but the record does not say positively that the amendment was made. The trial proceeding without further objection, it is not a violent presumption that the complaint was amended to show a good cause of action. The modern rule, and the generally prevailing principle to-day, is that all such amendments shall be made as may be necessary for the purpose of determining the real question or questions in controversy between the parties and administering justice." Under a similar state of facts, in *Kuhn v. Gustafson*, 73 Iowa, 636, 35 N. W. 662, the court said: "We are inclined to think that counsel understood that an amendment was filed, but whether this is so or not is immaterial. Counsel knew the ground on which the court made the ruling, and we think they should have called the attention of the court to the fact that the proper amendment was not filed, and therefore asked the court to strike out the evidence, and, as this was not done, the defendant cannot raise the objection that no amended petition was filed for the first time in this court."

It has been frequently held that where a leave to amend a pleading is granted by the court, and the contents of such amendment are suggested either by the court or by the parties asking leave to make such amendment, and the trial progresses as if such amendment had been made, it will be regarded that such amendment was made. *Underwood v. Bishop*, 67 Mo. 374; *Hines & Battle v. Wilmington & Weldon Ry. Co.*, 95 N. C. 434, 59 Am. Rep. 250; *Dexter A. Ballou v. Wilbur H. Hill et al.*, 23 Mich. 60; *Johnston v. Farmers' Fire Ins. Co.*, 106 Mich. 96, 64 N. W. 5. In *Maders v. Whallon et al.*, 74 Hun, 372, 26 N. Y. Supp. 614, the court adopts this rule in the following language: "On this trial the objection was made, at the opening of the case, that the complaint failed to state a cause of

action, and should for that reason be dismissed. The plaintiff thereupon moved to amend the complaint by inserting therein, after the words 'has no property,' the words 'and had no other property subject to levy and sale on execution at the time of or since the date of said conveyance, or since the rendition of the judgment.' The defendant duly objected to the allowance of the amendment, and the court overruled the objection, and allowed the amendment, to which the defendant excepted. It is now insisted that the complaint was not in fact amended, as the amendment does not appear in the complaint as incorporated in the judgment roll, and that the case, on this appeal, must be treated as if no amendment had been allowed by the trial judge. We cannot agree with the learned counsel in this contention, but we think we must treat the case the same as though the proposed amendment had been actually written in the complaint." See, also, *Bank of Lindsborg v. Ober & Hageman*, 31 Kan. 599, 3 Pac. 324.

In the case at bar, after the plaintiff had rested his case, and the demurrer to the evidence had been filed by the defendant, plaintiff obtained leave of the court to reopen his case for the specific purpose of introducing evidence to show the vacation of the street. Such leave was granted by the court without any objection of defendant, and, after the introduction of said Ordinance No. 415 by the plaintiff, leave was granted to plaintiff to amend his complaint to conform to the proof of vacation of the street. This action by the court was not objected to by defendant. If the ordinance presented shows a vacation of A street, it appears to this court that the language of the plaintiff and of the court, at the time permission was granted to the plaintiff to amend his petition to conform to the proof, is sufficient to suggest clearly the nature of such amendment, and since, immediately after said permission was given to plaintiff to amend his petition, counsel concluded their argument on the demurrer to the evidence, and the court sustained said demurrer without any motion on the part of the defendant to strike from the record the evidence tending to show a vacation of the street for the reason that plaintiff had failed to file his amended petition, it may be considered that the petition was amended in accordance with the permission granted by the court.

In his petition in error, plaintiff in error has made various assignments of error, but in his brief he has discussed and emphasized only the alleged error of the court in sustaining the demurrer to his evidence, and in rendering judgment for the defendant for its costs. Plaintiff in error insists that A street by virtue of said Ordinance No. 415 was vacated, and by virtue of its having been vacated that portion of the street upon which plaintiff's lots abutted to the center of said street by operation of law attached itself to the adjacent lots and became the private property of plaintiff. Defendant, on the oth-

er hand, contends that the effect of said ordinance is not to vacate A street, against public use and travel, but only for the purpose for which same is granted by said ordinance to the Arkansas Valley & Western Railway Company, and cites the case of *Tonkawa Milling Co. v. Town of Tonkawa*, 15 Okl. 672, 83 Pac. 915, as construing a similar ordinance, in which it is held that streets therein described are not vacated. The title of the ordinance construed in *Tonkawa Milling Company v. Town of Tonkawa*, supra, is as follows: "An ordinance granting a right of way to the Blackwell & Southern Railway Company through the town of Tonkawa, Kay county, Oklahoma Territory, and for the purpose of such right of way, vacating certain streets, avenues and alleys in said town of Tonkawa." Section 1 of said ordinance grants to the Blackwell & Southern Railway Company the right to construct, maintain, and operate its railroad, side tracks, and switches over and across certain streets, avenues, and alleys in the town of Tonkawa. Section 2, under which it was claimed that said streets were vacated, reads as follows: "That for the purpose aforesaid, the following streets, avenues and alleys of the said town of Tonkawa be and the same are hereby vacated. * * *" In that case it clearly appears, from the title of the ordinance and from the language of the clause under which the vacation of the streets was claimed, that the vacation was limited for the purpose of a right of way for said company, and that it was not against the public use thereof, except that the use of the public should be subject to the right of the railroad company to use the same in operating its railroad, side tracks, and switches.

Section 1 of the ordinance in this case reads as follows: "That the Arkansas Valley and Western Railway Company, its successors and assigns, are hereby granted the right to use and occupy certain streets and parks and alleys in the city of Perry and subdivisions thereof, for its main line of tracks in the city of Perry, and for its switches, side tracks, station grounds, buildings and all terminal facilities, and for the location of the industries connected with and adjacent to said railway and for all other railway purposes and for the right of way, and for such purposes, the following parks, streets and alleys of the city of Perry, Noble county, Oklahoma Territory, as herein more particularly described, are hereby granted and dedicated as follows, to wit." Then follows a description of the streets, parks and alleys, among which streets described is that portion of A street which lies in front of plaintiff's property. After concluding the description of the streets, parks, and alleys, it is provided in said section that the right of way therein granted and dedicated for said purposes over all of said parks, streets, and alleys through the city of Perry shall be 100 feet in width, except where a different width is shown by

the map or plan of said railroad company. Thereafter in the same section appears the following language: "All of said parks, streets and alleys as herein described of the city of Perry are hereby granted and dedicated to said Arkansas Valley and Western Railway Company, its successors and assigns, and the said railway company shall have and to its successors and assigns is hereby granted the right to use and to occupy all of said parks, streets and alleys and all of said parks, streets and alleys herein granted for its use and occupancy of the Arkansas Valley and Western Railway Company, its successors and assigns, are hereby vacated and shall remain vacated against public use and travel except such as are in this ordinance specifically excepted." Section 4 of said ordinance names the streets, parks and alleys the right to use and occupy which is given by said ordinance to the railway company, over and across which the right of the public to travel is reserved; but the streets therein named do not include A street. The same section further provides that the public shall be allowed to travel upon and across said railway upon each of said streets named in said section, and that it shall be the duty of said railway company to provide a suitable place on each side of the tracks of the railway company anywhere the same crosses each of the streets named in said section for the crossing of vehicles and foot passengers over its main and side tracks. Section 6 reads as follows: "Said railway company by its general solicitor shall file with the clerk of the city of Perry, within ten days after the passage of this ordinance, its acceptance of the term and conditions thereof and the same shall be and constitute a contract between the city of Perry and the Arkansas Valley and Western Railway Company, its successors and assigns, and shall operate as a dedication and grant to the said railway company of all the grounds, parks, streets and alleys herein granted and of the right of way, and right to use and occupancy of said grounds as in said ordinance granted for railway purpose and said parks, streets and alleys are hereby vacated and shall be and remain vacated for the use of said railway company and against public use and travel except as herein before provided for."

We have quoted all of the portions of the ordinance in which it is attempted to vacate any of the streets and alleys of the city of Perry. The language contained in the first section of which certain streets and alleys are vacated is different from the section of the ordinance in the case of *Tonkawa Milling Company v. Town of Tonkawa*, supra, by which it was contended that certain streets and alleys were vacated. It is stated in said section of the ordinance in that case that the streets and alleys are vacated for the purposes aforesaid, to wit, for the purposes of a right of way for the Blackwell & Southern Railway Company; but the language in

section 1 of the ordinance in the case at bar is "and all of said parks, streets and alleys herein granted for the use and occupancy of the Arkansas Valley and Western Railway Company, its successors and assigns, are hereby vacated and shall remain vacated against public use and travel except such as are in this ordinance specifically excepted." The clause "herein granted for the use and occupancy of the Arkansas Valley and Western Railway Company, its successors and assigns," clearly was intended to and does limit and point out the streets and alleys that are to be vacated, rather than to designate the purpose for which they were to be vacated. This construction is supported by the language immediately following said clause to the effect that all of said streets are vacated against public use and travel except as are in the ordinance specifically excepted.

Section 4, which excepts certain streets, parks, and alleys from the operation of said language of section 1, does not except A street, and while section 4 reserves to the public the right to travel over and across certain of the streets, alleys, and parks named in section 1, it does not reserve any such right as to A street. It is apparent from section 4 that it is intended by the ordinance to place a limitation upon the vacation of certain streets, parks, and alleys made in section 1; but it does not place a limitation upon the vacation made in section 1. The fact that by a provision of section 4 the railway company is required to make crossings over its track on those streets, the right to travel over and across which it reserved to the public, and that no such requirement is made of the railway company as to A street and the other streets the right to travel over and across which is not reserved to the public, indicates that it was the intention of the city council to entirely vacate A street against the use of the public, while as to the other streets the vacation was to be limited for the purposes of the right of way of the railroad company, and the right of the public to use the same to be reserved subject to the right of the railroad company to build its tracks upon said streets and operate its line of railroad thereon. Again, in section 6 of the ordinance, quoted supra, the language "and said parks, streets and alleys are hereby vacated and shall be and remain vacated for the use of said railroad company and against public use and travel except as herein provided for," supports the construction that some of the streets named in said ordinance were to be vacated only for the use of said railroad company, while others were to be vacated both for the use of the railroad company and against public use and travel.

The defendant in error in building its railroad track upon A street appropriated a part of the strip of land that attached to the lots

of plaintiff in error and became part of his property after the vacation of A street. This fact brings this case within the rule announced in *Blackwell, Enid & Southwestern Ry. Co. v. Gist*, 18 Okl. 516, 90 Pac. 889. In that case the railroad company built upon a street that had been vacated. An abutting property owner brought suit for damages sustained by her from the depreciation in the value of her abutting property. Although no damages were sought in that action by the abutting property owner for the appropriation by the railroad company of any part of the strip of land that attached to her property after the vacation of the street, the court held that the railroad company was liable in damages for any depreciation in the value of the abutting property caused by the appropriation of a portion of the street that had been vacated which had attached itself to the abutting property and had become the property of the abutting property owner.

The action of the court sustaining defendant's demurrer to plaintiff's evidence was error, for which error this cause is reversed and remanded, with directions to grant a new trial.

WILLIAMS, C. J., and DUNN, TURNER, and KANE, JJ., concur.

(21 Okl. 88)

RAY v. SCHOOL DIST. NO. 9, CADDO COUNTY.

(Supreme Court of Oklahoma. May 13, 1908.)

MUNICIPAL CORPORATIONS—WARRANTS—VALIDITY.

Indebtedness contracted or incurred for necessary and lawful purposes by any municipal or political corporation, or any subdivision of the territory of Oklahoma, created and existing under and by virtue of the organic act (Act May 2, 1900, c. 182, 26 Stat. 81) and the laws of the territory of Oklahoma prior to the taking of the first assessment for the purpose of territorial and county taxation, is valid if issued within the limit of 4 per centum of the value of the taxable property as ascertained by said assessment, but warrants prior to such first assessment issued for such purposes in excess of said 4 per centum limit are void.

(Syllabus by the Court.)

Error from Probate Court, Caddo County.

Action by Frank H. Ray against School District No. 9 of Caddo County. Judgment for defendant, and plaintiff brings error. Affirmed.

On the 20th day of October, 1905, plaintiff in error, as plaintiff, instituted this action against defendant in error, as defendant, in the nisi prius court, alleging in his petition that at all times thereafter mentioned and set out defendant was a duly and regularly organized school district in Caddo county, territory of Oklahoma, No. 9, and exercising the rights and powers of such under the laws of said territory, and subject to such duties and liabilities; that on the 3d day of Feb-

ruary, 1902, the regularly qualified and acting board of said district caused to be issued to L. A. Pell, manager of the Thomas Kane & Co. Works, a corporation, warrant No. 6 for the sum of \$203.15, and caused the same to be signed by the director and clerk of said district, and attested by the seal thereof, whereby the treasurer of said district was directed to pay to the order of said Pell, as such manager, the sum of \$203.15; that said warrant was issued for certain school furniture sold by the said L. A. Pell, as manager, to the said defendant, at its special instance and request; that said warrant was duly presented to the treasurer of the said district on June 21, 1902, and indorsed "not paid for want of funds," and given registry No. 6; that thereafter, for a good and valuable consideration, the said L. A. Pell, manager, did sell, assign, transfer, and indorse said warrant unto Frank H. Ray, the plaintiff, who thereby became, and ever since said time and is now, the owner and holder thereof; that a true and complete copy of said warrant, with all the certificates and indorsements, is attached to said petition, marked "Exhibit A," and made a part thereof; that said warrant has been duly presented to said defendant and its treasurer for payment, and payment demanded thereon, which has been refused; that by reason of the premises there is now due and owing to plaintiff on account of said warrant the sum of \$203.15, with interest at 6 per cent. since the 21st day of June, 1902. The plaintiff further alleged that on the 3d day of February, 1902, the defendant issued, through its board, to the said L. A. Pell, as such manager, its certain warrant No. 7 for the sum of \$29.05, and caused the same to be signed by the director and clerk and attested by the seal thereof, whereby the treasurer of said district was directed to pay to the order of the said L. A. Pell, manager, the sum of \$29.05; that said warrant was issued in payment of freight on certain school furniture sold by the said L. A. Pell, manager, to said defendant at its special instance and request; that said warrant was duly presented to the treasurer of said district on June 21, 1902, and indorsed "not paid for want of funds," and given registry No. 7; that afterwards, for a good and valuable consideration, the said L. A. Pell, as manager, did sell, assign, transfer, and indorse said warrant unto the plaintiff, and the plaintiff is now the owner of said warrant; that a copy of said warrant is attached to said petition, with all indorsements thereon. Plaintiff further alleges that there is now due on said warrant the sum of \$29.05, with interest at 6 per cent. since the 21st day of June, 1902. Plaintiff further declares that on the 20th day of February, 1902, said defendant caused to be issued to the said L. A. Pell, as manager, warrant No. 8 for the sum of \$166.10, and caused the same to be

signed by the director and clerk and attested by the seal thereof, whereby the treasurer of said district was directed to pay to the order of said L. A. Pell, manager, the sum of \$166.10; that said warrant was issued in payment of certain school supplies sold by said L. A. Pell to said defendant at its special instance and request; that said warrant was duly presented to the treasurer of said district on June 21, 1902, and indorsed "not paid for want of funds," and given registry No. 8; that thereafter, for a good and valuable consideration, said Pell, as manager, did sell, assign, transfer, and indorse said warrant unto the plaintiff, who thereby became, and ever since has been and is now, the holder thereof; that a copy of said warrant, with all the certificates and indorsements thereon, is attached to said petition, marked "Exhibit C," and made a part thereof; that by reason of the premises defendant is due to the plaintiff said sum of \$166.10, with interest at 6 per cent. from the 21st day of June, 1902. Plaintiff further alleges that on February 20, 1902, defendant caused to be issued to said Pell, as manager, its warrant No. 9 for the sum of \$9.63, and caused the same to be duly signed, attested and sealed, and delivered to said Pell, manager, whereby the treasurer of said district was directed to pay to his order the sum of \$9.63; that said warrant was issued in payment of freight charges on certain school supplies sold by Pell, as manager, to defendant, at its special instance and request; that said warrant was duly presented to the treasurer of said district on June 21, 1902, and indorsed "not paid for want of funds," and given registry No. 9; that thereafter, for a good and valuable consideration, said Pell, manager, did sell, assign, and transfer said warrant unto plaintiff, who thereby became, and has been ever since, the owner thereof; that a true and complete copy of said warrant, with all the certificates and indorsements, is attached to said petition, marked "Exhibit C," and made a part thereof; that said warrant was duly presented to defendant and its treasurer, and payment demanded thereon, which has been refused; that by reason of the premises there is due plaintiff said sum of \$9.63, with interest from the 21st day of June, 1902, at 6 per cent. per annum.

On the 15th day of November, 1905, defendant filed its answer herein, admitting that it was a municipal corporation duly organized under and by virtue of the laws of the territory of Oklahoma, and was so organized at the times and dates stated and named in the petition; and further alleged that at no time prior to the issuing of the said warrants numbered 6, 7, 8, and 9, as alleged in the petition of plaintiff, was there any written claim verified or otherwise presented to the school board by L. A. Pell, or any person for him, or the said Thomas Kane

& Co. Works, for the amounts set out in the respective warrants, or for any amounts whatever, and that there was no minute or entry upon the records of the said district of the presentation or allowance of any claim to the said L. A. Pell, manager. Defendant further pleads that the said county of Caddo was organized on or between the 6th day of August, 1901, and January 1, 1902; that the first assessment ever made in said Caddo county for school district and territorial purposes was in March, 1902, and by the said assessment, which was the first assessment ever made within said school district, or territory, county, or school district, the total assessed valuation of all the property within the said school district for the said year, 1902, as made, returned, and finally equalized by the territorial board of equalization, was the sum of \$10,620; that 4 per cent. of the said amount would amount to \$424.80; that the said school district, prior to the issuing of the warrants sued upon by plaintiff, had issued and delivered its warrants Nos. 1, 2, 3, 4, and 5, and that said warrants in the aggregate amounted to over the sum of \$1,000; that the said school district, prior to incurring the alleged indebtedness sued upon herein had already incurred an indebtedness of about \$1,000, and far in excess of the 4 per cent. of the first assessed valuation of said district; that the alleged issuing of the four warrants sued on herein, and the incurring of the alleged indebtedness sued on is null and void as being in violation of the act of Congress of the United States approved July 30, 1886.

On the 29th day of November, 1905, plaintiff filed its reply to the answer of defendant, denying each and every allegation therein contained inconsistent with the allegations of plaintiff's complaint. On the 19th day of November, 1906, the plaintiff and defendant filed in said cause a stipulation and agreed statement of facts, the body of which is in words and figures as follows: "That Caddo county, Oklahoma, was organized on the 6th day of August, 1901. That school district No. 9 of said county was organized on the 11th day of November, 1901; that on or prior to the 1st day of January, 1902, the following board of officers were duly appointed and qualified as such officers of said district: G. L. Weaver, director; Chas. H. Neal, clerk; J. W. Turner, treasurer. That on February 3, and February 20, respectively, 1902, said officers were acting as the duly qualified board of said school district. That after said date and prior to June 21, 1902, W. H. Fullerton became the duly qualified and acting treasurer of said district in place of the said J. W. Turner. That the warrants sued upon in this action were issued to L. A. Pell, manager Thos. Kane & Co. Works, as alleged in said petition. That said warrants were sold and delivered to Frank H. Ray, plaintiff herein, and the said plaintiff is now the legal

owner and holder of said warrants. That said warrants were presented to W. H. Fullerton, treasurer of said defendant district, on the 21st day of June, 1902, and payment thereon was refused, and they were registered on said date; the registry numbers being 6, 7, 8, and 9, respectively. That the said warrants were indorsed by the said W. H. Fullerton as follows: 'Presented on June 21, 1902, and not paid for want of funds.' That said warrants were issued to L. A. Pell, manager of the said Thos. Kane & Co. Works by the said defendant acting through its proper officers, for certain goods, wares, and merchandise consisting of school seats, desks, and apparatus, etc., also for freight on said goods, which were sold and delivered to the defendant district on or before February 20, 1902. That the said warrants to which reference is heretofore made being numbered 6, dated February 3, 1902, for \$203.15; No. 7, dated February 3, 1902; No. 8, dated February 20, 1902, for \$166.10; and No. 9 dated February 20, 1902, for \$9.63—are hereto attached, marked 'Exhibits A, B, C, and D, respectively,' and made a part of this stipulation. That the first assessment made in the said school district No. 9, for territorial, county, and school purposes, was made by the local assessor in March, 1902, and was certified by the territorial board of equalization to the county clerk of Caddo county, on the 14th day of July, 1902, and filed in the office of the said clerk on the 15th day of July, 1902. That the assessed valuation of said district, as shown by the said report filed with the county clerk, amounted to \$10,520. That the amount of outstanding indebtedness of said school district prior to the issuance of said warrants hereinbefore set out, and upon which this action is based, was \$1,022.37. That the records of said school district do not show that prior to or after the execution, issuance, and delivery of the above said warrants a written claim, verified or otherwise, was filed with the officers of said district by said L. A. Pell, manager of the Thos. Kane & Co. Works, or any person acting for him, other than the record of the above said warrants. That on and prior to the dates of the issuance of the said warrants there was no cash in the hands of the treasurer of said district, no taxes levied, due or payable, nor any other funds of any kind or character, out of which said obligations or any prior obligations could be paid."

Shartel, Keaton & Wells and Dyke Ballinger, for plaintiff in error. W. W. Vaughn and Theodore Pruitt, for defendant in error.

WILLIAMS, C. J. (after stating the facts as above). It is contended by the plaintiff in error that section 4 of an act of Congress approved July 30, 1886 (24 Stat. 171, c. 818), which is in words and figures as follows: "That no political or municipal corporation, county, or other subdivision, in any of the territories of the United States shall ever

become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum of the value of the taxable property within such corporation, county, or subdivision, to be ascertained by the last assessment of the territorial and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by such corporation shall be void * * *—does not become operative and effective until the value of the property in such municipality or tax district is ascertained by an assessment. It is admitted that the warrants sued on in this action exceed in the aggregate 4 per centum of the value of the taxable property within the school district of Caddo county, as subsequently ascertained by the assessment for territorial and county purposes for the year 1902, but plaintiff contends that said section 4, *supra*, being inoperative until after the first assessment, and that municipalities have implied power to create indebtedness when necessary, for lawful purpose, unless prohibited by statute, that the defendant in error had the right to create the indebtedness herein involved, and that plaintiff should have had judgment in the court below.

There has not been a uniformity in the decisions of the Supreme Court of the territory of Oklahoma on this question. The first case that came before said court involving this matter is that of *City of Guthrie v. Territory ex rel. Losey*, 1 Okl. 201, 31 Pac. 190, 21 L. R. A. 841, wherein the court says: "This congressional provision is a limitation upon the municipal authorities, but does not limit the power of the Legislature to levy assessments on the property within the corporation by proper legislation."

The next case before said court was that of *City of Guthrie v. New Vienna Bank*, 4 Okl. 222, 38 Pac. 13. The court said: "These municipalities get their life, existence, and power from the Congress of the United States, and it was the duty and province of that body to exercise a proper control over them. This was clearly intended as a limitation on the power of the corporate powers to become indebted. They get whatever power they have from the laws enacted or permitted by the United States Congress, and, in fixing a basis upon which to rest this power of creating indebtedness, Congress prescribed that it should be an assessment of taxable property for territorial and county purposes made previous to the incurring of such indebtedness. Language cannot be plainer and the intent and purpose more certain. A provision was placed in said act for the payment of existing indebtedness at the date of its adoption, but all future obligations, debts, or liabilities were to be controlled by the limitations and inhibitions contained in the statute. All debts contracted, incurred, or imposed after July 30, 1886, the date of the approval of the statute, must owe their validity and legality

to two factors, which were matters of record, and of which all persons must take notice. There must have been an assessment of taxable property within the county embracing the corporation, and the debt, when added to existing obligations, must not exceed 4 per cent. of such assessment. This is a wise and liberal limitation, and, if conditions existed which made it impracticable to operate municipal governments without creating debts, it is a condition which the courts cannot remedy; if any is required, it lies with Congress, and not with the courts or territorial Legislature."

In effect, in this case, the court expressly overrules the case of *City of Guthrie v. Territory ex rel. Losey*, *supra*, so far as it holds that the limitation found in the act of July 30, 1886, is not a limitation on the Legislature as well as on the municipality. In the case of *City of Guthrie v. New Vienna Bank*, *supra*, the court in effect holds: That under the act of July 30, 1886, the power to incur debts by a municipality by the Legislature imposing same upon it was limited by the assessed valuation of the property of such municipality as shown by an assessment previously ascertained; that without such assessment there was no power to create liabilities so as to fasten a future charge; that there was no basis for debts of any character upon which to fix a maximum of 4 per cent.; that consequently all debts of any character or for any purpose imposed on the municipality by the Legislature was invalid; and that it was a condition precedent that such assessment should be first made, otherwise there could be no limit fixed. The entire court, comprising Chief Justice Dale, Justices Scott, and McAtee concurred in this decision; Justice Bierer being the trial judge in the *ni si prius* court. Said decision was handed down September 7, 1894. A petition for rehearing was filed and denied February 8, 1896. In the meantime, at the June term, 1896, of said court, the case of *Hoffman v. County Commissioners of Pawnee County*, 3 Okl. 325, 41 Pac. 566, was decided. In that case the court says: "This cause involves the same question presented to the court in the case of *Nicholas and William Sauer v. J. W. McMurtry* as a taxpayer and county attorney of Roger Mills county, and was consolidated with this one for the purpose of argument before this court. The question in the *Pawnee* county case comes to this court by the petition in error of holders of warrants issued subsequent to the first assessment, who claim to be prejudiced by the action of the district court of Pawnee county, excluding warrants issued since the assessment in excess of the 4 per cent. limit from the bonding process and including warrants issued prior to that time therein. The presiding judge below, Justice Bierer, held to the view that said county could create a debt within the law prior to an assessment, not in excess of 4 per centum of the value of the taxable property in said

county to be ascertained by the first assessment. Chief Justice Dale concurs in this view. Justice Burford entirely dissents, and still adheres to the view expressed in the New Vienna Bank Case, as applicable to this case as well as to that one. Justice McAtee concurs fully with the reasoning in this opinion, notwithstanding his decision in the Roger Mills county case, and all the justices concur in the conclusions reached herein, excepting Justice Burford, in affirming the judgment of the court below."

The court further says: "Pawnee county is a municipal corporation. It is located in a territory of the United States. The taxable property has been assessed therein as provided by law. The laws of the United States and the territory have application thereto as any other municipality whose legal status is the same, rendered so by the same power and authority. The only difference, if that amounts to a legal difference, is that a debt has been contracted previous to the assessment. It is also true that debts were contracted and in existence in the territories of the United States in 1886, when the act was passed. This is evident from the use of the words 'including existing indebtedness.' When this statute became applicable to Pawnee county, said Pawnee county having an existing indebtedness, having had an assessment, and being a municipal corporation and situated in a territory of the United States, who will undertake to define the distinction between Pawnee county in this condition and a county in the territory of New Mexico in 1886, at the time of the passage of said act, said county in New Mexico being a municipal corporation, having had an assessment, having an existing indebtedness and being situated in a territory of the United States? Certainly no one would attempt such a distinction. So we can see no escape from the conclusion that the valid indebtedness incurred in Pawnee county prior to an assessment, must be regarded as comparable to the indebtedness existing in similar municipalities in other territories of the United States in 1886, when this act was passed. We presume that Congress intended that, if existing indebtedness reached or exceeded 4 per cent. of the assessed valuation, no greater debt could be incurred, but that such an impoverished condition of affairs would appeal to the wisdom of the proper legislative authority. There are many ways to relieve such a condition, but a discussion of the matter need not take place here. We have not to deal with that phase of the question. Neither have we to deal with the suggestion of the counsel for plaintiff in error, which is wholly outside of the record, that corrupt officers, unless restrained by the limitation referred to, will hopelessly burden a municipality with debt. We can only say that, if debts incurred are fraudulent, there is ample relief, but the court, so far as this record is concerned, is bound to presume that the indebtedness was necessar-

ily created and valid so far as it was incurred within existing provisions of law. From this reasoning it follows that section 4 of the act of July 30, 1886, did not become applicable to Pawnee county until after an assessment was had for territorial and county taxes, or that its provisions were repealed, as to their effect therein, by section 28 of the Organic Act (Act May 2, 1890, c. 182, 26 Stat. 93), and that all indebtedness created within existing provisions of law, in said county, are valid and binding obligations on the county. Further, that if, at the time of the first assessment, the existing indebtedness reaches, or is in excess of, 4 per cent. of the taxable property of said county, no more indebtedness can be created until such time as the taxable property shall have been increased, or the existing indebtedness shall have been liquidated to such an extent that the amount of debt to be created shall not exceed 4 per cent. of the value of the taxable property, to be ascertained by the last assessment for territorial and county taxes." Justice McAtee concurred, Justice Burford dissented, and Chief Justice Dale concurred in the conclusion affirming the judgment, but did not agree that a debt exceeding 4 per centum may be contracted prior to the first assessment, or at any other time, as long as section 4 of the act of 1886 is in force.

In the case of Sauer et al. v. McMurtry ex rel., 4 Okl. 447, 46 Pac. 576, Justice Scott, speaking for the court, said: "The court, in passing upon that case (referring to the Hoffman Case), held that all counties, municipal corporations, and other subdivisions in the territory of Oklahoma, created and existing under and by virtue of the organic act and the territorial statutes, have the power, prior to the taking of the first assessment of the taxable property for territorial and county taxation, to contract indebtedness, for all legitimate purposes, to an amount equal to 4 per centum of the value of the taxable property within said corporation, county, or subdivision, to be determined by the last assessment taken for the purpose of territorial and county taxation, and to issue warrants in evidence thereof." The indebtedness created in Roger Mills county by virtue of the warrants in question did not exceed in the aggregate 4 per centum of the taxable value of said county, as subsequently determined. The court held said warrants valid.

In the case of Hall Lithographing Co. v. Board of County Commissioners, 8 Okl. 391, 58 Pac. 624, Justice Hainer, speaking for the court, refused to follow the New Vienna Bank Case, and said: "Applying these principles to the case at bar, we are clearly of the opinion that section 4 of said act does not become operative until the value of the taxable property within the county or municipality has been ascertained by an assessment for territorial and county taxes, for the reason that, until such assessment has

been made, there is no means of determining the value of the taxable property within the county or municipality, and hence there is no standard for ascertaining the limit of indebtedness that may be created within the purview of said act; that said act of Congress presupposes an assessment, and, until the value of the property within the corporation is ascertained, the law cannot become effective. We therefore hold that the plaintiff in error, the board of county commissioners of Roger Mills county, had the power to incur a valid indebtedness and issue warrants as an evidence thereof, prior to the making of an assessment of the taxable property within said county for the purposes of territorial and county taxation, to meet the ordinary and necessary expenses of carrying on and conducting the functions of county government; and the incurring of such an indebtedness is not in violation of section 4 of the act of Congress of July 30, 1886, which prescribes, among other things, that no county shall ever become indebted in excess of 4 per centum of the value of the taxable property therein, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness." Justices McAtee and Irwin concur. Chief Justice Burford dissenting. Justice Burwell being the trial judge.

In the case of *Roger Mills County v. Rowden*, 8 Okl. 406, 58 Pac. 624, Justice Halner, speaking for the court, said: "We therefore hold that a newly organized county in this territory has the power to create a valid indebtedness, and issue warrants as an evidence thereof, prior to the making and completion of an assessment for the purposes of territorial and county taxation, to meet the ordinary expenses which are necessary to carry on and conduct the necessary functions of county government; and the incurring of such indebtedness is not in contravention of section 4 of the act of Congress approved July 30, 1886, which prescribes, among other things, that no county shall ever become indebted in excess of 4 per centum of the value of the taxable property therein, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness." Justices McAtee and Irwin concurring, Chief Justice Burford dissenting, and Justice Burwell being the trial judge.

In the case of the *Board of County Commissioners of Roger Mills County v. Sauer et al.*, 8 Okl. 411, 58 Pac. 626, Justice Halner, speaking for the court, said: "We think the demurrer was properly sustained. The only defense to the action was that the county had no power to incur any indebtedness, for the reason that no assessment had been made prior to the incurring of such indebtedness. This is untenable. The case comes clearly within the rule laid down in the case of *Board v. Rowden*, 8 Okl. 406, 58 Pac. 624, where this court held that a newly organized

county in this territory has the power to create a valid indebtedness, and issue warrants as an evidence thereof, prior to the making and completion of an assessment for the purposes of territorial and county taxation, to meet the ordinary expenses which are necessary to carry on and conduct the functions of county government; and the incurring of such an indebtedness is not in contravention of section 4 of the act of Congress approved July 30, 1886, which prescribes, among other things, that no county shall ever become indebted in excess of 4 per centum of the value of the taxable property therein, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness."

By reference to the case of *McMurtry v. County Commissioners of Roger Mills County*, 6 Okl. 60, 55 Pac. 1069, examination will show that the indebtedness was less than 4 per cent. of the first tax assessment when same was made, and the syllabus in the former case plainly says that the indebtedness is legal if not in excess of 4 per cent. of the first assessment.

In the case of *Hall Lithographing Co. v. Board of County Commissioners*, supra, the plaintiff sought to recover the sum of \$1,516.84 upon four certain warrants issued by said county before an assessment had ever been made. The first assessment in said county showed \$186,368.84 of taxable property. This claim was far below the maximum limit of 4 per centum of the taxable valuation. On page 385 of 8 Okl., page 622 of 58 Pac., the court says: "It further appears from the agreed statement of facts that the total amount of outstanding indebtedness of said county, including the warrants in question, was only \$3,564.83." The only question before the court in that case was the question of the illegality of the warrants sued on, and not a question of any excess above the 4 per centum limit.

In the case of *Commissioners of Roger Mills County v. Rowden*, supra, the agreed statement of facts, found on page 407, 8 Okl. (58 Pac. 624), shows that the warrants sued on amount to only \$229.61, and shows also that said county was within the 4 per cent. limit as represented by the first assessment for territorial and county purposes. In the case of *Roger Mills County v. Sauer*, supra, action was brought on warrants amounting to \$331.50, and defense was made to same on the grounds that the warrants were issued before the assessment was made; there being no contention that the warrants were in excess of 4 per centum of the tax valuation according to the first assessment. It does not appear that the Supreme Court of the territory of Oklahoma has ever in any case passed upon the question where the indebtedness created prior to the first assessment was in excess of 4 per centum of the tax valuation for territorial and county purposes when said first assessment had been made. The

question involved in this case has never been determined by said court, except in the New Vienna Bank Case. Then it was held that an indebtedness created before any assessment had ever been made was absolutely null and void. Since then the doctrine announced by Chief Justice Burford in that case has been modified in the Hoffman, McMurtry, Hall Lithographing Co., and Rowden Cases, to the extent that indebtedness created prior to the first assessment not in excess of 4 per centum of the value of the taxable property, to be ascertained by the first assessment for necessary expenses, was not invalid. The question is now before us as to whether or not we will absolutely overrule the New Vienna Bank Case, and go to the extent of holding that section 4 of the act of July 30, 1886, has no application whatever until after the first assessment has been made, and consequently no limitation whatever on municipalities prior to the first assessment. However much we might feel inclined to follow and recognize to the greatest degree the reasoning and conclusions as announced in the New Vienna Bank Case, yet, the modifications announced in the Hoffman, McMurtry, Hall Lithographing Company, and Rowden Cases, have been so generally acquiesced in, and acted upon in the territory of Oklahoma that the doctrine of stare decisis applies, for the same has become, you might say, a rule of property, and for that reason we do not feel that we would be justifiable in disturbing that rule at the present time. But why should we extend the same? The intention of Congress in passing the act of July 30, 1886, is obvious. Clearly its intention was to prevent the recurrence of evils which prior to that time had prevailed in the territories and their municipal governments, and to guard against abuses which were liable in the future, as in the past, to creep into the administration of such public affairs, and safeguard against peculations, grafts, extravagance, defalcations, and burdens in the way of taxation theretofore incumbering the administration of such municipal governments.

It was unquestionably with this view that Congress enacted the statute limiting counties, cities, towns, and districts in the territories from becoming indebted in any manner or for any purpose in excess of the 4 per cent. of their taxable value. The Supreme Court of the territory of Oklahoma, in the decision heretofore cited, has repeatedly held that such municipalities, prior to the first assessment, might incur such indebtedness, not to exceed 4 per centum of the taxable value as ascertained by law, to wit, the first assessment. We feel constrained to adhere to this limitation. It is a salutary limitation upon the debt contracting power and the right to impose taxing burdens upon the people. There is greater reason for applying this safeguard upon new municipalities than at any other time. The young man embarking in life's battles has a limitation in capacity—

yea a credit limitation—because he is untied. Naturally the same limitation should be placed upon the new municipality. But to hold that it was the intention of the greatest lawmaking body in this republic that the bridle should be taken off in the first life of a municipality in the contracting of debts up to the time of the first assessment, and thereafter it should be put on, would be to encourage beginners in municipalities to contract debts unrestrained, and consequently to shackle the successors to such an extent that they must bear the burdens of the expenditures of the beginners, though they have to forego wise improvements during the life of their administrations in municipal government. Reason, judgment, and good conscience supports this conclusion.

It may be urged that by no fixed rule can any one determine the exact amount of indebtedness that may lawfully be incurred under the 4 per centum limitation prior to the first assessment. The banker, bond buyer, or credit man, contracting with the young man that is first embarking in business necessarily to a degree experiments in extending credit until he has been tried, as does the warrant buyer and the script holder prior to the first tax assessment. He buys with full knowledge, in purchasing a warrant, that afterwards, if it is ascertained to be in excess of the 4 per centum limitation after the first assessment has been made, that it is void, and he acts at his peril. But if the basis of his debt rests upon good conscience and sound morals, he can take his case to the legislative power of the sovereignty for remedy. It is better that those who are in their municipal swaddling clothes should be protected by the limitations that have been imposed by wise legislation, than that these barriers should be cut down by technicalities, and, without any restraint, the strong power of greed and avarice and over-reaching machinations should be turned loose against such municipalities.

The judgment of the lower court should be affirmed, and it is so ordered. All the Justices concur.

(49 Wash. 375)

NORTH YAKIMA BREWING & MALTING CO. v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington. April 25, 1908.)

1. CARRIERS — TERMINATION OF RELATION — LOSS OF GOODS.

A carrier's liability as such continues until such time as the consignee has a reasonable opportunity to inspect the goods and take them away after notice of arrival in the usual course of business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 609.]

2. SAME—EVIDENCE.

Certain empty beer containers having been returned to plaintiff from defendant railroad, plaintiff's superintendent called at the freight office, on the morning of May 5th, and asked

for the freight bills, stating that plaintiff desired to pay the bills and remove the accumulated shipments. He was informed that the freight bills would be ready at any time after noon on that day; but plaintiff did not call for the containers in the afternoon, and they were destroyed the following night by fire, without negligence on defendant's part. Plaintiff's place of business was but 400 feet from the warehouse where the containers were stored, and the only reason why they were not taken away, during the afternoon of May 5th, before the fire, was that it did not suit plaintiff's convenience. *Held*, that defendant's relation as carrier had been terminated, and that it was not responsible for the loss of the containers.

Appeal from Superior Court, Yakima County; H. B. Rigg, Judge.

Action by the North Yakima Brewing & Malting Company against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

B. S. Grosscup and Ira P. Englehart, for appellant. Snyder & Luse, for respondent.

FULLERTON, J. The appellant is a common carrier, operating lines of railway in this state and elsewhere, one branch of which passes the city of North Yakima. The respondent is engaged in the business of manufacturing and selling beer and other malt products at the city named, and in the course of its business ships large quantities of its products to different parts of the state, in containers of various kinds, the title to which it retains in itself. These containers, when emptied of their contents by the respondent's customers, are returned to it over the appellant's lines. Between the 1st and the morning of the 5th days of May, 1906, there were returned, in this manner over the appellant's road, containers of the aggregate value of \$394.80. On the morning of May 5th the respondent's superintendent called at the appellant's freight office in North Yakima, and asked for his expense bills, desiring to pay them and take away the several shipments that had there accumulated. The appellant's agent replied that he did not then have the bills ready, but that he would have them ready at any time after noon of that day. The respondent did not call for them in the afternoon, and they were destroyed the following night in a fire, which burned the warehouse in which they were stored. The fire that burned the warehouse originated on the property of a third person, some distance from the appellant's warehouse, and spread thereto, in spite of the efforts made to control it. The fire did not originate nor spread to its warehouse as the result of negligence on the part of the railroad company. The trial judge, trying the case without a jury, on the foregoing facts held that the appellant's liability, with reference to the goods, was that of a common carrier; and, since the loss or destruction of the goods was not occasioned

by the act of God nor the public enemy, it was liable to the respondent for their value.

The correctness of this holding, under the facts, presents the only question we have found it necessary to consider. In the case of *Fisher v. Northern Pacific Railway Company* (Wash.) 94 Pac. 1073, we held that the mere placing of goods in storage by the carrier, after they had arrived at their destination, did not reduce the carrier's liability to that of a warehouseman, but that its liability as carrier continued until such time as the consignee had a reasonable opportunity to inspect the goods and take them away in the usual course of business. The converse of the rule must therefore be that, after goods have been transported by the carrier to their place of destination, and a reasonable opportunity is given the consignee to inspect them and take them away, the carrier's liability thereafter is that of a warehouseman, and it can be held for the loss of the goods only when that loss is occasioned by some negligence on its part. Was a reasonable time given in the present case to inspect and take the goods away? It seems to us that there was. What constitutes a reasonable time for the removal of goods after notice must, of course, vary with the circumstances of each particular case, and no general rule can be laid down applicable to all cases by which the fact can be determined; but, because of the nature of the liability and its extreme hazard to the carrier, it can be said that the consignee must act promptly after receiving notice of the arrival of his goods, and not defer taking them away to attend to other matters of his own, no matter how important they may be. The liability of a common carrier for goods in transit is an extraordinary liability, and, although founded on sound principles of public policy, is not to be extended beyond the point where necessity for its existence continues. In the case before us there was ample opportunity given to take the goods away. The respondent's place of business was but 400 feet from the warehouse where the goods were stored. It had its own drays and trucks, and the only reason why the goods were not taken away during the afternoon preceding the night the fire occurred was that it did not suit the convenience of the respondent. This being true, we think it should bear the loss, instead of the appellant, since each of the parties is equally free from responsibility for the fire which caused the loss.

The judgment appealed from will be reversed, and the cause remanded, with instructions to enter a judgment to the effect that the respondent take nothing by its action, and that the appellant recover its costs.

HADLEY, C. J., and RUDKIN, DUNBAR, CROW, and MOUNT, JJ., concur.

(49 Wash. 392)

STATE ex rel. MURHARD ESTATE CO. v. SUPERIOR COURT FOR CLARKE COUNTY et al.

(Supreme Court of Washington. April 27, 1908.)

1. HIGHWAYS—ESTABLISHMENT—REPORT OF ENGINEER—DEPUTY ENGINEER.

Under Ballinger's Ann. Codes & St. § 1564 (Pierce's Code, § 4006), providing that, where the duties of any officer are greater than he can perform, he may appoint necessary help, with the consent of the county commissioners, section 1595 (section 4037), providing that county commissioners may allow such deputies to county officers as in their judgment are required, and Acts 1907, p. 352, c. 160, § 6, referring to the "county engineer or his deputy," the county engineer was authorized to employ a deputy, and such deputy had the same power as his chief, and his report in proceedings to establish a road, signed by his own name, is sufficient as if made by the county engineer.

2. COUNTIES—DEPUTY COUNTY ENGINEER—APPOINTMENT—RATIFICATION.

Even if the appointment of the deputy surveyor or engineer was not authorized by county commissioners, as required by the statute, a report by him as to the laying out of a road having been accepted and acted upon by the board of county commissioners, they thereby ratified the appointment of such deputy.

3. SAME—VALIDITY OF APPOINTMENT—COLLATERAL ATTACK—PROPRIETY.

A deputy county surveyor's title to office, and the validity of his appointment, may not be attacked collaterally in an action by a property holder to invalidate or set aside proceedings for the establishment of a county road, located and established upon the report of such deputy.

4. HIGHWAYS—ESTABLISHMENT—PROCEEDINGS—EVIDENCE.

That a railroad company desired a county road to run where the county commissioners decided to locate it, and the railroad and the commissioners agreed that the latter should so locate it, was immaterial, in the absence of allegations or evidence that their action in locating the road was influenced or sought to be influenced by improper inducements, and, in an action to set aside such proceedings, the evidence was properly excluded.

5. EMINENT DOMAIN—TAKING LAND—DETERMINATION OF NECESSITY—COLLATERAL ATTACK.

Where the county commissioners had jurisdiction over the establishment of the road, the question of the propriety or necessity of taking the particular land was for the county commissioners, and their determination cannot be collaterally attacked.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 626.]

6. SAME—CONCLUSIVENESS OF DECISION OF COMMISSIONERS.

Where no appeal or review by certiorari was taken from the action of the county commissioners in ordering a county road established, and facts giving the county commissioners jurisdiction thereof appeared, the court was not required to consider matters over which the commissioners exercised jurisdiction on review of proceedings to condemn land for the road.

Original application for a writ of review by the state, on the relation of the Murhard Estate Company, against the superior court for Clarke county and others to review proceedings for the condemnation of land for county road purposes. Writ denied.

Milton W. Smith, for relator. A. L. Miller and Jas. P. Stapleton, for respondents.

ROOT, J. This is an original application for a writ to review the proceedings of the superior court for Clarke county, which resulted in an order condemning a portion of relator's property for county road purposes.

Relator relies upon three propositions of law, viz.: (1) That the county commissioners had no jurisdiction to order the road established or to direct the prosecuting attorney to institute proceedings for condemnation; (2) that the location of the road along the route specified is not required because the property owners offered to dedicate an equally suitable route; and (3) that the county commissioners in locating the road in such manner acted in collusion with the Portland & Seattle Railway Company.

It is argued by relator that the report of the deputy county surveyor is not sufficient to justify action by the county commissioners, for two reasons: (1) It was not made by the county engineer. (2) It does not give a description of each tract of land over which the road passes with the name and place of residence or address of the owners. Under the first point relator maintains that the county engineer was not authorized to employ a deputy, and second that, if so authorized, such deputy nevertheless had no power to act in the matter of viewing out a proposed road. Section 1564, Ballinger's Ann. Codes & St. (Pierce's Code, § 4006), provides that, in all cases where the duties of any office are greater than can be performed by the person elected to such office, he may employ, with the consent of the county commissioners, necessary help. Section 1595, Ballinger's Ann. Codes & St. (Pierce's Code, § 4037), provides that the county commissioners may allow such deputy or deputies to county officers as in their judgment the business requires. Section 6, c. 160, p. 352, Acts 1907, evidently contemplates the appointment of a deputy county surveyor or engineer where it reads, "the county engineer or his deputy." It is urged that this deputy signed his own name, instead of that of the county engineer or surveyor. We think the manner of his signing the report was immaterial, and that as a deputy he had in this instance the same power as his chief, and that his report must be accepted as if made by the county engineer. *State v. Rosener*, 8 Wash. 42, 35 Pac. 357.

It is urged that the appointment of this deputy was not authorized or ratified by the county commissioners. Perhaps it may not have been authorized or approved expressly; but it appears that this report was received, accepted, and acted upon by the board of county commissioners, and we think for the purposes of this transaction that this in itself amounted to a ratification of the appointment of such deputy. Moreover, we do not think that this deputy's title to the office he was exercising can be questioned in the collateral manner herein attempted. *State v. Fountain*, 14 Wash. 236, 44 Pac. 270; *North Western Lumber Company v. Chehalis County*, 23,

Wash. 95, 64 Pac. 909, 54 L. R. A. 212, 87 Am. St. Rep. 747; *Dane v. State*, 36 Tex. Cr. R. 84, 35 S. W. 661; *Wheeler & Wilson Mfg. Co. v. Sterrett*, 94 Iowa, 158, 62 N. W. 675. The alleged collusion between the county commissioners, which relator sought to prove, consisted as shown by his petition, of the fact that the railway company, for purposes of its own, desired the county road to run where the commissioners decided to locate it, and that said company and commissioners had agreed that the latter should so locate it. But it is not alleged, nor was any evidence tendered to show, that any improper influence or inducement was offered to, or brought to bear upon, said commissioners to occasion, or which did occasion, their action. We think the proffered evidence was properly excluded.

It is urged that there was no necessity for taking this particular land, as other land equally good had been tendered for the purpose. We think the character and contents of the original petition to the county commissioners and the report of the deputy surveyor to them were sufficient to give the board jurisdiction over the matter. The question of the propriety or necessity of taking this particular land was for the county commissioners, and their determination cannot be collaterally attacked. *State ex rel. Schroeder v. Superior Court*, 29 Wash. 1, 69 Pac. 366; *State ex rel. Pagett v. Superior Court (Wash.)* 91 Pac. 241. No appeal or review by certiorari was taken from the action of the commissioners in ordering the road established; and, as the jurisdictional facts appear, the court was not required to go into matters over which the commissioners exercised their jurisdiction.

Finding no error in the proceedings of the superior court, the writ is denied.

HADLEY, C. J., and DUNBAR, CROW, RUDKIN, and MOUNT, JJ., concur.

O'BRIEN et ux. v. HOPGOOD et al.

(Supreme Court of Washington. April 27. 1908.)

1. LOGS AND LOGGING — LIENS — STATUTORY PROVISIONS — CONSTRUCTION — AGENT OF OWNER—"AGENT."

A person getting out logs and piling under a contract with the owner is an agent, within the meaning of *Pierce's Code*, § 6082 (*Ballinger's Ann. Codes & St.* § 5930), providing that every person performing labor upon or assisting in obtaining or securing logs, etc., shall have a lien upon the same for the work done in obtaining or securing them, whether it was done at the instance of the owner of the same or his agent; hence the lien of persons performing work for the contractor is good as against the owner of the logs.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 1, pp. 262-270; vol. 8, p. 7569.]

2. SAME—LIEN—NATURE OF TRANSPORTATION.

Pierce's Code, § 6082 (*Ballinger's Ann. Codes & St.* § 5930), provides that every person performing labor upon or who shall assist in obtaining or securing logs, etc., and the owners of any tugboat or towboat which shall assist

in towing any logs, etc., or of any logging or other railroad over which saw logs, etc., shall be transported and delivered shall have a lien upon the same for the work done upon or in obtaining or for services rendered in towing, transporting, or driving the particular saw logs, etc. *Held*, that the statute gives a lien for hauling the timber products after they have been cut, even when not hauled by tugboats, towboats, logging or other railroads.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 33, *Logs and Logging*, §§ 60-66.]

3. APPEAL — REVIEW — VERDICTS — CONCLUSIVENESS.

A verdict is conclusive in the absence of matters in the evidence, instructions, or elsewhere justifying its disturbance.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 3, *Appeal and Error*, §§ 3912-3924.]

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by R. C. O'Brien and wife against P. W. Hopgood and the Perfection Pile Preserving Company. From a judgment for plaintiffs, the corporation defendant appeals. Affirmed.

George E. de Stelguier, for appellant. Morris, Southard & Shipley, for respondents.

ROOT, J. This action was brought by plaintiffs to recover for services claimed to have been rendered in obtaining and securing saw logs and piles, which were removed by the owner, this appellant, after plaintiffs had filed liens for their services. From a judgment in plaintiffs' favor, the defendant company appeals.

Defendant Hopgood had a contract for getting out this timber. Plaintiffs claim that he hired them as such contractor, and that, as such, he was the agent of the defendant company. The latter urges that O'Brien was jointly interested in the contract with Hopgood, and performed the services in question as such contractor. It also claims that Hopgood as contractor was not its agent—that the statute as to loggers' liens is different from others, which expressly constitute the contractor an agent for the owner. The last question involves the construction to be placed upon section 6082, *Pierce's Code* (*Ballinger's Ann. Codes & St.* § 5930), which reads: "Every person performing labor upon or who shall assist in obtaining or securing saw logs, spars, piles, cord wood, shingle bolts or other timber, and the owner or owners of any tugboat or towboat which shall tow or assist in towing, from one place to another within this state, any saw logs, spars, piles, cord wood, shingle bolts or other timber, and the owner or owners of any logging, or other railroad over which saw logs, spars, piles, cord wood, shingle bolts or other timber shall be transported and delivered, shall have a lien upon the same for the work or labor done upon, or in obtaining or securing, or for the services rendered in towing, transporting or driving, the particular saw logs, spars, cord wood, shingle bolts or other timber in said claim of lien described, whether such work,

labor or services was done, rendered or performed at the instance of the owner of the same or his agent. The cook in a logging camp shall be regarded as a person who assists in obtaining or securing the timber herein mentioned." We think a person getting out logs and piling under a contract with the owner is an agent within the meaning of this statute.

Appellant further contends that the statute provides no lien for merely hauling timber products after the same have been cut, except when hauled by tugboats, rowboats, logging or other railroads. *Ryan v. Gullfoil*, 13 Wash. 373, 43 Pac. 351, is cited in support of this contention, but we think it fails to give it support; that it has no application to a case like this, where the logs and piles were hauled before being worked into a finished product. The case of *Proulx v. Stetson & Post M. Co.*, 6 Wash. 482, 33 Pac. 1067, shows the liberality with which this court construes the statute in question.

The question as to whether O'Brien was a joint contractor with Hopgood, or whether he performed the service as one hired by Hopgood, was submitted to a jury. Its verdict in favor of respondents must be held conclusive here, as we find nothing in the evidence, instructions, or elsewhere justifying its disturbance.

The judgment is affirmed.

HADLEY, C. J., and DUNBAR, CROW, RUDKIN, FULLERTON, and MOUNT, JJ., concur.

STATE ex rel. NORTHERN PAC. RY. CO. v.
SUPERIOR COURT OF YAKIMA
COUNTY et al.

(Supreme Court of Washington. April 27, 1908.)

EMINENT DOMAIN—RIGHT TO CONDEMN—SUBSCRIPTIONS TO STOCK—SUBSCRIPTIONS BY ONE WITHOUT SUFFICIENT MEANS.

An objection that the principal portion of the stock of a railroad company was subscribed for by a stenographer in the president's office, whose only financial means is a salary of \$75 per month, is insufficient to prevent the company from maintaining condemnation proceedings.

Certiorari by the state, on the relation of the Northern Pacific Railway Company, against the superior court of Yakima county and the North Coast Railway to review condemnation proceedings. Order affirmed.

R. S. Grosscup and Ira P. Englehart, for relator. H. J. Snively, Danson & Williams, and Fred H. Moore, for North Coast Ry.

ROOT, J. The North Coast Railway brought an action to condemn a right of way for railroad purposes through a 21-acre tract of land owned by the Northern Pacific Railway Company in the city of North Yakima. The trial court, after due hearing, entered an order for the condemnation of a certain por-

tion of the premises thus sought to be appropriated. Each company, feeling aggrieved by said order, has applied to this court for a writ of certiorari to review the proceedings of the superior court.

It is urged by the Northern Pacific Company that the taking by the North Coast Company of the portion awarded by the trial court would seriously interfere with the purposes for which it, the Northern Pacific Company, will need, and for which it intended to use, these premises in the future, to wit, for storage and switching yards, repair, cleaning and coaling tracks, for roundhouses, ice-houses, refrigeration of cars, and other purposes incidental to its railroad business. The North Coast Company urges that the trial court did not allow it a sufficient amount of land, and that the refusal to allow it a certain additional portion seriously interferes with the plans of construction and operation of its proposed railway line. It will be seen that these contentions present questions of fact and opinion rather than questions of law. We do not believe a discussion of the evidence would serve any useful purpose. From an examination of it and a study of the exhibits, we are not prepared to say that the trial court's conclusion was erroneous. We think it is justified. Hearing the evidence, seeing the witnesses, being familiar personally with the premises and the general conditions and environment, we are satisfied from the record that the honorable trial judge endeavored to be fair with both of these parties, and that his conclusion was equitable and just and sustained by the evidence.

It is urged by the Northern Pacific Company that no proper showing was made of the subscription to the capital stock of the other company, in that the principal portion of said stock was subscribed for by a stenographer in the office of the president of the company; the stenographer being without financial means other than a salary of \$75 per month. In the light of former decisions of this court, the contention cannot be sustained. *State ex rel. Biddle v. Superior Court* (Wash.) 87 Pac. 40; *Purdin v. Wash., etc., Ass'n*, 41 Wash. 396, 83 Pac. 723; *State ex rel. Railroad Co. v. Superior Court* (Wash.) 88 Pac. 332.

Finding no error in the record, the order of the superior court is affirmed.

HADLEY, C. J., and DUNBAR, CROW, and RUDKIN, JJ., concur. FULLERTON and MOUNT, JJ., took no part.

LOVELAND et al. v. JENKINS-BOYS CO.
(Supreme Court of Washington. April 25, 1908.)

1. PLEADING — ANSWER — INCONSISTENT DEFENSES.

In an action to recover upon a written contract for the sale of goods, the answer denied the execution of the contract set out in the complaint, or the giving of any written order

for the goods described therein on the terms of the contract. The defendant in answer further alleged that his signature to the writing purporting to be a contract was obtained by trickery and fraud, and without the intent on his part to enter into a written contract. *Held*, that the defenses were not inconsistent, as, construing the pleading according to its legal effect, it not being a legal execution of the contract to procure the maker's signature by fraud, he could properly deny the execution of the contract, and plead affirmatively the fraud practiced upon him by which he was induced to apparently execute it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 189-191.]

2. CONTRACTS — VALIDITY — RIGHT TO QUESTION — ESTOPPEL — NEGLIGENCE.

Negligence or laches on the part of a party in signing a contract, without informing himself as to its contents, does not estop him from questioning its validity, where his signature was procured by trickery and fraud on the part of the other party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 423.]

3. SALES — AVOIDING CONTRACT — CONDITIONS OF — RETURNING GOODS.

A consignee of goods, whose signature to a contract for their purchase was procured by fraud on the part of an agent of the consignors, was not bound by the contract, though he did not return the goods, where he did not appropriate them to his own use, but gave the consignors notice that the goods were subject to their order on the payment of the charges advanced by the consignee, as the consignee was not attempting to rescind a contract; there being no contract whatever between the parties.

4. TRIAL — INSTRUCTIONS — APPLICABILITY TO ISSUES.

In an action on a written contract, in which the defense was that defendant's signature thereto had been obtained by fraud, instructions requested by plaintiff, based on the theory that defendant was attempting to rescind a contract duly made, were properly refused.

Appeal from Superior Court, Whatcom County; Jeremiah Neterer, Judge.

Action by Theodore O. Loveland against the Jenkins-Boys Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Bugge & Swartz, for appellants. Rose & Craven, for respondent.

FULLERTON, J. This action was brought by the appellants against the respondent, to recover upon a written contract for the sale of jewelry. The contract in question was in the form of an order, directing the appellants to ship to the respondent the jewelry described on a certain list to which the order was attached, on the terms printed thereon. The complaint set forth the contract, alleged its execution by the respondent and delivery to the appellants, the shipment of the goods ordered, their receipt by the respondent, and the failure and refusal of the respondent to pay for the same. For answer the respondent denied executing the written contract set out, or giving any written order for the goods described therein on the terms set out in the contract. And for a further and separate answer alleged in substance that it entered into an oral contract with the appellants to

sell certain of its goods on commission, the kind and character of which were particularly described; that the appellants shipped it the goods described in the complaint; that upon the receipt of the goods it paid freight and drayage charges for their transportation from their place of shipment to the respondent's place of business, amounting to \$6.85, the payment being necessary in order to obtain the goods from the carrier; that it thereupon proceeded to unpack the goods, when it discovered that the goods were not of the character or kind the appellants had agreed to furnish, nor were they goods that the respondent could handle in connection with the business in which it was engaged; that it immediately repacked the goods, and notified the appellants by letter that it would not receive the same, and would return them to the appellants on the repayment of the freight and drayage charges it had advanced; that the appellants replied to the letter, claiming that they had made a sale of the goods to the respondent, and held a written order for the same. It further alleged that this was the first time it learned that the appellants claimed to have a written order for the goods, and averred that if the order bore the genuine signature of the respondent, such signature was obtained thereto by trickery and fraud, and without the knowledge of the respondent. It then set forth the manner in which the signature was obtained. This it did in the following language: "[The appellants' agent] then asked H. C. Jenkins, an officer of the defendant, with whom the greater part of the above negotiations was had, to state the exact corporate name of defendant, so that the consignment arranged for might be correctly addressed, and with a pencil in hand made a movement indicating that he was about to write out the same. Defendant by its said officer informed him of the correct spelling of said name, and the said Wood replied that the word "Boys" was spelled in a peculiar manner, and asked the said officer of defendant to write it out for him himself, handing him the pencil, and indicating, on what said official supposed was a piece of paper containing only the blanks for the names of customers and their address, the place for him to write the same. That the said official of defendant, for the sole purpose of getting the correct name of defendant, as requested, wrote out the same upon the paper thus indicated by said Wood, without the defendant having entered into any contract, except as above indicated, and with no purpose or intention to sign any contract whatsoever. That if the document so alleged by plaintiffs to be a written contract bears the signature of defendant, such signature was obtained by trickery and fraud, and under the circumstances as here in this answer set forth, and not otherwise. That said alleged contract was never read to or by the defendant or any of its officers; that at the time defend-

ant's officer so wrote out the name of the defendant as aforesaid, the plaintiffs by their representative, with intention to trick and deceive the defendant, had a confusion of papers on the show case, over which the said officer of defendant was engaged, and that if plaintiffs' alleged contract bears the signature of defendant, the plaintiffs by their said representative covered and concealed the upper part of said paper in such confusion of papers which the said Wood had upon the show case, over which the defendant's said officer was working, and upon which the paper was lying upon which he wrote out the name of defendant as aforesaid, and that the purchase outright of the goods set forth in the complaint had not been discussed at any time during said negotiation, and that the defendant had consented to receive no goods whatsoever from the plaintiff, except the show case and certain goods upon consignment, under the circumstances and in accordance with the arrangement above expressly set forth." The appellants moved to strike the answer, on the ground that it was inconsistent. This motion was denied, whereupon it demurred on the ground that the affirmative answer stated no defense. This demurrer was likewise overruled, whereupon it filed a reply, denying the affirmative matter in the answer, and alleging affirmatively that the respondent ought not to be heard as to its affirmative defense, for the reason that it had not complied with the contract it admits it entered into. The affirmative matter was stricken on motion. The cause was then tried before the court and a jury, and resulted in a verdict and judgment for the respondent.

It is first assigned that the court erred in refusing to strike the answer on the ground of inconsistency. It is argued that the answer contains both a denial and an admission of the execution of the contract, and that such answers are not permitted under the Code. But we think the appellants mistake the effect of the answer. There is no admission of the execution of the contract. The averment in the separate answer is that the signature of the respondent to the writing purporting to be a contract was obtained by trickery and fraud, and without any intent on its part to enter into a written contract. Pleadings are construed according to their legal effect, and it is not a legal execution of a contract to procure the maker's signature thereto by trickery and fraud; and, when a person so defrauded is sued upon the purported contract, he may properly deny its execution, and plead affirmatively the fraud practiced upon him by which he was induced to apparently execute it. The question what constitutes inconsistent defenses received a somewhat elaborate consideration by this court in the case of *Seattle National Bank v. Carter*, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177. Reviewing a case from Ohio, where the

facts were similar to the facts in the case at bar, the court said: "*Citizens' Bank v. Closson*, 29 Ohio St. 78, was an action by the bank against Closson upon a promissory note, alleged to have been made by him to R. R. Fenner & Co., and indorsed to the bank before due. Closson set up the following defenses: (1) He denied the execution of the note; (2) he alleged that if the signature to the note was his, it was obtained by a fraudulent and cunningly devised scheme or trick without his knowledge, setting forth the fact that he was induced by false and fraudulent representations of Fenner & Co. to sign certain papers, represented to be mere receipts or orders relating to a proposed agency for selling a patent invention, and that if he signed the note, his signature was procured by making him believe that he was signing one of the receipts or orders; that it was obtained without consideration, and that the bank had knowledge of these facts when it purchased the note. The Supreme Court very properly held, and could not have held otherwise under any system of pleadings, that these defenses were all open to the defendant. They are not in any sense inconsistent; for, even though the note was made as affirmed in the second defense, it would not be a legal execution of the note, and consequently does not contradict the first denial, viz., the denial of the execution of the note."

It is next urged that the court erred in overruling the demurrer to the separate defense. It is argued that, assuming the allegations of the answer to be true, it shows such a degree of negligence and laches on the part of the respondent in putting its name to the writing as to estop it from questioning its validity. But the appellants evidently overlook their own part in the transaction. The charge is that they obtained the signature by deceit and fraud. When this was proven, the respondent's carelessness became immaterial. Where there is an intent to execute a contract in writing, and one of the parties to it seeks to rescind it on the ground that he was not fully informed as to its contents, then the question of his negligence and laches in its execution becomes material. But the law of rescission has no application to a case where the signature of a party to a writing he had no intention of executing is obtained by trickery and fraud. The affirmative matter in the reply was properly stricken. If the respondent did not perform the contract that was actually entered into, the remedy is a suit upon that particular contract. The respondent cannot be held upon a contract that it did not enter into, merely because it failed to perform the contract it did make. The appellants seem to argue that the respondent is bound by the contract because it did not return the goods to the appellants. But it was under no obligation to do this. Had it appropriated them to its own use it could have been held to account for their

reasonable worth, but it did its full duty to the appellants when it gave them notice that the goods were subject to their order on the payment of the charges advanced. The respondent was not, as the appellants argue, attempting to rescind a contract. There was no contract. The pleadings and proofs are to the effect that the writing called a contract was obtained from it by fraud. It therefore furnished no basis whatever from which to determine the appellants' rights. The respondent owed to them the duty concerning the goods that fair dealing between man and man required, and this was fully complied with when it repacked the goods, and gave them a reasonable time to repay the charges it had been wrongfully induced to pay thereon, and take the goods away.

The instructions requested were properly refused by the court as inapplicable to the issues. They were based on the assumption that a contract had been entered into, and that the respondent was seeking to set it aside. But, as we have said, this was not the issue before the jury. The issue was one of fraud in procuring the respondent's signature to a purported contract, and this was the question the jury were to determine. If they found it adverse to the respondent, the appellants were entitled to recover, as no other defense was interposed. The court fully and fairly charged the jury to this effect, and in doing so it performed its entire duty in that regard.

We find no error in the rulings of the court in admitting and rejecting evidence. There was substantial evidence also to sustain the verdict of the jury, and their finding is conclusive in this court as to the facts.

The judgment should be affirmed, and it is so ordered.

HADLEY, C. J., and CROW, ROOT, MOUNT, RUDKIN, and DUNBAR, JJ., concur.

WOELFLEN v. LEWISTON-CLARKSTON CO. et al.

(Supreme Court of Washington. April 29, 1908.)

1. APPEAL — DISMISSAL — GROUNDS—DEFECTS IN PROCEEDINGS—APPEAL BOND.

Under 2 Ballinger's Ann. Codes & St. §§ 5081, 5082 (Pierce's Code, §§ 720, 721), relating to the parties for or against whom judgment may be given, and judgments against one or more of defendants in the court's discretion, sections 6500-6506 (sections 1049-1054), relating to proceedings on appeal, when allowed, notice on appeal, appeal bonds, etc., and section 6521 (section 1069), relating to the power of the Supreme Court in disposing of cases on appeal, that there are two appeals, one from the final judgment, and one from the order denying a new trial, with only one bond given on the appeal from the final judgment; that the appeal bond did not run to a defendant below as to whom the action was dismissed and who did not appeal; that the bond, being conditioned both as an appeal and supersedeas, was not sufficient in amount to cover interest on the judgment from

date of entry; that the stay bond did not cover costs allowed a defendant below, as to whom the action was dismissed, and who did not appeal; that the attorney who had appeared for such defendant and appellants below accepted service of notice of appeal for it—were not, separately or taken together, grounds for the dismissal of the appeal.

2. SAME — STATEMENT OF FACTS — NOTICE TO ADVERSE PARTY—DEFENDANT AS TO WHOM ACTION WAS DISMISSED.

Under 2 Ballinger's Ann. Codes & St. § 5058 (Pierce's Code, § 675), requiring a party desiring to have a statement of facts certified to file it and serve a copy thereof on the adverse party, and serve written notice of the filing thereof on any other party who has appeared in the cause, it was unnecessary that notice of a motion for an order of extension of the time of filing a statement of facts be served on a defendant below as to whom the action was dismissed, or that the proposed statement of facts be served on such defendant, it not being an adverse party to appellants, its codefendants below, within the statute.

3. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—DUTY TO DISCOVER DANGER.

Plaintiff, a general foreman of defendant electric company, was directed to raise a piece of electric apparatus, and climbed upon the joists of a building to fix the pulleys and ropes thereto, knowing that three highly charged electric wires ran along the joists, but not knowing that two smaller wires ran from them through the roof, the latter being known as "lightning arresters," which were commonly found in all power houses, which fact plaintiff knew. The room being dark, plaintiff inadvertently came in contact with the smaller wires, and was injured. Held that, even if the room was too dark to permit plaintiff to see the wires, it was his duty to defendant, as foreman in charge of the work, to see that the room was sufficiently lighted, or to make inquiries or an examination, as to the location of the wires, and his failure to do so was, under the circumstances, gross negligence so as to preclude recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 710-722.]

4. SAME—VICE PRINCIPALS—DUTIES.

While the master must provide a reasonably safe working place for his servants, where the master is a corporation, this duty must be performed by others, who become vice principals, and where a master, whether a corporation or otherwise, authorizes its superintendent to supervise work, it becomes the latter's duty to perform those duties which the law imposes upon the master.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 422-488.]

5. SAME—PLACE OF WORK—DUTY TO DISCOVER DANGER.

A servant cannot recover for injuries received because of the dangerous condition of a working place, where such condition was well known to him, or where it was his duty to ascertain the condition of the place, which he neglected to do.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706-709.]

Appeal from Superior Court, Asotin County; C. F. Miller, Judge.

Action by Charles A. Woelflen against the Lewiston Water & Power Company and others. From a judgment for plaintiff, two of defendants appeal. Reversed and remanded, with instructions to dismiss.

Sturdevant & Bailey and I. N. Smith, for appellants. Elmer E. Halsey and Ben F. Tweedy, for respondent.

ROOT, J. This is an appeal from a judgment in favor of the plaintiff in an action brought to recover damages for personal injuries sustained in the power house owned by the Lewiston Light Company, and operated by the Lewiston Water & Power Company, in Asotin county, Wash. Said appeal is prosecuted by the latter company and the Lewiston-Clarkston Company, which was incorporated subsequent to the time of plaintiff's injury, and which it is claimed took over the property of the other two companies subject to all liabilities.

Respondent has interposed a motion to dismiss the appeal, upon the following grounds, to wit: (1) That there are two appeals, one from the final judgment, and one from the order denying a new trial; with only one bond given on the appeal from the final judgment. (2) That the only obligee mentioned in the bond is respondent Woelflen, whereas the bond should run to him and to the Lewiston Light Company, as to which the action was dismissed in the trial court and which did not join in the appeal. (3) That the bond, being conditioned both as an appeal and supersedeas, is insufficient in amount, inasmuch as it is not in an amount large enough to cover interest on the judgment from date of entry. (4) That, as costs were allowed to the Lewiston Light Company upon dismissal of the action as to it, these costs must be taken into consideration and covered by the stay bond. (5) That the Lewiston Light Company was, after the dismissal of the action as to it, an adverse party to these appellants, and that the attorneys who had appeared for it and the appellants had no right to accept service of notice of appeal for that company. We do not think the motion can be sustained upon any or all of the grounds assigned. 2 Ballinger's Ann. Codes & St. §§ 5081, 5082, 6500-6506, 6521 (Pierce's Code, §§ 720, 721, 1049-1054, 1069); Edgecomb v. Creditors, 19 Nev. 149, 7 Pac. 533; Williams v. Dennison, 86 Cal. 430, 25 Pac. 244; Nolan v. M. C. R. R. Co., 24 Mont. 327, 61 Pac. 880; Paland v. C., St. L. & N. O. R. Co., 42 La. Ann. 290, 7 South. 899; Oleson v. Wilson, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 639; Berghoff v. McDonald, 87 Ind. 549; Westland Pub. Co. v. Royal, 36 Wash. 399, 78 Pac. 1096; Douglas v. Badger State Mine, 43 Wash. 715, 86 Pac. 858; Doremus v. Root, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649. The motion to dismiss is overruled.

Respondent also moves to strike the statement of facts. This motion is based upon the ground that an order of extension of time for filing was made upon a motion no notice of which was served upon the Lewiston Light Company, and that the proposed statement was not served upon that company. Respondent contends that this company was an "adverse party," as contemplated in section 5058, Ballinger's Ann. Codes & St. (Pierce's Code, § 675). We are unable to agree with this contention. We perceive no reason

for its being considered an adverse party to the appellants or either of them, and no reason for requiring the statement to be served upon it, or notice to or service upon it, of any motion concerning the statement of facts or anything else having to do therewith. *Doremus v. Root*, supra. The motion to strike the statement of facts is denied.

The plaintiff was employed as superintendent or general foreman in charge of the company's outside work, such as erecting poles and stringing wires. In view of the conclusion which we have reached, it will be necessary to refer to only one of the defendants, the Lewiston Water & Power Company, which we will speak of as "the company." In the power house were three transformers, each five feet high and four feet square, composed of a case built of corrugated iron, resting in a frame made of angle iron, and in each case there was a "core," a receptacle containing a coil of wires immersed in oil for insulating and cooling purposes. The three transformers were located close together. In the operation of the plant, the transformer farthest to the south burned out. The manager of the company telephoned from Lewiston, directing plaintiff to take such assistance as he needed to the power house and lift the core out of this transformer so that the electrician could repair it. The manager sent a large block and tackle, weighing about five hundred pounds, consisting of pulleys and chains, for the purpose of doing this work. The plaintiff was an experienced electrician or worker about electrical plants and appliances, having been in that work for 17 years, during several of which he was superintendent of a plant in Wisconsin, and later having assisted in putting together the transformers for this defendant company at Lewiston, Idaho. After being directed as aforesaid by the manager to take the core out of this transformer, he took men for that purpose and was assisted by others whom he found at the power house. The work was undertaken under his direction and supervision. Overhead at the place where the ceiling would naturally be, there were joists running across the building, and upon these were some boards making a floor or platform over the transformer. The plaintiff went up to this position after having braced the joists, or caused them to be braced and supported, so that the weight could be lifted by attaching the block and tackle to the joists. To the latter a small block and tackle were fastened with which it was intended to haul up the large chain block which was to be used in raising the heavy core. A noose was made in the rope which was to be caught in an iron hook of block and tackle. In order to hook them together, plaintiff climbed down from the platform where he had been standing, to a cross-arm which projected toward the center of the room from the southeast corner of the power house and about four or five feet below the ceiling joist. Upon this

cross-arm there were three high tension wires each carrying 10,000 volts of electricity. That they were there and so charged with electricity was known to the plaintiff at that time, as he admits in his evidence. All of the transformers had been "killed down," as the expression is used by the electricians, meaning that the current of electricity had been cut off from them. This work was being done in the evening, the room being somewhat lighted by certain small lights but principally by a 2,000-candle power arc light, which is about the size and character of the ordinary street light. The room was in size about 25 by 50 feet. When plaintiff jumped down from the cross-arm, he stood with one foot on one side and one on the other of one of these highly charged electric wires. Connected with these were two small wires leading up to and through the roof. These uprising wires are commonly called "risers" or "lighting arresters," and are commonly found in all power houses. Plaintiff testified that he never knew of a power house without them. While plaintiff was attempting to connect the noose of the rope with the hook aforementioned, he received an electric shock, and was seriously injured. At the time, he did not know how he received this shock. On the witness stand he said, however, that he now knew that his hand came in contact with one of these risers. He testified that he did not know of the presence of these lightning arresters, had never been told of their being there, and that he did not see them because it was too dark to permit of their being seen. Other witnesses who were working there under his direction at the time testified that they saw the wires, and that they were plainly visible.

It is urged by plaintiff that the company was guilty of negligence in sending him without warning into a place that was dangerous by reason of the presence of these two wires unknown to him. The appellants urge, first, that there were several ways by which this work could have been done, any one of which would have been a perfectly safe method, but that plaintiff neglected to choose or follow a safe plan, but voluntarily chose a dangerous one. They say that a perfectly safe method would have been to have moved the transformer out from under these highly charged electric wires and to have lifted out the core at a place where there would have been no occasion to come near any of the wires. There was some evidence going to show that this method was suggested to the plaintiff. It is also urged by the appellants that the physical conditions, as well as the great preponderance of evidence, show that there was sufficient light to have seen these two perpendicular wires, and that it was carelessness and recklessness on the part of the plaintiff to have come in contact with either of them. They also urge that there was no occasion for plaintiff to leave the

platform and go down upon this arm where he would be in close contact with dangerous wires. It will not be necessary for us to pass upon these questions. For another reason, we believe that the evidence of the plaintiff himself must defeat his recovery. Assuming that the place where plaintiff went was too dark to permit of his seeing these two wires, we think that the going of an experienced electrical workman into a dark place of this kind, where he knew there were several highly dangerous wires and might be others, was in itself a grossly negligent act. He was not directed as to the particular manner or place in which he should do the work. He was sent there in charge of the work, and had supervision of all the men who were assisting to accomplish it. He was not only in duty bound to exercise ordinary care to protect himself, but he likewise owed a duty both to his employer and to the men working under him to use ordinary care in choosing and carrying out the methods of doing the work. To illustrate: Suppose, on account of the darkness of the place, he had received a shock and fallen upon one of the workmen, or dropped something, injuring the latter. Doubtless the injured workman would have had a cause of action against the company. Such workman could have alleged that plaintiff, as vice principal of the company, owed a duty to inspect the premises and not to go into a dark place where he knew, or might have known by reasonable inquiry or inspection, that there were dangerous electrical wires which might cause him to fall or drop some of the tools or appliances on one of the workmen below. Plaintiff being in charge of the work and not being limited by his orders as to the matter of light and the methods of handling the apparatus necessary, it was his duty first of all to see that the premises were in a reasonably safe condition for the doing of the work. Knowing, as he says he did, of the presence of the three large, heavily charged wires, and knowing that power houses were usually equipped with risers or lightning arresters, and without any reason to suppose that this power house was an exception to the rule, it was incumbent upon him to either secure sufficient light to reveal the true condition of the surroundings of this cross-beam before he climbed down upon it, or to make inquiries or an examination of some kind by which the presence of dangerous wires would have been known to him. Had he been working under the immediate direction of a superior officer, without any knowledge of the situation, and had obeyed an order to get upon this beam, relying upon the duty of the master to have the place safe, a very different question would be presented. It is undoubtedly the duty of the master to use ordinary care to provide a reasonably safe working place for his servant. Where the master is a corporation this duty must

be performed by it through certain persons who become, by reason of the duty thus imposed upon them, vice principals of the master, and it is upon these vice principals that the company, as such master, relies for information and for the proper preparation and care necessary to have the premises in the safe condition required by law. When the master, whether a natural person or a corporation, authorizes one of its superintendents to take charge of and supervise and carry out a certain undertaking in connection with its industrial operations, it becomes the duty of that servant to perform as and for the master those duties which the law places upon the latter. In this instance the plaintiff, being the superintendent in control of this undertaking, was charged with the duties just mentioned; and in failing to provide a sufficient amount of light or to have it properly adjusted or to in some other manner ascertain the dangerous conditions of the working place, he clearly neglected his duty to his employer. Plaintiff claims that he was not familiar with the interior arrangements of the power house; that although he had been working for the company for some years, he had not on an average been in the power house more than two or three times a month. He testified, however, that the foreman or engineer in charge of the power house was working with him and under his directions at the time of the accident, and there is no reason shown why he may not have learned from such assistant all about the conditions of the wires had he desired so to do; and no reason is given for not adjusting the lights so that all the wires in that vicinity could have been distinctly seen.

It is well settled that a servant cannot recover because of the dangerous condition of a working place, when such condition is as obvious or well known to him as to the master, or by the exercise of reasonable care by him would have been, or where it was the duty of the servant to ascertain as to the dangerous condition of the place, which duty he has neglected. In the case of *French v. First Avenue Ry. Co.*, 24 Wash. 83, 63 Pac. 1108, an engineer, recently placed in charge of a street railway power house having a large amount of machinery, was killed, and one of the reasons assigned for liability was that the place was insufficiently lighted and by reason thereof he did not notice certain defects that occasioned his fall into a large wheel. This court said, "If there was not sufficient light the engineer knew it," and laid stress upon the fact that the machinery in question was under the control of the engineer himself, saying among other things: "It certainly is the duty of the engineer to observe, examine, and understand the machinery which he is operating." In that case the engineer in charge was the person injured. In the case at bar the engineer ordinarily in charge of the room was working under this

plaintiff who was in charge of the work then being done. The duty to know of the condition of the working place rested upon this plaintiff equally as much as it did upon the engineer in the case just cited.

The case of *Anderson v. Inland Tel., etc., Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410, was one where a lineman was injured by an electric shock received as a result of a broken insulator on a telephone pole. The opinion has a strong bearing upon the facts of the case at bar. Among other things, the court said: "Corporations of this kind act through employes. Necessarily they cannot act in any other way. An inspection of their lines and posts and insulators must be made by the employes. * * * The respondent testified that he knew the power of electricity, and the danger that would be incurred by coming in contact with a live wire; that he knew that, if the insulator broke, the result would be that the wire which he touched would be charged; and he knew also that porcelain insulators frequently did break. It seems to us that this brings him within the rule which we have announced above—that when he accepted the employment, that was necessarily hazardous, he assumed this risk, which, under all the testimony, was an ordinary risk, and that he did not exercise the discretion which he ought to have exercised in testing this wire. * * * While there is no gainsaying the rule that under ordinary circumstances the employe has the right to rely upon the fact that the master will furnish him a safe place to work and safe appliances, yet the law does not intend that this shall be a blind and unreasonable reliance, but that reasonable men shall exercise in a reasonable manner the faculties of which they are possessed. It seems to us it would only have been such reasonable exercise of prudence upon the part of the respondent in this case to have tested this wire before he touched it. * * * In this case it was equally within the knowledge of the master and the servant that this was a dangerous employment; and it cannot be said that there was negligence on the part of the master, and absence of rashness on the part of the servant, or that the servant used his skill, to protect himself in the course of his employment. He had sufficient skill, according to the undisputed testimony, to protect himself, and he had the apparatus at hand for testing the insulator and the wires. * * * We think, from an investigation of the whole case, that it appears from undisputed testimony that plaintiff did not exercise reasonable care in the investigation of the dangers which he knew were incident to his employment, and that had he exercised such care, and made the tests which reasonable prudence would have dictated, he would have had knowledge of the danger which beset him."

In *Jones v. Moran Bros. Co.* (Wash.) 88

Pac. 626, a painter aboard a ship undertook to walk through a dark compartment between decks, where there was a hatchway, into which he fell. As he knew there was a hatchway and knew that it was dark, this court held that, by going through there without a light and at a speed so great as to cause him to stumble over the coamings of the hatch, he was negligent; such negligence on his part defeating a recovery.

In *Steeple v. Panel, etc., Box Co.*, 33 Wash. 344, 74 Pac. 476, plaintiff fell off a platform in the dark. He claimed that he did not know it was without a railing, and was going to look for his hat which had blown off. Among other things, the court said: "When he picked up the lantern to look for his hat, instead of using the lantern, he negligently moved without bringing the lantern to bear. There were other lanterns there, all under his supervision and care, and it was his duty to prepare all the light that was necessary for the work which was being done. Consequently he cannot complain that his injury was caused by not properly lighting the platform. * * * It is true the plaintiff testifies that he did not know that the platform was without a guard, but a plaintiff cannot recover simply by making a statement of that kind, if, under the circumstances, it was his duty, as a reasonably prudent man, to have made such an examination as would have resulted in the desired information."

26 Cyc. p. 1169, says this: "It is not necessary that the servant should be warned of every possible manner in which injury may occur to him, or of risks that are as obvious to him as to the master, or which are readily discoverable by him by the use of ordinary care, with such knowledge, experience, and judgment as he actually possesses, or as the master is justified in believing him to possess."

Thompson on Negligence, vol. 4, § 4063, says: "The master is not under any duty to warn or instruct servants who have already enjoyed an ample opportunity to become acquainted with the danger. Servants are expected to keep their eyes open, and exercise such a reasonable care for their own safety as their situation permits." See, also, *McClellan v. Gerrick* (Wash.) 93 Pac. 1087; *Weideman v. T. R. & M. Co.*, 7 Wash. 517, 35 Pac. 414; *Olson v. McMurray C. L. Co.*, 9 Wash. 502, 37 Pac. 679; *Smith v. Hecla Mining Co.*, 38 Wash. 454, 80 Pac. 779; *Bier v. Hosford*, 35 Wash. 544, 77 Pac. 867; *Robare v. Traction Co.*, 24 Wash. 577, 64 Pac. 784; *Miller v. Moran Bros. Co.*, 39 Wash. 631, 81 Pac. 1069, 1 L. R. A. (N. S.) 283, 109 Am. St. Rep. 917; *Bullivant v. City of Spokane*, 14 Wash. 577, 45 Pac. 42; *Ford v. Heffernan Engine Works* (Wash.) 93 Pac. 417; *Tham v. Steeb Shipping Co.*, 39 Wash. 272, 81 Pac. 711; *McGirty v. S. N. E. Tel. Co.*, 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62; *Moul-*

ton v. Gage, 138 Mass. 390; *Larsson v. McClure*, 95 Wis. 533, 70 N. W. 662; *Griffin v. O. & M. Ry. Co.*, 124 Ind. 326, 24 N. E. 888; *Dixon v. Western U. Tel. Co.* (C. C.) 68 Fed. 630; *Wood, Master & Servant*, §§ 328, 366; *Beach, Contrib. Negligence*, §§ 299, 346; 1 *Bailey, Master & Servant*, § 62; 20 *Am. & Eng. Enc. Law*, pp. 78, 96, 130, 131, 142, 149; 26 *Cyc.* 1169, 1171, 1188, 1202, 1236, 1241; 4 *Thompson, Negligence*, §§ 4057, 4062, 4063, 4076, 4079.

The judgment as against these appellants is reversed, and the case remanded, with instructions to dismiss the action.

HADLEY, C. J., and FULLERTON, MOUNT, and CROW, JJ., concur.

E. H. MOOREHOUSE & CO. v. WEISTER CO.

(Supreme Court of Oregon. May 12, 1908.)

APPEAL—TRANSCRIPT—TIME FOR FILING.

B. & C. Comp. 1901, § 549, provides that from the expiration of the time allowed to except to the surety in an undertaking on an appeal or from the justification thereof, if excepted to, the appeal shall be deemed perfected. Section 553 provides that within 30 days thereafter the appellant shall file a transcript in the Supreme Court. *Held*, that a justification is not completed until the examination of the surety before the clerk at a time and place specified has been had, the reduction of such examination to writing, the signing of the same by the surety when requested, and a finding that the surety is sufficient by the clerk evidenced by his indorsement on the undertaking, and hence a transcript filed within 30 days after indorsement by the clerk on the undertaking was filed in time.

Appeal from Circuit Court, Multnomah County; Thos. O'Day, Judge.

Action by E. H. Moorehouse & Co. against the Weister Company. From a judgment for plaintiff, defendant appeals. Motion to dismiss appeal. Motion dismissed.

A. King Willson, for the motion. H. H. Riddell, opposed.

PER CURIAM. This is a motion to dismiss an appeal because the transcript was not filed within the time required by law. The notice of appeal and undertaking were served and filed on January 4, 1903. Respondent excepted to the sufficiency of the surety, and appellant thereupon gave notice that it would produce him before the clerk of the court for justification on January 11th. The surety appeared at the time stated, and was examined under oath touching his sufficiency; his examination being taken in shorthand. The respondent requested that his testimony be reduced to writing and signed by him, and the shorthand notes were subsequently extended, and on January 25th the surety appeared before the clerk, signed his testimony, and on that date the clerk found the surety sufficient, annexed the examination to the undertaking, and indorsed his allowance there-

on. The transcript was filed in this court on the 22d of February, or within 30 days thereafter. The statute (B. & C. Comp. 1901, § 549) provides that, from the expiration of the time allowed to except to the surety in an undertaking on an appeal, or from the justification thereof, if excepted to, the appeal shall be deemed perfected, and within 30 days thereafter the appellant shall file a transcript or abstract with the clerk of this court (section 553). When the sureties on an undertaking for an appeal are excepted to, the transcript must thereafter be filed within 30 days (unless the time is extended in the manner provided by law) after the justification of the sureties, and the question for dismissal is whether the justification is at the time the surety appears before the officer for examination, or at the time the examination is completed, and the undertaking approved. Under the statute the justification of a surety consists in his examination before the officer at a time and place specified, the reduction of such examination to writing, and signing of the same by the surety, when requested, and a finding that the surety is sufficient by the officer before whom the examination is had, which is evidenced by the indorsement on the undertaking. Sections 271, 272. Until these several acts are performed, the justification, in our opinion, is not complete, or the appeal perfected.

The transcript was therefore filed within time, and the motion to dismiss is overruled.

FERRARI v. BEAVER HILL COAL CO.

(Supreme Court of Oregon. May 12, 1908.)

1. APPEAL—NOTICE—SUFFICIENCY.

Under B. & C. Comp. § 545, providing that a notice is valid, though defective as to the name of the court, etc., if it intelligibly refer to the action, a notice of appeal which intelligibly referred to the action in which the appeal was taken was valid, though it was entitled in the Circuit Court of the United States for a certain county instead of in the circuit court of such county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2140-2149.]

2. HOLIDAYS—JUDICIAL PROCEEDINGS—"JUDICIAL BUSINESS."

Under the statute providing that no court shall be open nor any judicial business be transacted on legal holidays, service of notice of appeal is not judicial business, and such notice may be served on a legal holiday other than Sunday.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Holidays, §§ 2, 3.

For other definitions, see Words and Phrases, vol. 4, p. 3853.]

3. APPEAL—MOTION TO DISMISS—QUESTIONS REVIEWABLE.

The Supreme Court will not on motion to dismiss an appeal review the action of the trial judge in permitting the undertaking on appeal to be filed after the expiration of the time allowed by law.

Appeal from Circuit Court, Coos County; J. W. Hamilton, Judge.

Action by James Ferrari, a minor, by his

guardian, against the Beaver Hill Coal Company and another. From the judgment, the coal company appeals. On motion to dismiss appeal. Denied.

See, also, 94 Pac. 181.

J. M. Blake and L. A. Liljeqvist, for the motion. John S. Coke and A. J. Sherwood, opposed.

PER CURIAM. This is a motion to dismiss an appeal, because (1) the notice of appeal is entitled in the Circuit Court of the United States for the county of Coos; (2) the notice was served and filed on a day appointed by the Governor as a legal holiday; and (3) the undertaking on appeal was not served and filed within the time required by law. None of these reasons are sound.

1. The notice of appeal intelligently referred to the action in which the appeal was taken and is valid and effective, notwithstanding the mistake in the name of the court in the title. B. & C. Comp. § 545. That was evidently a mere clerical error, and does not affect the merits in any way.

2. A legal holiday, other than Sunday, affects only those acts and transactions which are designated in the law establishing the day. The statute, providing for legal holidays, declares that no court shall be open nor any judicial business be transacted on such day, except for certain specified purposes, and under the rule above stated all other acts are legal. Service of notice of appeal is not judicial business within the meaning of the statute, and such a notice may, therefore, be served on a legal holiday. 21 Cyc. 443.

3. The undertaking was not served and filed within time, but the judge of the court below, on motion of appellant, permitted such undertaking to be filed after the expiration of time allowed by law, and we cannot review his reasons for doing so on motion to dismiss an appeal.

Motion denied.

OREGON AUTO-DISPATCH v. PORTLAND CORDAGE CO.

(Supreme Court of Oregon. May 12, 1908.)

NEGLIGENCE—RES IPSA LOQUITUR—APPLICATION OF RULE.

The maxim "res ipsa loquitur" relates to cases involving negligence, and has no application to an alleged breach of warranty that a rope would be sufficient to lower a safe.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 218, 271; vol. 43, Sales, §§ 1258-1260.]

On petition for rehearing. Petition denied.

For former opinion, see 94 Pac. 36.

C. A. Bell, for appellant. S. B. Linthicum and Isaac Hunt, for respondent.

EAKIN, J. Counsel for the defendant, by this petition, insists that negligence on the part of defendant must be the basis of plain-

tiff's recovery; but no such element is involved. Assuming that the rope was perfect, yet, if it was not of sufficient strength to lower the safe, it did not fulfill the warranty; and, if the rope was broken by the weight of the safe, then there was a breach of the warranty. That such was the case is the legitimate inference from finding No. 3. We do not understand that the maxim "*res ipsa loquitur*" has any application to such case. That relates to cases involving negligence. 21 Am. & Eng. Ency. Law (2d Ed.) 512; Black's Law Dict.

This is an action upon a contract on an express warranty, and an alleged breach of the warranty is the ground upon which the recovery is sought—not a warranty that the rope was a good rope, but that it was sufficient for the purpose desired. Defendant was asked to furnish a rope that would lower a safe of that weight, and defendant chose the rope and said it was sufficient in strength to do the work. If it was not, then defendant is liable, and, the court having found that the rope broke, it could not find for defendant, except upon the fact that plaintiff carelessly handled the rope or the safe, or used defective appliances, as alleged in defendant's answer.

The case of *Darling Milling Co. v. Chapman et al.*, 131 Mich. 684, 92 N. W. 352, cited by defendant, did not turn upon the finding quoted in the brief, but the opinion says that the judge made findings of the material facts of which the one quoted was the concluding one, namely, that plaintiff had wholly failed to establish a breach of the contract as alleged in the declaration. But it is not intimated that this finding was sufficient to sustain the judgment. Our statute requires the court to state the facts found separately from the conclusions of law. There are but two facts found by the court, namely, that there was a warranty as alleged, and that the rope broke, and this will not sustain the judgment rendered. In *Kane v. Rippey*, 22 Or. 299, 29 Pac. 1005, this court held that a finding "that the abstract furnished to plaintiff does not show any legal defects or incumbrances, and there are none in fact," is not a finding of fact, but a naked conclusion; and so the fourth and fifth findings are merely conclusions. If the rope broke from any other cause than the weight of the safe, the facts relating thereto should have been found.

The petition is denied.

(51 Or. 573)

SMITH v. INTERIOR WAREHOUSE CO.

(Supreme Court of Oregon. May 12, 1908.)

On petition for rehearing. Petition denied. For former opinion, see 94 Pac. 508.

EAKIN, J. Counsel for defendant insists that the force of the language quoted in the opinion from the testimony of witness Knight

relating to the agreement to receive wheat stored in other warehouses than defendant's is explained away by the redirect examination; but we do not so consider it. In the testimony quoted the witness is referring to the time of the signing of the contract, and at that time, although he knew some of the wheat was so stored, he did not know whose wheat it was, and thought Smith did not know. Smith testifies that at the first conversation with Knight it was understood that part of the wheat was in other warehouses than defendant's.

We believe the testimony justifies the conclusion reached, and the petition is denied.

(14 Idaho, 561)

JOHNSON v. JOHNSON et al.

(Supreme Court of Idaho. March 23, 1908.)

1. PUBLIC LANDS—SURVEY.

Under the provisions of sections 2395 and 2396, Rev. St. U. S. (U. S. Comp. St. 1901, pp. 1471, 1473), public lands are to be surveyed into townships 6 miles square, and each in turn subdivided into 36 sections of a mile square, except where a line of an Indian reservation, or the tracts of land theretofore surveyed or patented, or the course of navigable rivers, may render this impracticable, and in that case this rule must be departed from no further than such particular circumstances require.

2. BOUNDARIES—MEANDERED WATERS.

Where lands front upon navigable streams, and a line meandering the margin of such stream is run for the purpose of ascertaining the quantity of land to be paid for, such meander line is not regarded as a boundary line, but only points out the sinuosities of the bank for the purpose of arriving at the area of land to be paid for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 121, 122.]

3. NAVIGABLE WATERS—LANDS UNDER WATER—OWNERSHIP—COMMON LAW.

Under the common law, the title to the soil under tide water was in the King, his title extending as far as the tide. In nontidal streams, whether navigable or not, the title in fee to the bed of the stream was in the riparian owner; but if the stream be navigable in fact, the public had an easement or right of passage over and along such stream.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 180-185.]

4. SAME—ISLANDS.

Under the common law, a riparian proprietor bounded on or by a stream above tide water, although navigable in fact, acquires exclusive ownership in the soil to the middle thread of the current, subject to the public easement of navigation; and all grants of the government bounded upon or by such stream entitle the grantee to all islands lying between the mainland and the center thread of the current, unless it appears, either from the grant itself or from other circumstances surrounding the same, that the government intended to reserve such island from such grant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 212-216.]

5. PUBLIC LANDS—PATENTS—CONSTRUCTION—RESERVATIONS.

When the government grants land for a consideration, and does not reserve any rights or interests that would ordinarily pass by the rules of law, and does no act which indicates an intention to make such reservation, the grant

includes all that would pass by it if it were a private grant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 314-316.]

6. NAVIGABLE WATERS—GRANT BY GOVERNMENT.

Where the government grants land bordering upon a navigable stream—that is, a freshwater stream not affected by the ebb and flow of the tide—and there is nothing in the grant or in the acts of the government which indicates an intention upon the part of the government to make any reservation or limit the grant to the water's edge, the grantee takes to the middle of the main channel of such stream.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 212-216.]

7. SAME—OWNERSHIP OF LANDS UNDER WATERS.

In this state the doctrine is announced and adopted that a riparian owner upon the streams of this state, both navigable and nonnavigable, takes to the thread of the stream, subject, however, to an easement for the use of the public.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 180-185.]

8. SAME.

Section 2476, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1567), provides: "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both." Under this section the waters of navigable rivers within the territory specified are declared to be public highways; but said section does not reserve the bed of the stream, but does declare that when the opposite banks of any stream, not navigable, belong to different persons, the stream and the bed thereof shall become common to both.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 180-185.]

9. SAME.

This act of Congress means that navigable streams, within the territory to be disposed of, shall be deemed to be and remain public highways, subject to the public easement; that the public should enjoy its free and uninterrupted navigation, unobstructed by dams, bridges, or other structures which might impede its commerce; the intention of Congress being to reserve the use of the rivers for the public without interference with the riparian owner, and the latter to have his right to the bed of the stream without interference with the *jus publicum*.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 180-185.]

10. SAME—"NAVIGABLE STREAMS."

In this state all streams which are capable of being used for the purpose of carrying boats, passengers, freight, floating logs, timber, wood, or any other product to market are recognized and declared to be navigable streams, the beds of which remain in the riparian owner subject to a public easement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 5-11.]

For other definitions, see Words and Phrases, vol. 5, pp. 4675, 4684; vol. 8, p. 7728.]

11. SAME.

The fact that navigable rivers are reserved as public highways in no way interferes with the legal doctrine that the riparian owner takes to the thread of the stream.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 180-185.]

12. SAME—RIGHT OF PUBLIC.

The public have an easement in, and the right to use, the navigable streams of this state, but, in so doing, must have due consideration

and reasonable care for the rights of the riparian owner, whose right to use a stream implies the necessity as well as the right to pass to and from such stream.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 239-244.]

Sullivan, J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Lincoln County; Alfred Budge, Judge.

Action to quiet title by O. P. Johnson against William M. Johnson and another. Judgment for defendants, and plaintiff appeals. Reversed.

E. M. Wolfe, for appellant. Sullivan & Sullivan, for respondents.

STEWART, J. This is an action to quiet title to lot 6 in section 6, in township 8, south of range 14 east, and lots 6 and 7 in section 1, in township 8, south of range 13 east, Boise meridian, in Lincoln county. The real controversy, however, involves lots 6 and 7 in section 1, township 8 south, of range 13 east. The plaintiff alleges title in fee; that one William McCandless obtained title to said property by patent, and conveyed the same to this plaintiff by a warranty deed; that the defendants claim some interest or estate in said property, but that such claim is without any right whatever. The complaint alleges, also, that the defendants have entered upon a part of said land and planted a crop, and have dug up ditches and ruined and destroyed plaintiff's fences, and will continue to do so unless restrained by the court. The plaintiff asks judgment requiring the defendants to set forth the nature of their title, and that the court declare the plaintiff to be the owner of said premises, and that the defendants have no interest therein. The defendants answered, and denied that they claim any estate in said property, unless such premises include an unsurveyed island known as "Weatherby Island," situated in Snake river in section 1, township 8 south, range 13 east, Lincoln county, Idaho, in which defendant Walter Gridley admits that he claims some interest in said property, and avers that he is the owner of what is known as "Weatherby Island," and denies that the defendants have entered upon said land of the plaintiff, or planted a crop thereon or dug up or destroyed ditches or fences. As an affirmative defense, the defendant Walter Gridley alleges that he and his predecessors in interest have been in the exclusive, open, continuous, notorious, and quiet possession of what is known as "Weatherby Island" for more than five years prior to the commencement of this suit. The cause was tried by the court, and findings of fact and conclusions of law were made, and a judgment entered in favor of defendants. The plaintiff appeals from the judgment.

The real controversy involves the south boundary line of lots 6 and 7 in section 1. These lots lie along the north bank of Snake

river. In the findings of fact the court found that the plaintiff was the owner of lot 6 in section 6, township 8 south, of range 14 east, and lots 6 and 7 in section 1, township 8 south, of range 13 east, Boise meridian; that it appears from the official plat of the United States Land Office that all the lands within the legal subdivision of section 6, township 8 south, of range 14 east, and said section 1, of township 8 south, of range 13 east, had been returned to the government as surveyed, and that the remainder of the subdivisions of said sections are shown to be the waters of Snake river, and that the government issued its patent to the predecessor of plaintiff for the fractional subdivisions heretofore described, abutting on a line which purports to meander said stream; that said meander line, on the south of said lots, does not, in fact, meander said north bank or water line of Snake river; that said lots abut on said Snake river, and are bounded on the south thereby; that said north bank of Snake river, south of said lots, is a well-defined perpendicular bluff or rim rock; that the north water line of said Snake river, south of said lots, is at the base or foot of said bluff or rim rock; that said lots extend only to the north water line of said Snake river, which is at the base or foot of said bluff or rim rock; that defendants are not occupying or claiming any estate or interest in or to said above-described lots or any part thereof; that the defendant Walter Gridley is the owner and entitled to the possession of that certain unsurveyed tract of land known as "Weatherby Island" in section 1, township 8 south, of range 13 east; that said tract of land last described is an island in Snake river, and is partly opposite said lots 6 and 7 in section 1; that said island, nor any part thereof, is included in said lots owned by plaintiff herein; that the defendant Walter Gridley and his predecessors have been in possession of and occupying said island for more than 10 years immediately preceding the commencement of this action. As conclusions of law, the court finds that the meander line of said Snake river, south of said lots owned by the plaintiff herein, is not the true boundary line thereof, and the plaintiff, by virtue of the patent to said lots, and the conveyance to him by the patentee, only takes title to the north water line of said Snake river, and that said plaintiff did not therefore acquire any estate or interest in or to said Weatherby Island; that the plaintiff is entitled to have his title quieted in said lots under a proper description, showing that said lots do not include said Weatherby Island. Upon these findings, the court rendered a decree quieting the plaintiff's title to the property described in the complaint bounded on the south by the north water line of Snake river, which is fixed at the foot or base of the north bank of said river as shown by a perpendicular bluff or rim rock.

A number of errors are assigned by the ap-

pellant, but they in effect involve the question as to whether or not the south boundary line of lots 6 and 7 in section 1 as described in the plaintiff's complaint is the high-water line of Snake river, as found by the court. The appellant also contends that there was no island in Snake river, as claimed by the defendants, under the name of "Weatherby Island," but if there was such island, that the same is a part of said lots 6 and 7 as claimed by plaintiff. The plaintiff introduced in evidence in this case the official plat of the land office, embracing the lands involved in this controversy, which official plat shows that all of section 1, in which said lots 6 and 7 are a part, was surveyed by the government, and that no island whatever is shown in Snake river in front of said lots. It also appears in this case, without contradiction, that the main channel of Snake river flows to the south of what is termed as "Weatherby Island," or upon the opposite side of said island from said lots 6 and 7.

Under the provisions of sections 2395 and 2396, Rev. St. U. S. (U. S. Comp. St. 1901, pp. 1471-1473), it is provided that the public lands shall be surveyed into townships six miles square, and each in turn subdivided into 36 sections of a mile square, except where a line of an Indian reservation or of the tracts of land theretofore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case, this rule must be departed from no further than such particular circumstances require. The patent to Wm. McCandless, the grantor of plaintiff, was for lots 6 and 7, section 1, township 8 south, range 13 east, and lot 6, section 6, township 8 south, range 14 east. The boundary lines for lots 6 and 7, section 1, are not set out in the patent, but reference is made to the official plat of the survey of said lands for identification of the land granted, thereby adopting the plat as a part of the instrument. The patent reads, "according to the official plat of the survey returned to the General Land Office by the Surveyor General." By referring to the official plat marked in this case as "Plaintiff's Exhibit 4," we find that all the lands bounding lots 6 and 7, covered by said patent, are straight except the line bordering on Snake river.

It has always been the policy of the government, as we understand it, where lands front upon navigable streams, to measure the price of the lands conveyed by the quantity of upland granted, and to require no payment for lands covered by the waters of streams or lakes, and, for the purpose of ascertaining the quantity of upland to be paid for, a line meandering the margin of such waters is run, and, where this is the purpose of running such meandering line, it is not regarded as a boundary line, but only points out the sinuosities of the bank, for the purpose of arriving at the area of land to be

paid for. *Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784; *Railroad Co. v. Schurmeier*, 7 Wall. (U. S.) 272, 19 L. Ed. 74; *Hardin v. Jordan*, 140 U. S. 371-380, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; *Horne v. Smith*, 159 U. S. 40-43, 15 Sup. Ct. 988, 40 L. Ed. 68. The evidence in this case clearly shows that the body of land designated in the record as "Weatherby Island," at ordinary high-water season, is entirely surrounded by water, and at low-water season the water of said Snake river passes entirely around the south border of said island, in the main channel of said stream, as a result of which the high-water line of said Snake river is along the rim rock to the north boundary line of said island. This line, the respondents contend, is the south boundary line of said lots 6 and 7 as owned by the plaintiff, and with this contention the trial court agreed.

Counsel for both appellant and respondents cite the case of *Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784, as authority sustaining their respective positions. An examination of that case, however, at once discloses the fact that it has no bearing upon this particular question. In *Johnson v. Hurst*, the question decided by this court was as to whom land lying between the meander line of a stream and the water line belonged, and this court held that where it appeared from the notes of the official plats that all the lands within the legal subdivision, as directed to be surveyed by the United States statutes, had been returned as surveyed, and the remainder of these subdivisions are shown to be the waters of a navigable stream, the grantees to lots or fractional subdivisions abutting on the meander line take title to the stream. In the case at bar, however, the question of title to the land between the meander line and the stream does not arise. The record in this case shows that the field notes were introduced in evidence, but they were not brought to this court by the record. As stated above, the plat showing the government survey of section 1 shows that the land not occupied by the Snake river was surveyed, and there does not appear to be any island in Snake river in front of lots 6 and 7 in said section. The defendants, however, introduced in evidence a plat and survey of said section 1, made by one John Koets, county surveyor of Lincoln county, in which is shown an island consisting of 25 acres lying in Snake river, mostly in front of said lots 6 and 7 in said section 1. This witness testifies that a rim of rock to the north of said island was the north bank of Snake river, and that while lot 6 is designated on the government plat as containing 26.55 acres, yet if said lot extends down to the north bank of Snake river, which he fixes as the rim rock, there are 48½ acres in said lot 6, or 8½ acres more than a complete 40, and that, while the government plat shows 17.85 acres in lot 7, he found in fact

18½ acres. In other words, according to the government plat, there were 44.40 acres in said lots 6 and 7, while by actual survey he found there to be 67 acres in said lots 6 and 7, and that there are 25 acres in the island, which, if it belongs to the plaintiff, would give plaintiff 92 acres of land, or 47.60 acres more than is shown on the government plat. This witness also testifies that there is a small neck of land extending from the island out across the north channel of said Snake river to the main land, an average width of 20 feet, and that the water of said Snake river could get around the end of the neck or tongue at ordinary high water, and thus entirely surround said island with the waters of Snake river; that Riley creek flows over the rim rock near the boundary line between lots 6 and 7, the waters of which empty into this north channel of Snake river, and during the low-water season the water flows east into the waters of Snake river and then around the south boundary line of said island, and that the tongue or neck referred to as extending from the island towards the main land is immediately west of the mouth of said Riley creek, and immediately below this neck or tongue are springs from which water rises and flows west into the waters of Snake river. We have recited these facts to show the true condition of the premises.

It can serve no purpose in this opinion for this court to review the decisions under the common law as to the boundaries of lands lying upon navigable waters. It is sufficient, however, to state that at common law a conveyance of land bounded upon a river or stream in which the tide does not ebb or flow, though navigable in fact, is presumed to carry title to the thread of the stream (5 Cyc. 895; *Farnham on Waters & Water Rights*, vol. 1, § 50; 4 Am. & Eng. Ency. [2d Ed.] 828), and that in the United States, where the test of navigability is navigability in fact, the decisions with reference to boundaries of lands lying upon nontidal, navigable rivers are hopelessly in conflict (5 Cyc. 896). Much of the conflict in the decisions of the various states arises out of the application of the common law to streams navigable in fact. Under the common law, only streams affected by the ebb and flow of the tide were deemed navigable; while in this country, streams navigable in fact are navigable streams. Applying the common law, then, to streams not affected by the ebb and flow of the tide, although navigable in fact, the riparian proprietor takes to the thread of the stream. Under the common law, the title to the soil under tide water was in the King, his title extending as far as the sea. In nontidal streams, whether navigable or not, the title to the fee or bed of the stream was in the riparian owner, but, if the stream be navigable in fact, the public had an easement or right of passage over or

along such stream. Under the common law, only arms of the sea and streams where the tide ebbs and flows are deemed navigable. Streams above tide water, although navigable in fact at all times or in freshets, were not deemed navigable in law. To these, riparian proprietors bounded on or by the river, could acquire exclusive ownership in the soil, water, and fishery to the middle thread of the current, subject, however, to the public easement of navigation. The consequence of this doctrine is that all grants bounded upon a river not navigable by the common law entitle the grantee to all islands lying between the mainland and the center thread of the current. This was the doctrine announced by the Supreme Court of the United States in the case of *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428, wherein it quotes with approval from *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112, as follows: "We feel bound so to construe grants by the government according to the principles of the common law, unless the government has done some act to qualify or exclude the right. * * * The United States have not repealed the common law as to the interpretation of their own grants, or explained what interpretation or limitation should be given to or imposed upon the terms of the ordinary conveyance which they use, except in a few special instances; but these are left to the principles of law, and rules adopted by each local government where the land may lie. We have adopted the common law, and must therefore apply its principles to the interpretation of their grant."

In 1 *Farnham on Waters & Water Rights*, at page 249, and in 5 *Cyc.*, at page 895, the authors have classified the different states which follow the letter of the common law, the spirit of the common law, and those refusing to follow the common law. An examination of the authorities of the several states will at once impress the reader with the conviction that the authorities are in a hopeless conflict, and that the law writers are even unable to determine accurately what the several courts have held. So it will be seen that in considering this question we are confronted with an irreconcilable conflict of the law upon this question. This is the first time this question has ever been presented to this court for decision. What rule this court will adopt must depend upon what seems to be the most advantageous to the interest of the public and the private citizen in this new state. Some states have determined this matter by inserting a provision in the Constitution, others by legislative enactment, but most of the states have merely adopted the common law, and by so doing have declared that the title to the bed of fresh-water streams rests in the riparian owner. This conflict in the decisions in various states relating to the title to land under fresh-water streams has arisen from

either a failure to correctly comprehend the common-law principles applicable thereto, or a doubt in the wisdom of applying such principles. Under the provisions of section 18, Rev. St. 1887, of this state, the common law of England, so far as it is not repugnant to or inconsistent with the Constitution or laws of the United States, in all cases not provided for in these Revised Statutes, is the rule of decision in all the courts of this state, unless the same conflicts with the Constitution or laws of this state.

In case of *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. 210, 34 L. Ed. 819, the Supreme Court of the United States, speaking through Justice Field, says: "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. As an incident of such ownership the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state, either to low or high water mark, or will extend to the middle of the stream."

Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428.

It appears from the government plat to which reference is made in the patent to plaintiff's grantor that the government sold and conveyed all the land in lots 6 and 7, in section 1, bounded by the river on the south, and that no reservation whatever was made in said patent. No intention appears on the part of the government to reserve any land lying between said lots 6 and 7 and the river. The only conclusion that can be drawn from the action of the government is that it intended to pass title to the plaintiff's grantor to all lands north of the main channel of said Snake river as a part of said lots 6 and 7, and that the government did not consider the island in question in this case of sufficient importance to reserve the same from said grant. *Hardin v. Jordan*, *supra*; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *McBride v. Whitaker*, 65 Neb. 137, 90 N. W. 966; *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; *Butler v. Grand Rapids*, 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84; *Horne v. Smith*, 159 U. S. 46, 15 Sup. Ct. 988, 40 L. Ed. 68; *Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447. This, we think, is the true doctrine, unless section 2476 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1567), hereinafter discussed, calls for a different conclusion.

This precise question arose in the case of *Chandos v. Mack*, 77 Wis. 573, 46 N. W. 803,

10 L. R. A. 207, 20 Am. St. Rep. 139, and the court says: "The inference certainly is very strong, when the government leaves a small island in a navigable river, lying between the shore and middle of the stream, unsurveyed, and sells all the surveyed islands and all the land on both sides of the river, that it intends to abandon all right to such unsurveyed island, and let it pass to the riparian owners of lands on the river as an incident to its grant." This case quotes with approval the case of *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112, in which the Supreme Court of Illinois held: "That when a government grant is made which does not reserve a right or interest that would ordinarily pass by the rules of law, and the government does no act which indicates an intention to make such reservation, the grant includes all that would pass by it, if it were a private grant; and that as the United States has not imposed any limitation upon its grant of the land in question, which was an island in the Mississippi river, separated from the adjoining land by a slough, the title of the riparian owners extended to the thread of the river, and included the island."

In case of *Schurmeler v. St. Paul & Pac. R. R. Co.*, 10 Minn. 82 (Gil. 59) 88 Am. Dec. 59, the Supreme Court of that state, in discussing this question, says: "We think, therefore, that it is too clear to admit of a reasonable doubt that the river bounds this lot on one side. But this being admitted, the further question is presented whether the riparian owner takes to high-water or low-water mark, or to the middle thread of the stream. At common law, grants of land bounded on rivers above the tide water carry the exclusive right and title of the grantee to the middle thread of the stream, unless an intention on the part of the grantor to stop at the edge or margin is in some manner clearly indicated; except that rivers navigable in fact are public highways, and the riparian proprietor holds subject to the public easement. In this case no intention is in any way indicated to limit the grant to the water's edge, and, if the common-law rule prevails here, Roberts, by his purchase, took to the center of the river, including the land subsequently surveyed by the government—called 'Island No. 11'—and which is now claimed by the defendants. The common law of England, so far as it is applicable to our situation and governments, is the law of this country in all cases in which it has not been altered or rejected by statute, or varied by local usage under the sanction of judicial decisions. 2 Kent, Com. 27, 28. We think, in respect to the rights of riparian owners, it is as applicable to the circumstances of the people in this country as in England. * * * We think no reason can be given why the same rule should not apply to grants made by the government that are applicable to grants made by individuals." This case was affirmed by the Supreme Court

of the United States, 74 U. S. 272, 19 L. Ed. 74.

A very concise and forcible statement of this question is to be found in *Gavit's Adm'r's v. Chambers*, 3 Ohio, 496, in which the court says: "It is, we conceive, vitally essential to the public peace and to individual security that there should be distinct and acknowledged legal owners for both the land and water of the country. This seems to have been the principle upon which the common-law doctrine was originally settled, that where a stream was not subject to the ebb and flow of the tide it should be deemed the property of the owners of the soil bounding upon its banks." If the opposite rule be adopted, the court further observes: "At what point does the right of the owner of the adjoining lands terminate? On the top, or at the bottom, of the bank? At high or at low water mark? Does his boundary recede and advance with the water, or is it stationary at some point? And where is that point? Who gains by alluvion? Who loses by the direptions of the streams? No satisfactory rules can be laid down in answer to these questions if the common-law doctrine be departed from. * * * It cannot be reasonably doubted that, if all the beds of our rivers supposed to be navigable, and treated as such by the United States in selling the lands, are to be regarded as unappropriated territory, a door is opened for incalculable mischiefs. Intruders upon the common waste would fall into endless broils among themselves, and involve the owners of the adjacent lands in controversies innumerable. Stones, soil, gravel, the right to fish, would all be subjects for individual scramble, necessarily leading to violence and outrage. The United States would be little interested in preserving either the peace or the property, and, indeed, would be powerless to do it, without an interference with the policy of the state, as unsuitable for the Union to exercise as it would be inconvenient, if not dangerous, to state sovereignty. We do not believe that it was the intention of the United States to reserve an interest in the bed, banks, or water of the rivers in the state, other than the use for navigation to the public, which is distinctly in the nature of an easement, and all grants of land upon such waters we hold to have been made subject to the rule of the common law, which, in this case, is the plain rule of common sense. And it is this: He who owns the lands upon both banks owns the entire river, subject only to the easement of navigation, and he who owns the land upon one bank only owns to the middle of the river, subject to the same easement. This is the rule, recognized not only in England, but in our sister states."

In the case of *Ingraham v. Wilkinson*, 4 Pick. 268, 16 Am. Dec. 342, the Supreme Court of Massachusetts says: "The question then arises to whom belongs an island form-

ed by a division of the waters of a river, where, but for the island, the borderers on the river would meet each other in the middle of the river; and this question must be settled by analogy to cases of a similar nature, which, though they may have arisen in other countries under the jurisdiction of the civil law, have nevertheless been adopted by the common law as fairly coming within its general principles." The court, after quoting at length from the Code of Napoleon and other writers, says: "Although these wise provisions seem to be confined to the case of islands recently formed, the same reason will extend them to the case of islands, the origin of which cannot be traced, unless the property in them has been otherwise appropriated according to the rules of law; for whether originally formed by deposits from the water, or by a sudden division of the river, would seem to be immaterial, unless the owner of one side should be able to show that it was created by a disruption from his land. According to these principles, therefore, this island belongs in severalty to these borderers on each side of the stream, if their lands on the main are coextensive with the island; if not, then the owners of the next adjoining lots will have a right to claim a portion of the island conformable to their lines."

This case was approved in *Pratt v. Lamson*, 2 Allen (Mass.) 284; *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 548; *Commonwealth v. Alger*, 7 Cush. (Mass.) 97. In 9 Cush. 548, a construction is placed on the case of *Ingraham v. Wilkinson*, and the court says: "It recognizes the rule of common law that the property in the soil of rivers not navigable, subject to public easements, belongs to those whose lands border upon them; and from this right of property in the soil in the bed of the river the court deduces the right of property in an island which gradually arises above the surface and becomes valuable for use as land. Assuming the thread of the river as it was immediately before such island made its appearance, this rule assigns the whole island, or bare ground formed in the bed of the river, if it be wholly on one side of the thread of the river, to the owner on that side; but if it be so situated that it is partly on one side and partly on the other of the thread of the river, it shall be divided by such line and held in severalty by the adjacent proprietors."

Mr. Farnham in discussing this question in vol. 1, at page 244, says: "There is, undoubtedly, a perceptible advantage in owning land adjoining a navigable body of water. So plainly is this true that in all new countries settlers locate upon such waters before they do further inland, and the course of commercial activities follows very closely the lines of navigable waters. To deprive such a settler of his advantage is to take from him a portion of the value of his prop-

erty. In addition to this there is a value in the use of the bed and shores of the water which can be availed of in subordination to the public right of navigation, and which is very material. A forceful illustration of this is the fact that, in almost every instance when a state has established its title as against the riparian owner, it has immediately proceeded to grant the beds and shores, or a portion thereof, thereby making a revenue for its own use. * * * When, in addition to this, it is remembered that the title, if held to be in the riparian owner, is subject to practically the same trusts to which it would be subject if it was in the public, there is no excuse for the efforts which have been made to deprive the riparian owner of his advantage. The rule of the common law is definite and certain. It has solved all the problems for hundreds of years where it has been adopted, while the opposite rule is indefinite, uncertain, and a source of prolific litigation. By the common-law rule the title above tide water is in the riparian owner, subject to the public use. Under that rule there is no temptation on the part of the state to interfere with the riparian rights of the abutting owner."

In *Hardin v. Jordan*, 140 U. S., at page 388, 11 Sup. Ct., at page 814 (35 L. Ed. 428), the court says: "Of course, as already stated, there is no question where the land abuts and bounds upon a fresh-water stream or river. In such cases the law is perfectly plain. Sir Matthew Hale says: 'Fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent, so that the owners of the one side have, of common right, the propriety of the soil, and consequently of the right of fishing, usque ad flum aquæ; and the owners of the other side, the right of soil or ownership and fishing unto the flum aquæ on their side. And, if a man be owner of the land of both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length.' *De Jure Maris*, pt. 1, c. 1."

But it is useless to pursue this inquiry further. The authorities are in conflict, and the better reason, we think is with the contention that the riparian owner takes title to the thread of the stream, both in navigable and nonnavigable rivers, subject to an easement for the use of the public.

The Supreme Court of Michigan, in the case of *Goff v. Cogle*, 118 Mich. 307, 76 N. W. 489, 42 L. R. A. 161, says: "The court left the question to the jury to determine whether or not there was an island in the river, and the jury must have found that there was; so that question must be taken as settled, that there was an island in fact. But, so far as the record shows, there was no island there which had been recognized by the government as such, and which was

no part of the mainland. The deeds to defendant conveyed to him the lands in controversy, unless the south channel is treated as the Clinton river within the meaning of the deeds. The deeds cannot be so construed, as even upon meandered streams the lands extend to the middle thread; and it appears that the north channel is the main channel, so that defendant's deeds conveyed land extending to the middle of the main channel." To this case is attached a very exhaustive note treating this entire subject, and classifying the cases as to their respective holdings upon this question. The annotator says: "The common-law rule that the title to non-tidal rivers is in the riparian owner has the presumption that it has the rule of common sense behind it, because it has survived the test of time. Moreover, it has the advantage of certainty. No other rule will determine with certainty where the title is. But when it is considered that the riparian owner has a right of access to waters, the title to the beds of which is in the state (State ex rel. Denny v. Bridges, 19 Wash. 44, 52 Pac. 320, 40 L. R. A. 593), and that the state has control of navigable waters although the title to the bed is in the riparian owner, it would seem that it made little difference which rule was followed."

To hold in this case that the plaintiff under his grant from the government took title only to high-water mark, and that between high and low water mark there is a body of unsurveyed land which was not included in his grant, because it was an island, or in excess of his grant, would the public suffer or be damaged any more than if such unsurveyed land should afterwards be surveyed and some other person procure title to the same? Either the plaintiff's land or the land of such other person would extend to low-water mark or the thread of the stream, and if we hold, as contended by respondents, that Snake river to high-water mark is a public highway, we are unable to discover any theory or reason upon which to found an opinion that the public would be served and protected any more than to hold that the island in controversy is a part of lots 6 and 7 as contended by appellant. If the riparian owner owns the land only to high-water mark, in many instances in this state large bodies of land will be found between high and low water mark which will be subject to disposition by either the state or the national government, as it is the policy of the government to encourage individual ownership in its lands and not to reserve title in the state. If such land would be subject to location by another, such locator would take title to either low-water mark or the thread of the stream, and, if to the thread of the stream, the same objection could be urged against the owner as against the appellant in this case. But we are unable to discover upon what theory title pass-

ed from the national government to the state.

Our attention has not been called to any act of Congress which seems to indicate a grant from the national government to the state, and if title did not pass to the state, then it is apparent that the title to the land between high-water mark and the thread of the stream did pass to the riparian owner or was reserved in the national government. In this case the national government made no such reservation. The patent to the plaintiff's grantor passed all land bounded by Snake river on the south in lots 6 and 7, section 1.

Counsel for respondent also contends that under the provisions of Rev. St. U. S. § 2476 (U. S. Comp. St. 1901, p. 1567), all navigable rivers are reserved as public highways, and, because of such reservation, title could not pass to the riparian owner only to high-water mark, as the remainder of the bed of the stream is reserved as a public highway. This section reads as follows: "All navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways, and, in all cases where the opposite banks of any streams not navigable, belong to different persons, the stream and the bed thereof shall become common to both." It will be observed that this section reserved the waters of a stream as a public highway, but recognizes that the bed of the stream belongs to the riparian proprietors.

In *Schurmeler v. St. Paul & Pac. R. R. Co.*, supra, the court says: "This act of Congress provides that all navigable rivers within the territory to be disposed of by virtue of that act shall be deemed 'to be and remain public highways.' At common law, rivers navigable in fact are public highways, and the riparian owner holds subject to the public easement. This act of Congress, therefore, is merely a declaration or affirmation of the common law, and not a modification of it. The fact that these rivers are, and must remain, public highways, is not at all inconsistent with the view that riparian owners have the fee of the bed of the stream."

In discussing this question in *Braxon v. Bressler*, 64 Ill. 488, the court says: "The meaning of the act of Congress declaring that all navigable streams within the territory to be disposed of should be deemed to be and remain public highways is that the river, navigable in fact, should be subject to the public easement; that the public should enjoy its free and uninterrupted navigation, unobstructed by dams, bridges, or other structures which might materially impede its commerce; that it should be a common highway for every vessel which might float upon its waters. The intention of Congress was only to reserve the use of the river. This the public could possess without interference with the riparian owner, and the latter could have his right to the bed of the stream without interference with the *jus publicum*. The peace

of society and the security of personal rights demand the legal recognition of ownership of the beds of the streams within the states, as well as the water. He should have the right to protect the bed of the stream from individual trespasses. The opposite view vests the fee in the United States, and makes it the proprietor of every navigable stream in the state. Its interposition in the prosecution of trespasses would be an intermeddling with the policy of the state, and would be perilous to its sovereignty. The common-law rule would best subserve the public peace and protect from violence."

Some conflict in the authorities arises out of the question as to what are navigable streams. Applying strictly the rule generally applied by courts as a test of navigability, perhaps all of the streams in this state would be nonnavigable. But we do not deem it wise to apply the same test in determining the navigability of a stream. In the case of *Harrison v. Flite*, 148 Fed. 781, 78 C. C. A. 447, the court says: "To meet the test of navigability as understood in the American law, a water course should be susceptible of use for purposes of commerce, or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable, a water course must have a useful capacity as a public highway of transportation." If this test be applied to streams of this state, they would all no doubt fail to come up to the standard thus fixed, of navigability. But we do not believe that this test will fit the conditions prevailing in this state, or best serve the public in the use made of its streams. It is common knowledge that most of the streams of this state rise in the mountains, and are used more generally for floating timber than for carrying passengers or freight. This being so, we deem it advisable to recognize as navigable streams used either for transporting freight or passengers by boats, or for floating lumber, logs, wood, or any other product to the market. The correct rule, we think, is stated in Black's *Pomeroy on Water Rights*, § 218, as follows: "In those states

where lumbering is a principal industrial interest, it has been found necessary to establish a new rule in respect to the use of the streams, which is not founded upon any principle or precedent of the common law, but solely upon the local exigencies and customs. This rule is that a fresh-water stream which is capable of being used for the purpose of floating down logs to the mills or to market, although it may be too small to admit of navigation, is 'navigable' (or, more properly, 'floatable') and a public highway, in the sense that the general public have an easement of passage over it for that purpose, though the title to the bed of the stream may remain in the riparian owners, subject to such public easement." We believe, therefore, the conditions prevailing in this state fully justify this court in holding many streams to be navigable which under the decisions of other states would be nonnavigable, and that this court is fully warranted in applying the principle of riparian ownership, as applied in many states to nonnavigable rivers, to what we term "navigable" rivers. The fact that navigable rivers are reserved as public highways, in no way interferes with the legal doctrine that the riparian owner takes to the thread of the stream. Snake river, being a navigable river, is a public highway, and subject to the use of the public, not only to low-water mark, but to high-water mark, and the riparian owner can in no way interfere with this use.

In the case of *Powell v. Springston Lumber Co.*, 12 Idaho, 723, 88 Pac. 97, this court through Justice Allshie, says: "Navigable streams are public highways over which every citizen has a natural right to carry commerce, whether it be by boats or the simple floating of logs. The appellant has an undoubted right to float his logs and timber down the Cœur d'Alene river, but in doing so, he must have due consideration and reasonable care for the equal right of defendant." Again: "The right of a riparian owner to use a stream implies the necessity as well as right to pass from the shore to the navigable waters of the stream, and this in turn must require some effective means or medium by which to reach such point for loading or unloading the commercial and floatable commodity."

People v. Gutchess, 48 Barb. (N. Y.) 656.

Most of the streams in this state have their origin in the mountains, and are fed from springs and the melting snows, and it is common knowledge to all that the rise and fall of such streams is often very sudden and decided; that within a few hours or days, at most, many of the streams which in ordinary times are but a few feet in width, in times of high water are many hundred feet wide; that during high water many acres are covered by the waters of said streams which during the greater portion of the year are rich agricultural lands and very produc-

tive; that to reserve to the state or national government the lands covered during high-water seasons, and limit the riparian owner to the high-water bank, would in many instances take away from the riparian owner the most valuable portions of his landed interest, and deny him the right of access to the water of such stream. To thus limit the boundary lines of the riparian owner would take away without compensation large bodies of land upon which valuable improvements have been made, and upon which many people depend for a livelihood, and which is the source of much of the wealth of this state. It would fix as the boundary line of the riparian proprietor a line of uncertainty which might shift and change as the high and low water seasons change, and which would result in endless litigation and uncertainty. As stated by the court in *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541: "The incalculable mischiefs that would follow if the riparian owner was liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line had been changed by accretions and relictions, are self-evident, and have been frequently animadverted on by the courts. These considerations certainly apply to riparian ownership on lakes as well as on streams. * * *

The owners of lands bordering on them have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the state to any relictions produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water. The endless litigation over the location of the original water lines, and the grievous practical injustice to the owner of the original riparian estate, that would follow, would of themselves be a sufficient reason for refusing to adopt any such doctrine. That the state would never derive any considerable pecuniary benefit—certainly none that would at all compensate for the attendant evils—we may, in the light of experience, safely assume. Our conclusion, therefore, is that upon both principle and authority, as well as considerations of public policy, the common law is that the same rules as to riparian rights which apply to streams apply also to lakes and other bodies of still water."

These reasons, so forcibly stated by the author, in our judgment are unanswerable when applied to the streams of this state, and to adopt a different doctrine would in our judgment lead to incalculable injury, not only to the property owner, but to the public at large. Counsel for respondent, however, contends that it would be an injustice in this case to hold that the island in controversy

was a part of lots 6 and 7, because by so doing there would pass to appellant under his patent 92 acres of land, when, as shown upon the government plat, there was only 44.40 acres in said lots 6 and 7. But under said patent, the patentee took to the stream, and the fact that upon the plat there is shown to be 26.55 acres in lot 6, and 17.85 acres in lot 7, established only one thing and nothing more, and that is that in issuing said patent the government required the patentee to pay only for the land as marked on said plat. But it is no evidence that more land would not pass by said grant. Justice Ailshie, speaking for the court on a similar subject, in *Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784, in effect holds that so far as the government is concerned, and the General Land Office which represents that branch of the government, all of the lands lying within section 1, including lots 6 and 7, have been surveyed and returned to the land office, and the lands therein contained have been thrown on the market for settlement and sale. No other survey has ever been made by or on account of the government, and the government has at no time complained of the appellant having or occupying more land than belongs to him, nor has it ever asserted any right to any part thereof. And the court says: "We know of no principle of law whereby any third party can now be heard to complain. If the government has parted with a larger acreage than it received pay for, that fact cannot concern the defendant or any other third person who does not claim title from the government. Indeed, there is doubt if the government itself, under the facts in this case, could now be heard to question the plaintiff's title; but with that issue we have nothing to do in this case."

In the case of *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 35 L. Ed. 442, the Supreme Court of the United States sustained the title of a riparian owner to 25 acres between the meander line and the water line, when the patent called for only a fractional one-quarter section containing 4.53 acres. In the case of *Sherwin v. Bitzer*, 97 Minn. 252, 106 N. W. 1046, the Supreme Court of that state sustained the title of a riparian owner to 143.93 acres between the meander line and the lake in a different section, where his patent called for 98.6 acres. In opposition to the view, however, the respondent calls our attention to the leading case of *Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68, in which the Supreme Court of the United States held: "Where the meander line of a government survey was really a mile or more from the main waters of a river, and the water line of a bayou opening into the river was intended as a real boundary, the patent describing the land by the number of the sections and its quantity as 170 acres will not convey a strip of unsurveyed land of a mile or more in width containing 700 acres between the bayou and the river, although the

official plat names a river as the boundary of the survey." This decision, however, is based upon the fact that the land was in different sections from the land described in the patent, and the fact that a large body of land was omitted from the survey satisfied the court that a mistake had been made. The facts in that case, however, are not applicable to the case under consideration, as here the government is not complaining, and it does not appear that any mistake was made or that any fraud would be perpetrated upon the government if the survey as shown by the official plat be sustained. In the case at bar, the land in controversy is in the same section as the land patented to the grantor of appellant, and partly in the same legal subdivision as lot 7, the remainder being in the 40-acre tract south of lot 6. So applying the rule adhered to in *Horne v. Smith*, supra, and many cases cited by respondents, it does not apply in this case. Here the land in controversy is in the same section as the land patented; the thread of the stream is in the same section; the acreage patented and the land claimed are not so disproportionate in size as to indicate that the island was not intended to be covered by the survey.

In the answer in this case, the defendants set up title by adverse possession, but the court made no finding upon that issue. The transcript discloses that, after the respondents had offered certain evidence with reference to the defendants' possession of said property, the plaintiff offered evidence in relation thereto which was disallowed by the court. Had the court made a finding in favor of the defendants on this issue, the refusal to allow plaintiff to introduce evidence on that issue would have been error. But inasmuch as the court made no finding on this question, the plaintiff was not harmed thereby.

We are therefore of the opinion that the court erred in holding that lots 6 and 7 claimed by the plaintiff extended only to the north water line of Snake river, which is at the base or foot of said bluff or rim rock, and that the defendant, Walter Gridley, is the owner of the unsurveyed tract of land known as "Weatherby Island" in section 1, township 8 south, of range 13 east, and in holding that said island or any part thereof is not included in said lots owned by the plaintiff, and erred in entering judgment for the respondents. The judgment, therefore, will be reversed, and a new trial ordered as to the defense of the statute of limitations and adverse possession. Costs awarded to appellant.

AILSHIE, C. J., concurs. SULLIVAN, J., dissents.

SULLIVAN, J. (dissenting). I am unable to concur with the majority of the court in the main principle of law involved in this

case, and would merely dissent, without expressing my views, if I did not consider that the rule of law applied to navigable streams of this state was so at variance with the rule as laid down by the Supreme Court of the United States and the Supreme Courts of the Pacific Coast states and many other of the leading states of this country. As I view it, the rule laid down is so at variance with the best interests and rights of the people of the state and contrary to the decisions of so many of the courts of last resort of many of the states that I cannot permit the decision to go unchallenged and without entering my earnest protest against the doctrine therein laid down, which I think is contrary to sound principles of public policy.

The Supreme Court of the United States is the court of last resort for the interpretation of all laws of Congress, and that court has interpreted many of the land laws of Congress, and has declared and passed upon the extent of the title conveyed by patents from the United States to riparian owners to lands bordering on navigable streams within the states and territories, and it would seem to me that the decisions of that court upon the question of the extent of such grants should be accepted by this court, rather than the views of some of our state courts and the opinion of a text-book writer whose practice and environment may have led him to express views to the effect that the common-law rule as to navigable rivers is better adapted to the wants of the people of this great nation, and ought to be applied to our great navigable streams and lakes, instead of the rule laid down by the Supreme Court of the United States. I am inclined to give greater weight to the decisions of the Supreme Court of the United States, especially when construing the extent of the grants of the United States to purchasers of the public lands, than my associates give to them.

One of the state court decisions recognized to be the ablest on the question of the extent of the title acquired under a United States patent by a settler on riparian lands is that of *McManus v. Carmichael*, 3 Iowa, 1. That decision was rendered in 1856, and time has proven the wisdom of the rule there laid down, to wit: That the riparian owner, under a grant from the government, takes to high-water mark only. Gould in his work on *Waters* (3d Ed.) § 72, refers to that case as one of the leading American authorities upon this subject, and, referring to other decisions, that authority in section 67 of said work states that the doctrine that some of the states have held with regard to the private ownership of the beds of navigable waters above the tide is at variance with sound principles of public policy, and the Supreme Court of the United States cites the case of *McManus v. Carmichael*, supra, as holding to the correct rule and as being consistent with the sound principles of public policy.

In *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224, this question was given profound consideration by that great court. The common-law doctrine of navigable rivers and tide waters was reviewed. The condition existing between the extent and topography of the small British Islands and that of the great American continent is there commented on. The influence of the common-law doctrine for two generations is declared to have excluded the admiralty jurisdiction from our great rivers and inland seas, and it is stated how, under the influence of that doctrine, a number of the states of the Union adopted it without regard to the ownership of the soil under navigable waters above tide water, and then the court declared that such doctrine is at variance with "sound principles of public policy," and further declared that there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. But in the face of that decision, the majority of this court have saddled on to this young commonwealth the antiquated, bygone, obsolete, effete, and discarded doctrines of the common law in that regard, which is not applicable to the conditions of this country, and has been rejected by many of the states of the Union and most, if not all, of the Pacific Coast states, including California, as well as by the Supreme Court of the United States.

In the case of *Barney v. Keokuk*, *supra*, the Supreme Court of the United States declared that the beds and shores of navigable streams properly belong to the respective states by their inherent sovereignty, and also declared that the United States has wisely abstained from extending its surveys and grants beyond the limits of high-water mark; while my associates hold that such grants do extend to the thread of the stream, regardless of this decision of the Supreme Court of the United States. It seems that my associates prefer to take the views of a text-book writer and the decisions of some of the states that have been hampered by the common-law rule, which was intended to apply to a country whose longest river is but 300 miles in length, when our own Snake river is more than 1,000 miles long, to the opinion of the Supreme Court of the United States as to the extent of the government grant to settlers on navigable streams. The Supreme Court in that case further declares that all cases in which that court has seemed to hold to a contrary view or doctrine depended on the local laws of the state where such lands were situated, and my associates have quoted and rely upon those cases from the Supreme Court of the United States which were decided and depended upon the local laws of the state from whence such cases were taken, and not upon the sound principles of public policy, which principles are referred to in the case of *Barney v. Keokuk*. In that decision, speaking through Mr. Jus-

tice Bradley, the court said: "The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Islands and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence, it laid the foundation in many states of doctrines, with regard to the ownership of the soil in navigable waters above tide water, at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in *Martin v. Waddell*, 16 Pet. (U. S.) 367, 10 L. Ed. 997, *Pollard v. Hagan*, 3 How. (U. S.) 212, 11 L. Ed. 565, and *Goodtitle v. Kibbe*, 9 How. (U. S.) 471, 13 L. Ed. 220. These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genesee Chief*, 12 How. (U. S.) 443, 13 L. Ed. 1058, has declared that the Great Lakes and other navigable waters of the country, above, as well as below, the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the states in which the lands were situated."

In *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, which is a very exhaustive opinion, and refers to and discusses numerous cases in regard to tide waters and navigable rivers, in referring to the extent of grants by Congress of portions of public lands within a state or territory, said: "Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States"

It is there held that the grants by Congress of portions of the public lands within a state or territory to settlers thereon, though bordering on or bounded by navigable waters, whether tide water or not, convey of their own force no title or right below high-water mark, and do not impair the title and dominion of the state to the lands below high-water mark. In the face of that decision, my associates hold that such grants go to the center of the navigable stream, including all islands therein.

In the very celebrated case of *Illinois Central Ry. Co. v. People of State of Ill.*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018, regardless of the decisions of the Supreme Court of the state of Illinois in regard to navigable waters, the Supreme Court of the United States held that the bed or soil of navigable waters was held by the people of the state in their character as sovereign in trust for public uses for which they are adapted. By an act of the Legislature, it had been undertaken to deprive the state of the fee and control over the bed and waters of the harbor of Chicago, and place the same in the hands of a private corporation, and the court there held that there could be no irrevocable contract in a conveyance of property by a grantor in disregard of a public trust under which he was bound to hold and manage it. The Legislature of Illinois by that act endeavored to grant the fee to the Illinois Central Railroad Company, its successors and assigns, to the bed of said harbor. Referring to tide waters and the rule of the common law with reference thereto, the court said: "The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes, over which is conducted an extended commerce with different states and foreign nations. * * * At one time the existence of tide waters was deemed essential in determining the admiralty jurisdiction of courts in England. That doctrine is now repudiated in this country as wholly inapplicable to our condition. * * * When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. * * * The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the Crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide." And it is there held that the bed or soil of navigable waters in this country is held by the people of the state in their character as sovereign, in trust for public uses for which they are adapted. In that case

the Legislature of the state had undertaken to deprive the state of its control over the bed of the harbor of Chicago by granting it in fee to the Illinois Central Railroad Company.

My associates appear to be trying to imitate the Legislature of Illinois by attempting to convey in fee by judicial construction to the riparian landowners the title to the beds of our navigable streams, without any authority of law or permission granted by the sovereign people, and, as I view it, contrary to the decision of the Supreme Court of the United States as to the extent of a government grant. We, no doubt, will have the same results under this decision that they have had in Illinois and other states where the contrary doctrine is held, of the riparian landowner collecting toll from those using the stream for transportation, for tying up their vessels to the shore, or for other purposes of navigation. Not only that, but there are many islands in Snake river, containing from a few acres of land up to more than a hundred, that my associates have magnanimously bestowed upon the adjacent riparian landowner as a gift, and, as I think, contrary to the rights and interests of the people generally.

In the opinion of my associates, it is stated that in the United States, where the test of navigability is navigability in fact, the decisions in reference to the boundaries of land lying upon nontidal, navigable rivers are absolutely in conflict. We concede that they are in conflict, but contend that my associates have taken the view contrary to the decisions of the United States Supreme Court, and as that court held in *Barney v. Keokuk*, supra, to be "at variance with sound principles of public policy," as well as contrary to the decisions of many of the state courts. Mr. Justice Stewart suggests, after concluding that the authorities are in hopeless conflict, that the text-book writers are unable to determine accurately what the several courts have held. I would suggest that the decisions of the Supreme Court of the United States upon this question are not in hopeless conflict. They do not give forth contradictory rules or doctrines, but hold to the one rule that sound principles of public policy require the title to the land under navigable waters to remain in the state. It is not the function of this court to grant and give away lands belonging to the state by adopting a doctrine which the Supreme Court of the United States has declared to be at variance with sound principles of public policy, against which doctrine we have such a long list of decisions of courts of last resort of the states of the Union. Under such circumstances, this court should preserve the rights of the state and the people, and the state, under proper regulations, should protect the rights of the riparian landowner and the rights of all the people to the reasonable use of such streams and their beds and convey them to no private owner.

In the case of *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428, the

court held that the grants of the government for lands bounded by streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the land lies, and in a number of decisions the Supreme Court follows the decisions of the state courts so far as the title to the beds of navigable rivers is concerned. While that court states that it is contrary to or at variance with the "sound principles of public policy" to permit private ownership of the beds of navigable rivers, it sustains the decisions of the Supreme Courts of several states which are thus designated as "at variance with the sound principles of public policy," on the ground that after a territory becomes a state the title to the beds of navigable streams is transferred to the state, and if the state desires to give it away and donate it without compensation to riparian owners the Supreme Court of the United States will not interfere, unless it should be necessary to do so in order properly to regulate commerce, as it did do in *Illinois Central Ry. Co. v. Illinois*, *supra*. It is there declared that the right of the states to regulate and control the shores of navigable waters and the land under them is supreme, and it is there further held that it depends upon the law of each state as to what waters and to what extent this prerogative of the states over the beds of such streams shall be exercised. It is upon that theory that many of the decisions of the state courts have been sustained by the Supreme Court of the United States. It is held that after statehood the state holds the title to the beds of navigable streams, and that the state may dispose of them, if it desires to do so, to private owners. The decisions are to the effect that no such disposition shall interfere with the rights of the general government to regulate commerce on such navigable streams.

It is suggested by my associates that it is vitally essential to the public peace and to individual security that boundaries of land should be definitely fixed, and that they are definitely fixed by taking the thread of the stream. This is not and cannot be true in this state, where many of our large streams from year to year change their thread. Only recently one of the large rivers of the state changed its thread more than a mile from where it was one year ago. The average high-water mark would be just as safe and certain a boundary as the thread of the stream. If one varies, as a rule the other also varies.

It is stated in section 76 of Gould on Waters (3d Ed.) that "the true boundary line of a navigable stream or lake is the point to which the water usually rises in ordinary seasons of high water," and I think that line just as definite and as certain of ascertainment as the thread of the stream. It is perhaps useless for me to continue this subject further, but the decision of my associates,

as I view it, is so at variance with the principles of sound public policy and the rights of the people that I could not refrain from expressing my opinion upon the main principle of law involved in this case.

It has been suggested that there is no law of the United States transferring the beds of the navigable streams of Idaho to the state. We concede that there is no positive law of Congress to that effect, but under the construction given by the Supreme Court of the United States to the land laws of Congress, and to the grants of the government, as soon as a territory becomes a state, the title to the beds of all navigable streams goes to the state. I would suggest that there is no law of this state authorizing this court to transfer lands belonging to the state to private ownership, as has been done in this case. The Supreme Court of the United States has the authority to construe the extent of grants from the United States government. This court takes the title to the beds of navigable rivers from the people and gives it to private landowners without any authority in law and without any jurisdiction in the court to do so. While generosity is recognized as a good quality of heart, it is not a very just rule for the courts to be more generous with the state's property than it would be with its own property.

A long line of able decisions, standing at the head of which are those of the United States Supreme Court, holds that grants of the government to settlers along navigable streams only extend to high-water mark, and why this young state should adopt the common rule in regard thereto is beyond my comprehension, for by so doing hundreds of acres of lands belonging to the public of the state are turned over to a few riparian private landowners, and, as there are many islands in Snake river containing from a few acres up to more than a hundred, they are by this decision given to persons who did not purchase them and did not intend to do so. To such prodigality with the people's inheritance, I am unalterably opposed. Why not protect the people's rights by following the precedents of the strongest courts in the nation, rather than follow the decisions of courts which were hampered by and could not escape from the old common law and rule that is not at all adapted to the great rivers and lakes of the United States, one of which lakes would contain the British Islands and the surface not then be half covered? There is a well-recognized line of decisions which holds that the riparian owners take to the low-water mark, and, as I view it, that rule would protect the interest of the people of the state much better than the one adopted by the majority of the court. In *Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784, this court held that the riparian owner took to the water line, not intimating that he took to the thread of the stream. However, in that case, the question of the ownership of

the land between high and low water mark was involved, the parties apparently conceding that the riparian owners' rights did not go to the thread of the stream.

For the reasons above set forth, I think that the beds of our navigable streams should forever remain in the state for the benefit and welfare of the whole people, under proper state regulation, and not gratuitously given to riparian owners by the courts of the state or by the Legislature.

MOSS et al. v. RAMEY.

(Supreme Court of Idaho. March 23, 1908.)

QUIETING TITLE.

The decision in the case of O. P. Johnson, Appellant, v. Wm. M. Johnson and Walter Gridley, Respondents, 95 Pac. 499, followed and approved.

Sullivan, J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Canyon County; Frank J. Smith, Judge.

Action by A. B. Moss and another against A. H. Ramey. Judgment for defendant, and plaintiffs appeal. Reversed.

Richards & Haga, for appellants. Frank Harris, for respondent.

STEWART, J. This is an action to quiet title to lots 3 and 4 in section 22, lots 1 and 2 in section 27, lots 1 and 2 in section 28, and lot 1 in section 33, all in township 8 north, of range 5 west, Boise meridian.

The plaintiffs claim to be the owners in fee of this property, and allege that the defendant claims an interest therein to that portion of said lots lying along and bordering on the right bank of the main channel of Snake river, and extending from near the south line of lot 1, in section 33, northerly to a point some distance south of the north line of lot 3, section 22, and extending easterly from the said right bank of the main channel of Snake river to a ravine or slough passing through and lying wholly within said lots and connecting it at both ends of such ravine or slough with the main channel of Snake river, but allege that said claim of the defendant is without right, is unjust, and unfounded, and a cloud upon plaintiffs' title thereto. The plaintiffs further allege that the portion of the main channel of Snake river lying within the north and south boundaries of the tract of land described is not navigable, and the westerly limits of said lots extend to the center line of the main channel of said Snake river, and that said Snake river in the vicinity of said lots is not a navigable stream.

The defendant specifically denies the allegations of the plaintiffs' complaint, and alleges affirmatively that the defendant has had continuous, actual, open, adverse, notorious, and exclusive possession of all of that certain island involved in this case lying

west of and adjoining the channel of Snake river, west of section 27; and that the plaintiffs and their predecessors in interest are barred of any right to bring this action under the provisions of sections 4036, 4037, and 4043, of the Revised Statutes of Idaho of 1887. The defendant further alleges that there is an island bordering upon and lying west of the east channel of Snake river, west of the lots described in the plaintiffs' complaint, and that said island is claimed, owned, and occupied by the defendant and has been in his possession under claim of ownership since 1893, with full notice and knowledge to the plaintiffs; that on October 5, 1868, the lots described in plaintiffs' complaint were surveyed by the government of the United States, and the west boundary thereof thereby established and recognized as being the east bank of the east channel of Snake river, and the lots described in plaintiffs' complaint by the patents to plaintiffs' predecessors in interest limited the quantity to 190.60 acres, and that it was not intended to convey any land to either of the plaintiffs or their predecessors in interest west of the east bank of said east channel of Snake river; that the plaintiffs nor their predecessors in interest ever claimed or established any right whatever in and to any portion of said island; that the plaintiffs have recognized the same as government land, and attempted to procure a title thereto through an attempt of one Ruth Moss to enter the same as desert land, but that said application was rejected by the government on the ground that the same was not desert land. The defendant further alleges that he has expended a large sum of money in the improvement and cultivation of said island, made with the full knowledge and acquiescence of plaintiffs. Upon these issues the court made his findings of fact, and in effect found that the plaintiffs have succeeded to the title in fee to lots 3 and 4 in section 22, lots 1 and 2 in section 27, lots 1 and 2 in section 28, and lot 1 in section 33, all in township 8 north, range 5 west, Boise meridian, according to the official plat of the survey of said land, and that the plaintiffs and their predecessors in interest have owned the fee to the same since the year 1891; that the eastern boundary of said lots 1 and 2 of section 27, and lots 1 and 2 of section 28, meanders within a short distance of an easterly channel of Snake river, varying from a few feet at the north side of said tract to about 100 feet on the south side; that running immediately west of said meander line is a large channel of Snake river with well-defined banks, the channel varying in width from 100 to 300 feet, and the depth from 6 to 10 feet, through which the water of Snake river regularly flows during a large portion of the year, varying from 3 to 6 months, and some years the entire season; that said channel is an ancient chan-

nel of Snake river, and has been such for 30 years; that immediately west of the east bank of said channel is a large island and islands comprising in the aggregate 120 acres of land more or less, which is surrounded on the easterly side by the smaller channel of Snake river and on the southerly and westerly side by the main channel, which main channel has well-defined banks and channels with water flowing therein during the entire season of each year, the island being the property described in defendant's answer and alleged to belong to the defendant; and that said island is unsurveyed government land, and when surveyed according to the Idaho survey would be in section 28, township 8 north, range 5 west; that the defendant since the year 1893 has had continuous, actual, open, adverse, notorious, and exclusive possession of said island lying west of the center line of said easterly channel, which said island is west of said section 27, town and range as above given, and has held said island under claim of ownership exclusive as against the plaintiffs and their predecessors in interest, continuously since 1893, and since said time has had said land inclosed by good and substantial inclosure and has cultivated the same to crops during each year; that the plaintiffs' lands are limited to the number of acres described in their patent, and extend only to the water's edge of the most eastern channel east of said island; that the plaintiffs nor their predecessors in interest have made no claim or asserted any right to said island since the year 1893; that the defendant, believing plaintiffs claimed no interest to said island, built a house thereon and resided upon said premises for a number of years and made valuable improvements thereon, and has continued to hold and claim the same as his exclusive property.

As a conclusion of law, based upon such findings of fact, the court holds that the plaintiffs are barred from recovering or asserting any right in or to said island or any part thereof, and are barred from the right to bring any action, under the provisions of sections 4036, 4037, and 4043 of the Revised Statutes of 1887 of this state. Upon these findings and conclusions of law the court rendered judgment in favor of the defendant for costs. The plaintiffs moved for a new trial, upon a statement duly prepared and settled, which was overruled, and the plaintiffs appeal to this court from the order overruling the motion for a new trial and from the judgment.

From the record it appears that when the government surveyed the lands in sections 22, 27, 28, 33, and 34, and filed a plat thereof, Snake river was shown to be the west boundary line of lots 3 and 4 in section 22, lots 1 and 2 in section 27, lots 1 and 2 in section 28, and lot 1 in section 34, and that no island was surveyed or platted lying in Snake river in front of any of said lots. The defendant

introduced in evidence a plat made by John S. Milligan, county surveyor of Malheur county, Or., in which it is shown that immediately west of lots 1 and 2 in section 27, and lots 1 and 2 in section 28, there is an island, and that the main channel of Snake river forms a westerly boundary of said island, and a smaller channel forms an easterly boundary, the latter carrying only a part of the water as shown by the findings; that these two channels surround a body of land consisting of about 120 acres, the island in controversy.

The record presents two questions for consideration. The first is, did the grant covering lots 1 and 2 in section 27, and lots 1 and 2 in section 28, convey to the patentee as a part of said lots, the land or island in controversy in this case? In other words, did the riparian owner take title to the thread of the main channel of Snake river? This question has been fully discussed and recently passed upon by this court in the case of *Johnson v. Johnson*, 95 Pac. 499, which opinion we approve in this case, and consider that the same fully disposes of said question adversely to respondent.

The defendant also relies upon the defense that the plaintiffs and their predecessors in interest have not been seised or possessed of the premises in controversy within five years prior to the commencement of said suit, and as a result are barred by the statute of limitations. This defense is based upon the statute which provides that no recovery of real property can be maintained unless it appears that the plaintiffs, their ancestors, predecessors, or grantors, were seised or possessed thereof within five years before the commencement of such action. Rev. St. 1887, § 4036. The defendant claims that he has been in the continuous, actual, open, adverse, notorious, and exclusive possession of the property in controversy since the year 1893; and under this allegation of the answer the court found the same to be true, and found that said defendant has held said property under claim of ownership exclusively against the plaintiffs and their predecessors in interest continuously and against all other persons whatsoever since the year 1893, and has had said property inclosed by good and substantial inclosure, and has cultivated the same during each year since 1893. The defendant contends that the same facts which justified the court in making the finding that he had been in the exclusive possession of said property for more than five years last past constituted a disseisin of said property, and by reason of such fact that the plaintiffs cannot maintain this action because they and their predecessors in interest have not been seised or possessed of said property within five years before the commencement of this action. Rev. St. 1887, § 4036, provides: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was

seised or possessed of the property in question within five years before the commencement of the action."

The findings in this case are to the effect that the property in controversy was unsurveyed government land, and that the defendant entered into possession of the same, claiming that the same was government land and that the plaintiffs had no title thereto, and that the defendant has held possession of said property under said claim since the year 1893.

The question then arises: Will such facts defeat the plaintiffs' right to recover said property? The theory of the trial court was that the plaintiffs could not recover in this action because the property in controversy was unsurveyed government land and did not belong to the plaintiffs, and that the defendant entered upon said land as government land and has had the exclusive possession thereof since the year 1893. This case was tried and decided by the trial court upon the theory that the land in controversy was unsurveyed government land, but this court finds that the legal title was in the riparian owner. What finding the court would have made upon the question of adverse possession, had such court determined that the legal title was in the riparian owner, this court is unable to say. For the reasons stated in the opinion in *Johnson v. Johnson*, supra, this case must be reversed. And, inasmuch as the court's findings were made upon a wrong theory of the law, we deem it only just to all parties to grant a new trial in order that the court may determine whether plaintiffs' title has been divested or right of action arrested by adverse possession of the defendant.

The judgment will be reversed, and a new trial ordered, with leave to either party to amend their pleadings. Costs awarded to appellants.

AILSHIE, C. J., concurs. SULLIVAN, J., dissents.

STATE v. PECK.

(Supreme Court of Idaho. May 5, 1908.)

1. CRIMINAL LAW — APPEAL—EVIDENCE—BILL OF EXCEPTIONS.

In order to present to this court for review the evidence in a criminal case, or the rulings and decisions of the court in admitting or rejecting evidence, it is necessary to incorporate in a bill of exceptions so much of the evidence as is necessary to present the questions of law upon which the exception is based.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2816.]

2. SAME—COMMENTS OF ATTORNEY.

This court will not review comments of the prosecuting attorney upon the evidence, or, as to what has been proven and what not proven, in the absence of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2929.]

3. SAME—INSTRUCTIONS.

To authorize this court to review the instructions given by the court upon its own mo-

tion, such instructions must be presented to this court by proper bill of exceptions, either incorporating the instructions given, or the exception with a proper identification of such instructions, showing that the exception was taken at the time the instructions were given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2818.]

4. SAME.

This court will not review an instruction advising the jury as to acquittal in the absence of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2940-2945.]

5. SAME—INSTRUCTION TO ACQUIT.

An instruction directing a jury to acquit is erroneous, as the court is only authorized to advise the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1727-1729.]

6. SAME.

Where the court has fully and fairly instructed the jury upon a question of law, it is not error to refuse an instruction submitted by the defendant covering the same proposition of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

7. SAME.

An instruction which invades the province of the jury, and directs them with reference to questions of fact, is erroneous, and the court commits no error in refusing to give the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1703, 1704.]

8. SAME—REFUSAL OF BAIL.

The refusal of the trial court to admit a defendant to bail cannot be reviewed upon an appeal from the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2986-2990.]

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Roy Clark Peck was convicted of grand larceny, and he appeals. Affirmed.

Clay MacNamee, for appellant. J. J. Guheen, Atty. Gen., and B. S. Crow, for the State.

STEWART, J. The defendant was convicted of the crime of grand larceny. He moved for a new trial, which was denied, and this appeal is from the order denying the motion for a new trial and from the judgment. The appellant assigns 10 errors, the first of which relates to the admission of certain portions of the evidence of a witness introduced by the state. The second relates to the acts of the court in sustaining objections to certain questions asked a witness upon cross-examination by counsel for the defendant. The third relates to remarks made by the prosecuting attorney during his argument. The fourth relates to an instruction given by the court on his own motion. The fifth, sixth, seventh, and eighth relate to the refusal to give certain instructions asked for by the defendant. The ninth relates to the entering of judgment on the verdict. The tenth relates to the refusal of the court to admit the defendant to bail after sentence.

The Attorney General contends that this

court cannot consider any matters relating to the evidence, for the reason that the transcript does not show that the evidence, to which objection was made, was incorporated in a bill of exceptions, and for that reason it does not appear what testimony was offered and what rejected, or that the trial judge ever saw, approved, settled, or allowed a bill of exceptions containing the evidence set forth in the transcript as the evidence in said case. This objection is well taken. The transcript in this case first shows the appearances, the filing of the information, the allowance of time in which to prepare a statement on motion for a new trial, and then follows what purports to be evidence given upon said trial; but it does not appear at any place that the evidence was given, or that it was settled or allowed by a bill of exceptions, or identified by the trial judge as evidence given in said cause. After the evidence is set out, then comes what counsel designates as a bill of exceptions, entitled as follows: "Bill of Exceptions. Comes now the defendant, Roy Clark Peck, by and through his counsel, Edgar G. Riste and Clay MacNamee, and present and set forth the following bill of exceptions on his motion for a new trial herein, which are as follows"—then follows certain statements purported to have been made by the prosecuting attorney, and purported objections and exceptions thereto by counsel for defendant; then the instructions given by the court on his own motion, followed by instructions 1, 2, 3, and 4, requested by counsel for defendant and refused by the court. The verdict, judgment, notice of motion for bail pending appeal and certain affidavits in support of the same, assignments of error, and a certificate of the trial judge as follows: "Entire and foregoing bill of exceptions on motion for a new trial is hereby settled and allowed as a true bill of exceptions of the case herein." So it does not appear that the purported evidence contained in the transcript was incorporated in or made a part of the record by bill of exceptions.

Rev. St. 1887, § 7940, among other things, provides: "That on the trial of an indictment (which includes a trial upon information), exceptions may be taken by the defendant to a decision of the court. 2. In admitting or rejecting testimony, or in deciding any question of law not a matter of discretion, or in charging or instructing the jury upon the law on the trial of the issue."

Rev. St. 1887, § 7941, provides: "When a party desires to have the exceptions taken at the trial settled in a bill of exceptions, the draft of a bill must be prepared by him and presented, upon notice of at least two days, to the district attorney, to the judge for settlement, within ten days after judgment has been rendered against him, unless further time is granted by the judge, or by a justice of the Supreme Court, or within that period the draft must be delivered to the clerk of the court for the judge. When received by

the clerk, he must deliver it to the judge, or transmit it to him at the earliest period practicable. When settled, the bill must be signed by the judge and filed with the clerk of the court."

Rev. St. 1887, § 7942, provides: "Exceptions may be taken by either party to the decision of a court or judge upon a matter of law in granting or refusing a motion for a new trial."

Section 7944 provides: "When a party desires to have the exceptions mentioned in the last two sections (one of which is sec. 7942) settled in a bill of exceptions, the draft of a bill must be prepared by him and presented, upon notice of at least two days to the adverse party, to the judge for settlement, within ten days after the order or ruling complained of is made, unless further time is granted by the judge, or by a justice of the Supreme Court, or within that period the draft must be delivered to the clerk of the court for the judge. When received by the clerk, he must deliver it to the judge, or transmit it to him at the earliest period practicable. When settled, the bill must be signed by the judge and filed with the clerk of the court."

Section 7945 provides: "A bill of exceptions must contain so much of the evidence only as is necessary to present the questions of law upon which the exceptions were taken, and the judge must, upon the settlement of the bill, whether agreed to by the parties or not, strike out all other matters contained therein."

Section 7946 provides: "When written charges have been presented, given, or refused, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges, with endorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon, may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions."

The statute thus provides that, in order to present to this court the evidence in a criminal case, or the rulings and decisions of the court in admitting or rejecting evidence, it is necessary to incorporate in a bill of exceptions so much of the evidence as is necessary to present the questions of law upon which the exception is based. Rev. St. 1887, §§ 7940, 7941, 7945, supra; *State v. Dupuis*, 7 Idaho, 614, 65 Pac. 65.

The first and second alleged errors, not being saved by a bill of exceptions as required by the statute, are not subject to review by this court.

The third error assigned relates to certain comments made by the prosecuting attorney upon the failure of the defendant to produce certain witnesses, whom the defendant claimed to be with him at the time he purchased the horse in question. This exception is found in the bill of exceptions, but as the

bill of exceptions does not contain the evidence, it is impossible for this court to determine the propriety of the comments of the prosecuting attorney. We are not advised what the evidence was, therefore cannot tell what it did show or failed to show, and for that reason cannot determine whether the prosecuting attorney's remarks were legitimate argument, or otherwise.

The fourth error relates to a certain instruction given by the court upon its own motion. An examination of the record, however, does not disclose any exception taken to this instruction. By failing to except to the instruction at the time it was given the defendant waives the right to allege the giving of the same as error. In the case of *State v. Suttles*, 13 Idaho, 88, 88 Pac. 238, in discussing this question, this court said: "While the statute gives the defendant an exception to all instructions given upon request of the state, it is still obligatory upon the defendant to except to any instruction given by the court on its own motion at the time it is given, and if he fails to do so, he will be deemed to have waived any objection he had and to have been satisfied with the instruction at the time it was given. In order, therefore, to present his objection on appeal, it is necessary to take exception and have the same settled in a bill of exceptions." The instruction complained of is incorporated in what is denominated a bill of exceptions, but the bill of exceptions does not show that any exception was taken to this instruction at the time the same was given. Therefore, no error appears under this assignment.

Under the provisions of Rev. St. 1887, § 7976, subds. 7, 8, the written charges asked and refused, and all charges given and the indorsements thereon, become a part of the record, and may be transmitted to this court upon appeal. To review the instructions given by the court on its own motion, the defendant must except to the giving of such instructions at the time given, and in order to present such exception on appeal it is necessary to have such exception incorporated in a bill of exceptions. The bill of exceptions may contain the instructions given with the exception, or may omit the instructions and identify the instructions by proper reference. It is sufficient if the bill of exceptions clearly shows the instructions given, and that the exception was taken at the time it was given. If the exception is not presented in this manner to this court, then the defendant will be deemed to have waived any objection to the giving of such instructions. Rev. St. 1887, §§ 7940, 7906, 8051; *State v. Suttles*, 13 Idaho, 88, 88 Pac. 238.

Under the provisions of section 7946, instructions requested by either the state or the defendant and refused, need not be excepted to or embodied in a bill of exceptions, but the instructions with indorsements show-

ing the acts of the court form part of the record, and any error or decision of the court thereon may be taken advantage of on appeal in the same manner as if presented in a bill of exceptions. Thus, under the statute, instructions requested are deemed excepted to and become a part of the record, and may be reviewed on appeal without a bill of exceptions, while the action of the court in giving instructions on its own motion must be presented to this court by a bill of exceptions in order to have such action reviewed.

The fifth assignment of error relates to the refusal of the trial court to give the following instruction: "The jury is instructed that the evidence before them is insufficient upon which to base a conviction and directs that they return a verdict of not guilty." But, as the evidence is not brought to this court, we are unable to determine whether or not this instruction would have been applicable to the evidence or not. We cannot say that the court erred in refusing to give this instruction, because we are not advised as to what evidence was before the court and the jury, or whether it authorized a conviction or acquittal. There is, however, another objection to this instruction, and that is that the statute does not authorize the trial court to instruct a jury to acquit. Rev. St. 1887, § 7877, provides: "If at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant. But the jury are not bound by the advice." Under this statute, if the evidence is insufficient, the court may advise the jury to acquit, but the court is not authorized to instruct the jury to acquit. Subdivision 6, Rev. St. 1887, § 7855, reads: "The judge must then charge the jury if requested by either party; he may state the testimony and declare the law, but must not charge the jury in respect to matters of fact." Had the court given this instruction it would have violated this provision of the statute, as it would have directed the jury as to matters of fact. *Territory v. Neilson*, 2 Idaho (11ash.) 614, 23 Pac. 537; *State v. Wright*, 12 Idaho, 212, 85 Pac. 493.

Appellant next alleges as error the refusal of the trial court to give the following instruction: "The court instructs the jury that the possession of property, however recent, is not of itself a criminalizing circumstance, but to such evidence of possession must be added circumstances that will prove defendant's guilt beyond a reasonable doubt." This instruction is not a correct statement of the law, and also invades the province of the jury in determining questions of fact. It tells the jury that the possession of property, however recent, is not of itself a criminalizing circumstance, and that to such evidence of possession must be added circumstances that will prove defendant's guilt beyond a reasonable doubt. As we under-

stand the law, possession of property recently stolen is not evidence sufficient of itself to warrant a conviction, but is a circumstance tending to show guilt, which, taken in connection with other evidence, is to determine the question of guilt. *State v. Wright*, 12 Idaho, 212, 85 Pac. 493. The court however, had fully and correctly instructed the jury upon this question, and for that reason it was not error to refuse to give such instruction. *State v. Rooke*, 10 Idaho, 388, 79 Pac. 82.

Instruction No. 3, requested by the defendant, is as follows: "The court instructs the jury that the fact of possession of the property of another is offset by the evidence of good character when such evidence of good character is believed." This instruction clearly invades the province of the jury, and is erroneous. The court, however, had fully instructed the jury upon the question of good character and the effect to be given to evidence in relation thereto. For both reasons the court committed no error in refusing such instruction.

Instruction No. 4, requested by defendant, is as follows: "The court instructs the jury that flight is an incriminating circumstance, and the lack of flight in the case presented by the state is a material lessening of the proof of guilt placed before you." This instruction, like those above, invades the province of the jury, and is not a correct statement of the law. To say that because the evidence of the state does not show flight that therefore the guilt of the defendant is very much lessened is clearly invading the province of the jury in determining the effect to be given to flight, or the effect to be given to the lack of flight. The court, however, has no power to say to a jury that one fact of evidence offsets or detracts from the force or effect of some other fact. This is one of the things the jury are required to determine in order to reach a verdict. This instruction, therefore, clearly invades the province of the jury, and also is not a correct statement of the law, and the court committed no error in refusing to give the same.

The ninth error alleges that the court erred in pronouncing sentence against the defendant on the verdict herein. We are unable to determine just what counsel meant by this assignment. If it is meant that the evidence does not warrant the verdict, then it is answered by the failure to present to this court by proper bill of exceptions the evidence given at the trial. If it is because the jury were not properly directed as to the law, it may be answered by the record which shows that no exception was taken to the law as given by the court, and as to the instructions requested by the defendant, the court committed no error in refusing the same.

As a tenth assignment of error, counsel alleges that the court erred in refusing to

admit the defendant to bail after sentence pending his appeal. The record does not show that the trial judge ever made any order with reference to bail, either in admitting or refusing bail. For that reason, the question of bail is not before this court for review. The action of the court with reference to bail cannot be reviewed upon appeal from the judgment. *Rev. St. 1887, § 8042, subd. 3.*

We find no error in this record, and the judgment will be affirmed.

AILSHIE, C. J., and SULLIVAN, J., concur.

In re BEDFORD'S ESTATE.
COMMERCIAL NAT. BANK v. BED-
FORD et al.

(Supreme Court of Utah. April 9, 1908.)

1. HOMESTEAD — ALLOWANCE — INCREASE IN VALUE — EFFECT — CONCLUSIVENESS OF ALLOTMENT.

Rev. St. 1898, § 2829, provides that a homestead of land and appurtenances not exceeding the sum of \$2,000, and \$250 additional for each minor child, shall be wholly exempt from the payment of debts of the decedent, and shall be the absolute property of the surviving husband or wife and minor children, to be set apart on petition and notice at any time after the return of the inventory. Held that, where real estate was set apart as a homestead to the surviving wife and a minor child, it became theirs absolutely, subject only to the valid liens or mortgages with which it might be incumbered, and the estate was not subject to be reopened and further administered because at a subsequent time the value of the property set aside exceeded the limit of the statutory homestead exemption.

2. SAME—"ABSOLUTE."

The word "absolute," as used in *Rev. St. 1898, § 2829*, providing for the setting apart of a homestead as the absolute property of the surviving husband or wife and minor children, means complete, final, perfect, unconditional, unrestricted, not relative, not limited, independent of anything extraneous; and in the sense of complete, and not limited, it distinguishes an estate in fee from an estate in remainder, and characterizes a pure estate, unmixed and unconnected with any peculiarities or qualifications; a naked estate, freed from any qualifications and restrictions in the donee.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 1, p. 38; vol. 8, p. 7560.]

Appeal from District Court, Second District; J. A. Howell, Judge.

Petition by the Commercial National Bank against Emella O. Bedford and others to reopen the probate proceedings in the matter of the estate of C. A. Bedford, deceased. From a judgment for defendants, plaintiff appeals. Affirmed.

A. R. Heywood, for appellant. Valentine Gideon, for respondents.

MCCARTY, C. J. C. A. Bedford died January 9, 1898, leaving a widow and one minor son. At the time of his death Bedford was engaged in the hardware business at Ogden,

Utah. The stock of hardware, together with certain real property situated in Weber county, constituted his entire estate. Upon the real estate, which was used by Bedford and his family as a homestead, was a mortgage in favor of the Commercial National Bank of Ogden, appellant herein. The estate was duly probated, and the stock of hardware appraised at \$2,530 and the real estate at \$1,900. The stock of hardware was subsequently reappraised and sold for \$1,304.45. The money received for the hardware was used in paying off the mortgage referred to, and in paying the expenses of probating the estate. After notice to creditors had been duly given, a large number of claims against the estate were duly presented, approved, and allowed. Among the claims thus presented was one for \$500 in favor of the appellant. None of these claims were ever paid. Subsequent to the filing of the inventory and appraisement, the widow, Emelia O. Bedford, filed a petition praying that the real estate be set apart to her and her minor son as a homestead. Notice was duly given and a hearing had upon the petition. The appellant herein appeared by its counsel at said hearing and opposed the granting of the petition. On June 28, 1898, the district court made an order setting apart the real property to Emelia O. Bedford and her minor son, Clayton O. Bedford, as a homestead under section 2829, Rev. St. 1898. On June 29, 1898, the executors filed their final account in said cause, which, after due notice thereof had been given, was, by the court, allowed and settled; and thereafter, on or about August 3, 1898, the court made and entered an order discharging the executors from further administering upon the estate, thereby bringing said proceedings to a close. No property has since been discovered belonging to the estate other than the stock of hardware and the real estate mentioned; and no appeal has ever been taken from any of the orders made or from the decree of final distribution in said proceedings; nor have any of said orders been vacated, or in any manner modified or disturbed. About the month of May, 1907, the widow, Emelia O. Bedford, sold the land theretofore set apart as a homestead for \$4,300. The sale of the minor's interest was authorized by an order of court under guardianship proceedings wherein the said Emelia O. Bedford was named as guardian. On April 10, 1907, appellant filed its petition in the district court of Weber county, asking that the probate proceedings in the matter of the estate of C. A. Bedford, deceased, be reopened on the ground that since the discharge of the executors additional assets belonging to said estate had been discovered, and that the same had come into the hands of the widow, Emelia O. Bedford. To this petition an answer was filed by the widow for herself, and as guardian for the minor child. A hearing was had on the petition and the answer filed thereto, and the court found that no property

had been discovered belonging to the estate except what had been administered, and dismissed the petition. From the order and decree dismissing this petition, this appeal is prosecuted.

It is contended on behalf of appellant that the decree of the court setting apart the real property as a homestead for the widow and minor child did not invest them with the title thereto, but limited their interest therein to \$2,250, the amount of the exemption provided for in section 2829, Rev. St. 1898, for a surviving widow and one minor child. In other words, it seems to be the theory of counsel for appellant that the decree only gave the widow and minor child the right to occupy the property as a homestead until such time as its value might be greater than the homestead exemption, and if at any time the value of the homestead should exceed the sum of \$2,250 the estate should be reopened and further administered, and the property sold, and the proceeds in excess of \$2,250, or so much thereof as might be necessary, applied to the payment of the claims which had been presented to and approved by the executors and allowed by the court. We think this contention is untenable and entirely without merit. Section 2829, Rev. St. 1898, so far as material here, provides that "a homestead consisting of land and appurtenances not exceeding the sum of two thousand dollars, and two hundred and fifty dollars additional for each minor child * * * shall be wholly exempt from the payment of the debts of the decedent and shall be the absolute property of the surviving husband or wife and minor children * * * to be set apart on petition and notice at any time after the return of the inventory." The word "absolute" as here used has a well-defined meaning. "'Absolute' means complete, unconditional, not relative, not limited, independent of anything extraneous. In the sense of 'complete, not limited,' distinguishes an estate in fee from an estate in remainder. * * * Characterizes a pure estate, unmixed and unconnected with any peculiarities or qualifications; a naked estate, freed from any qualification and restriction, in the donee." Anderson's Dict. of Law, 8. In Rapalje & Lawrence's Law Dictionary, the word is construed to mean: "Complete, final, perfect, unconditional, unrestricted; as an unconditional conveyance; an estate without condition or qualification." For further illustrations, see 1 Words & Phrases, 42-44; Johnson's Adm'r v. Johnson, 32 Ala. 640-642.

It therefore follows that the statute in this case is susceptible of but one construction, namely, that when real property is set apart as a homestead to the surviving wife or husband and minor children, as provided in section 2829, Rev. St. 1898, it becomes theirs absolutely, subject only to the valid liens or mortgages, if any, with which it may be incumbered. In other words, they are invested with whatever title the deceased had to the

property at the time of his death. This court in effect so held in the case of *Syndergaard v. Marx*, 31 Utah, 490, 88 Pac. 616.

The judgment is affirmed, with costs.

STRAUP and FRICK, JJ., concur.

LAWSON v. TRIPP et al.

(Supreme Court of Utah. March 28, 1908.)

1. LIMITATION OF ACTIONS—COMPUTATION OF PERIOD OF LIMITATION—ABSENCE AT TIME OF ACCRUAL OF CAUSE OF ACTION—"RETURN TO THE STATE"—"COME INTO THE STATE."

The word "return," in Rev. St. 1898, § 2888, providing that "if when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state," as applied to absent debtors, includes nonresidents as well as citizens of the state who have gone abroad and returned to the state, the words "return to the state" being equivalent to "come into the state."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 464, 465.

For other definitions, see Words and Phrases, vol. 2, pp. 1277, 1278.]

2. SAME—OPERATION AND EFFECT OF BAR OF LIMITATION—EFFECT AS TO REMEDIES IN OTHER STATES.

Where one acquired a cause of action, after its accrual, by assignment, even though when it accrued he was and ever since has been a citizen of the state, he is not within the exception to Rev. St. 1898, § 2899, which provides that when a cause of action which has arisen in another state is barred therein by lapse of time an action thereon shall not be maintained in this state "except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued."

3. SAME—CONSTRUCTION OF LIMITATION LAWS IN GENERAL.

While statutes of limitation are to be liberally construed, provisions thereof excepting certain persons or classes from the operation of the statutes are to be strictly construed, and courts will not by construction extend such an exception to include persons not expressly mentioned therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 13-15.]

4. STATUTES—CONSTRUCTION—GIVEN EFFECT TO ENTIRE STATUTE.

To so construe one section of a statute as to render abortive another section thereof is not permissible where the two sections can by any reasonable construction be made to harmonize.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 283.]

5. ACTIONS—NATURE AND ELEMENT OF CAUSE OF ACTION.

A cause of action consists in, first, the primary right and the facts from which it flows, and, second, the breach of that right and facts constituting such breach, which elements taken together create a remedial right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 1-9.]

6. CONTRACTS—CONSTRUCTION—PLACE OF MAKING.

The place where the last act is done which is necessary to give validity to a contract is the place where the contract is made, and so, where a contract for the sale of real estate was written in one state and was signed there on behalf of the vendor, who resided in another state, by one wholly unauthorized to make or sign the contract, and was thereafter forwarded to the

vendor, who replied by letter assenting thereto, the contract was made in the state of the vendor, his assent being given there, and being the last act necessary to make the writing a valid contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 929-935.]

7. SAME—PLACE OF PERFORMANCE.

When no place of performance is fixed by a contract, it will be presumed that the contract is to be performed where made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 932-934.]

8. SAME—ACTIONS—PLACE OF ACCRUAL OF CAUSE OF ACTION.

A failure to perform a contract made in a foreign state, and which fixed no place of performance, constituted a breach in such state and not elsewhere, and the cause of action arising thereon, if any, arose in such state and not elsewhere.

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Action by John L. Lawson against Robert B. Tripp and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

Frick, Edwards & Smith, for appellant. Henderson, Pierce, Critchley & Barrette, for respondents.

MCCARTY, C. J. On the 27th day of November, 1889, E. A. Tripp, of Salt Lake City, Utah, representing himself as the agent of his brother, R. B. Tripp, entered into a written contract to sell to John A. Groesbeck certain real estate situated in Salt Lake City, Utah, and received the sum of \$500 as part payment of the purchase price of the property. The balance, \$9,500, was to be paid in 10 days from the date of the contract, and "when a warranty deed and good title is delivered and accepted." The contract also provided that the vendors were to furnish to the vendee on or before December 6, 1889, an abstract of title to the premises. This contract was sent to R. B. Tripp, who at the time resided in South Dakota, where he has ever since continuously resided. There he assented to the contract. On January 30, 1890, Groesbeck sold and assigned to John L. Lawson all his right, title, and interest in and to said contract. On August 30, 1903, Lawson began this action against E. A. Tripp and R. B. Tripp to recover damages for a breach of the contract mentioned. It is alleged in the complaint, among other things, that John A. Groesbeck, after making the payment of the \$500 hereinbefore referred to on the contract, continued able, ready, and willing to carry out and fully perform all the terms and conditions of said contract on his part to be performed, and continued able, ready, and willing to pay the sum of \$9,500, balance of the purchase price, upon the delivery to him by the defendants of an abstract of title and a warranty deed showing a good and marketable title thereto as provided in said contract. (4) "That the defendants have continuously since the 27th day of November, 1889, failed, refused, and neglect-

ed to furnish or deliver an abstract of title to said property, a warranty deed, or any deed, to said premises conveying a good and marketable title to said real estate to the said John A. Groesbeck or to this plaintiff, although said John A. Groesbeck and this plaintiff have often requested the same of the defendants." The complaint further alleged that the defendant "R. B. Tripp has been absent from the state of Utah continuously since the 27th day of November, 1889, to the present time, with the exception of about twenty days, during which time * * * he has been in the state of Utah." A demurrer was interposed on the ground that the action was barred by the statute of limitations. The demurrer was sustained as to E. A. Tripp, and the action dismissed as to him and proceeded against R. B. Tripp alone. R. B. Tripp answered, and after putting in issue the allegations of the complaint, set forth certain separate and specific defenses, among which were: (1) The bar of the statute of limitations, arising under section 2970, Rev. St. Utah 1898; (2) that the defendant tendered a deed in due form for the premises, together with abstract of title showing a good and marketable title to be delivered on receipt from Groesbeck of the balance, \$9,500, of the purchase price, and that said tender was refused; (3) that the bar of the statute of limitations arising under the provisions of the Revised Statutes of Utah, and particularly under section 2899, by reason of the fact that under the laws of South Dakota, where defendant had at all times resided, the action had become barred, and was therefore barred within the state of Utah. Evidence was introduced both by plaintiff and defendant in support of their respective claims and theories regarding the merits of the case. The court, however, failed to find on any of the issues involving the merits, but found in effect that the contract was a South Dakota contract, and that the cause of action was barred by the statute of limitations, and entered judgment of dismissal in favor of defendant on that ground alone. To reverse the judgment, plaintiff has appealed to this court.

No error is assigned because of the failure of the court to find on the issues involving the merits of the case. As stated by counsel for appellant in their brief: "It will be observed that the court passed upon the sole question whether the cause of action was barred, eliminating all other questions respecting the merits of the case. * * * The court in this case did not pass upon that phase of the case at all (referring to the merits), but simply based its decision upon the one question, viz., whether or not the cause of action, if any there was, was barred by the statute of limitations." And again they say: "There is, therefore, nothing for this court to consider—in fact, nothing it can legally pass upon—except this question." Counsel for appellant contend that "the contract in question is

a Utah contract, to be performed in Utah; that a breach, if any occurred, occurred in Utah, and that therefore a cause of action, if any exists, arose in Utah." Section 2875, Rev. St. 1898, provides that "an action upon any contract, obligation, or liability founded upon any instrument of writing," etc., must be commenced within six years. Appellant, however, insists that R. B. Tripp, having continuously resided outside of the state since the alleged breach of the contract, the cause of action arising thereon is within the exception provided for by section 2888. This section reads as follows: "If when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if after the cause of action accrues he depart from the state, the time of his absence is not part of the time limited for the commencement of the action." In the case of *Burnes v. Crane*, 1 Utah, 179, this court, in harmony with the great weight of authority, held that the word "return" in section 2888, supra, as applied to absent debtors, includes nonresidents as well as citizens of the state who have gone abroad and returned to the state. The words "return to the state" are held to be equivalent to "come into the state." 25 Cyc. 1227-1231; 19 A. & E. Ency. Law, 233; *Buswell, Lim. & Adv. Poss.* 117; *Weber v. Yancy*, 7 Wash. 84, 34 Pac. 473; *Burrows v. French*, 34 S. C. 165, 13 S. E. 355, 27 Am. St. Rep. 811; *Wood v. Bissell*, 108 Ind. 229, 9 N. E. 425; *Stanley v. Stanley*, 47 Ohio St. 225, 24 N. E. 493, 8 L. R. A. 333, 21 Am. St. Rep. 806; *Whitcomb v. Keator*, 59 Wis. 609, 18 N. W. 469; *Parker v. Kelly*, 61 Wis. 552, 21 N. W. 539.

Respondent, however, insists that the cause of action, if any existed in favor of plaintiff, arose in South Dakota, and the action, being barred by the statutes of that state, cannot, under section 2899, Rev. St. 1898, be maintained in this state. This section provides: "When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued." It is conceded that appellant acquired the claim upon which he bases his right of action by virtue of an assignment after the cause of action had accrued thereon. The question therefore arises, does appellant come within the exception mentioned in section 2899? In other words, has he, within the meaning of the statute, held the cause of action from the time it accrued? It is contended on behalf of appellant that the purpose of the exception is to prevent the statute from running against causes of action generally which are held by citizens of this state who were citi-

zens at the time such actions accrued, regardless of whether they acquired the causes of action before or after they arose, and that therefore appellant comes clearly within the spirit and intent of the exception. The language of the statute is plain, and free from ambiguity. In order to bring a party within the exception, two things must be shown to exist: First, that the party relying upon the exception was, at the time the cause of action arose, and ever since has been, a citizen of this state; and, second, that he has held the cause of action since it accrued. It being conceded that plaintiff acquired his cause of action by assignment after the cause of action accrued, he therefore does not come within the exception. The contention that the exception was intended to include all citizens of this state as a class, and that it was not made in favor of any particular set or class of citizens, and that the statute should be so construed, cannot, under the great weight of authority, prevail. While the general rule is that statutes of limitation generally are to be liberally construed, it is also a well-recognized doctrine that, when such statutes contain provisions excepting certain persons or classes from the operation of the statutes, those exceptions are to be strictly construed. And courts will not by construction extend the exception so as to include persons not expressly mentioned therein. Black, in his work on Interpretation of Laws, p. 332, referring to statutes of limitation, says: "But if the statute itself is to be construed liberally, necessarily it follows that the exceptions which it makes in favor of particular persons or classes are to be construed with strictness. Accordingly the doctrine is now very fully established that implied and equitable exceptions are not to be ingrafted upon the statute of limitations where the Legislature has not made the exception in express words in the statute; the courts cannot allow them on the ground that they are within the reason or equity of the statute." In *McIver v. Ragan*, 2 Wheat. 24, 4 L. Ed. 175, the Supreme Court of the United States, speaking through Chief Justice Marshall, says: "Wherever the situation of a party was such as, in the opinion of the Legislature, to furnish a motive for excepting him from the operation of the law, the Legislature has made the exception. It would be going far for this court to add to those exceptions. It is admitted that the case of the plaintiff is not within them, but it is contended to be within the same equity with those which have been taken out of the statute." The court then refers to the difficulties to plaintiff and parties similarly situated because of the strict construction placed on the statute by the trial court, and says: "If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations an exception which the statute does not contain." 25 Cyc. 990; *Allen v. Mille*, 17 Wend. (N. Y.) 202; *Bedell*

v. Janney, 9 Ill. 193; *Favorite v. Booher's Adm'r*, 17 Ohio St. 348; *Dozier v. Ellis*, 28 Miss. 730; *Sacia v. De Graaf*, 1 Cow. (N. Y.) 356; *Amy v. City (C. C.)* 22 Fed. 418; *Pryor v. Ryburn*, 16 Ark. 671; *Buswell, Llm. & Adv. Poss.* 16.

This brings us to the decisive question presented by this appeal, namely: Did the alleged cause of action accrue in this state, or did it arise in South Dakota? If it arose in the latter state, it follows, from the construction we have given the exception found in section 2890, Rev. St. 1898, that the action is barred; but if the cause of action accrued in Utah, it is not barred, and the judgment of the trial court must be reversed. Counsel for respondent contend that the term "when a cause of action has arisen," as used in section 2890, Rev. St. 1898, should be construed as meaning when the courts of a state have jurisdiction of the particular subject-matter in controversy and by issuing process can acquire jurisdiction of the person of the defendant, and have cited decisions of able courts which sustain this view. To so construe section 2890 would, in effect, render abortive section 2888 of the same chapter. This we are not permitted to do, provided the two sections can by any reasonable construction be made to harmonize. This rule of statutory construction is so well established and has been so universally followed by the courts that we deem it unnecessary to cite authorities in support of it. The cause of action, if any existed in this case, arose because of the defendant's default in failing to comply with and carry out his part of the agreement hereinbefore mentioned. In other words, he violated a legal duty that he owed to the plaintiff and which was imposed upon him by the terms of the contract. *Pomeroy*, in his work on Code Remedies, § 453, tersely, and, as we think, correctly, defines a cause of action to be: "A primary right possessed by the plaintiff and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from the delict; and, finally, the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements the primary right and duty and the delict or wrong combined constitute the cause of action." And again, in section 775 of the same work, the author says: "The 'cause of action' consists in, first, the primary right, and the facts from which it flows; and, second, the breach of that right, and the facts constituting such breach. These, taken together, create a remedial right and are the cause of action." In the case of *Bach v. Brown*, 17 Utah, 435, 53 Pac. 991, in an opinion written by Mr. Justice Bartch, it is said: "'Cause of action,' in the sense here indicat-

ed, is synonymous with 'right of action,' and includes the omission or act without which no right of recovery could exist. In this case it includes the omission which constituted the violation of duty agreed to be discharged, and arose at the time when and place where that duty was to be discharged. * * * That which gives cause for complaint is the breach. Hence, whenever the breach occurs, whether by commission or omission, the cause of action arises; and, when the contract is to be performed at a place stipulated, the act or omission, which is the groundwork for complaint, will be regarded as having occurred at that place." Bliss, Code Pleading, § 113. Applying the foregoing principles of law, as announced by such able writers as Pomeroy and Bliss, and as declared by this court in *Bach v. Brown*, supra, it necessarily follows, as we have herebefore stated, that the wrong out of which the cause of action alleged in the complaint arose was defendant's failure to perform his part of the agreement. That is, it was the wrong done, the legal duty violated by defendant in omitting to carry out his part of the contract at the place where the contract was to be performed. The contract in this case does not fix the place of performance. The court, however, found that the contract was made in South Dakota, and we think the record supports the finding. It appears that when E. A. Tripp drafted and signed the contract he had no power of attorney or authority of any kind from his brother, R. B. Tripp, to make the contract. The record shows that the contract was at no time signed by Groesbeck. After the contract was drawn and signed by E. A. Tripp, he immediately forwarded it by mail to R. B. Tripp at his home in South Dakota and informed him of what had been done in the premises. R. B. Tripp replied by letter assenting to the contract. The case is therefore reduced to these propositions: A contract is written in Utah and is signed on behalf of the vendor, who resides in South Dakota, by one who is wholly unauthorized to make or sign the contract. Until the vendor signed the instrument purporting to be a contract, or assented to it, there was no contract. Until then the minds of the vendee and vendor did not meet, and the writing was but a mere offer or proposal. It matters not where the writing was drafted, whether in Utah or elsewhere. The question is not where was the contract drafted or written, but where was it made? It is an elementary principle of the law of contracts that the place where the last act is done which is necessary to give validity to a contract is the place where the contract is made. 9 Cyc. 670; 2 Parsons on Contracts, 712; 3 Page on Contracts, 1718; U. S. Sav. & Loan Co. v. Beckley, 137 Ala. 119, 33 So. 934, 62 L. R. A. 33, 97 Am. St. Rep. 19. In this case the last act necessary to make the writing in question a valid contract was done by R. B. Tripp in South Dakota when he assented to

it. Had he withheld assent, there would not have been any valid contract between him and plaintiff's assignor.

It is also a well-recognized rule that, when no place of performance is fixed by the contract, it will be presumed that the contract is to be performed where made. 3 Page on Contracts, 1717; 9 Cyc. 669; *Lewis v. Headley*, 36 Ill. 433, 87 Am. Dec. 227; *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 294; *Pritchard v. Norton*, 106 U. S. 137, 1 Sup. Ct. 102, 27 L. Ed. 104; 22 A. & E. Enc. Law (2d Ed.) 1325, and cases cited in note 2. Counsel for appellant concede this to be the law. But they contend that the contract was made in this state, and that it is a Utah contract; and from this premise, in their brief, they reason as follows: "There being nothing in the contract fixing any other place of performance, the law made it performable in Utah and nowhere else. If it was thus to be performed in Utah, a failure to perform any part must inevitably result in constituting a breach in Utah and not elsewhere. From this flows the logical result that a cause of action, if any arose at all, must have arisen in Utah and not elsewhere. Logically no other conclusion is possible." (Citing *Deseret Irr. Co. v. McIntyre*, 16 Utah, 398, 52 Pac. 628, and *Brown v. Bach*, supra.) But the court found that the contract was made in South Dakota, and was therefore a South Dakota contract, and, as we have stated, the record supports this finding. Therefore, applying the rule of law contended for by appellant, the correctness of which must be conceded, to the finding that the contract was made in South Dakota, it necessarily follows that the cause of action arose in that state and not in Utah. Hence the finding of the trial court, that the action was barred by the statute of limitations, must be sustained.

The judgment is affirmed, with costs.

STRAUP, J., and CHIDESTER, District Judge, concur.

SALT LAKE CITY v. CHRISTENSEN CO.

(Supreme Court of Utah. April 14, 1908.)

1. CONSTITUTIONAL LAW—CONSTRUCTION OF CONSTITUTIONAL PROVISIONS—STATE CONSTITUTIONS—GRANT OR LIMITATION OF POWERS.

State Constitutions are mere limitations, and not grants, of powers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 30.]

2. TAXATION—NATURE AND EXTENT OF POWER—POWER OF LEGISLATURE IN GENERAL.

The power of taxation is a legislative function, and, unless restrained by the Constitution, the exercise of this power is vested in the Legislature, whose power over the subject is plenary and supreme.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 59.]

3. LICENSES—OCCUPATION TAX—CONSTITUTIONAL PROVISIONS—LEGISLATIVE POWER.

... Const. art. 13, § 3, requires the Legislature to provide by law a uniform and equal rate of

assessment and taxation of all property. Section 12 provides that nothing in the Constitution shall be construed to prevent the Legislature from providing a tax on occupation, license, franchise, or mortgages. *Held*, that section 12 places no limitation on the power of the Legislature to impose the several kinds of taxes specified therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, §§ 2-16.]

4. SAME—EQUALITY AND UNIFORMITY.

The constitutional provision imposing equality and uniformity of taxation has no application to an occupation or license tax, but is limited to a direct property tax, which is assessed and collected in the usual way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 8.]

5. SAME—NATURE OF OCCUPATION TAX.

A tax imposed on the carrying on of any business, trade, profession, or calling is not a direct tax on property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 1.]

6. SAME—AMOUNT OF TAX—REASONABLENESS—CLASSIFICATION.

Rev. St. 1898, § 206, subd. 87, confers power on cities to raise revenue by levying and collecting a license fee or tax on any private corporation or business within the limits of the city, and regulate the same by ordinance, and provides that all such license fees and taxes shall be uniform in respect to the class upon which they are imposed. *Held*, that an ordinance imposing a tax on any business, trade, profession, or calling, and which divides the merchants and bankers into 22 classes, those carrying stock exceeding \$500,000 to constitute the first class and pay an annual license tax of \$500, the lowest class being limited to \$200, which pays an annual license tax of \$10, and the amount of \$100,000, constituting the difference between each of the first five classes, was not in violation of the statute, the classification, while in one sense arbitrary, not being unreasonable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 63.]

7. TAXATION—POWER TO TAX—RESTRICTIONS—POWERS OF COURTS.

Where neither the Constitution nor the statute imposes absolute restrictions on the power of taxation, the courts may not arbitrarily impose any, unless it clearly appears that the tax imposed is oppressive or clearly and unreasonably discriminatory, and thus is an abuse of the taxing power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 59.]

8. MUNICIPAL CORPORATIONS—ORDINANCES—OCCUPATION TAX—VALIDITY.

That the penal provision of an ordinance providing for an occupation tax may be void, as imposing a penalty for failure to pay the tax which is not imposed for a failure to pay taxes generally, does not invalidate the remainder of the ordinance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 248-251.]

Appeal from District Court, Third District; Geo. C. Armstrong, Judge.

The Christensen Company, a corporation, was convicted of violating a city ordinance imposing an occupation tax, and appeals. Affirmed.

Zane & Stringfellow, for appellant. Ogden Hiles and H. J. Dininny, for respondent.

FRICK, J. On the 27th day of November, 1906, the city, in due form, filed a complaint

in the city court wherein it was alleged that the defendant was carrying on a certain business within said city without having complied with certain sections of an ordinance requiring the payment of a certain license tax as therein specified. The defendant, appellant here, demurred to the complaint. The case, by consent of the parties, was transferred from the city court to the district court of Salt Lake county. In connection with the demurrer aforesaid the parties submitted the case to the district court upon substantially the following agreed statement of facts:

That the appellant is a corporation, and is engaged in and carrying on the business of a shoe merchant in said city; that it has refused to comply with sections 356 and 380 of the Revised Ordinances of said city; that appellant has paid all taxes except the license tax referred to in said ordinance, which latter tax appellant claims to be invalid; that appellant for the year 1906 had been duly assessed upon all of its stock under the laws of the state for state, county, and city purposes (other than said license tax), and that the taxes so assessed have been fully paid; that the license tax now in question is attempted to be collected upon the same stock of goods upon which the other taxes referred to above were paid. Section 356 of the City Ordinances provides: "It shall be unlawful for any person to engage in or carry on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required, without first taking out or procuring the license required for such business, trade, profession, or calling." Section 380, so far as material here, provides: "It shall be unlawful for any wholesale or retail merchant to commence or carry on his business without first making a statement under oath of a cash value of all goods, wares, and other merchandise which he may have in his possession or under his control for sale." The ordinance is also made applicable to bankers and brokers, who must make a similar statement showing the amount of capital employed in the business conducted by them. These statements are required to be filed with the city recorder. The ordinance divides the merchants and bankers into 22 classes. All those that exceed the sum of \$500,000 constitute the first class, and must pay an annual license tax of \$500. The lowest class is limited to \$200, which pays an annual license tax of \$10. The several classes are somewhat arbitrarily arranged. To illustrate: The amount of \$100,000 constitutes the difference between each of the first five classes; that is, the first class takes in all above \$500,000, while the fifth class reaches all above \$100,000 and not exceeding \$200,000, and so on. The fifth class pays a license tax of \$300 annually, the fourth \$350, and the third \$400, and the second \$450.

The sixth class reaches all stocks valued at \$75,000 and not exceeding \$100,000, and pays \$250 as an annual tax. The seventh class reaches stocks valued at \$60,000 and not in excess of \$75,000, and pays an annual license tax of \$225. The classification is continued by this method until it reaches the lowest class as stated above. The appellant comes within the nineteenth class, the stocks of which are valued at \$1,000 and not to exceed \$2,000, and is required to pay an annual license tax of \$30. The foregoing, we think, sufficiently illustrates the classification upon which the city bases its right to impose the license tax involved in this proceeding. Upon the foregoing facts and the two sections of the ordinance above quoted from, the district court overruled the demurrer and adjudged the appellant guilty of a violation of the ordinance aforesaid, and imposed a fine of \$10 and costs, from which this appeal is prosecuted.

The first alleged error to be noticed relates to the objection that the ordinance is invalid. It is strongly urged by counsel for appellant that the ordinance in question offends against section 3 of article 13 of the Constitution of this state, which, so far as material here, provides: "The Legislature shall provide by law a uniform and equal rate of assessment and taxation of all property in the state, according to its value in money, and shall prescribe by general laws such regulations as shall secure a just valuation for taxation of all property; so that every person and corporation shall pay a tax in proportion to the value of his, or its property." No doubt the provisions of this section are mandatory, and require that all property taxes shall be equal and uniform in so far as this may be accomplished by the application of general laws. Does this section apply to the license tax in question? If it does, then, perhaps, it may be said that the tax imposed by the ordinance is not as equal and uniform, when limited to a strict money valuation, as it could be made, and hence the tax is not proportioned as required by the section just quoted. We think, however, that the section in question was not intended to have, and, in fact, does not have, any application to the license tax in question. It is quite true, as counsel for appellant suggest, that the tax in question, although called a license tax, is, nevertheless, not within that class of licenses which are imposed under the police power of the state for the purposes of regulation, but that it is in fact a tax imposed for revenue purposes merely. This may be conceded, and still we think the tax in question is not within the constitutional provision above referred to. Section 12 of the same article provides: "Nothing in this Constitution shall be construed to prevent the Legislature from providing a stamp tax, or a tax on income, occupation, license, franchise or mortgages." It is contended that this section must be con-

strued in pari materia with that part of section 3 quoted above, and that the different kinds of taxes enumerated in the latter section must be equal and uniform, precisely the same as those must be which are mentioned in section 3. It seems to us, however, that section 12 has nothing whatever to do with section 3. It is too well settled to require more than passing mention that state Constitutions are mere limitations and not grants of powers. It is equally well settled that the power of taxation is a legislative function, and unless restrained by the Constitution the exercise of this power is vested in the Legislature and its power over the subject is plenary and supreme. By adopting section 12, as we view it, the framers of the Constitution neither intended to, nor did they, in any way place a limitation upon the power of the Legislature to impose the several kinds of taxes specified in that section. Out of abundant caution, however, the framers of the Constitution said that nothing therein should be so construed as to prevent the Legislature from imposing and enforcing the said taxes.

Having thus eliminated from the Constitution altogether the several kinds of taxes specified in section 12, is it reasonable to suppose that the framers of that instrument nevertheless intended to provide for the conditions upon which such taxes should be imposed by a reference to other parts of the same instrument? The framers of the Constitution imposed certain duties, and with them certain specified restrictions, upon the Legislature, but in section 12 neither duties nor restrictions of any kind are mentioned. All that was intended, and all that was there said, was that nothing that had been said on the subject of taxation should be construed so as to in any way curtail the power of the Legislature with regard to license or occupation taxes. In other words, the framers of the Constitution desired to impress upon all that no restriction upon the Legislature should be implied from what had been before written in that instrument upon the special subject of taxation referred to in section 12. We are of the opinion, therefore, that the right to impose occupation and license taxes and the other subjects of taxation mentioned in section 12 was left, and clearly intended to be left, where it always was, namely, with the Legislature, to be applied and controlled as to it might seem just and proper.

Independently of the constitutional exception above discussed, the courts have frequently passed upon and applied the general constitutional provision demanding equality and uniformity of taxation. The decisions are almost, if not quite, unanimous that the constitutional provision which imposes equality and uniformity of taxation has no application to an occupation or license tax, but is limited to a direct property tax which is assessed and collected in the usual way;

and, further, the contention that the tax in question is a direct tax upon property is also very ably and satisfactorily discussed and decided against counsel's contentions by the following, among numerous other, cases: *City of Newton v. Atchison*, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486; *Banta v. City of Chicago*, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611; *American Union Express Co. v. City of St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382; *In re Watson*, 17 S. D. 486, 97 N. W. 463; *Baker v. City of Cincinnati*, 11 Ohio St. 534; *Fleetwood v. Read*, 21 Wash. 547, 58 Pac. 605, 47 L. R. A. 205; *Stull v. De Matos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; *City of Aurora v. McGannon*, 138 Mo. 38, 39 S. W. 469; *Clark v. City of Titusville*, 184 U. S. 329, 22 Sup. Ct. 382, 46 L. Ed. 569; *Commonwealth v. Clark*, 195 Pa. 634, 46 Atl. 286, 86 Am. St. Rep. 694, 57 L. R. A. 348; *City of Little Rock v. Prather*, 46 Ark. 471; *City of Los Angeles v. Los Angeles Ind. Gas Co. (Cal.)* 93 Pac. 1006; *Mageneau v. City of Fremont*, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786, 27 Am. St. Rep. 436; *Rosenbloom v. State*, 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922.

Counsel for appellant, however, contend that the cases decided by the Supreme Court of the United States are not controlling, because that court simply passed upon the question whether such taxes were in conflict with the federal Constitution. This contention is no doubt correct, but inasmuch as the tax in question does not come within the section of our Constitution which requires it to be based upon a strict money valuation, what is said by the Supreme Court of the United States with regard to the propriety of classification and uniformity is of great, if not controlling, force.

But it is further contended that if the tax in question is not violative of the Constitution of this state, it still must fail because it is in violation of subdivision 87, § 206, Rev. St. 1898, by virtue of which the tax is imposed. Under section 206 the Legislature has conferred certain powers upon the cities of this state, and, among others, the following: "To raise revenues by levying and collecting a license fee or tax on any private corporation or business within the limits of the city, and regulate the same by ordinance. All such license fees and taxes shall be uniform in respect to the class upon which they are imposed." The foregoing is a verbatim copy of what constituted subdivision 89 of section 1755, Comp. Laws 1888, which was in force at the time the Constitution was adopted, and was re-enacted and incorporated into the Revised Statutes of 1898. This is cumulative evidence that the framers of the Constitution in adopting section 12 of article 13, above referred to, intended to leave the power and manner of imposing license taxes just as they were. The provision is also, with the exception of three words, namely, "private corporations" and "fees," a transcript of the stat-

ute of Nebraska, under which the tax under consideration in the case of *Mageneau v. Fremont*, supra, was imposed. The same objection to the tax was made in the Nebraska case as is here made, namely, that the tax is not uniform, and therefore is not in compliance with the foregoing provision. This objection was, however, overruled in the Nebraska case, and this was done notwithstanding the fact that the tax in Nebraska was imposed upon all merchants alike, whether large or small, under what is termed a "flat rate." This will also be found to have been the case in a number of other cases, while in others a classification was upheld similar to the one under which the tax in question was imposed. The authorities, therefore, are against the contention of appellant that such a classification offends against uniformity. The provision is not that the taxes must be equal as between individuals, but that they "shall be uniform in respect to the class upon which they are imposed." If a flat rate upon all merchants alike is a uniform tax within the provision, why is one where greater equalization is effected by classifying the merchants into groups, so as to bring those with stocks the value of which are more nearly alike, not also uniform? The classification is for the sole purpose of establishing equality, so far as this can be done.

These questions of uniformity and equality are fully discussed and decided against appellant, and classifications similar to the one applied in this case are sustained in the cases cited from Kansas, Pennsylvania, the Supreme Court of the United States, Missouri, Arkansas, California, and others. While Mr. Justice Brewer, in the Kansas case, supra, suggests that prima facie a tax assessed upon the actual value of property is perhaps better calculated to approximate true equality and uniformity than this can be done by any other method, he, nevertheless, concedes that it is but a theory, and that such a method may not in all cases produce equality or uniformity. Where the burden imposed by a tax is alone considered, the foregoing method, as a general rule, may respond to both uniformity and equality, but where the benefits derived from a city imposing the tax are considered in connection with the burdens thereby imposed, a tax based strictly upon a property valuation worked out by percentages may fall far short of being either equal or uniform. For example: In a city like Salt Lake, where the city provides police and fire protection and lights the streets for all alike, and defrays the expenses incident thereto out of the general funds, it is not unlikely that a merchant with a stock worth \$5,000 may derive fully as much benefit from this source as one with a stock worth \$50,000, and it may cost the city quite as much to protect the lesser as it does the greater. The maintaining of the streets in repair and sprinkling and flushing them applies in the same way. No method of taxation that is absolutely equal and uni-

form has yet been discovered. If, therefore, a flat rate upon all merchants alike should be imposed, the disparity of the tax as applied to individual cases may be much greater still than it would be by a reasonable classification of the merchants as has been done by the city in this case. It may cost the city more in proportion to provide the appellant with the necessary fire and police protection, say nothing concerning the other matters referred to, than it does to provide the same things to one of the classes above him which pays a larger tax. The classification adopted by the city, while in one sense arbitrary, cannot be said to be unreasonable as a matter of law. Its purpose is not to oppress, but rather to equalize the burden of taxation. If a tax were levied strictly according to value, and the amount thereof ascertained by percentages upon such value, may it not, for the same reasons we have stated, perhaps be less equal and uniform than it is by the present method? This is, we think, well illustrated by the late case cited from California. It is also illustrated by the cases which uphold the flat rate upon all merchants and business men alike. Numerous other illustrations might be made, and some others are given in the cases cited, why the method to be pursued in imposing taxes of the character now under consideration must, to a very large extent, be left to the discretion of those whose duty it is to impose and collect them. Where neither the Constitution nor the statute imposes absolute restrictions, the courts may not arbitrarily impose any unless it clearly appears that the tax imposed is oppressive, or clearly and unreasonably discriminatory, and thus is an abuse of the taxing power. Under the very numerous decisions of the courts of this country, emanating, as they do, from the highest federal and state courts, the questions with regard to the uniformity and equality, as well as the method of classification pursued by the city in this case, are no longer open questions. All of them have been settled adversely to the contention of appellant. *Matthews v. Jensen*, 21 Utah, 207, 61 Pac. 303, does not announce a doctrine contrary to the cases above referred to. In that case the power of imposing the license was involved. What is there said about classification and uniformity was applied to the imposition of the license fee under the police, and not under the taxing, power of the state. That decision, therefore, has no controlling influence upon the question involved in the case at bar.

Finally, it is urged that the ordinance is invalid because it imposes a penalty by fine or imprisonment for a failure to pay a mere property tax, which penalty is not imposed for a failure to pay taxes generally. If we assume that this part of the ordinance were void for the reasons stated, it would still not affect the validity of the tax. *Mageneau v. City of Fremont*, 30 Neb. 854, 47 N. W. 280, 9 L. R. A. 786, 27 Am. St. Rep. 436. In 2 *Cooley on Taxation* (3d Ed.) p. 848, the author,

after stating that the constitutional provision against imprisonment for debt does not apply, says: "In case of license taxes it is still customary to provide for arrest and imprisonment as a means of enforcing payment." A large number of cases are cited in support of the text. In *Rosenbloom v. State*, 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922, the former decisions of the Supreme Court of Nebraska holding to the contrary are overruled. The Supreme Court of Nebraska in the latter case brings itself into harmony with the great weight of authority in holding that arrest, fine, and imprisonment may be resorted to for the purpose of enforcing payment of license and occupation taxes. The decisions from a large number of the state courts are cited in the latter Nebraska case, and we shall do no more than to refer the reader to that case for the decisions upon this point.

From what has been said it follows that the ruling of the district court was in accordance with the great weight of authority, and the judgment is accordingly affirmed, with costs to respondent.

McCARTY, C. J., and STRAUP, J., concur.

CHADWICK v. ARNOLD et al.

(Supreme Court of Utah. April 4, 1908.)

1. TRIAL—FINDINGS OF COURT—SUFFICIENCY—CONCLUSIONS—FINDINGS OF FACT—SEPARATE STATEMENT OF.

In an action to have the holder of the legal title of certain real estate adjudged a mere holder of the title in trust for plaintiff's benefit, by reason of a verbal contract entered into between plaintiff and the person from whom, with notice, defendant acquired his title whereby such person agreed to convey the realty to plaintiff upon receipt of a certain sum, a finding that no enforceable contract existed between the plaintiff and such person was insufficient under Rev. St. 1898, § 3169, requiring that the facts found and the conclusions of law be separately stated.

2. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—NOTICE—EVIDENCE.

In an action to have the holder of the legal title of certain real estate adjudged to hold it in trust for plaintiff, evidence examined, and held to show that defendant acquired the title to the property with actual notice of plaintiff's rights.

3. FRAUDS, STATUTE OF—CONTRACTS WITHIN—ORAL CONTRACTS—SALE OF LAND.

A mere oral agreement to purchase land from another is within the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, *Frauds, Statute of*, §§ 122-131.]

4. TRUSTS—CONSTRUCTIVE TRUSTS—RESULTING TRUSTS—CONTRACTS CREATING.

Where a person having no interest in certain real estate orally agrees with another that the latter should purchase it with his own funds, taking the title in his name, and that he should thereafter convey it to the first person at an agreed price, no resulting or constructive trust arises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, *Trusts*, §§ 102-120, 140.]

5. FRAUDS, STATUTE OF—CONTRACTS WITHIN.

A contract whereby one person agree to use his own funds to purchase certain real estate in which the other party to the contract has no

interest, taking the title in his own name, and to thereafter convey the property to the other party upon an agreed price, is within the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 122-131.]

6. TRUSTS — CONSTRUCTIVE TRUSTS — "TRUST EX MALEFICIO."

A trust *ex maleficio* arises whenever a person acquires the legal title to property of another by means of an intentional false or fraudulent verbal promise to hold the same for a certain purpose, and, having thus obtained the title, retains and claims the property as his own.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 148.

Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7127, 7822.]

7. SAME—CREATION.

A verbal contract was entered into between a person who was both the legal and equitable owner of certain real estate, subject only to a mortgage, and another who agreed to bid in the property on foreclosure sale, obtain a sheriff's deed therefor, and thereafter to convey the title to the owner for a certain sum, relying upon which agreement the owner failed to make an appearance at the foreclosure sale, whereby the land was bid in by the other party to the agreement for about one-third of its value. Before such person received the sheriff's deed, and within the period within which the property could have been redeemed, the owner paid to such person a portion of the price which he was to pay, which was received and applied on the amount to be paid as a prerequisite to the conveyance of the title. After obtaining title such person asserted his ownership to the property, and refused to convey it according to the agreement. *Held*, that a trust *ex maleficio* arose, enforceable though the contract was not in writing as required by the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 148.]

8. VENDOR AND PURCHASER—RIGHTS OF PURCHASER—BONA FIDE PURCHASERS—NOTICE.

A purchaser of property from a party holding the legal title in trust for another, with notice of the existence of the trust, is in no better position to assert title than the person from whom he purchased.

9. TRUSTS — ESTABLISHMENT—PROCEEDINGS—JUDGMENT.

Where, in an action to adjudge the holder of the legal title to certain property a trustee for the benefit of another, the evidence showed the existence of a trust *ex maleficio*, the fact that plaintiff based her right to recover by demanding by her pleadings the specific performance of an oral contract by the defendant's vendor to convey the property to her for a certain sum, though the mortgage indebtedness against the property, which defendant's vendor removed, was more than twice such sum, and though it would be inequitable and unjust to defendant to compel the reconveyance of the property by defendant to plaintiff for the contract sum, did not preclude plaintiff from obtaining relief, as the relief granted by equity, where a trust *ex maleficio* is raised, is not founded on the specific performance of an oral contract, but upon the principle that equity turns the fraudulent procurer of the legal title into a trustee, and, by raising such a trust by construction, can do equal and complete justice between the parties; and hence, where the conveyance of the property upon the payment of the contract sum would be inequitable, it will order a reconveyance upon such terms as are equitable, and will protect the rights of the person defrauded.

Appeal from District Court, Fourth District; J. E. Booth, Judge.

Action by Aseunath Chadwick against John

H. Arnold and another. From a judgment for defendants, plaintiff appeals. Reversed, and remanded with directions.

M. M. Warner, for appellant. D. D. Hontz, for respondents.

STRAUP, J. This is an action in equity in which the plaintiff seeks a decree adjudging that the defendants hold certain real estate in trust for her use and benefit. The substance of the allegations of the complaint is that the plaintiff, the owner of the real estate, mortgaged it to the wife of the defendant Arnold; that thereafter Arnold verbally agreed to purchase the mortgage, bid the property in at foreclosure sale, and agreed to convey the title of the property to her for the sum of \$2,500 after he obtained a sheriff's deed; that, relying on his promise, she made no appearance in the action brought to foreclose, and made no effort to redeem the property within the statutory period of redemption; and that, in pursuance of the agreement, she made partial payments to Arnold, and after the property was sold at foreclosure sale, and after Arnold obtained the sheriff's deed, she tendered him the balance of the \$2,500, but he refused to reconvey the property to her, claiming the property as his own, and sold it to the defendant Emert, who purchased it with notice of her claim of interest. She prayed that the defendants be required to convey the property to her upon the payment of the unpaid balance of \$2,500, or, if specific performance of the contract be denied, that she be permitted to redeem the premises from the foreclosure sale. The court rendered judgment in favor of defendants, quieting the title in the defendant Emert and dismissing the action against Arnold, without prejudice to another action to adjudicate the monetary transactions had between plaintiff and Arnold. The plaintiff appeals, assailing the findings and conclusions.

At the trial the plaintiff gave evidence tending to show that on September 24, 1900, she was both the legal and equitable owner of the real estate in question. On that day she gave a mortgage on the real estate to Eliza Arnold, wife of defendant Arnold, to secure the payment of a promissory note in the sum of \$4,200, with interest at 8 per cent. per annum. Arnold and his wife did not live together harmoniously, and, for three or four years prior to July, 1904, the defendant Arnold lived at plaintiff's place, as she said, "throughout the day, and ate his meals there most of the time." They were then very friendly, and had more or less business transactions together. After the mortgage became due, Arnold told plaintiff that he thought he could make a deal with his wife to buy the mortgage by trading his farm where his wife lived for the mortgage and some cattle owned by his wife, and that if the plaintiff would pay him \$2,500 he would come out even, and that was all he cared for; and that he would

bid in the place and give her a deed for it. Arnold thereupon obtained an assignment of the mortgage. In the meantime suit had been commenced to foreclose the mortgage. Arnold had himself substituted as party plaintiff in the action. He told Mrs. Chadwick not to appear in the foreclosure action, and that when the sheriff gave him a deed the plaintiff could pay him \$2,500 and he would deed the property back to her, and that she could have a year or two after the sheriff's deed in which to pay the money. The mortgage was assigned to Arnold in November, 1902. On November 10, 1903, he obtained a judgment against the plaintiff in the sum of \$4,250, \$825 interest, and costs, and obtained the usual order for a sale of the premises. The property was sold on foreclosure sale January 12, 1904, and was bid in by Arnold for the sum of \$5,100. The sheriff's deed was issued to him July 14, 1904. The plaintiff continued to reside on the premises until August, 1905, when she was dispossessed by order of the court. The plaintiff, relying upon the representations and promise of Arnold, made no appearance in the foreclosure suit, and made no effort to redeem the property within the statutory period of redemption. In April, 1904, and before the sheriff's deed was issued to Arnold, and within the period of redemption, she paid Arnold the sum of \$575 as part payment of the \$2,500, receipt of which was acknowledged by him as follows: "Vernal, Utah, April 28, 1904. Received of Mrs. Asenath Chadwick, five hundred seventy-five (\$575) dollars paid on the Home Farm. John Arnold." The evidence shows that by the expression "Home Farm" was meant the premises in question. Plaintiff also testified that she paid him additional sums of money amounting to \$110, and that he was also indebted to her in the sum of \$296 for pasturage, which amount, it was agreed, should also be credited on the \$2,500. After Arnold got the sheriff's deed, plaintiff tendered him the further sum of \$2,250 and demanded a reconveyance of the property, but he refused to make the conveyance. He sold the property to the defendant Emert for the sum of \$5,250. Plaintiff had owned the farm and resided on it for more than 20 years, and was in possession of it until she was evicted in August, 1905. She testified that the land, 155 acres, was worth \$100 per acre. The evidence further shows that Emert, when he purchased the property, had actual knowledge of plaintiff's claim of interest, but he thought he was not chargeable with such knowledge, because such interest did not appear upon the abstract of title, and that he thought he was bound to take notice only of what did appear of record. Plaintiff further testified, in effect, that she was able and willing to redeem the property sold under foreclosure, and would have done so had it not been for the promise and oral agreement of Arnold.

The testimony of the defendant Arnold in some respects differs from that of plaintiff, but from his own testimony it is quite clear that there was some sort of agreement between himself and the plaintiff concerning the acquiring of the title and reconveying it to the plaintiff. In this regard he testified: "Q. Now, then, Mr. Arnold, did you ever, at any time, have any conversation with Mrs. Chadwick in regard to selling or reconveying the place to her? And, if so, what was that conversation? A. She asked me if I would take \$2,500, and I said 'yes.' * * * It was some time in January—the last days in January or the first days in February after the sale of the property, I think, or after the sheriff's sale. I think a few days after that, the same month. * * * She asked me if I would take \$2,500 down and let them keep the place; if they would pay me \$2,500 down and let them keep it. * * * She says, 'I can pay you \$2,500 down.' She says, 'Will you take it if I'll pay you \$2,500 down; and we can pay you the rest out of this wood contract?' I says, 'yes.'" The material difference between their testimony is that plaintiff claimed Arnold agreed before the mortgage was foreclosed to bid it in and reconvey it after he got the sheriff's deed for the sum of \$2,500, while he claimed the agreement was made about the time or shortly after the foreclosure sale, but within the statutory period of redemption, upon the payment of \$2,500 down and the balance to be paid out of a wood contract. Arnold further denied that the receipt referred to was signed by him. He admitted having received the money, but claimed that it was paid on account of other transactions. The receipt was strong corroborative evidence of plaintiff's claim. Its actual signing and execution by Arnold was testified to by plaintiff and two other witnesses. Two other wholly disinterested witnesses—a justice of the peace and Arnold's attorney, who represented him in the justice's court—testified that, in a prior suit before the justice's court, when the receipt was exhibited to Arnold, he then testified that the signature was his signature. Two other witnesses testified that the signature was in his handwriting. Against all this stands the mere denial of Arnold that it was his signature. His testimony also in other particulars differs from that of the plaintiff.

Though from all the evidence in the case it clearly appeared that some kind of an agreement was entered into between plaintiff and Arnold with respect to Arnold's acquiring the title and reconveying it to plaintiff, nevertheless the court wholly failed to find what the terms of the agreement were, or any of the facts or circumstances surrounding the making of it. Instead of making such findings, the court found as follows: "The evidence is insufficient to warrant any finding that the defendant J. H. Arnold and plain-

tiff ever entered into any agreement respecting the said land, or whereby the said Arnold ever obligated himself to convey or restore said premises or property to plaintiff for any sum or amount whatever, or that there was any contract at all entered into such as could be enforced. The court further finds that the contract, such as the plaintiff claims exists, would, if existing, come within the inhibition of the statute of frauds, and no part performance is either pleaded or proven." It is, of course, apparent that such a finding is not a finding of facts, but a statement of mere conclusions. If the court was of the opinion that the evidence was insufficient to establish the facts and transactions alleged in the complaint, the court ought to have found them against the plaintiff, for on her was the burden of establishing them. If, on the contrary, the court was of the opinion that such facts were established, but that they showed a contract which was ineffectual because of the statute of frauds, the court, nevertheless, should have found the facts, and then, by way of conclusions, should have declared their effect. That is to say, the court should have separately found whatever the facts were respecting the transactions alleged in the complaint, and upon them should then have separately made its conclusions of law. The statute very plainly requires that "the facts found and the conclusions of law must be separately stated." Section 3169, Rev. St. 1898. This the court failed to do. The effect of the court's finding is that no contract existed between plaintiff and Arnold which was enforceable. Not only is the finding open to the objection that findings and conclusions are not separately stated, but it is open to the further objection that it is not a finding of facts but mere conclusions. The court did not find whether the verbal agreement and transactions were as testified to by plaintiff or as testified to by Arnold. That there was an agreement between them respecting the transactions is, however, testified to by both of them and not denied by any one. The material difference in their testimony is as to the amount of money that the plaintiff was required to pay, and as to the value of the property. The court also found: "No knowledge or notice, actual or constructive, was ever received or had by the defendant A. C. Emert that the plaintiff claimed an interest in the said premises." From the findings, or, rather, conclusions of law, it is apparent that the court determined the case on the theory that the parol agreement, as testified to by plaintiff, was within the statute of frauds, and for that reason ineffectual, and that Emert was an innocent purchaser for value. We think the evidence clearly shows that Emert purchased with actual knowledge of plaintiff's claim of interest in the premises, and that the finding which the court made in that regard was contrary to the evidence, and, for that reason, erroneous.

This brings us to the real question in the case: Whether the statute of frauds applies to such a case as testified to by the plaintiff. It, of course, is readily conceded that a mere oral agreement to purchase land from another is within the statute of frauds. So, too, it is conceded that if A., having no interest in the real estate, orally agrees with B. that the latter should purchase it with his own funds and take the title in his own name, and that he should thereafter convey it to A. upon an agreed price, no resulting or constructive trust arises, and that such a contract is also within the statute of frauds. The doctrine, however, is quite generally accepted that a trust *ex maleficio* arises whenever a person acquires the legal title to property of another by means of an intentional false or fraudulent verbal promise to hold the same for a certain purpose, and, having thus obtained the title, retains and claims the property as his own. The doctrine is well stated in volume 3, Pom. Eq. Jur. (3d Ed.) § 1055, as follows: "A second well-settled and even common form of trusts *ex maleficio* occurs whenever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose—as, for example, a promise to convey the land to a designated individual, or to reconvey it to the grantor, and the like—and having thus fraudulently obtained the title, he retains, uses, and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit. Equity regards such a person as holding the property charged with a constructive trust, and will compel him to fulfill the trust by conveying according to his engagement." And in section 1056: "The foregoing cases should be carefully distinguished from those in which there is a mere verbal promise to purchase and convey land. In order that the doctrine of trusts *ex maleficio* with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal, otherwise the statute of frauds would be virtually abrogated; there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute; it endeavors to prevent and punish fraud by taking from the wrongdoer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of constructive trusts." In a note to section 1055 it is said: "The doctrine is often used with great efficacy to prevent the triumph of fraud, and to protect persons under necessities, in cases where, at execution sale, or mortgage foreclosure, or other compulsory public sale, a party buys in the land under a prior fraudulent promise made to the owner that the purchaser will

take the title, hold the property for the benefit of such owner, and will reconvey to him on being repaid the amount advanced for the purchase price; and having thus by fraudulent contrivance cut off competition, and prevented the owner from making other arrangements to protect his property, and having obtained the property perhaps for much less than its real value, he refuses to abide by his verbal promise, and retains the land or other property as absolutely his own. Equity will relieve the defrauded owner by impressing on the property a trust *ex maleficio*, and by treating the purchaser as a trustee in invitum." Mr. Waterman, in his work on Specific Performance of Contracts, at section 252, says: "A verbal agreement entered into by A. and B. with an execution debtor whose land is about to be sold by the sheriff to purchase it with their own funds and hold it for his benefit is equivalent to a loan of money and a taking of the title as security for its repayment, or an agreement by one person to purchase land for the benefit of another, under circumstances which would amount to a fraud upon the latter, if the former were allowed to repudiate his promise, and therefore is not within the statute of frauds." And in section 253: "Where it is verbally agreed between the vendor of land at a judicial sale and the purchaser that the purchaser's rights shall be only those of a mortgagee, and he fraudulently violates the contract by obtaining an absolute deed to himself and selling the land to a third person who has notice of the agreement, the purchaser and his vendee hold the title in trust for the original owner."

With respect to the question when a constructive trust will be created by a court of equity, at section 171, vol. 1, Perry on Trusts (4th Ed.), it is said: "Thus, where one buys land at an execution sale, or sale under a trust deed, under an agreement with the debtor that the latter may redeem, the purchaser holds in trust; it would be a fraud to allow him to repudiate the contract." In the case of *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18, it is observed: "Where one having any interest is induced to confide in the verbal promise of another that he will purchase for the benefit of the former at a sheriff's sale, and in pursuance of this allows him to become the holder of the legal title, a subsequent denial by the latter of the confidence is such a fraud as will convert the purchaser into a trustee *ex maleficio*." In support of these texts are the following cases: *Sandfoss v. Jones*, 35 Cal. 481; *Wolford v. Herrington*, 74 Pa. 311, 15 Am. Rep. 548; *Mulholland v. York*, 82 N. C. 510; *Tankard v. Tankard*, 84 N. C. 286; *Avery v. Stewart*, 136 N. C. 437, 48 S. E. 775, 68 L. R. A. 776; *Rose v. Bates*, 12 Mo. 30; *Soggins v. Heard*, 31 Miss. 426; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Cutler v. Babcock*, 81 Wis. 195, 51 N. W. 420, 29 Am. St. Rep. 882; *Larmon v. Knight*, 140 Ill. 232, 29 N. E. 1116,

33 Am. St. Rep. 229; *Ryan v. Dox*, 34 N. Y. 307, 9 Am. Dec. 696; *Laing v. McKee*, 13 Mich. 124, 87 Am. Dec. 738.

Viewing the case from the standpoint of plaintiff's evidence, it is made to appear that the plaintiff, when the verbal agreement was entered into, was both the legal and equitable owner of the land in controversy, subject only to the mortgage held by Arnold's wife; that Arnold verbally agreed that he would purchase the mortgage, bid in the land on foreclosure sale, obtain a sheriff's deed therefor, and that he would thereafter convey the title to plaintiff for the sum of \$2,500; that she, relying upon his promise and representations, failed to make an appearance in the foreclosure suit or to redeem the property from foreclosure sale; that the land, worth more than \$15,000, was bid in by Arnold for \$5,100, a sum less than the mortgage indebtedness; that before Arnold obtained the sheriff's deed, and within the period in which the property could have been redeemed, plaintiff paid him something like \$685 in cash, which was received by him and applied on the agreement; and that the defendant Arnold, after having acquired the sheriff's deed, retained the title, claimed the property as his own, and refused to convey it to plaintiff. Upon such facts we think a trust *ex maleficio* arose, and that it would be a fraud to allow Arnold to repudiate the contract. In this respect it can be here said, as was said by the court in *Avery v. Stewart*, supra: "If the legal title is obtained by reason of a promise to hold it for another, and the latter, confiding in the purchaser and relying on his promise, is prevented from taking such action in his own behalf as would have secured the benefit of the property to himself, and the promise is made at or before the legal title passes to the nominal purchaser, it would be against equity and good conscience for the latter, under the circumstances to refuse to perform his solemn agreement and to commit so palpable a breach of faith. It would be strange indeed if such conduct is beyond the reach of a court of equity, and if the party who has been grossly deceived and injured by it is without a remedy. The fact that the defendant in this case paid the purchase price out of his own money should not alter the case to the prejudice of his victim." And as Emert took the property with notice, he is in no better position to assert title and ownership of the property than is Arnold. We therefore think that the finding, or conclusion, of the trial court that the agreement as claimed by plaintiff came within the statute of frauds was erroneous. The foregoing authorities clearly show that the statute of frauds does not apply to such a case.

It is urged, however, that the plaintiff must recover, if at all, the specific performance of the contract as alleged and testified to by her. That is, it is claimed that the defendants must be required to reconvey to

her on the payment of the balance of the \$2,500, or not at all, and, since the plaintiff did not dispute owing the full amount of the mortgage indebtedness and had no defense to the foreclosure action, it is said that to compel the defendants to reconvey the property to her for \$2,500 when she owed more than twice that amount is inequitable and unjust, and therefore, as the contract which she is seeking to enforce is inequitable, no relief can be granted her. Such a conclusion does not necessarily follow. The relief granted by courts of equity, where a trust *ex maleficio* is raised, is not founded on the specific performance of the oral contract, but upon the principle that equity turns the fraudulent procurer of a legal title into a trustee to get at him. That is to say, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of the circumstances and relations, and this trust they will fasten upon the conscience of the offending party and will convert him into a trustee of the legal title and order him to hold it for the benefit of the owner or to execute the trust in such manner as to protect the rights of the defrauded party. The rule is well stated in Pomeroy's Equity Jurisprudence, *supra*, that "equity does not pretend to enforce verbal promises in the face of the statute; it endeavors to prevent and punish fraud by taking from the wrongdoer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of constructive trusts." In Bispham's Principles of Equity (7th Ed.) § 218, in speaking of the enforcement of trusts *ex maleficio*, the rule is stated that "the ground of these decisions is that the statute of frauds is not to be used as a shield for fraud; and that where a party has, by his promise to buy or hold or dispose of real estate for the benefit of another, induced action or forbearance by reliance upon such promise, it would be a fraud that the promise should not be enforced; and that the method of enforcement will be through the machinery of a trust." And in the case of *Cutler v. Babcock*, *supra*, the court said: "Nor is it necessary to rest the right of the defendant Babcock solely on the power of a court of equity to compel the plaintiff to specifically perform his part of the agreement by conveying the lots in question to the defendant. The relief sought may well be rested on the jurisdiction of the court on the ground of fraud by holding the plaintiff liable to convey as a trustee *ex maleficio*." These trusts differ from other trusts in that they are not within the intention or contemplation of the parties at the time the contract is made. They are thrust upon a party contrary to his intention and against his consent. Courts of equity, by raising a trust by construction in cases of fraud, can do equal and complete justice between the parties. When the trust is raised, a court of equity can order the trustee to hold the legal title for the original owner

upon just and proper terms, or to execute the trust in such manner as to protect the rights of the defrauded party. The facts and circumstances as shown by the evidence are sufficient to raise the trust. If, in the execution of it, it is not equitable to compel a reconveyance of the property upon the payment of \$2,500, the defendants are not, for that reason, to be permitted to take advantage of their wrong, but should be made to execute the trust upon such terms as are equitable, and as will protect the rights of the plaintiff. We think there is force to the position that, on the record, the defendants should not be compelled to reconvey the property upon the payment of \$2,500 less the payments already made by the plaintiff. We think it would be more consistent with equity to require a conveyance upon the payment of the amount of the mortgage indebtedness, less the payments made by the plaintiff, the amount of indebtedness, if any, owing by the defendant Arnold to her, and the rents and profits derived by the defendants from the premises.

We are of the opinion, on the whole of the evidence, that the court erred in holding that the statute of frauds applied to the case, and in finding that Emert was an innocent purchaser. The findings and conclusions of the trial court in that respect are set aside, and the court directed to make findings and conclusions to the effect that the defendants hold the title of the premises in trust for the plaintiff. The case is further remanded to the trial court with directions that an accounting be had between plaintiff and respondents, and that the court especially determine the amount of the mortgage indebtedness, including interest and costs, the payments made by plaintiff to Arnold, and the amount of indebtedness, if any, owing by Arnold to her, and which they had agreed should be credited to her account, the value of the rents and profits since plaintiff's dispossession, and, if necessary, or if either party desires it, to take further evidence on these questions and on the accounting. The court is then directed to deduct from the amount of the mortgage indebtedness, including interest and costs, whatever amount is found to have been paid Arnold by plaintiff, the amount of his indebtedness to her and which they agreed should be credited to her account, the rents and profits of the premises since plaintiff's dispossession, and whatever other matter is found should be credited to plaintiff on the accounting, and to make findings accordingly. The court is directed to then adjudge that the defendants be required to convey the premises to plaintiff upon her payment to the defendant Emert of the balance so remaining after making such deduction, giving plaintiff six months from the time of re-entry of judgment within which to make such payment; and on her default to make such payment, then she is barred of

all right, title, and interest in and to the premises.

The judgment of the court below is therefore reversed, and the case remanded. Appellant is given costs of this appeal.

McCARTY, C. J., concurs.

FRICK, J. (concurring). While I concur in the law as the same is stated, and the result reached, by my Brethren, I, nevertheless, feel constrained to add a few words, in view of some of the statements contained in the opinion of Mr. Justice STRAUP with regard to the testimony in the record. I do this, not because the testimony in the opinion is stated incorrectly, unfairly, or improperly, but because I fear that, in referring to the case hereafter as a precedent, it may be assumed that the conclusions reached in this case were based on certain elements which, in my judgment, are not in the case.

In summing up plaintiff's testimony and the reasons why a trust *ex maleficio* should be declared, Mr. Justice STRAUP, among other reasons, gives the following: "That the land, worth more than \$15,000, was bid in by Arnold for \$5,100, a sum less than the mortgage indebtedness." From this—although, no doubt, not so intended—no other inference could be deduced than the one that Mr. Arnold obtained the title to the land for the purpose of reaping a large profit. It is true that Mrs. Chadwick placed such a value upon the land, but the testimony of a number of qualified and disinterested witnesses is to the effect that the value of the land was no more than the amount at which it was bid in at the foreclosure sale. It further appears that after the foreclosure sale the land was publicly advertised for sale for a long time prior to the sale of it to Mr. Emert, and could have been bought at the price paid for it by him. Moreover, the sheriff's sale was open to all bidders, and no one bid more than Mr. Arnold bid for it. If we view the matter of value, therefore, from the standpoint of the witnesses alone, the testimony is overwhelmingly against Mrs. Chadwick. But if we add to this the further circumstance, no court would be justified in finding that Mr. Arnold did not bid in the land at a fair valuation.

It appears that the land was placed in the hands of at least one real estate agent for sale; that he inspected it with a view of setting a price upon it; and that another man, who was a large owner of lands in the vicinity, also inspected it, and was well qualified to express an opinion as to its value, testified that the land was worth not to exceed \$5,000, and that he would not pay that sum for it, while the real estate agent testified that it was worth about that amount. In view of these facts, which, to my mind, are conclusive with respect to the value, Mr. Arnold cannot be said to have been actuated in what he did by the expectation of reaping a

large profit out of the land; and this feature, therefore, in my judgment, ought not be considered as an element in the case. But, even after eliminating this feature—as Mr. Justice STRAUP well says—there was at least some kind of an agreement between Mrs. Chadwick and Mr. Arnold with respect to his acquiring the title to the land at the foreclosure sale and its disposition thereafter. What this agreement was the parties to it do not agree, and the court has made no findings respecting its terms and conditions. Taking Mrs. Chadwick's version of it and that of the only other witness who testified in her behalf upon that subject, I was strongly inclined to the view that the agreement amounted to no more than that Mrs. Chadwick should have the right to repurchase the land from Mr. Arnold at the agreed price of \$2,500 to be paid for by her with interest from time to time as she was able to do so. If the agreement amounted to no more than this, and being in parol, it was invalid because within the statute of frauds. This conclusion was deduced, to some extent at least, from the fact that Mrs. Chadwick had absolutely no defense to the note and mortgage, and hence could not have been prejudiced in any way by not appearing in the foreclosure action. Moreover, she said that she was to have the land reconveyed to her free of all incumbrances.

While I have no doubt that Mrs. Chadwick was not misled nor injured by the foreclosure proceedings, nor by the sale thereunder, I am not so clear that she was not misled with regard to her right to redeem the land from foreclosure sale. The majority of this court are firmly of the opinion that in view of all the facts and circumstances a trust *ex maleficio* arose by reason of which Mr. Arnold should be adjudged as holding the land in trust for Mrs. Chadwick. In this regard I feel constrained to yield to their judgment. The judgment of two out of three, where all have equal opportunity to examine and judge of the facts, is, in my judgment, stronger than the judgment of one. Under such circumstances I feel constrained to yield to their judgment. I do so with less hesitancy in this case for the reason that if my judgment, as first conceived, should be wrong, Mrs. Chadwick would be left without redress, while, on the other hand, the court may, in its decree, protect the interests of all and do complete justice between them in accordance with the equities in favor of each.

ROBINSON v. MUTUAL SAVINGS BANK
OF SAN FRANCISCO et al. (Civ. 411.)

(Court of Appeal, First District, California.
March 5, 1908. Rehearing Denied
April 2, 1908.)

1. BANKS AND BANKING—DEPOSITS—OWNER-SHIP—EVIDENCE.

Evidence held to show that plaintiff who deposited money in a bank to the joint account

of herself and decedent deposited it as the agent of decedent for decedent's use.

2. GIFTS—GIFTS INTER VIVOS—TIME OF TAKING EFFECT.

A valid gift goes into immediate effect and has no reference to the future; it divests the donor of its title, and requires a renunciation on his part of all claim and interest in the subject of the gift, and hence where a woman placed money of her own in a bank to the joint account of herself and another so that either could draw therefrom, and retained the bank book herself, there was no gift of the account to the other person.

3. JOINT TENANCY—JOINT ACCOUNT IN BANK.

The deposit of money to the joint account of depositor and his agent did not constitute a joint tenancy or ownership with right of survivorship.

4. GIFTS—ASSERTION AFTER DEATH OF DONOR—EVIDENCE.

Where the claim of a gift is not asserted until after the death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 95-100.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Lizzie C. Robinson against the Mutual Savings Bank of San Francisco to recover a deposit in which Joseph Leggett and Charles H. Robinson, as executors of Amanda M. Scales, interpleaded, claiming the money, and upon the deposit of the amount in court by the bank the interpleaders were substituted as defendants. From a judgment for plaintiff and an order denying a new trial, the substituted defendants appeal. Reversed.

Jas. G. Maguire and Devoto & Richardson, for appellants. A. Ruef and F. T. Finch, for respondent.

HALL, J. Plaintiff brought suit against the Mutual Savings Bank of San Francisco to recover the sum of \$4,370.49 as the balance of money alleged to have been deposited by plaintiff with said bank. Upon a showing by the defendant bank that Joseph Leggett and Charles H. Robinson, as executors of the last will of Amanda M. Scales, deceased, made claim to the same money, said defendant bank was allowed to deposit with the court said sum of \$4,370, and was thereupon dismissed from the action, and said Leggett and Robinson, as such executors, were substituted as defendants. Leggett and Robinson, as such executors, answered plaintiff's complaint, and set up a claim to said money as part of the estate of Amanda M. Scales, deceased. The findings and judgment were in favor of plaintiff and against the substituted defendants, who have appealed from the judgment and the order denying their motion for a new trial. Appellants attack the findings as not being supported by the evidence.

It is alleged in the complaint that prior to the commencement of the action plaintiff

deposited with defendant the Mutual Savings Bank of San Francisco, and the said defendant received of and from plaintiff, for the use and benefit of plaintiff, the sum of \$5,729.69, which said amount said defendant promised to repay to plaintiff, and that said defendant has repaid to plaintiff the sum of \$1,359.20 and no more, thus leaving a balance of \$4,370.49.

The substituted defendants, in their answer, deny the allegations of the complaint above set forth, and further allege that prior to the 7th day of July, 1904, Amanda M. Scales deposited said sum of \$5,729.69 with said defendant, the Mutual Savings Bank of San Francisco, and caused said deposit to be made payable by said defendant to "Amanda M. Scales or Lizzie C. Robinson." "That said Amanda M. Scales so directed and made said deposit payable to 'Amanda M. Scales or Lizzie C. Robinson' for the sole purpose of enabling said Lizzie C. Robinson, as the agent of said Amanda M. Scales, to withdraw moneys from said deposit for the use and benefit of said 'Amanda M. Scales' and as the same might be required by said Amanda M. Scales, or to be paid out by her through said Lizzie C. Robinson (the plaintiff herein) as the agent of said Amanda M. Scales." That prior to the 7th day of July, 1904, said Amanda M. Scales withdrew from said deposit the sum of \$1,359.20, and no more, leaving a balance on deposit with said defendant bank of \$4,370.49. Amanda M. Scales died on the 7th day of July, 1904.

The court found all the allegations of the complaint to be true, and also found "That it is not true that prior to the commencement of this action, and prior to the 7th day of July, 1904, or at any other time, Amanda M. Scales deposited with said defendant Mutual Savings Bank of San Francisco the sum of \$5,729.69, or any sum." "That it is not true that prior to the 7th day of July, 1904, or at any other time, said Amanda M. Scales withdrew from said deposit the sum of \$1,359.20, or any sum whatever." From the foregoing statement of the contents of the pleadings and of the findings, it is apparent that the plaintiff's complaint was framed upon the theory that all the money deposited was deposited by plaintiff for her own use and from her own money, and that Mrs. Scales deposited none of it, and had no interest therein, and that the court in its findings fully adopted such theory of the facts. No such theory can be sustained upon the facts disclosed by the record before us.

Mrs. Scales, at the opening of the account in question, was upwards of 80 years of age and totally blind. The plaintiff had been in the habit of attending to business for her for several years before the opening of this account. The account was opened on March 10, 1902, by the deposit of a check for \$1,149.05 belonging to Mrs. Scales, and was opened

in the name of "Amanda M. Scales or Lizzie C. Robinson." Every item of deposit belonged to Mrs. Scales at the time of its deposit, as is admitted by plaintiff on the witness stand, save, possibly one, which confessedly also did originally belong to Mrs. Scale. This item will be referred to later. Concerning the opening of the account the plaintiff testified in substance that she obtained a check for Mrs. Scales, payable to her, from Bovee, Toy & Sontagg for \$1,149.05; that Mrs. Scales indorsed the check and plaintiff deposited it in the bank. In answer to the question "For what purpose did Mrs. Scales tell you at that time that she gave you that check?" the plaintiff said, "She wanted to establish a claim there that I could draw against—an account there that I could draw against, and pay bills for her, because she was constantly demanding such services of me, and she said, at the time, she said, 'I want to open this little account, it will be a joint account; whatever is left after I am gone shall be yours.'" She further said that all the other deposits in the account were from Mrs. Scales, and came from rentals of her property and different sources. Upon cross-examination she testified: "When this first deposit was made on the 10th day of March, 1902, Mrs. Scales told me that she wanted me to pay her bills out of the account, and to open that account for the purpose of enabling me conveniently to do that, and whatever remained after she died was to be mine; or that I could draw against it while she lived if I chose to. I never drew against it for any account, except her own, while she lived."

The evidence shows without conflict that plaintiff, acting for Mrs. Scales, for her use and to pay her bills, drew from the account the sum of \$1,359.20. Plaintiff also testified that Mrs. Scales also told her that she might draw from the account for her personal use, but she never did so. The evidence above set forth does not support the finding that the sum of \$5,729.69 was deposited with the bank by plaintiff for her use and benefit in the sense and meaning of the finding. In a legal sense the deposits were made by Mrs. Scales for her use and benefit. The plaintiff was acting simply as the agent of Mrs. Scales, and was depositing the money of Mrs. Scales for her use. For the same reason the evidence does not support the finding of the court: "That it is not true that prior to the commencement of this action, and prior to the 7th day of July, 1904, or at any other time, Amanda M. Scales deposited with said defendant, Mutual Savings Bank of San Francisco, the sum of \$5,729.69, or any other sum." The money was deposited by Mrs. Scales through her agent, the plaintiff, and likewise, in legal effect, whatever was withdrawn was withdrawn by her through her agent the plaintiff.

The evidence does not show a gift by Mrs. Scales to plaintiff of all the moneys deposit-

ed in the account or of the account itself. Although the deposit was in the names of either, and either could draw therefrom as between themselves and the bank, this does not show a gift to plaintiff, nor constitute a joint tenancy or ownership with a right of survivorship. Mrs. Scales at all times retained the right herself to draw the money. She retained dominion over it. She never delivered the bank book to plaintiff. It at all times remained in the possession of the bank at the convenience of both Mrs. Scales and plaintiff. "A valid gift goes into immediate effect, and has no reference to the future. It divests the donor of his title, and requires a renunciation on his part of all claim and interest in the subject of the gift." *Denigan v. Hibernia, etc., Soc.*, 127 Cal. 137, 59 Pac. 389; *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 59 Pac. 390, 78 Am. St. Rep. 35. In both of the above-cited cases money, the separate property of a wife, was deposited in the names of the husband and wife, "and payable to the order of either of them." It was held that the form of the deposit did not indicate any gift to the husband or any joint interest of both parties with a right of survivorship. In the latter case it was held that the rule that joint interests or estates are such as are created by a single will or transfer in equal shares, when expressly declared in the will or transfer to be a joint tenancy, applies to personality as well as to realty. The doctrine of the *Denigan Cases* is supported by the following cases, all of which are reviewed in the second *Denigan Case*: *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486; *Gorman v. Gorman*, 87 Md. 338, 39 Atl. 1038; *Schlick v. Grote*, 42 N. J. Eq. 352, 7 Atl. 852; *Noyes v. Newburyport Sav. Inst.*, 164 Mass. 583, 42 N. E. 103, 49 Am. St. Rep. 484.

The evidence does not bring this case within the doctrine of *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 Pac. 370, where money was deposited in such a way as to constitute the bank a trustee for plaintiffs, nor within *Sprague v. Walton*, 145 Cal. 228, 78 Pac. 645, where the wife, on the order of her husband, actually drew certain money and deposited it in her own name. In no aspect of the case can it be said that the findings attacked are sustained by the evidence, and for this reason the judgment and order must be reversed.

We have not overlooked the testimony given by plaintiff that one item of the deposit was given to her outright by Mrs. Scales for her own use, before the same was deposited. There was a sharp conflict in the evidence on this point, Mr. Leggett testifying to a statement made to him quite inconsistent with the claim that the item in question had been given to plaintiff. In this connection it is well to revert to what was said in *Denigan v. Hibernia, etc., Soc.*, supra: "When the claim of a gift is not asserted

until after the death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift."

But whatever the fact may be concerning the claim that this particular item was given to plaintiff, and by her afterwards deposited in the account sued on, the amount of the same is less than the balance sued for and for which judgment was given. If this particular sum of money was therefore the money of plaintiff, and deposited by her for her use in the account, this fact does not sustain the findings as made, nor the judgment rendered.

The judgment and order are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

WILMORE v. MINTZ.

(Supreme Court of Colorado. March 2, 1908.
Rehearing Denied May 4, 1908.)

ELECTION OF REMEDIES—REMEDIES BARRED.

A landlord whose lease provides that he shall have a lien for his rent on all goods on the leased premises, by bringing an action and obtaining a decree that he was entitled to a lien on the goods, and that they should be sold under execution, makes an election to treat his contract as one of lien, so that he cannot abandon those proceedings and treat the matter as a chattel mortgage pure and simple, and take personal possession of the property to satisfy the lien, in the absence of a showing that the judgment was ineffectual, and that possession could not be secured by the sheriff under the execution.

Appeal from District Court, City and County of Denver; John I. Mullins, Judge.

Replevin by Charles T. Wilmore against Henry Mintz. Judgment for defendant. Plaintiff appeals. Affirmed.

Stuart & Murray, for appellant. J. E. Robinson, for appellee.

BAILEY, J. In the year 1900 the appellant made a lease of certain property in Jefferson county to one Milstein, the lease containing the following clause: "(9) That all goods and chattels, or any other property used or kept on said premises, shall be sold for the rent or damages under this lease, whether exempt from execution or not, meaning or intending hereby to give the party of the first part a valid and first lien upon any and all goods and chattels, crops and other property belonging to said party of the second part." About the 29th day of April, 1901, Milstein assigned the lease to appellee. Appellee took possession of the property and held it until the expiration of the lease. Milstein owned certain personal property which he kept upon the premises until he assigned the lease to appellee, at which time he sold it to appellee, and it continued to remain on the premises until appellee moved away, at which time he took all of the property with him. Later appellant brought an ac-

tion in the county court of Jefferson county against Milstein, appellee, and one Rosenbaum. Appellant obtained judgment on the 25th of June, 1902, against the defendants in that action for \$400, in which judgment it was held that "the plaintiff has and holds a first lien for the amount of the judgment herein upon the property of the defendant, Mintz, described as follows [then follows a description of the property], and that said lien accrued on the 29th day of April, 1901, and that said property be sold as other property is sold upon execution for the payment and satisfaction of the plaintiff's judgment herein." The judgment also provides for the issuance of an execution. Nothing appears to have been done under this judgment, and in November, 1902, the appellant brought this action in the district court of Arapahoe county to replevin the property mentioned in the decree, and which is the same that was owned and kept by appellee upon the premises leased from appellant. At the trial in the district court and upon proof of the acts hereinbefore stated, a judgment of nonsuit was rendered, and plaintiff appeals to this court.

The basis of the replevin suit was the clause contained in the lease hereinbefore set forth, to the effect that appellant should have a first lien upon the property and the judgment of the county court, wherein the amount of damages sustained by appellant had been determined. The appellant contends that the clause in the lease operated as a chattel mortgage, and that upon default in the payment of the rent he was entitled to possession of the property; while the appellee contends that the clause created but an equitable lien in favor of the landlord, and that the landlord was not entitled to possession of the property upon a breach of the conditions of the lease, but that a suit should be brought to foreclose the lien. It is not necessary for us to determine in this action whether the lease amounted to a chattel mortgage or simply created an equitable lien, for the reason that the appellant has determined that question for us. An election once made with knowledge of the facts between coexisting remedial rights which are inconsistent is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding based upon a remedial right inconsistent with that asserted by the election. 15 Cyc. 262, and cases therein cited. In bringing his action in the county court of Jefferson county and obtaining a decree that he was entitled to a lien upon this property and that the same should be sold under execution, appellant elected to treat his contract as one of lien, and having done so, and having obtained his judgment, he could not abandon those proceedings and treat the matter as a chattel mortgage, pure and simple, after having obtained a judgment authorizing the issuance of an execution and the tak-

ing of this property to satisfy the judgment. He did not have the right to ignore these proceedings and take personal possession of the property for the purpose of satisfying the lien.

In the absence of a showing that the judgment was ineffectual, and that the possession of the property could not be secured by the sheriff upon the execution, the plaintiff was not entitled to maintain the action. The judgment of the district court being correct, it will not be disturbed, and is therefore affirmed.

Affirmed.

STEELE, C. J., and GODDARD, J., concur.

CANON CITY et al. v. MANNING et al.

(Supreme Court of Colorado. April 8, 1908.)

1. PLEADING—RULINGS ON DEMURRER—WAIVER.

A defendant who answered to the merits after the overruling of the demurrer to the complaint challenging the capacity of plaintiffs to sue waives the ruling, and, where a demurrant wishes to take advantage of any supposed error in overruling a demurrer to a complaint, on grounds which under the Civil Code constitute ground for demurrer, which appear on the face of the complaint, he must, excepting for want of facts or jurisdiction, allow final judgment to be entered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1403-1406.]

2. INJUNCTION—GROUNDS—RESTRAINING JUDICIAL ENFORCEMENT OF PENAL STATUTE.

As a general rule, the judicial enforcement of a penal ordinance of a municipality cannot be inhibited by a court of equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 155.]

3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—CRIMINAL PROSECUTIONS.

Whether one has been guilty of such violation of the law as justifies the seizure of his property or the infliction of punishment can only be determined by a court of competent jurisdiction, where accused is afforded an opportunity to be heard before judgment is pronounced against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 750-755.]

4. INJUNCTION—RESTRAINING PROCEEDINGS UNDER PENAL ORDINANCES.

The ordinances of a city, prohibiting the sale and giving away of intoxicating liquors, declaring that every place where intoxicating liquors are sold or dispensed shall be a nuisance, imposing fines for the violation of ordinances, and authorizing public officers to abate such nuisances by closing the place where intoxicating liquors are dispensed, and preventing any person from entering the same, etc., do not authorize the officers of the city to declare ex parte that a lodge maintaining a club for the social enjoyment of the members thereof, where liquors are dispensed to them and guests, each member paying for that consumed by himself and guest, violates the ordinances, and the officers cannot close the clubrooms and prevent the members of the lodge from entering the same, and equity will restrain the officers from so doing, since the lodge has no adequate remedy at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 155, 179.]

5. EQUITY—GROUNDS OF RELIEF.

Where an action at law does not afford a plain, speedy, and adequate remedy whereby the whole mischief of which the party complains may be reached, and his rights both present and future be fully secured, he may invoke the aid of equity for his protection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 151-163.]

6. INJUNCTION—ENFORCEMENT OF ORDINANCE.

Mills' Ann. Code, § 143, providing that no writ of injunction shall issue to restrain the enforcement of a penal ordinance, means only that no writ of injunction shall issue to restrain the judicial enforcement of such ordinance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 155, 179.]

Error to District Court, Fremont County; J. W. Sheafor, Judge.

Action by Frank Manning and others against the city of Canon City and others. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

The Benevolent & Protective Order of Elks of the United States of America is a fraternal, social, and benevolent society having many subordinate lodges, one of which is located at Canon City. This lodge is a voluntary society, not incorporated, and consists of upwards of 325 members, and is supported by the fees and dues paid in by its membership. The rules of the order prescribe the qualifications for membership. Pursuant to the constitution and by-laws of the order, it maintains clubrooms at Canon City for the social enjoyment of its members, where liquors are dispensed to them, each paying for that consumed by himself or his guests in a sum fixed by the board of control. The membership of the club is limited to members of the organization in good standing. None but members of the order or their guests are admitted to the club, and no person not a member of the order who is a resident of Canon City or the immediate vicinity can be admitted. Guests, except members of the order, are not permitted to spend any money in the club. The club has quite an elaborate set of rules for the government of its members and the management of its affairs, and is part and under the control of the Canon City lodge of the order. It is not incorporated, and its affairs are managed by a board of control appointed in accordance with the rules of the order and the rules and regulations of the club. The club is conducted in an orderly manner, and no conduct calculated to disturb the peace is permitted. Billiard and card tables are maintained for the use of the members and guests. The rooms are supplied with magazines and other reading matter. Canon City has ordinances prohibiting the sale or giving away of intoxicating liquors within its corporate limits by any person, except regularly licensed druggists, duly licensed to sell liquors for medicinal, mechanical, and chemical purposes. One of these ordinances declares that every place within the limits of Canon City where intoxicating liquors are sold or dispensed, except by druggists duly licensed, is a nuisance.

Penalties in the way of fines are provided for the violation of these ordinances. One of the provisions of the ordinance declaring places where liquors are sold or dispensed nuisances is: "The city marshal and all police officers of said city shall abate said nuisance by securely closing such place and preventing any person and all persons from entering the same except for the lawful removal of such liquor, until all liquor or any or every kind hereinbefore mentioned shall have been removed therefrom, and until the owner of said place shall have given bond to the said city in a form and with sureties to be approved by the city council of said city of Canon City, in the penal sum of twenty-five hundred dollars, conditioned that such place shall not again be suffered or permitted to be used for any purpose hereinbefore specified as constituting it a nuisance." Under this provision, the city, through its mayor and marshal, gave notice to the club to stop the sale and dispensing of liquors to its members within the rooms occupied by it, and that, unless such sales were stopped within a time specified, the provisions of the ordinances of the city with respect to the sale and dispensing of intoxicating liquors would be rigidly enforced against the club. Up to the time of giving such notice, no prosecution under any of the ordinances in question had ever been commenced or prosecuted against the club or its members. Defendants in error, constituting the board of control of the club, thereupon commenced an action against the city of Canon City and its mayor and marshal to restrain them, except by some regular form of judicial proceeding in a court of competent jurisdiction, from closing the clubrooms or preventing any member or members from entering them, or interfering with the full and entire enjoyment of such rooms by the members. The complaint filed stated substantially the facts above set forth. To this complaint a demurrer was filed by the defendants, which challenged the complaint upon the grounds, among others, that the plaintiffs had no capacity to sue, and that the complaint did not state facts sufficient to constitute a cause of action, or as a basis for relief of any kind. This demurrer was overruled. The defendants thereupon answered, and a trial was had before the court. The facts established under the issues made by the pleadings were substantially as above recited. Judgment was rendered for the plaintiffs, enjoining the defendants, except by some regular form of judicial proceeding in a court of competent jurisdiction, from closing the clubrooms or preventing any member or members of the club or their guests from entering such rooms, and to refrain and desist from interfering with the full and entire enjoyment of such rooms by the members of the club or their guests. The defendants bring the case here for review on error.

Taylor & Sayre and H. L. Ritter, for plaintiffs in error. Chas. E. Waldo, Clyde C. Dawson, Jas. A. Stump, A. L. Jeffrey, and E. H.

Stinemeyer, for defendants in error. Bonynge & Ritter, T. A. McHarg, Albert A. Reed, Frank C. West, Geo. H. Van Horn, and Geo. A. Carlson, amici curiæ.

GABBERT, J. (after stating the facts as above). The first error assigned on behalf of defendants is that the court erred in overruling their demurrer to the complaint, which challenged the capacity of plaintiffs to bring the action. Presumably, if there was any merit in this contention, it appeared upon the face of the complaint. By answering to the merits, the defendants waived that question. It has been repeatedly decided that where a demurrant wishes to take advantage of any supposed error in overruling a demurrer to a complaint upon grounds which under our Civil Code constitute grounds for demurrer, which appear upon the face of the complaint, he must, except for want of facts or jurisdiction, let final judgment be entered, for by afterwards answering to the merits he cannot, except for the two defects mentioned, raise such questions in connection with his answer. *Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 Pac. 642; *Diamond Rubber Co. v. Harryman*, 40 Colo. —, 92 Pac. 922.

It is next urged that the complaint shows that the plaintiffs have attempted to invoke the aid of a court of equity to prevent the enforcement of a penal ordinance, and that for this reason, and also because the testimony establishes this fact, the judgment is erroneous. The judicial enforcement of a penal ordinance cannot be inhibited by a court of equity. *Denver v. Beede*, 25 Colo. 172, 54 Pac. 624; *Adams v. Cronin*, 29 Colo. 488, 69 Pac. 590, 63 L. R. A. 61; *Olympic Athletic Club v. Speer*, 29 Colo. 158, 67 Pac. 161. There may be exceptions to this rule, as suggested in the above cases, but this case does not fall within the exception, so far as the judicial enforcement of the ordinance in question is involved. Neither is that question the vital one in this case. The plaintiffs did not seek a judgment inhibiting the defendants from judicially enforcing such ordinance, nor did the judgment rendered inhibit the defendants from so doing. On the contrary, the questions presented by the complaint and on the facts established at the trial are: (1) May the city authorities summarily close the clubrooms and exclude the members of the club therefrom; and (2) if not, may they be enjoined from so doing?

The defendants claim that they have the right, by virtue of the ordinances of the city, to close the clubrooms and exclude its members therefrom, and do not deny the averments of the complaint, to the effect that it was their intention and purpose to take these steps. In support of their authority and right to do so, it is claimed that the clubrooms managed by the plaintiffs are maintained in violation of the ordinances of the city inhibiting any place to be kept within

its limits wherein intoxicating liquors are sold or dispensed to members of the club occupying such place. That question is not the material or crucial one involved, and we shall express no opinion upon it. We are not concerned with the guilt or innocence of plaintiffs, neither can that question, under our rulings in the Beede and other cases, be determined in this proceeding. The first important question to determine, in order to solve what we have indicated are the only ones in the case, is whether the defendants may determine for themselves that the club is violating the ordinances of the city, and proceed summarily to enforce its *ex parte* orders against it. This question must be answered in the negative. The fact that members of the organization represented by plaintiffs meet in their clubrooms is not a violation of the ordinances. Neither is the mere storage of liquors in such rooms contrary to any provision of such ordinances. The violation of such ordinances, if any there be, consists in dispensing such liquors to the members of the club. Whether or not that is a violation cannot be determined by the city officials, but only by a court of competent jurisdiction, wherein plaintiffs are afforded an opportunity to be heard, so that the question of whether they are violating the ordinances of the city can be judicially determined. By the terms of the ordinances which the defendants say they proposed to enforce, no such opportunity is afforded the plaintiffs. Defendants propose *ex parte* to determine that the ordinances of the city have been violated, and pursuant to that conclusion contend they have the right to close the clubrooms and exclude the members therefrom. Such a proceeding as that cannot be upheld. Persons, even though they be officials of a municipality, may not take the law into their own hands, however justifiable they may think such a course may be to prevent infringement of the law. Such a course must inevitably result in bringing about conditions destructive to the peace of a civilized community. If it can be done in one case, it may in another; and thus there would be no limit to the unlawful means which might be resorted to for the purpose of punishing alleged infringements of the law, although those engaged in doing so would also be violating it. A man's property cannot be seized, nor can he be punished, except for a violation of the law, and whether he has been guilty of such violation as justifies the seizure of his property, or the infliction of punishment, can only be determined by a court of competent jurisdiction, where he is afforded an opportunity to be heard before judgment is pronounced against him. *Darst v. People*, 51 Ill. 286, 2 Am. Rep. 301; *Earp v. Lee*, 71 Ill. 193; *Baldwin v. Smith*, 82 Ill. 162. The law provides a method whereby the unlawful selling of liquor may be judicially determined and judicially

punished. In the present case the ordinances of Canon City make such provision.

Having concluded that the ordinances cannot be enforced in the manner threatened by defendants, the next question is whether they may be enjoined from carrying their threat into execution. This question must be answered in the affirmative. The reason upon which the Beede and other cases decided by this court, wherein it is held that the judicial enforcement of a penal ordinance could not be enjoined, rests, is that equity can only be invoked when there is no plain, adequate, and complete remedy in the law courts of which the party invoking its aid can avail himself. That condition is not present in the case at bar. On the contrary, it is entirely absent, for the obvious reason that no opportunity is afforded by the provisions of the ordinance under consideration whereby the plaintiffs may be heard on the question of whether or not the dispensing of liquors in their clubrooms in the manner set out in their complaint, and as established by the facts, is a violation of the ordinances of the city inhibiting the sale of liquors within its limits. They must either submit to the *ex parte* determination of the city officials that they are violating the ordinances of the city and permit their clubrooms to be closed, and the members excluded therefrom, and then bring an action to be reinstated in the possession of their rooms, or they must resort to force when the city authorities undertake to enforce the provisions of the ordinances against them. Certainly the first course does not afford an adequate remedy at law, because that expression does not mean that such a remedy is afforded by quietly submitting to an alleged wrong, and then bringing an action against the alleged wrongdoer to redress it. Neither is the second expedient one to which the law will compel a party to resort by refusing him protection in the first instance, because that course invites violence and a breach of the peace. Perhaps he might justify such action if called to account therefor, but that is not an adequate remedy at law to afford protection against the illegal invasion of his rights. The general rule is that if, in order to protect the rights of a party, an action at law does not afford a plain, speedy, and adequate remedy whereby the whole mischief of which he complains may be reached, and his rights, both present and future, be secured in a perfect manner by the judgment of a court at law, he may invoke the interposition of equity for his protection. 1 Story's Equity Jurisprudence, § 33. Applying this rule, it is clear that this case does not fall within the rule laid down in the Beede and other cases cited by counsel representing the city authorities. The amendment to section 143 of Mills' Annotated Code, which provides that no writ of injunction shall issue to restrain the enforcement of a penal ordinance, does not apply, because that

can only be construed to mean that no writ of injunction shall issue to restrain the judicial enforcement of such ordinance. There are doubtless instances where city authorities would be justified in employing summary methods because of the emergency of the situation to prevent infringement of the law, or to prevent parties from taking steps which would inevitably lead to a violation of the law, or to protect the health of the public, or where, for the protection of the public, police surveillance must be exercised and prompt action taken; but no such emergencies are presented in the present case. Whether or not the plaintiffs and those whom they represent are violating the ordinances of the city can be determined judicially, and, if they are so found guilty, the judgments to that effect can be enforced by judicial process, without jeopardizing the safety of the public in the slightest degree, and any attempt on the part of the city authorities to do otherwise cannot be permitted. In reaching this conclusion, we must not be understood as indicating that a judgment of a court, to the effect that the clubrooms could be closed and the members excluded, would be upheld, or that the dispensing of liquors in these clubrooms to members of the organization represented by plaintiffs in the circumstances established in this case is not a violation of the ordinances of the city inhibiting the sale of liquors within its limits. It will be time enough to determine either, or both, of these questions, when presented by an appropriate proceeding. What we do determine is that, in the circumstances of this case, the city authorities cannot enforce the provisions of the ordinances involved extrajudicially, and that they may be enjoined from attempting to do so.

The judgment of the district court is affirmed.

Affirmed.

CAMPBELL and HELM, JJ., concur.

SCOTT v. TUBBS.

(Supreme Court of Colorado. April 6, 1908.)

NEW TRIAL—MISCONDUCT OF JURORS.

Respondent, in condemnation proceedings, should be given a new trial, without payment of costs, for misconduct of jurors, where, after inspection of the property, four of the jurors, apart from the officer in charge, go with petitioner, on his invitation, to a saloon, and drink with him; and this without regard to the question whether the verdict was affected thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 98.]

Error to Summit County Court; J. W. Swisher, Judge.

Action by Avery B. Tubbs against James K. Scott. Judgment for petitioner. Respondent brings error. Reversed.

James F. Callbreath, Jr., for plaintiff in error.

STEELE, C. J. The action was brought under the statute entitled "Eminent Domain," and had for its purpose the condemnation of the plaintiff in error's land to the use of the defendant in error for an irrigating canal. A jury assessed the plaintiff's damages at \$40. Judgment was entered upon the verdict. The costs, amounting to \$303.50, were taxed against the plaintiff in error. Several assignments of error are discussed in the brief, but we shall ignore all but one—that relating to the improper conduct of the jury. Before proceeding to a consideration of the assignment of error mentioned, we direct attention to the opinion of this court in the case *Colorado Fuel & Iron Co. v. Four Mile Railway Co.*, 29 Colo. 90, 66 Pac. 902, wherein the statutes providing for the summoning of a jury in proceedings under the eminent domain act are construed. Upon the day set for the hearing, at the request of petitioner, it was ordered that the jury inspect the premises sought to be condemned. After the examination of the premises, and before returning to the courtroom, four of the jurors, apart from the officer in charge of the jury, went to a saloon in company of the petitioner, defendant in error here, and at his invitation drank with him at the bar of the saloon. This was conclusively shown by the affidavits filed in support of the motion for a new trial. Two of the jurors state in their affidavit that the petitioner took them to a saloon and treated them, but that their verdict was not influenced thereby, and that they did not know they had been doing wrong. The court offered to set aside the verdict and to grant a new trial upon the payment of the costs by the respondent, but the respondent refused to take a new trial upon the terms proposed. Judgment was then entered, and the respondent appealed.

A new trial should have been granted, and the petitioner should have been required to pay the costs. Such action on the part of the petitioner and the jurors cannot be tolerated, and to excuse such conduct would be to render a trial in a court of justice a farce. It may be that the petitioner and jurors were entirely innocent of any wrong intent, and that no wrong or injustice was in fact done, but the opportunity for wrongdoing under the conditions shown in the affidavit is so great that we must, in order to maintain the integrity of judicial procedure, reverse the case. Jurors who separate from the other jurors and the officer in whose charge they are, and accept entertainment from one of the parties while they are considering the case, are guilty of such misconduct that a verdict rendered by them has not the appearance even of being fair and impartial. And a party who so far forgets his position as a litigant as to furnish entertainment for jurors who are to pass upon the merits of the controversy in which he is engaged should not complain if a verdict in his favor by jurors with whom he has

been in such close communication and to whom he has furnished drink is set aside on motion of his adversary. Nor should the court consider whether the verdict was or was not influenced by the petitioner. The conduct complained of is so manifestly improper that there is but one course open. Nor shall we consider what other courts have done under similar circumstances. Questions like these cannot be determined by the weight of authority, unless there be a doubt in our minds as to the course for us to pursue; and, as no doubt exists, we shall reverse the judgment.

GOUDARD and BAILEY, JJ., concur.

**COLORADO TRADING & TRANSFER CO.
v. BLUM.**

(Supreme Court of Colorado. April 6, 1908.)

1. APPEAL—REVIEW—CONFLICTING EVIDENCE.

Verdict for plaintiff will not be disturbed merely because only he and one other witness testified to the making of the contract, as claimed by him, while four witnesses, employes of defendant, testified to the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

2. SAME—HARMLESS ERROR.

Defendant is not prejudiced, and under Mills' Ann. Code, § 78, providing that any error or defect in the pleadings or proceedings not affecting substantial rights shall be disregarded in every stage of an action, and no reversal shall be had therefor, judgment for plaintiff should be affirmed, even if the court treated the complaint as charging defendant as a common carrier, and the proof showed it was acting as a private carrier; the liability of the carrier to safely deliver goods, for default in which the action was brought, being the same whether it engaged to do so under the implied liability of a common carrier or under the express contract proven.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4086.]

Appeal from District Court, Teller County; Louis W. Cunningham, Judge.

Action by Abraham Blum against the Colorado Trading & Transfer Company. Judgment for plaintiff, and defendant appeals. Affirmed.

H. M. Blackmer, Karl C. Schuyler, and Walter F. Schuyler, for appellant.

STEELE, C. J. The complaint alleges that the defendant is a common carrier of goods for hire in the state of Colorado; that on the 17th day of May, 1903, in consideration of the sum of \$50 agreed to be paid to the defendant, the defendant agreed to safely carry from Cripple Creek to Colorado City and Colorado Springs certain enumerated articles of the value of \$1,500; that the defendant, having received the articles under the agreement mentioned, did not safely carry and deliver them, "but, on the contrary, the defendant so negligently and carelessly conducted, and so misbehaved in regard to the same in its calling as a common carrier, that a large part of said goods were wholly lost to the plaintiff,

and the balance thereof were badly damaged." And prays for judgment in the sum of \$987.25. The affirmative defenses set forth in the answer are that the goods received by the defendant were agreed to be transferred and carried by the defendant at the sole risk of plaintiff, and not otherwise; and that the injury, if any, to the goods was occasioned wholly or in part by reason of the negligence of the plaintiff. The replication denies the affirmative matter of the answer. There was verdict and judgment against defendant for the sum of \$200, and the defendant appealed to the court of appeals. The points relied upon to reverse the judgment are that the judgment and verdict are against the weight of the evidence, and that a fatal variance existed between the complaint and the proof.

The plaintiff and one witness testified to the contract entered into between the plaintiff and the defendant, and that it agreed to haul the plaintiff's goods from Cripple Creek and deliver them safely to him at Colorado City or Colorado Springs. Four witnesses, employes of defendant, testified that the defendant protested against carrying the goods in but two wagons, and that thereupon plaintiff agreed to assume all risk of breakage or damage to the goods if they were carried in two wagons. And counsel say that inasmuch as the testimony of these witnesses was denied by the plaintiff only, the verdict and judgment should be set aside. The decisions of this court holding that where there is a conflict of the evidence a new trial will be denied, unless the jurors so acted as to warrant the presumption that they misunderstood the evidence or misconceived its force and effect, or allowed malice or prejudice or some other improper motive to sway their judgment, are so numerous that they need not be cited. It not appearing that the jurors misunderstood the evidence or misconceived its force or effect, or that they were prompted in rendering their verdict by some improper motive, we must hold that the first position taken by defendant as a ground for reversing the judgment is untenable.

The position of the defendant with respect to the alleged variance between the allegations of the complaint and the proof is thus stated in the brief: "That where a defendant is sued and the recovery sought is based on the violation of the defendant's contract as a common carrier, and upon the trial of the cause the evidence shows that the defendant was not acting as a common carrier in the performance of the contract, and that it owed to the plaintiff simply the duties of a private carrier, then and in that event there is such a variance that the plaintiff cannot recover." The testimony clearly established that the defendant is a common carrier. It was the owner of a large number of wagons and horses, and was engaged in the business of hauling goods for hire to points outside of the district. Counsel direct attention to the statement of the complaint wherein it is

alleged that "the defendant so negligently and carelessly conducted, and so misbehaved in regard to the same in its calling as a common carrier, that a large part of said goods were lost," etc., as showing that the defendant was sued in its capacity as a common carrier, and state that the court found that the contract entered into between the parties was a contract of the defendant in its capacity as a private carrier. There is nothing in the abstract showing that the court so treated the contract, or that any finding on the subject was made. The instructions do not appear in the abstract; but if the court did so regard the contract and did so find, we think the court was in error. The authorities cited by appellant sustain its contention that under a complaint charging the defendant as a common carrier no recovery can be had upon proof of a liability as a private carrier only, but in the cases cited there was no obligation of the defendant to carry the goods, or they were cases where, by the terms of an express contract, the liability had been changed from that of a common carrier to that of a private carrier merely. In this case there does not appear to have been any change in the liability of the defendant, whether it was acting as a common carrier or as a private carrier. The goods delivered to it for carriage were of the character that it was ordinarily engaged in carrying, the contract it made to carry and safely deliver is not different from its engagement if no express contract had been made. So that, even though it be conceded that the court treated the complaint as charging the defendant as a common carrier, and the proof showed that the defendant was acting in its capacity as a private carrier, the liability of the carrier to safely deliver the goods was the same whether it engaged to do so under the implied liability of a common carrier or under the express contract established by the testimony.

The defendant was not prejudiced by any action of the court, and under section 78, Mills' Ann. Code, it becomes our duty to affirm the judgment.

GODDARD and BAILEY, JJ., concur.

BAILEY v. CARLTON.

(Supreme Court of Colorado. April 6, 1908.)

1. APPEAL—REVIEW—HARMLESS ERROR—EXAMINATION OF WITNESS.

In an action for commissions for services rendered in obtaining title to mining property, where it appeared that the sale of the property could not be consummated without a surrender of a lease thereon, and the owners of the lease had agreed with plaintiff to surrender it if he obtained a satisfactory option, one of the owners of the lease was asked as a witness whether he recollected that at a certain date he had practically abandoned hope of carrying out the sale, and if defendant had not agreed or offered to surrender to him the agreement to surrender the lease, to which he answered that he did not

recollect that, but knew that they had abandoned the idea of carrying out that contract, and never did carry it out. *Held*, that the question and answer were not prejudicial to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4140-4145.]

2. EVIDENCE—COMPETENCY—CONVERSATIONS.

Where evidence of a conversation is admissible at all, the entire conversation is admissible.

3. APPEAL—REVIEW—HARMLESS ERROR—EXCLUSION OF QUESTION TO WITNESS.

In an action for commissions by a person engaged to assist defendant in securing title to certain mining property with a view to effecting a consolidation of it with other property, it appeared that, after plaintiff and defendant had been unsuccessful in effecting a purchase, another person had secured an option upon the property, and it had been subsequently transferred to a new corporation, in which defendant had invested. There was no proof that defendant had taken any part in procuring the option or organizing the company, or that he had, for the purpose of avoiding his contract with plaintiff, procured another person to secure title to the property. *Held*, that the exclusion of a question asked defendant as a witness, if it was understood between him and plaintiff that the legal title to the properties had to be taken in his name by himself or another, was not prejudicial to plaintiff, since what the contract provided was immaterial under the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4187-4193.]

4. BROKERS—ACTION FOR COMPENSATION—EVIDENCE.

In an action for commissions by a person engaged to secure title to certain mining property, where defendant's answer averred that he had taken no part in a transaction involving their subsequent purchase by another person, and plaintiff had testified that he would not be entitled to commissions had the person obtaining the purchase dealt with persons other than defendant, evidence of the person who purchased the claims that defendant took no part in the transaction was admissible.

5. TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS EMBRACED IN CHARGES GIVEN.

It is not error to refuse a requested charge where the principles of law embraced by it are embodied in another charge which is given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

6. SAME.

In an action for commissions for services rendered in obtaining title to property, where plaintiff alleged that he agreed to assist defendant in securing title to the property, and that defendant, by reason of such assistance, did secure the title, he cannot complain of a charge basing his right to recover upon proof of such allegations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

7. BROKERS—COMMISSIONS—ACTIONS—INSTRUCTIONS.

In an action for commissions for services rendered in obtaining title to mining claims, a charge that if plaintiff and defendant were unable to agree with the owners in the purchase of the claims, and other persons, not co-operating with defendant, thereafter initiated negotiations with the owners for the purchase of the claims, and put them into a consolidated company, plaintiff could not recover even though defendant contributed to the purchase, was not subject to the objection that it, in effect, stated that plaintiff, even if he had complied fully with his contract, could not recover if he and defendant were unable to agree with the owners of the claims as to their purchase.

8. TRIAL—INSTRUCTIONS TO BE CONSIDERED AS AN ENTIRETY.

In determining the propriety of an instruction, it should be taken as an entirety, and not divided into incomplete phrases.

9. BROKERS—COMMISSIONS—ACTION—INSTRUCTIONS.

In an action for commissions under a contract by which plaintiff was employed to assist defendant in acquiring the title to property for the purpose of effecting a consolidation of it with other property, a charge that plaintiff could not recover if he and defendant were unable to effect a sale with the owners, and other persons not co-operating with defendant subsequently did so, and effected a consolidation, even though defendant contributed to the purchase, was not inconsistent with the terms of the contract, since the thing contracted to be done was the securing of the title to the property and the making of the consolidation by plaintiff, and not by another person not connected with defendant.

10. SAME—RIGHT TO COMMISSIONS.

If plaintiff contracted to assist defendant in purchasing mining claims and consolidating them with other property, and the attempt was unsuccessful and the project abandoned, defendant would not be thereby precluded from afterwards negotiating with others to carry out the same enterprise, and, if the matter were accomplished in connection with other persons wholly independent of plaintiff's efforts, he could not recover for his unsuccessful services.

Appeal from District Court, Teller County; Robert E. Lewis, Judge.

Action by Morton S. Bailey against Albert E. Carlton for commissions. Judgment for defendant, and plaintiff appeals. Affirmed.

Richardson & Hawkins, for appellant. Ira Harris, for appellee.

BAILEY, J. The complaint in this action alleges that on or about the 1st day of June, A. D. 1900, the defendant "employed the plaintiff to assist him in procuring the title to two certain lode mining claims situate in Cripple Creek mining district, Teller county, state of Colorado, known as the Doctor and Chief lode mining claims, for the purpose of effecting a consolidation of said claims with certain other lode mining claims situate contiguous thereto, and the defendant then and there contracted with and agreed to pay to the plaintiff for such services the sum of 5 per centum upon any amount which it might be found necessary to pay to the owners of the said Doctor and Chief lode mining claims, for the purpose of securing the same so as to effect said consolidation"; that the plaintiff accepted the employment, entered actively upon the work of aiding and assisting the defendant in securing the claims, and continued to do so until the consolidation was effected; "that on or about the 1st day of December, A. D. 1900, the defendant, while the plaintiff was so engaged in aiding and assisting him as aforesaid, did secure the title to said lode mining claims, and did effect the consolidation of said properties, including the said Doctor and Chief lode mining claims, in which said consolidation there was paid to the owners of the said Doctor and Chief lode mining claims the sum of \$450,000";

that by reason of the said consolidation, and the aid and assistance rendered therein by plaintiff, there became due and owing from the defendant to the plaintiff the sum of \$22,500, which has not been paid. The defendant answered this complaint, first, by a general denial, then by a special defense, in which he alleged that he authorized the plaintiff to get an option for the sale of the property and agreed to pay him a commission of 5 per cent., provided the plaintiff could get the properties or an option for their purchase at a price satisfactory to the defendant; that defendant gave the plaintiff ample time to procure the option, but that plaintiff failed to do so; that during the fall of 1900 H. H. Lee of Denver secured an option for the sale of the property in the name of J. A. Hayes, trustee, and under such option the owners transferred to the Doctor-Jackpot Consolidated Mining Company the properties mentioned in the complaint, and that the properties were purchased by this mining company wholly through the efforts of Lee, and that the plaintiff rendered no assistance whatever in such purchase. Plaintiff denied the allegations of this answer. There was a verdict and judgment for the defendant, and plaintiff appeals.

The first alleged error discussed in the briefs relates to the testimony of A. M. Stevenson, a witness for the plaintiff. It appears that Mr. Stevenson and Josiah Winchester had a lease upon the properties described in the complaint, and that the sale could not be consummated without a surrender of this lease; that Stevenson and Winchester had agreed with the plaintiff to surrender the lease in the event of his securing a satisfactory option. Such an option was not secured. Upon the cross-examination of Mr. Stevenson, the following question was asked: "Do you recollect, Mr. Stevenson, that you had practically abandoned the hope of carrying this matter out in September, and at that time did not Mr. Carlton agree or offer to surrender this to you?" It evidently had reference to the agreement to surrender the lease. Plaintiff objected to this question as being immaterial. This objection was overruled. The witness answered: "I don't recollect that. I know that we had abandoned the idea of carrying out that contract, and never did carry it out." The plaintiff could not have been prejudiced by this question or answer, even though it was improper (which we do not determine), for the reason that with the exception of the statement that the contract was never carried out, and consequently was abandoned, the balance of the question was answered in the negative. The plaintiff surely was not injured by Mr. Stevenson's saying he did not recollect that they had practically abandoned the hope of carrying the matter out in September.

The defendant testified, without objection, that at the plaintiff's suggestion he called upon Mr. Robison, who was one of the own-

ers of the property, and had a conversation with him relative to its purchase. In the course of his testimony he stated that Mr. Robison declared with much emphasis that his (the defendant's) time had been wasted, and that he (Robison) never would sell the property for the price named by defendant. This last statement was objected to, the objection overruled, and plaintiff assigns error for that. If the conversation with Mr. Robison was admissible at all, and we cannot conceive of any reason why it was not, and the plaintiff does not assert that it was not, then it was perfectly proper to give the entire conversation.

In the course of the trial testimony was admitted which tended to show that Mr. Lee secured an option upon the property; that he, with the co-operation of Edward J. Sealey, sold this property to Clarence Edsall, who had it transferred to J. A. Hayes, trustee, pending the formation of the corporation called the "Doctor-Jackpot Consolidated Mining Company," to which it was afterwards transferred. About the time that this arrangement was completed the defendant was approached by some of the promoters and requested to take part in the enterprise, which he did, investing the sum of \$25,000 in this new company. Upon cross-examination of the defendant in relation to this consolidation thus effected, he was asked the following question: "It was never understood that the legal title to these properties was necessary to be taken in your name by yourself or Judge Bailey, was it?" This question was objected to and the objection sustained. It is contended that the court erred in this. If there was error committed by the court in this respect, it was without prejudice to the plaintiff, for the reason that the uncontradicted testimony shows conclusively that the defendant was not a party to the procuring of the option nor to the organization of the enterprise, which finally brought about the consolidation of the properties, until the transaction was practically consummated. This being true, it is immaterial as to whether or not the contract made by the plaintiff and defendant contemplated that the legal title to the property should be taken in the name of the plaintiff or defendant, or in some person else. If the proof had tended to show that the defendant, for the purpose of avoiding his contract with the plaintiff, had procured some other person to secure the title to the property, a different rule would obtain, but here there is a total absence of any proof which imputes an unfair or dishonest motive on the part of the defendant, and there is nothing to show that the title to the property was obtained either by him or through his instrumentality or that of the plaintiff. Consequently, even though the question may have been proper under the pleadings, an examination of the transaction as shown by the testimony demonstrates that the sustaining of the objec-

tion was without prejudice to the rights of the plaintiff.

Mr. Edsall, a witness called for defendant, was permitted, over the objection of plaintiff, to testify that he purchased the claims in question from Mr. Sealey and to give the circumstances and details under which he purchased them, and also to testify that the defendant took no part in the transaction. This is assigned as error. We fail to see the force of the contention, in view of the fact that the answer of the defendant alleges the very thing which was proven by Edsall's testimony. Plaintiff testified that he would not be entitled to his commission if Lee was conducting his negotiations with parties other than the defendant; and Edsall's testimony was admissible for the purpose of showing that that very fact existed. This disposes of all the objections and exceptions which were made and reserved during the taking of the testimony.

Instruction No. 2, requested by the plaintiff, was to the effect that, if they believed the contract set out in the complaint had been established and that the plaintiff performed the obligations imposed upon him by the contract, that notwithstanding the fact that others may have been engaged in endeavoring to accomplish the same purpose, yet, if the defendant had not revoked the plaintiff's authority and the purpose of the contract was consummated, the plaintiff was entitled to recover. The court refused to give this instruction, but did give instruction No. 5, requested by the plaintiff, which embodies the same principle of law. Consequently there was no error in the refusal to give instruction No. 2. *Baldwin v. Central Savings Bank*, 17 Colo. App. 7, 67 Pac. 179.

Plaintiff complains bitterly because of the instructions given by the court to the jury, asserting that the court tried the case upon a wrong theory. As we read the instructions, they are in absolute harmony with the case made by the pleadings and the testimony. Instruction No. 1 is as follows: "Now, the jury are instructed that if you find and believe by the preponderance or greater weight of the evidence that the defendant, in the summer of 1900 did employ the plaintiff to assist him in procuring the title to said Doctor and Chief lode claims for the purpose of putting said claims with others, into a consolidation, and agreed to pay plaintiff 5 per centum on the amount at which said claims might be purchased, that plaintiff agreed thereto, and immediately thereupon and thereafter did assist the defendant in procuring the title to said claims, and that defendant about December 1, 1900, while plaintiff was so assisting him, did secure from Cone and Robison, the owners of said lode claims, the title thereto, at a consideration of \$450,000 paid, and did put said claims into a consolidation with other contiguous claims, then the jury will find for the plaintiff and assess his damages at \$22,500,

together with 8 per cent. per annum interest thereon from the time plaintiff made demand upon defendant for the payment of said sum to this date; otherwise you will return a verdict for the defendant." The plaintiff says that this instruction is erroneous because it limits his right to recover by the interposition of several contingencies not mentioned in the contract, the first of which—that the defendant should secure the title from the owners—is wholly foreign to the contract. Plaintiff's case as made by the complaint rests upon the allegation that the defendant while the plaintiff "was so aiding and assisting him as aforesaid did secure the title to said lode mining claims, and did effect a consolidation of said property." Having alleged that the plaintiff agreed to assist the defendant in securing the title, and that defendant by reason of such assistance did secure the title, plaintiff cannot complain of an instruction which bases his right to recover upon proof of the allegation. Again, that portion of the instruction found in the following words: "Did put such claims into a consolidation"—is asserted to be a modification of the contract, yet the words used by the court are the very words that are used by the plaintiff in stating his cause of action. And so with the next objection which is urged to this instruction—that is, that the defendant should have secured the title while plaintiff was assisting him. Yet the language of the complaint is that the defendant, "while the plaintiff was so aiding and assisting him as aforesaid, did secure the title to said lode mining claims."

The third instruction given by the court to the jury is as follows: "Although the jury may find and believe from the evidence that the defendant did employ the plaintiff to assist him in securing the title to said lode claims, and did agree to pay the plaintiff 5 per cent. on the purchase price at which said lode claims should be taken into a consolidated company, and that plaintiff did render services in an attempt to procure said lode claims to be put into said consolidated company, yet if you further find and believe from the evidence that plaintiff and defendant were unable to agree with Robison and Cone in the purchase of said claims, and that other persons, not co-operating with defendant, thereafter initiated negotiations with said Robison and Cone for the purchase of said lode claims and put them into a consolidated company, you will return a verdict for the defendant, even though you may further find and believe from the evidence that the defendant on request, contributed to the purchase of said lode claims." The plaintiff quarrels with this because of the phrase, if the jury "believe from the evidence that plaintiff and defendant were unable to agree with Robison and Cone in the purchase of said claims." Plaintiff contends that this, in effect, tells the jury that if the plaintiff had made out a complete case, if he had complied fully with

all of the terms of the contract, yet he could not recover if "the plaintiff and defendant were unable to agree with Robison and Cone in the purchase of said claims." The instruction must be taken as an entirety. It cannot be divided into phrases which are incomplete, and thus destroy its sense. The balance of the clause is: "and that other persons, not co-operating with defendant, thereafter initiated negotiations with said Robison and Cone for the purchase of said lode claims and put them into a consolidated company," plaintiff could not recover, even though the defendant contributed to the purchase of the property. Plaintiff also contends that the phrase "other persons not co-operating with defendant" is not warranted by the contract, because, as he says, "the only contingency provided for by the contract is that the consolidation shall be effected." This is not true, because the contract, as alleged by the plaintiff, is that the plaintiff was employed to assist the defendant in securing the title to the property for the purpose of effecting a consolidation of said claims with certain other property, and that the plaintiff did secure the title to the property, and did effect the consolidation. The thing contracted to be done was securing the title to the property, and the making of the consolidation by the plaintiff, and not by some person not connected or associated with him. Plaintiff in his testimony stated: "I wouldn't obtain any commission, I wouldn't be entitled to any commission, if Mr. Carlton was not the party for whom Mr. Lee was acting. If Mr. Lee was acting for some other parties and was effecting a consolidation through others, then I wouldn't have any commission." This instruction relates to that very phase of the contract which was pleaded and proven by the plaintiff. Defendant testified that about the 1st of September he and the plaintiff concluded that they would be unable to purchase this property from Robison and Cone, and make the consolidation because of the price at which it was held by the owners, and that the project was abandoned. Plaintiff said that, while there were no further negotiations or communications after about August 27th upon his part, there was no thought of an abandonment.

The fourth instruction given by the court is to the effect that if there was an abandonment of the contract, and that thereafter the defendant, acting with others, succeeded in obtaining the property and making the consolidation, and this, independent of any of the efforts of plaintiff, the plaintiff could not recover. The defendant was entitled to this instruction upon his theory of the case. If, as he contends, he and the plaintiff found that they were unable to make the purchase of the property and abandoned the project, this would not prohibit the defendant from afterwards negotiating with others to carry out the same enterprise, and, if the matter was accomplished

in connection with others, wholly and absolutely independent of any efforts made by the plaintiff, plaintiff could not recover for his services which had proven to be futile. The ninth instruction is as follows: "The court instructs you that, although you may find from the evidence that the defendant employed the plaintiff to assist him in procuring title to the Doctor and Chief mining properties for the purposes of consolidation, still if you further find from the evidence that the titles to such properties were acquired by some one other than the defendant herein, and that the defendant did not actively participate, or take part in acquiring the title to such properties, then your verdict must be for the defendant." This instruction is based upon the allegations of defendant's answer and the testimony introduced on behalf of the defendant, and, if the jury found the facts as therein stated, the plaintiff would then have no cause of action against the defendant.

We are satisfied that, under the pleadings and the proof, the plaintiff had no right of recovery against the defendant. We are unable to find wherein the court erred in the trial of the cause, and the judgment will therefore be affirmed.

Affirmed.

STEELE, C. J., and GODDARD, J., concur.

EMPSON PACKING CO. v. CLAWSON.

(Supreme Court of Colorado. April 6, 1908.)

1. CONTRACTS—PERFORMANCE—DETERMINATION OF THIRD PERSON—CONCLUSIVENESS.

Where parties to a contract designate one who is authorized to determine questions relating to the execution of the contract, and stipulate that his determination shall be final and conclusive, both parties are conclusively bound by his determination of such matters, except in case of fraud or gross mistake implying bad faith or failure to exercise an honest judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1326.]

2. SAME.

A contract required one to plant and cultivate a certain acreage of peas, and collect and deliver the same to a packing company, which agreed to receive and pay a specified price for peas delivered by him in proper condition for canning. The contract stipulated that the superintendent of the packing company should be the sole judge of the proper condition of the crop for canning. *Held*, that the judgment of the superintendent was conclusive in the absence of fraud or gross mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1326-1329.]

3. SAME.

A party to a contract stipulating that the determination of a third person as to performance of the contract shall be conclusive, who desires to avoid the determination of the third person must allege facts presenting fraud or implying bad faith or a failure to exercise an honest judgment by such third person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1326-1329, 1343.]

4. SAME—CONSTRUCTION.

A contract required plaintiff to plant and cultivate a certain acreage of peas, and collect and deliver the same to a packing company. The contract stipulated that the peas should be suitable for canning purposes, and that the superintendent of the canning company should be the sole judge of the proper condition of the crop. It provided that plaintiff should submit samples of crops to the canning company a few days before the peas were ready to harvest, and that the company would advise what day the delivery should be made. *Held*, that the company, on being notified by plaintiff that the crop was about ready to be harvested, must exercise due diligence in examining the crop to determine its condition with respect to fitness for canning, and plaintiff was entitled to recover where the company failed to exercise due care, and prevented a delivery at a time when the crop was in proper condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1430-1437.]

5. SAME.

Where the performance of an obligation is prevented by one of the parties to a contract, the party prevented from discharging his part of the obligation will be treated as though he had performed it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1430-1437.]

6. APPEAL—ERRONEOUS RULINGS—GROUNDS FOR REVERSAL.

Where a cause was submitted to the jury on two theories, one erroneous and one correct, and the court on appeal cannot determine which theory the jury followed, the judgment must be reversed.

Appeal from District Court, Boulder County; Jas. E. Garrigues, Judge.

Action by Garrett Clawson against the Empson Packing Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Fillius & Davis and Ernest Morris, for appellant. H. M. Minor and Albert Dakan, for appellee.

GABBERT, J. The Empson Packing Company and Garrett Clawson entered into a contract, whereby Clawson contracted to plant and cultivate a certain acreage of peas, and to collect and deliver the same to the packing company. The company agreed to receive the peas that Clawson delivered in proper condition for canning, and to pay him a specified price per 100 pounds. The contract contained this stipulation: "It is stipulated and agreed that all peas grown on this contract shall be delivered at the factory of the Empson Packing Company at Longmont, Colorado, in suitable condition for canning purposes. The largest peas must be tender and in best condition for eating. All pods must be green when vines are cut. If they are white they will be too old and will not be accepted. The foreman, superintendent, or some officer of the Empson Packing Company is to be the sole judge of the proper condition of the crops for canning. Party of the first part (Clawson) is to submit sample of crops to party of the second part a few days before peas are ready to harvest, and they will be advised what day to deliver them." The company refused to ac-

cept part of the crop, and Clawson brought suit to recover damages for the alleged failure of the company to comply with this contract. In his complaint, after setting out the contract *hæc verba*, plaintiff alleged, in substance, that he had complied with its terms upon his part, but that the company refused to receive or pay for about two-thirds of his crop, which refusal was without legal reason or excuse therefor, whereby the plaintiff lost this part of his crop, to his damage in the sum of \$500. To this complaint the defendant company answered, in which it denied that plaintiff cultivated and raised a crop of peas of the quality required of him by the terms and conditions of his contract; denied that it refused to receive or pay for any peas raised by him under his contract that were of the quality and kind specified; and alleged that the peas tendered by plaintiff were not of the quality as specified in the contract, that they were not in suitable condition for canning, that the peas were scalded and wrinkled, that they were carefully inspected, as provided in the contract, by the president of the company, its field foreman, and superintendent for the purpose of ascertaining whether they were in proper condition for canning, and that each and all of these persons determined that they were not. To this answer the plaintiff filed a replication, wherein he averred that he notified the defendant that the peas were in proper condition for delivery, and that he was ready and willing to deliver them, and that at the time of such notice they were in the condition required by the contract, and that, if they were not in the condition that the contract required when delivered or tendered, it was because of the refusal of the defendant to receive them sooner. He further alleged that the field superintendent of the defendant had been to the field where the peas were growing, and well knew that they were ready and in proper condition to deliver, but, disregarding his duty, and arbitrarily acting in bad faith, declined and refused to state that the peas were ready to deliver, and therefore denied that the officials mentioned in the defendant's answer examined and determined when the peas were in proper condition for delivery, but willfully, negligently, and in bad faith declined and refused to do so, and to notify plaintiff when to deliver them, contrary to, and in disregard of, the obligations imposed upon it by the contract. The issues thus made were submitted to a jury. Verdict was rendered for plaintiff. From a judgment thereon, the defendant appeals.

Over the objection of the defendant, testimony was admitted on behalf of the plaintiff tending to prove that the peas were in a proper condition for canning at the time he offered to deliver them to the defendant at its factory. The testimony on behalf of the defendant was to the effect that the peas were unfit for canning purposes because they were scalded. The court instructed the jury to the effect

that they should determine from the testimony whether or not the peas tendered by plaintiff were scalded, and that they might determine from the testimony bearing on the condition of the peas at the time of their rejection for the purpose of determining whether the defendant exercised the right reserved in the contract to determine the proper condition of the peas for canning, in a fair and impartial manner, or arbitrarily and prejudicially to the plaintiff, and that defendant was bound to exercise the right of determining the condition of the peas in a manner satisfactory to the mind of a reasonable person. The admission of the testimony for the purpose indicated, as well as the instructions given, was error. The parties to the contract selected the persons who should be the sole judges of the proper condition of the peas for canning. Their decision that they were not was binding and conclusive upon them, and could not be assailed, except for fraud, or such gross mistake as would indicate bad faith, or that they had failed to exercise an honest judgment in discharging the duty imposed upon them. In other words, the rule of law is that where parties to a contract designate a party who is authorized to determine questions relating to its execution, and stipulate that his determination shall be final and conclusive, both parties are conclusively bound by his determination of those matters which he is authorized to determine, except in case of fraud, or such gross mistake upon his part as would necessarily imply bad faith, or a failure to exercise an honest judgment. *Martinsburg & Potomac R. R. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; *Sweeney v. United States*, 109 U. S. 618, 3 Sup. Ct. 344, 27 L. Ed. 1053; *McAvoy v. Long*, 13 Ill. 147; *Elliott v. M., K. & T. Ry. Co.*, 74 Fed. 707, 21 C. C. A. 3; *Wallace v. Curtiss*, 36 Ill. 156; *Lucas Coal Co. v. Del. & H. Canal Co.*, 148 Pa. 227, 23 Atl. 990; *Nofsinger v. Ring*, 71 Mo. 149, 36 Am. Rep. 456; *Chicago, Santa Fe R. R. Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917; *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106; *Lynn v. B. & O. R. R. Co.*, 60 Md. 404, 45 Am. Rep. 741; *McAuley v. Carter*, 22 Ill. 53; *Choctaw & M. R. Co. v. Newton*, 140 Fed. 225, 71 O. C. A. 655. In the case at bar the parties selected certain officials of the defendant company, and stipulated that the fitness of the peas for canning should be determined solely by them. Necessarily this stipulation rendered their judgment conclusive in the absence of the conditions under which it could be assailed. By this stipulation the parties did not agree that the correctness of the judgment of the persons agreed upon to determine the fitness of the peas for canning should be submitted to a court, a jury, or the opinion of any one, other than those designated. Courts have no authority to abrogate or modify contracts which parties have deliberately entered into. On the contrary, it is their duty to enforce them as they find them, and not to direct

provisions by implication which the plain and unambiguous language evidencing the contract does not warrant. What might constitute such fraud, bad faith, or a failure to exercise an honest judgment by the persons designated to determine the fitness of the peas for canning we will not undertake to say, because there is no evidence tending to prove that any of these persons were guilty of such acts as would permit the plaintiff to have assailed their judgment. They examined the peas, they tested them, and determined that they were unfit to can, and their judgment in this respect concludes the plaintiff on the subject of the condition of the peas which he tendered to the defendant.

The attention of counsel is directed to the pleadings in so far as they relate to the question already determined, and, although we shall not indicate our views on the sufficiency of the pleadings to raise that question, because no point is made by counsel with respect thereto, we deem it proper to suggest that in order to raise the question of fraud, or such action as necessarily implied bad faith upon the part of those who were to determine the condition of the peas for canning, or failure to exercise an honest judgment in discharging the duty imposed upon them, it may be necessary to plead facts presenting these questions. *Martinsburg & Potomac R. R. Co. v. March*, supra. At the conclusion of the testimony on the part of plaintiff, defendant moved for nonsuit, and, after rendition of verdict in favor of plaintiff, the defendant moved for judgment non obstante veredicto. Both these motions were properly denied, because there was another issue in the case from that we have considered. By the replication an issue was tendered, without objection on the part of the defendant, to the effect that defendant was notified when the crop would be in a suitable condition for delivery and canning; that he, plaintiff, was ready and willing to deliver it at the time specified; that defendant never consented to receive the peas until several days after the date when defendant was notified that the crop was ready for delivery; and that, if the peas were not in the condition stipulated in the contract at the time he delivered or tendered them to the defendant, it was because of the refusal of the latter to receive them sooner. There is testimony to the effect that on a Friday Clawson notified the field foreman of defendant that the peas would be ready for delivery the following Monday or Tuesday; that the foreman stated he could not promise to come that soon; that on Monday plaintiff went to the factory and saw the field foreman and the president of the company, and asked them if he could not commence cutting the peas. The foreman replied that he could not promise. Clawson again informed him that he thought the peas were ready to cut, and again asked him if he could not begin cutting on Wednesday, to which he replied

that he could not promise. Thursday or Friday after the first notification was the first time that the company consented to have the peas cut. There is also testimony to the effect that on Monday the date designated by Clawson when the peas would be ready to cut, they were in proper condition for canning. A witness on behalf of Clawson testified that he met the field foreman on Saturday subsequent to the day plaintiff says he notified the defendant when the crop would be ready to harvest, when he drove into the patch of peas; that he, the witness, informed him that it would be necessary to deliver the peas the first of the next week, to which he replied: "Yes; but, if there comes a shower, you will be surprised to see how long they will keep green." Clawson testified that the reason assigned by the defendant for not receiving the peas when they were delivered, or tendered for delivery, was that they were too ripe, while, as we have previously stated, the objection to receiving them given on behalf of the defendant was that they were scalded. There is also other testimony bearing on the issue made by the replication, to which it is not necessary to refer. It controverts or contradicts, in some respects, that to which we have referred, so that it would be the province of the jury to determine the facts, and we have only referred to the testimony noticed for the purpose of showing that there was evidence tending to prove the issues made by the replication.

The contract between the parties contained mutual promises. Clawson agreed to grow a certain acreage and deliver the crop to the defendant, and not sell to any other person without its consent. The defendant agreed to receive all peas delivered in a proper condition for canning. The contract specified certain tests by which the fitness of the peas could be determined. It further provided that Clawson should submit samples of crops to the company a few days before the peas were ready to harvest, and that he would be advised what day to deliver them. It is contended by counsel for appellant (which is, no doubt, correct) that the canning of peas is a science, and that it requires skill and expert knowledge to determine at just what stage of the development or maturity the peas should be cut and canned. It also appears from the testimony that the time within which the peas must be harvested after they reach the proper stage of maturity for canning is very short. It is evident from the contract that the parties intended that the crop should be harvested at a time which would give the best results to both. The defendant, through its officials, was to be the judge of the proper condition of the crops for canning; but, by the contract, it was also necessary for it to advise Clawson when the crop should be delivered. In order to do this, it was necessary upon its part to notify Clawson when the crop should be harvested. In discharging this obligation which

it assumed, it was incumbent upon the defendant to exercise due diligence in examining the peas for the purpose of determining their condition with respect to their fitness for canning. It could not be negligent in this respect and escape liability to take and pay for the crop if that negligence resulted in rendering the peas unfit to can. The testimony discloses that the defendant was notified two or three days in advance of the time when the crop would be ready to deliver, so that the peas would be in the condition which the contract contemplated. It appears, according to the testimony on the part of plaintiff, that the field foreman examined the crop two days before the day plaintiff claimed it would be ready to be harvested; that at this time he did not assert that the peas were not sufficiently mature to harvest, but suggested that, if there should be a shower, the peas would continue to keep green, thus indicating that they were in a proper condition then to harvest, but they would remain so for a while in the event of a rain. During the time which Clawson contends the peas were ready to be delivered he was importuning the defendant to furnish a cutter and permit him to harvest and deliver the peas. Defendant did not consent to his delivery of the peas until two or three days after the time when he said they were ready for delivery. It is his contention that when they were delivered, if they were not in proper condition for canning, it was because they were too ripe, which, he says, is the objection the defendant made. It thus appears, according to the claim of Clawson, that the reason why the peas were not up to the standard required by the contract was because the defendant had not performed the obligation imposed upon it to exercise due care in ascertaining the condition of the crop for canning, and in not permitting him to deliver them at a time when it was in a proper condition. If the testimony established these facts, then the plaintiff was entitled to recover, for the obvious reason that the failure of the defendant to discharge the obligations which it assumed under the contract was the cause why the peas were not fit for canning. He who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned; or, if the performance of an obligation is prevented by one of the parties to a contract, the party thus prevented from discharging his part of such obligation is to be treated as though he had performed it. *Palm v. O. & M. R. R. Co.*, 18 Ill. 217; *Hunt v. Vest*, 8 Ala. 713, 42 Am. Dec. 639; *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167; *Marshall v. Craig*, 1 Bibb (Ky.) 379, 4 Am. Dec. 647; *Davis v. Crawford*, 2 Mill, Const. (S. C.) 401, 12 Am. Dec. 682. There was, however, as we have stated, some conflict in the testimony with respect to the condition of the crop at the time when Clawson claimed he notified the defendant it was ready for delivery. Even

though the case may have been properly submitted to the jury, under the issues made by the replication, we cannot affirm the judgment, because it appears that the case was tried by plaintiff and by the court submitted to the jury, upon two theories: (1) Whether or not the peas tendered were rejected by the defendant in good faith, or that they were in such condition as to have reasonably satisfied the defendant; and (2) the condition of the peas at the time Clawson claimed they were ready for delivery, and the failure of the defendant to discharge the obligation upon it imposed in determining their condition at this time. The first we have said was erroneous; and, as we cannot tell from the record which theory the jury followed in rendering a verdict, the judgment must be reversed: and it is so ordered.

The judgment of the district court is reversed, and the cause remanded for a new trial, with leave to the parties to amend their pleadings as they may be advised.

Reversed and remanded.

STEELE, C. J., and CAMPBELL, J., concur.

MAYHEW v. SMITH et al.

(Supreme Court of Colorado. April 6, 1908.
Rehearing Denied May 4, 1908.)

1. APPEAL — PRESENTATION OF GROUNDS OF REVIEW—OBJECTIONS—SUFFICIENCY OF GENERAL DENIAL—FAILURE TO OBJECT—EFFECT.

Even though a general denial was bad as not amounting to a denial, where the parties treated it as a good denial on trial, and evidence was introduced thereunder without objection, its sufficiency could not be raised for the first time on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1241-1246.]

2. SAME — REVIEW—VERDICT—SUFFICIENCY OF EVIDENCE.

Where the question as to whether an interlineation on the face of a judgment was made by the justice on the same day it was rendered or thereafter was submitted to the jury, there being legal evidence to sustain a finding that it was made on the same day, the jury's finding will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

3. SAME—APPROVAL OF TRIAL COURT—EFFECT—HARMLESS ERROR.

Where the trial court submitted to the jury whether an interlineation on the face of a justice's judgment was made on the day it was rendered or later, even if the admissibility of the judgment was for the court, its approval of the jury's finding obviated any error in submitting the question to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4215.]

4. TRIAL—QUESTIONS FOR JURY—CONFLICT IN EVIDENCE.

In an action to recover for property alleged to have been unlawfully levied upon under a justice's judgment, the evidence being conflicting as to whether an interlineation in the judgment was made on the day it was rendered or later, that question was properly submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 342, 343.]

5. EXECUTION—LEVY—NECESSITY OF EXHIBITING AUTHORITY.

While it is better practice to do so, the failure of an officer to exhibit to the debtor his authority for levying an execution does not invalidate the levy, and affords no ground for excluding evidence of the execution under which a levy was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 283.]

6. APPEAL—RESERVATION OF GROUNDS OF REVIEW—OBJECTIONS—WAIVER.

Where the admission of an indorsement upon the back of an execution paper to prove the appointment of a special constable was at first objected to, and afterwards admitted by consent, but counsel thereafter withdrew his consent, and upon the trial court asking him if he objected to its admission replied, "I just pass that by without saying anything," it may not be objected on appeal that the special appointment was not sufficient under the statute.

7. APPEAL—REVIEW—VERDICT—APPROVAL OF TRIAL COURT—EFFECT.

In an action to recover for property unlawfully taken under execution levied by a specially appointed constable, the question as to whether, at the time of the special appointment, there was a qualified constable who could have been conveniently found in the township having been submitted to the jury, and their finding approved by the court, it will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3948-4950.]

8. CONSPIRACY—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action to recover for property seized under an alleged unlawful conspiracy between the justice of the peace issuing the execution and the execution creditor, it may be shown that the judgment against the debtor in the justice court was for groceries sold him, as that fact tended to show that the creditor was seeking in good faith to collect a just debt, and tended to disprove a conspiracy.

Appeal from District Court, Rio Grande County; Charles C. Holbrook, Judge.

Action by Payson E. Mayhew against Willard P. Smith and others. From a judgment for defendant, plaintiff appeals. Affirmed.

Plaintiff, Mayhew, brought this action against defendants to recover the sum of \$160, alleged to be the value of personal property belonging to him, of which defendants unlawfully deprived him, and the further sum of \$500, as exemplary damages, which he claims to have sustained as the result of the carrying out of an unlawful conspiracy entered into by defendants to seize and carry away this property, in accomplishing which, with violence, force, and arms, they abused, humiliated, and insulted him, and wantonly disregarded his rights and feelings. The defendants in their separate answers deny that the seizure was unlawful, and, as a separate defense, justify under a judgment rendered by defendant Foster, justice of the peace, at the suit of another defendant, Smith, as a plaintiff, which was duly rendered against Mayhew, and which, under the authority of a writ of execution issued by the justice, was executed by the other defendant, Wallace, as a special constable, deputed by the justice to levy upon and sell the property

in satisfaction of the judgment. A replication to the affirmative matters of the answers having been filed, the case was submitted by the court to a jury, which found for defendants, and the judgment, entered upon the findings, has been appealed from by plaintiff.

Charles M. Corlett, for appellant. James P. Veerkamp, for appellees.

CAMPBELL, J. (after stating the facts as above). 1. Plaintiff says that the attempted denial in the answer of each defendant, "He denies each and every allegation contained in the plaintiff's said complaint not hereinafter specifically admitted, denied, or traversed," is no denial at all. Whether this contention is true is not important for several reasons. At the trial it was treated as a good denial by both parties, and evidence was introduced in support of it without objection. The point here made cannot, for the first time, be urged upon review.

2. The defendants, in support of their affirmative defense, offered in evidence the judgment, or a transcript thereof, under which they justified. It showed upon its face an interlineation, and, the evidence being in conflict as to the time it was made, the court asked the jury to determine the question of fact, in effect instructing them that, if such interlineation was made by the justice on the same day the judgment was rendered, the judgment was good, but, if made at a later day, the judgment was bad and afforded no justification to defendants in seizing and selling plaintiff's property. The jury found that the interlineation was made on the day of the judgment, and, as there is legal evidence to sustain the finding, it will not be disturbed. It seems that plaintiff's contention is that the admissibility of the judgment was a question for the court, and not for the jury. If that is so, the court's approval of the jury's finding obviates the objection; but we think it was entirely within the province of the court to submit to the jury, for them to determine upon conflicting evidence, the fact as to the time of interlineation, upon which the validity of the judgment depended. Plaintiff was not thereby injured.

3. Complaint is made that the trial court committed error in receiving in evidence the execution under which the levy and sale were made by the special constable. The ground of the objection is that though the plaintiff here, the judgment debtor under the justice's judgment, repeatedly asked the constable, at the time of the levy, for the execution, the latter either replied that he did not have it, or failed to show it. We are not cited to any statute of this state, or any decision by this court, that such failure of an officer to exhibit to the debtor his authority invalidates a levy. It may be that an experienced officer would advise the debtor that he has an execution, and probably that is the better prac-

tice: but his refusal to do so does not invalidate the levy or sale thereunder. 11 Am. & Eng. Enc. Law (2d Ed.) 850.

4. No qualified constable was present at the office of the justice of the peace at the time of the application for a writ of execution, and, it appearing to the justice that none such could be conveniently found in the township, he thereupon appointed Wallace, one of the defendants, a special constable to execute and serve the writ of execution. This appointment was made out under the hand and seal of the justice, not upon the back of the paper on which the execution was printed, but upon a separate piece of paper, which was then put on the back of, and fastened to, such paper. When an attempt was made by defendants to prove the special appointment by introducing such indorsement, objection at first was made by one of plaintiff's counsel. Afterwards, however, he consented that the exhibit constituting the appointment might go in. Thereafter, another of plaintiff's counsel conceiving that a mistake had been made in consenting to the admission of the exhibit, both of plaintiff's attorneys withdrew their consent. Whereupon the court asked them whether or not they objected, and the reply was: "I just pass it without saying anything." Afterwards, still later in the trial, when plaintiff's counsel moved to strike the exhibit, the court refused to grant the motion, upon the ground that it went in without objection. Such being the facts which the record discloses, plaintiff may not, upon this review, be heard to object that the indorsement of the special appointment was not made as our statute requires. Whether or not compliance was had with the statute is therefore not involved in this case, and we express no opinion about it. The further objection that the purported appointment of the constable was void, in view of the uncontradicted evidence that there was a qualified constable in this precinct at a distance of five or six miles from the office of the justice, at the time, ready, able, and willing to serve, had he been called upon, is not tenable. By some authorities it is held that whether or not, in the language of our statute, a qualified constable could be "conveniently found in the township," is a question exclusively within the power of the justice himself to determine, and his finding cannot be questioned. 18 Am. & Eng. Enc. Law (2d Ed.) 40; *Noles v. State*, 24 Ala. 672, 695. However that may be, the court submitted to the jury the question whether a qualified constable could be conveniently found at the time of the special appointment, and the jury said that he could not. The trial court, in overruling the motion for a new trial, must have concurred with the jury, and we cannot say they were wrong.

5. It is contended that there was error in permitting defendants to show that the judgment in the justice court against this plain-

tiff was for groceries sold to him. One of plaintiff's grievances against defendants was that they formed an unlawful conspiracy to seize and carry away his property. In one sense, it is immaterial what was the character of the claim that was reduced to judgment, but the fact, if it be a fact, that the judgment creditor was seeking, in good faith, through the court, to collect a just debt by the seizure and sale of the debtor's property, tends to disprove an unlawful conspiracy by him and the court officers wrongfully to deprive the debtor of such property.

6. Plaintiff questions the ruling of the court in refusing instructions tendered by him, and giving certain other instructions of its own motion. Our examination of the record does not disclose that proper objections were made or exceptions saved to the rulings complained of. We may say, however, that the charge of the court was fair and impartial. Plaintiff's rights were carefully guarded by it.

None of the other questions argued possess merit.

Perceiving no prejudicial error in this record, the judgment is affirmed.

Affirmed.

GABBERT and GODDARD, JJ., concur.

BOARD OF COM'RS OF EL PASO COUNTY v. RHODE et al.

(Supreme Court of Colorado. Nov. 4, 1907.
Rehearing Denied May 4, 1908.)

OFFICERS — COMPENSATION — OCCUPATION OF OFFICE BY DE FACTO OFFICER.

Defendant and another were rival candidates for the office of county treasurer, and defendant was declared elected, and the other candidate appealed to the county court, where a judgment was given against defendant, whereupon he appealed to this court, which reversed the judgment of the county court, and decided that defendant was legally elected. Meanwhile the other candidate had served as treasurer for about six months, and received the salary of the office for that period, and defendant, being reinstated, paid to himself a sum equal to the salary of the office during the period he was illegally kept out of the office. *Held*, that a salary paid to a de facto officer cannot be recovered by the de jure officer upon determination of the contest in his favor, and, as the county cannot be compelled to pay twice for the same services, defendant was not entitled to the salary of the office while it was held by the contesting candidate as treasurer de facto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, §§ 67, 134, 159.]

Appeal from District Court, El Paso County; Edward Stimson, Judge.

Action by the board of county commissioners of the county of El Paso against W. E. Rhode and another. From a judgment for defendants, plaintiff appeals. Reversed, and judgment directed for plaintiff.

R. L. Chambers and Robert Kerr, for appellant. Harvey Riddell, for appellees.

BAILEY, J. Defendant Rhode and one Steinmetz were rival candidates for the office of county treasurer of El Paso county at the election held in November, 1897. The defendant Rhode was by the board of canvassers of said county declared elected for the term beginning January 1, 1898, and received a certificate of election. About the 1st of December, 1897, Steinmetz instituted a contest against Rhode to determine the right to hold such office. Upon the 6th day of January, 1898, the county court of El Paso county, in which the contest proceeding was pending, gave judgment that Steinmetz was elected, and Rhode took an appeal to this court. In July, 1898, this court reversed the judgment of the county court, and determined that Rhode was elected, instead of Steinmetz. *Rhode v. Steinmetz*, 25 Colo. 308, 55 Pac. 814. After this decision was rendered, defendant Rhode came into possession of the office. Steinmetz held the office from the 1st of January until some time in July, and received from plaintiff the salary pertaining to the office for that time, amounting to \$1,750. About the 1st of October, defendant Rhode took out of the fees and other emoluments coming into his office the sum of \$1,750 as compensation to himself as treasurer during the period from the 1st of January until the 1st of July, and reported his action to the plaintiff. Plaintiff demanded the return of the money to the public funds of the county. Defendant Rhode refused to comply with the demand, and this action was brought against him and his surety the defendant company. The matter was submitted to the district court for judgment upon the pleadings. The district court rendered judgment in favor of the defendants, and plaintiff appeals.

There is only one question presented in the case, and that is as to whether or not an officer de jure can recover from a county salary paid by the county to the officer de facto during the period that the officer de jure was kept from the office. One phase of this question was before the Court of Appeals in the case of *Henderson v. Glynn*, 2 Colo. App. 303, 30 Pac. 265. In that case Glynn and Allen were rival candidates for the office of district judge. Glynn received the certificate of election, and Allen instituted contest proceedings. Pending these proceedings Henderson, as State Auditor, declined to draw warrants for the payment of the salary of Glynn; the purpose of resisting the payment being to protect himself and the state against double payment of the same salary. Glynn brought an action of mandamus against Henderson to compel him to draw the warrants. The Court of Appeals said: "Under existing facts and the authorities, both he and the state would be amply protected in paying the salary to the incumbent. That he is judge de facto, in possession of the office and in the discharge of his duties, under color of an election, and hold-

ing all the evidence of being there rightfully, is admitted or unquestioned. In *Terhune v. Mayor*, 88 N. Y. 251, it is said: 'It is no longer open to question in this state that payment to a de facto officer, while he is holding the office and discharging its duties, is a defense to an action brought by the de jure officer to recover the same salary.' " If the state could be compelled to pay the salary of the party holding the office pending the contest proceedings, as was done in the case of *Henderson v. Glynn*, supra, then it follows as a matter of course that the officer de jure upon the termination of the contest in his favor could not recover the salary from the state or county. The people cannot be compelled to pay twice for the same services. To the same effect is the doctrine in *Henderson v. Glynn*. See *In re Havird*, 2 Idaho (Hash.) 687, 24 Pac. 542; *Commissioners of Saline Co. v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171; *Shaw v. County of Pima*, 2 Ariz. 399, 18 Pac. 273; *McVeany v. Mayor of N. Y.*, 80 N. Y. 185, 36 Am. Rep. 600; *McDonald v. City of Newark*, 58 N. J. Law, 12, 32 Atl. 384; *Greeley Co. v. Milne*, 36 Neb. 301, 54 N. W. 521, 19 L. R. A. 689, 38 Am. St. Rep. 724; *County of Wayne v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382; *Michel v. City of New Orleans*, 32 La. Ann. 1094. The states holding contrary views are California, Pennsylvania, Maine, and Tennessee. The great weight of authority is in favor of the doctrine that the county having paid the officer de facto cannot be held to pay the officer de jure for the same period, and, if defendant Rhode could not recover judgment against the county for his salary during the period when the office was held by Steinmetz, it follows as a matter of course that he had no right to pay himself out of the public funds. Consequently the judgment of the district court should have been for the plaintiff, and not for the defendants. It will therefore be reversed and remanded, with instructions to enter judgment in favor of the plaintiff and against the defendants, according to the prayer of the complaint.

Reversed and remanded.

STEELE, C. J., and GODDARD, J., concur.

STECK v. PRENTICE.

(Supreme Court of Colorado. April 6, 1908. Rehearing Denied May 4, 1908.)

1. INSURANCE — DUTY TO FILE ANNUAL REPORTS—LIABILITY—"ACT."

Sess. Laws 1901, p. 116, c. 52, § 1, imposes a fee on every domestic corporation, and declares: "But this act shall not apply to corporations not for pecuniary profit or corporations organized for * * * benevolent purposes." Sections 2-10, pp. 117-121, require the payment of various fees, and each section contains a proviso that nothing therein contained shall apply to corporations not for pecuniary profit. Section 11, p. 121, provides that all corporations shall file annual reports showing the amount of the

capital stock actually paid and how paid, etc., and makes the officers and directors of the corporation liable for a failure to make annual reports. *Held*, that section 11, when considered in connection with previous legislation on the subject embodied in Laws 1897, p. 157, c. 51, does not apply to a mutual fire insurance company engaged solely in the business of the mutual insurance of the property of its members, and the word "act" in the quoted clause in section 1 must be construed to refer to the whole act, and cannot be construed to mean "section," so as to refer only to section 1.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 117, 118.]

2. STATUTES—CONSTRUCTION—PRIOR LEGISLATION.

Where there is any doubt about the meaning of an excepting clause in a statute, the court may consider other statutes enacted on the same subject, though some of them are repealed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 300-306.]

3. CORPORATIONS — OFFICERS — FAILURE TO MAKE REPORT—PENAL STATUTES—CONSTRUCTION.

Statutes imposing noncontractual liability on officers of a corporation for failure to file annual reports required by law are penal in their nature, and must be strictly construed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1460½.]

Appeal from District Court, City and County of Denver; Samuel L. Carpenter, Judge.

Action by B. D. Prentice against James Steck and others. From a judgment for plaintiff, defendant James Steck appeals. Reversed and remanded.

John F. Mall, for appellant. Talbot, Denison & Wadley, for appellee.

CAMPBELL, J. This is an action against the directors of a corporation to recover the penalty prescribed by the act of 1901 (Sess. Laws 1901, p. 116, c. 52) for a failure to file an annual report with the Secretary of State. From a judgment for plaintiff, one of the defendants, James Steck, appealed. In his brief he relies upon four separate propositions for a reversal of the judgment. In our view only one of them requires consideration, for its decision in his favor compels a reversal of the judgment and a dismissal of the action.

The corporation of which appellant is a director is a mutual fire insurance company, and is not for profit, but was organized and engaged solely in the business of the mutual insurance of the property of its members. The act which contains this penalty consists of 14 sections. Section 11 provides that all corporations shall make and file an annual report with the Secretary of State and pay the prescribed fee therefor, failure to do which within the time fixed makes their officers and directors jointly, severally, and individually liable for all corporate debts which were contracted during the year next preceding the time when such report should be filed and until such report shall be made and filed. The last sentence of the first section of the act

reads: "But this act shall not apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes." This language is plain and unambiguous. There seems no room for construction. The appellee, however, contends that, since the eleventh section says the fee to be paid for filing an annual report by a corporation not for pecuniary profit shall be \$1, and sections 2 and 10 each contain a proviso that nothing in those sections shall apply to corporations not for pecuniary profit, the word "act," in the sentence above quoted from section 1, means, not the entire "act," but only the particular "section." It is true there are reported cases where, in statutes, "act" has been held to mean "section"; but we do not think such was the meaning in which the word was here employed.

There is no specific requirement in section 11, or in any other portion of the act, that corporations not organized for profit shall file an annual report, and it is only because of the fee prescribed therein for such filing, and the presence of the provisos in sections 2 and 10, that appellee claims that they must do so. True, the provisos in sections 2 and 10, that neither of those sections shall apply to corporations not for pecuniary profit, are unnecessary if the word "act" in the first section is taken in its ordinary sense; but that circumstance is not conclusive that the General Assembly meant "section" when it said "act." These provisos in sections 2 and 10 are not in conflict with the proviso in section 1. On the contrary, they are in harmony therewith, and, instead of weakening the force of the exception in the opening section, these later provisos, by way of repetition, tend rather to strengthen it. If there were an irreconcilable conflict between different parts of this act, and if there were no express provision, as there is here, in section 1, that the act itself should not apply to corporations not for pecuniary profit, it might be a case for the enforcement of the rule that between conflicting sections of the same act the later in order of arrangement prevails.

There is another consideration of weight in leading to the conclusion that the act was not intended to apply to a corporation not for pecuniary profit, and those organized for religious, educational, and benevolent purposes. Section 11 contains the form which the corporations to which the act is applicable shall follow in making their annual reports. Among others, there are requirements that the amount of the capital stock of the corporation shall be given, the proportion of the capital stock actually paid in, how the same was paid, whether in cash for the purchase of property or otherwise. These requirements are not applicable to the corporations excepted by the first section, as generally they have no capital stock, and many of them no property. Then, too, after setting forth what the annual report must contain as

applicable to corporations in general, there are further requirements for particular corporations, such as those engaged in mining or milling the precious metals, still other requirements for railroad corporations, others still for telegraph and telephone companies, others for corporations engaged in the business of coal mining, and still others for canal, ditch, power, and other corporations, engaged in supplying water for irrigation, domestic, mining, or power purposes; but nowhere, and this is significant, is there a form or statement adapted to such corporations as are exempted by the first section. If there were any doubt about the meaning of the excepting clause, it is proper for the court to consider other statutes which the General Assembly has enacted upon the same subject, even though some are repealed. The first statute on this subject seems to have been passed in 1897 (Sess. Laws 1897, p. 157, c. 51), and the same exception found in section 1 of the present act was contained in that of 1897. This tends to show that the intention of the Legislature was to include only corporations which are organized for profit. *Ireland v. Commissioners*, 6 Colo. 280; *Stermer v. Commissioners*, 5 Colo. App. 379, 38 Pac. 839.

Statutes imposing noncontractual liability upon officers or stockholders of a corporation for such defaults are penal in their nature and strictly construed. In order to shield one from such liability, these acts should not be rendered meaningless; but they should not be broadened so as to include cases clearly beyond the scope of the legislative intent. It has been the policy of this state to encourage the formation of such organizations as are included in this excepting clause. There is not the same reason for imposing upon their managing officers such liability as is imposed upon officers of corporations organized for the profit of themselves and their stockholders, and we do not believe the General Assembly is to be charged with such intention, after having expressly declared that the act should not apply to nonprofit corporations.

The judgment of the district court will therefore be reversed, and the cause remanded, with instructions to dismiss the action.

Reversed and remanded.

STEELE, C. J., and GABBERT, J., concur.

(42 Colo. 449)

**BOARD OF COM'RS OF TELLER COUNTY
v. TROWBRIDGE, Dist. Atty.**

(Supreme Court of Colorado. March 2, 1908.
Rehearing Denied May 4, 1908.)

1. WORDS AND PHRASES—"SALARY."

A "salary" is a periodical allowance made as compensation to a person for his official or professional services, or for his regular work.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6287, 6291; vol. 8, pp. 7792, 7793.]

2. SAME—"FEE."

A "fee" is a payment for services done or to be done, usually for professional or special services; the amount being sometimes fixed by law or custom and sometimes optional.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2712, 2716.]

3. STATUTES—EXPRESSION IN TITLE OF SUBJECT OF ACT.

Act April 20, 1891, p. 221, entitled "An act to amend section seven (7) of chapter xxxviii of the General Statutes of the state of Colorado, entitled 'Fees' the same being general section one thousand four hundred and eighteen (1418) of the said statutes, as the same was amended April 20, 1889," by section 1, par. 5, p. 223, limits the annual compensation of district attorneys, including the salary paid by the state, to \$4,000. The title of the act of 1877 (Gen. Laws 1877, p. 427), of which Gen. St. § 1418, is a part, is "An act to fix and regulate fees chargeable by county, precinct and other officers." Section 7 (Gen. Laws 1877, § 1167) of this act relates to the fees of district attorneys and is entirely silent as to the salaries of such officers. Const. art. 5, § 21, provides that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title. *Held*, that the act of April 20, 1891, p. 223, § 1, par. 5, is obnoxious to Const. art. 5, § 21, in that it is not germane to the subject expressed in the title, or to the subject of the section which it attempts to amend, a salary being a fixed compensation for regular work, while fees are compensation for particular services rendered at irregular periods, payable at the time the services are rendered, and is invalid, and does not repeal Act April 6, 1891, p. 308, § 2, limiting and regulating the annual compensation of the district attorneys in the several judicial districts of the state.

**4. DISTRICT AND PROSECUTING ATTORNEY —
EXPENSES—ALLOWANCE.**

A district attorney is not entitled to deduct from the fees of his office amounts necessarily expended by him as such district attorney for office rent, clerk hire, etc.; he not being required to keep an office as are other state and county officers, and there being no statutory provision which imposes on the county commissioners the duty of furnishing an office to the district attorney as they are required to do for other officers.

Campbell and Bailey, JJ., dissenting in part.

En Banc. Error to District Court, Teller County; Jas. L. Russell, Judge.

Action by the board of county commissioners of Teller county against Henry Trowbridge, district attorney of the Fourth judicial district. From the judgment the county commissioners bring error, and the district attorney assigns cross-errors. Affirmed in part, and reversed in part, and remanded, with directions.

Harvey Riddle, for plaintiff in error. C. D. Hayt and Fred R. Wright, for defendant in error.

MAXWELL, J. By an agreed statement of facts two questions were propounded to the court below for solution: "(1) Is the district attorney of the Fourth judicial district entitled to \$4,000 as the maximum limit of compensation as such district attorney for the year 1901, or is he entitled to the sum of \$3,000 as such maximum limit of compensation? (2) Is such district attorney entitled to deduct from the fees of his office the amounts,

or any part thereof, necessarily incurred and expended by him as such district attorney for office rent, clerk hire, stenographer, telephone, postage, letter files, and stationery?" The court found that the district attorney was entitled to the sum of \$4,000 as the maximum limit of compensation for the year 1901, and was not entitled to deduct from the fees of his office any of the amounts incurred and expended by him for office rent, stenographer, telephone, postage, letter files, or stationery, and rendered judgment accordingly.

The assignments of error of the county commissioners assail the judgment allowing the district attorney the sum of \$4,000 as the maximum limit of his compensation, and the cross-errors of the district attorney assail the judgment disallowing the amounts necessarily expended by him for office rent, clerk hire, stenographer, telephone, postage, letter files, and stationery. Prior to 1891, district attorneys were paid a salary of \$800 by the state and were allowed to collect and retain certain fees, provided by section 7 of chapter 38, Gen. St. 1883, being general section 1418. The county commissioners contend that by the act approved April 6, 1891, entitled "An act to provide for the payment of salaries to certain officers, to provide for the disposition of certain fees and to repeal all acts inconsistent therewith" (Sess. Laws 1891, p. 307), it was provided, by section 2 thereof, that in districts presided over by one judge only, district attorneys should receive \$4,000 and in districts presided over by more than one judge, district attorneys should receive \$5,000, the surplus fees by him collected to be accounted for as therein provided, and that the section relating to salaries was amended by the act of April 11, 1899 (Sess. Laws 1899, p. 331, c. 134), so that the salary of the district attorney of the Fourth judicial district was fixed at \$3,000 per annum, and therefore the court erred in allowing the district attorney a salary of \$4,000 for the year 1901. The district attorney contends that paragraph 5, § 1, of the act of April 20, 1891 (Sess. Laws 1891, p. 221), repealed section 2 of the act of April 6, 1891, it being a later act of the same session, and that the act of April 11, 1899, is of no validity as to the question here presented, in that it is an attempt to amend a section of a law which had been repealed. The commissioners meet this contention by saying that paragraph 5, § 1, of the act of April 20, 1891, is itself of no validity, because the subject-matter of such paragraph is not embraced within the title of the act. The matter therefore resolves itself into this one question: Does paragraph 5, § 1, of the act of April 20, 1891, repeal section 2 of the act of April 6, 1891?

Section 21, art. 5, of the Constitution of Colorado, is: "No bill * * * shall be passed containing more than one subject, which shall be clearly expressed in its title. But if any subject shall be embraced in any act

which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." It is the settled doctrine of this court that the above section of the Constitution of this state contains a mandatory declaration of an essential condition to the validity of legislative enactments, and that so much of any act as is not directly germane to the subject expressed in the title is without force. *People v. Fleming*, 7 Colo. 230, 3 Pac. 70; *People v. Hall*, 8 Colo. 485, 9 Pac. 34; *In re Breene*, 14 Colo. 401, 24 Pac. 3. The title of the act of April 20, 1891, is: "An act to amend section seven (7) of chapter xxxviii of the general statutes of the state of Colorado, entitled 'Fees' the same being general section one thousand four hundred and eighteen (1418) of said statutes as the same was amended April 20, 1889." The title of the act of 1877, of which section 1418, Gen. St. 1883, is a part, is: "An act to fix and regulate fees chargeable by county precinct and other officers." Gen. Laws 1877, p. 427. Section 7 of this act (Gen. Laws, 1877, § 1167) relates to the fees of district attorneys, and is entirely silent as to salaries of such officers, and therefore in its final analysis the question presented is: Does an act which purports to amend a particular section of an existing statute, the title of which relates to "fees," and the section attempted to be amended covering the subject of fees only, violate section 21, art. 5, of the Constitution, by incorporating therein a paragraph fixing the salary to be paid to the officer who receives the fees, upon the ground that the subject is not clearly expressed in the title, and is not germane to the subject expressed in the title? In other words, is the subject "salary" directly germane to the subject "fees"?

Salary: "A periodical allowance made as compensation to a person for his official or professional services, or for his regular work." Standard Dictionary. Fee: "A payment for services done or to be done, usually for professional or special service, the amount being sometimes fixed by law or custom and sometimes optional." Id. The distinction between salary and fees recognized by all the authorities is this: A salary is a fixed compensation for regular work, while fees are compensation for particular services rendered at irregular periods, payable at the time the services are rendered. Our Constitution recognized this distinction. Section 15, art. 14, Const. It is there provided for a classification of counties by population, for the purpose of establishing the fees to be charged by certain officers for services to be performed by them, and, where salaries are provided by law, the same shall be paid out of the fees collected. In *Landis v. Lincoln Co.*, 31 Or. 424, 426, 50 Pac. 530, it is said: "By the ordinary acceptance of the term 'fees,' as heretofore and now used in the statute, we understand it to signify compensation or remuneration for particular acts or services

rendered by public officers in the line of their duties, to be paid by the parties, whether persons or municipalities, obtaining the benefit of the acts, or receiving the services, or at whose instance they were performed (*Musser v. Good*, 11 Serg. & R. [Pa.] 247; *Tillman v. Wood*, 58 Ala. 578), while the term 'salary' denotes a recompense or consideration to be paid a public officer for continuous, as contradistinguished from particular, services, and may be denominated 'annual or periodical wages or pay.' * * * Lexicographers and some authorities class 'salary' and 'wages' as synonymous. * * * But not so with the terms 'salary' and 'fees,' as they appear generally to be distinguished very much as indicated above." In *Cowdin v. Huff*, 10 Ind. 83, 85, it is said: "There are now, and were, at the adoption of our Constitution, at least three modes in use of compensating persons engaged in the public service, viz., fees, salaries, and wages. These modes are all different, each from the other, and the difference between them has been immemorially well understood. Fees are compensation for particular acts or services; as the fees of clerks, sheriffs, lawyers, physicians, etc. Wages are the compensation paid, or to be paid, for services by the day, week, etc., as of laborers, commissioners, etc. Salaries are the per annum compensation to men in official and some other situations. The word 'salary' is derived from 'salarium,' which is from the word 'sal,' 'salt,' being an article in which the Roman soldiers were paid." See, also, *Board v. Wasson*, 74 Ind. 133; *Seller v. State*, 160 Ind. 605, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448.

On principle and authority we are forced to the conclusion that the subjects "salary" and "fees" are not directly germane to each other. In the former opinion announced in this case, it was held that *Airy v. People*, 21 Colo. 144, 40 Pac. 362, decided the question here presented contrary to the conclusions here announced, but further consideration of that case, in view of the precise question there under consideration, convinces us that we were wrong in so holding. There the question under discussion was: Is the salary act of April 20, 1891, obnoxious to the constitutional requirement that no bill except a general appropriation bill shall contain more than one subject? The court held that the general subject of the bill there under consideration was the compensation of public officers, and that the two subdivisions or branches of the subject, to wit, salaries and fees, were included within the general subject. This conclusion seems to be justified by the authorities there cited, and the familiar rule applicable to cases of this kind, thus stated by Judge Cooley (Const. Lim. [4th Ed.] 220): "It has been said by an eminent jurist that when courts are called upon to pronounce the invalidity of an act of legislation passed with all the forms and ceremonies requisite to give it the force of law,

they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained." As before stated, section 7 of chapter 38 of the general statutes relates to fees alone. Paragraph 5 of section 1 of the act of April 20, 1891, relates to salaries alone. Subjects which we have concluded are not directly germane to each other. Therefore paragraph 5 of section 1 of the act of April 20, 1891, is obnoxious to section 21, art. 5, of the Constitution, in that it is not germane to the subject expressed in the title or to the subject of the section which it attempts to amend. It is therefore invalid, and did not repeal section 2 of the act of April 6, 1891. *People v. Fleming*, 7 Colo. 230, 3 Pac. 70; *Commissioners v. Aspen M. & S. Co.*, 3 Colo. App. 223, 32 Pac. 717; *Edwards v. D. & R. G. R. R. Co.*, 13 Colo. 59, 21 Pac. 1011; *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; *Dolese v. Pierce*, 124 Ill. 140, 16 N. E. 218. It follows that the salary of the district attorney was \$3,000, and not \$4,000, as ruled by the trial court. Judgment upon this branch of the case must be reversed.

2. On behalf of the district attorney, it is insisted that the court erred in the disallowance of the expenses necessarily incurred by him in the discharge of his official duties; such expenses being for the items hereinbefore enumerated. The principle relied upon in support of this contention is thus stated by Mechem on Public Officers (section 877): "Where a public officer, in the due performance of his duty has been expressly or impliedly required by law to incur expense on the public account, not covered by his salary or commission and not attributable to his own neglect or default, the reasonable and proper amount thereof forms a legitimate charge against the public for which he should be reimbursed." A number of authorities are cited in the brief in support of the above proposition, all of which have been given due consideration. The principle stated in the above quotation from Mechem is the law, but in our judgment is inapplicable to the facts of this case. There is no statute of this state which either expressly or impliedly requires the district attorney to "incur on the public account" the expenses of office rent, stenographer, clerk hire, or telephone, or any of the other expenses enumerated above. He is not required to keep an office. Other state and county officers are so required, which clearly indicates that it was within the contemplation of the Legislature that, if such expenses were incurred by the district attorney, they should be borne by him. In the absence of a statute making

the counties liable for such expenses, the general principle of law announced by Mech- em is only applicable in cases which are strictly within the purview of the principle. Many of the cases cited by counsel for the district attorney in support of this contention are not in point. Others are cases where the officers were required by law to keep an office, and to keep it open for the transaction of public business during reasonable office hours. In such cases the courts have held that the county was liable for fuel and lights. Other cases are to the effect that, where the law provides that the county authorities shall fix the compensation of county officers, and the amount of their necessary clerk hire, stationery, fuel, and other expenses, it was held that such provision was intended to effectually prohibit anything from being paid beyond what was so fixed or actually necessary. These latter authorities are against the contention of the district attorney.

Not a single case has been cited which is directly in point, nor has diligent investigation found one. In *Benton v. Decatur County*, 38 Iowa, 504, the county auditor was obliged to have assistance and employed persons whom he paid for the services by them rendered. From a judgment disallowing the claims presented by the auditor an appeal was taken. In the course of the opinion, the court said: "The officer accepts his position with a knowledge of the work to be done, and of the remuneration promised. He impliedly undertakes to do the work for the compensation offered. It is only by doing this work that he can perform the engagement into which he has entered. He needs not perform all the duties of his office in person. For the mere manual duties he may employ the fingers of a clerk, but such clerk must be paid out of the salary provided by law for the officer, for the law declares that certain work shall be done for a specified compensation, and, if it is made to cost more, the law is violated." It may be said that the above authority applies to the employment of a stenographer and other clerical assistance, only; but we think that the principle announced is sound, and should be applied to the other items of expense herein involved. Other authorities to the same effect are: *Cohen v. Commonwealth*, 6 Pa. 111; *Christ v. City of Wilkes Barre*, 142 Pa. 114, 21 Atl. 805; *Daggett v. Ford County*, 99 Ill. 834; *Cullom v. Dolloff*, 94 Ill. 330. If the district attorney may maintain an office in one county, he may maintain an office in every county in his district, with its attendant expenses. We believe that such a rule, if it were established, would be dangerous in the extreme, as thereby every other officer in the state would be authorized to employ stenographers and clerks and purchase stationery at the expense of the state or county. The board of county commissioners of each county by statute is required

to provide offices for the county officers. There being no statutory provision which imposes upon the board of county commissioners the duty of furnishing an office to the district attorney seems to be an additional reason for holding that the counties of his district are not chargeable for office rent and other expenses of such office. The judgment of the court below, upon this branch of the case, was right, and will be affirmed.

The former opinion announced in this case will be withdrawn.

The judgment will be affirmed in part, and reversed in part, and the cause remanded, with directions to the district court to enter judgment upon the agreed statement of facts pursuant to this opinion.

Reversed in part, affirmed in part, and remanded.

I am authorized by Mr. Justice CAMPBELL and Mr. Justice BAILEY to say that they dissent from the ultimate conclusion reached by the court on the first branch of the case, if it is based, and can be sustained, only upon the announced proposition that fees and salaries are not germane to each other, as it seems to them to be opposed to the reasoning in the *Airy Case*, supra; and whether or not the final conclusion can be reached by other reasoning, they are not, as at present advised, prepared to express an opinion.

(48 Colo. 140)

WASEM v. GRAY.

(Supreme Court of Colorado. April 6, 1908.
Rehearing Denied May 4, 1908.)

1. PARTNERSHIP—ACTS OF MEMBERS—SCOPE OF AUTHORITY—INSURANCE.

It is within the scope of the implied authority of a partner to effect insurance upon firm property, and, in case of loss, to assign, sell, or collect the adjusted claim therefor, and, if one member of a firm perpetrates a fraud on the other by such assignment, the injured party must look to his partner for satisfaction, and not to the assignee, who has no notice of the fraud.

2. INSURANCE — ASSIGNMENT OF ADJUSTED CLAIM—PARTNERSHIP PROPERTY—RIGHT OF ASSIGNEE.

An adjusted claim for insurance is a chose in action, title to which passes by assignment, unless the assignee knows of fraud that vitiates the transfer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1483.]

3. ASSIGNMENTS—ACTION BY ASSIGNEE—DEFENSES—LACK OF INTEREST IN ASSIGNED CLAIM.

The fact that a part of a claim when collected is to be paid by plaintiff to another is insufficient as a defense to an action on an assigned claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 197.]

4. PARTNERSHIP—ACTION AGAINST MEMBER—ELEMENTS—SUFFICIENCY.

In an action against a partner on an assignment of a firm indebtedness, evidence held to sustain a judgment for plaintiff, notwithstanding an assignment of an adjusted claim for insurance by defendant's partner to plaintiff's assignor prior to the contracting of the indebtedness sued on.

Appeal from District Court, City and County of Denver; Samuel L. Carpenter, Judge.

Action by Horace A. Gray against F. W. Wasem, a member of a partnership, on a claim against the firm. From a judgment for plaintiff, defendant appeals. Affirmed.

B. C. Hilliard, for appellant. Fred W. Parks, for appellee.

CAMPBELL, J. F. W. Wasem and A. B. Schletzbaum, as copartners under the firm name of F. W. Wasem & Co., were engaged in the grocery business in the city of Denver. They incurred debts aggregating about \$108 to various merchants of whom they had purchased goods. The several claims therefor against the firm were assigned to Charles C. Benton, and afterwards Benton assigned them to the plaintiff, Gray, who brought suit thereon against Wasem, one of the partners, and recovered a judgment, from which Wasem appealed. The answer consists of two separate defenses: First, payment; second, that only part of the indivisible claims against the firm was assigned to Gray, which precluded him, as assignee, from maintaining the action in his own name.

The plea of payment was not established. The copartnership had a fire insurance policy on its stock of goods and sustained a loss, the amount of which was agreed upon by the insured and insurer, and the adjusted claim was assigned to Benton by Schletzbaum in the firm name. It is claimed by defendant that Benton collected this money on the insurance policy at the time that he himself was a creditor of the copartnership, and that, having thus received this firm money, he applied it, in violation of Wasem's rights, to an individual debt which Schletzbaum owed him. Defendant invokes the rule of law that one of two members of a copartnership cannot apply the firm property to the payment of his individual debt without the consent of the other partner; and, as Wasem did not authorize Schletzbaum to apply the firm insurance money to his individual debt, such application by Schletzbaum was a fraud on Wasem, and must be taken as a payment, through Benton, of the partnership claims. Were the facts as defendant claims them to be, the rule of law might prevent a recovery in this case; but the court, upon sufficient legal evidence, found against the defendant on the facts.

The assignment by Schletzbaum, in the firm name, of the firm's adjusted claim against the insurance company, is valid on its face. It is within the scope of the implied authority of one partner to effect an insurance upon firm property, and, in case of loss, to assign or sell or collect the adjusted claim therefor. It is a chose in action, title to which passes by assignment, unless the assignee knows of fraud that vitiates the transfer. The defendant Wasem admits that he knew of this assignment about the time it was made, and the only objection which he now makes thereto is that, when the claim was collected, it was ap-

plied to the individual debt of Schletzbaum, and not to the payment of the firm debts. The evidence leaves it doubtful whether such objection was made by him at the time, and it may be that this is an afterthought on his part. However that may be, if Schletzbaum perpetrated a fraud on Wasem, the latter must look to Schletzbaum for satisfaction. The assignment of the claim for the insurance money was a part of the ordinary routine of the firm business, and, as we have seen, within the implied authority of either partner to make. There is no evidence that Schletzbaum was indebted to Benton, or that Schletzbaum assigned the claim against the insurance company in satisfaction of, or that Benton ever applied the money collected from the insurance company upon, an individual debt, if any, of Schletzbaum to him. For aught that appears to the contrary, Benton bought the claim against the insurance company outright, and paid full value for it. He did not become a creditor of the firm, so far as the record shows, until about 40 days after he acquired the claim against the insurance company, when he purchased from the firm creditors the accounts which they had against it. And, if thereafter, when collection was made, he used part of the amount to buy the creditors' claims, it was his money, and not that of the firm, with which payment was made. It may be, as counsel for defendant says, that Wasem has been wronged by having a judgment rendered against him on accounts which he supposed were to be paid out of the proceeds of the insurance policy. If so, it is unfortunate for him that he has not shown a state of facts which prevents the recovery. The accounts against the firm which were assigned to Benton and by Benton to plaintiff were just debts of the firm, and plaintiff, in good faith and for a valuable consideration, acquired them.

The second defense—that the entire interest in these claims was not assigned to plaintiff—is not tenable. There is nothing on the face of the assignment, or in the evidence, which sustains such defense. It does appear that, when the amount is collected, \$15 thereof are to be paid by plaintiff to one Charles Corum; but the written assignment purports to transfer to the assignee Gray all of Benton's interest in the creditors' accounts, and there is no evidence that Corum ever had, or has asserted, any interest therein, except a fixed sum when collected.

It appearing from the record that the assignment of the claim under the insurance policy to Benton was valid, and there being evidence in the record from which the trial court might have found a ratification by Wasem of this assignment, and the defense of payment and partial assignment not having been established, we do not see how the judgment can be disturbed. It is therefore affirmed.

Affirmed.

GABBERT and BAILEY, JJ., concur.

(77 Kan. 599)

HOWARD MILLS CO. v. SCHWARTZ LUMBER & COAL CO.

(Supreme Court of Kansas. April 11, 1908.)

1. EMINENT DOMAIN — AUTHORITY TO CONDEMN.

A private corporation, owning a mill operated by steam power, and having for its purpose the manufacture and sale of flour and feed, cannot exercise the right of eminent domain for the purpose of improving and enlarging such business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 82.]

2. SAME—"PUBLIC MILLS."

The provisions of chapter 65, Gen. St. 1901, do not apply to mills used merely for the purpose of manufacturing flour and feed for sale, and such mills are not made "public mills" by that act.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, p. 5797.]

3. SAME—MILLS.

Section 1306, Gen. St. 1901, does not confer the right of eminent domain upon a mill or other manufacturing corporation which is merely engaged in the manufacture of flour and feed for sale by the use of steam power.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by the Schwartz Lumber & Coal Company against the Howard Mills Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On April 3, 1906, the Howard Mills Company began proceedings to condemn certain real estate for its use which belongs to the Schwartz Lumber & Coal Company. During such procedure, and on May 17, 1906, the Schwartz Lumber & Coal Company filed its petition in the district court of Sedgwick county to enjoin this appropriation of its property. The defendant answered, and when the case was reached for trial, it was submitted to the court upon an agreed statement of facts which, so far as necessary to show the questions presented in this court, reads: " * * * The plaintiff is the owner of the tract of land described in said application and sought to be taken and appropriated by said proceedings; that the plaintiff is a private corporation organized under the laws of Kansas, and engaged in the business of the purchase and sale of lumber, coal, and building material at retail, and uses said tract of land so sought to be appropriated in its said business, and desires to keep and use said tract in its said business; * * * that the defendant, the Howard Mills Company, is a private corporation organized under the laws of Kansas, and that the purpose for which it is organized is stated in its charter as follows: 'The purposes for which this corporation is formed is the manufacture and sale of flour and feed'—that said Howard Mills Company is a milling corporation using power, and is authorized to engage in the manufacture and sale of flour and feed and do all things necessary or expedient in the operation of such a mill and the manu-

facture and sale of flour, feed, and other grain products; that in the year 1901 the said Howard Mills Company, being the owner of said tract of land, erected thereon its present mill and elevator, and from that time to the present has engaged in operating the same in the manufacture and sale of flour and feed and other grain products; that said business has been so conducted during all said time at a fair living profit; that the said mill is equipped with and operated by a steam power plant consisting of engine and boiler of 100-horse power, which furnishes power capacity for manufacturing 400 barrels of flour each day of 24 hours, and is equipped with an elevator having storage capacity of 25,000 bushels of wheat and 1,000 bushels of corn and other grain, and said mill has a storage capacity of from 80,000 to 100,000 pounds of flour and 40,000 pounds of meal and feed, and said mill is equipped with modern mill machinery and apparatus of the capacity of 250 barrels of flour each day of 24 hours; that each barrel of flour contains 196 pounds of flour and consumes $4\frac{1}{2}$ bushels of wheat; and that in the ordinary operations of said mill from 50 to 65 per cent. of the horse power capacity of said power plant is used; that the storage capacity for fuel owned by said Howard Mills Company is 25 tons of coal and 200 barrels of oil; that the ordinary daily consumption of fuel in the operation of said mills is 4 tons of coal and 15 barrels of oil; that if it were not necessary to use any part of the said mill for storing manufactured products, additions to the milling machinery and apparatus could be made which would give the said mill a milling capacity equal to the full horse power capacity of the said power plant; that if the power plant were used to its full capacity the consumption of fuel would be increased 25 per cent.; that it frequently happens that it is not practicable to obtain coal in car load lots upon so short notice as 10 days, and the Howard Mills Company in the operation of its mill has frequently experienced a shortage of fuel for the operation of the same; that the business conducted by the Howard Mills Company in said mill is and has been the purchase of wheat and other grain in the open market, and manufacturing the same into flour and feed, and selling the same in the open markets, and manufacturing flour and feed for farmers and other customers for pay, when offered, as follows: Said Howard Mills Company will grind for pay wheat in quantities of 20 bushels or more, and will grind corn or other grain into feed for pay at any time and in any quantities, and will exchange flour and bran for wheat in any quantity upon request; and has conducted in the past, and is now conducting, a large business in such exchange for its customers, retaining a sufficient allowance from the grain so exchanged to pay its regular customary and uniform rates of exchange; that said Howard

Mills Company publishes and keeps posted up in its said mill its rate of exchange, and the terms and conditions on which it will grind for pay; that under the present conditions of the milling business in Wichita and in the state of Kansas, the business of grinding for toll and pay is not now carried on so far as the grinding of wheat into flour is concerned, and that the method of exchanging flour of a grade and weight of the wheat corresponding to the grade and weight of the wheat offered for exchange has been substituted therefor; that the grinding of corn and other grain into feed for pay is regularly and extensively carried on by the Howard Mills Company in its said mill; that the object of the Howard Mills Company in appropriating the land sought to be appropriated by said proceedings is to provide facilities for the present, and future increase of the milling capacity of its said mill, and the present and future increase of its business, and that the full plans and designs to be adopted in utilizing said land in said business are not matured or settled upon, and are to be so settled upon from time to time as the increase or changes in the business and operation of said mill render the same expedient or necessary; that, if the said Howard Mills Company shall acquire the land so sought to be appropriated in said proceeding, its present intention is to increase its present storage capacity for its flour and other mill products by erecting on said land a building substantially covering all the tract so acquired, to be set on a stone foundation one story in height for the storage of its manufactured products, and constructed with a view to making additions therefor for storage purposes and putting in additional machinery as the operation of said mill and the conduct of said business may from time to time render expedient or necessary, also to increase its storage capacity for fuel by erecting oil tanks and structures for storing coal or other fuel sufficient for the efficient operation of said mill; that the said Howard Mills Company is desirous of extending and increasing its business by operating its mill to its full capacity, and by increasing its capacity by the addition of new buildings and additional machinery, and that it has not now the necessary land upon which to construct such additional buildings and machinery; that the said tract of land sought to be appropriated by said proceedings is the only land adjoining or near to the said mill of the said Howard Mills Company that is practical for the purpose of enlarging and extending the said mill as is desired and contemplated by the said Howard Mills Company; that the said land so sought to be appropriated by said proceedings owned by the plaintiff is used by the plaintiff for storing its lumber, brick, and other building material as suits its convenience, and for the maintenance of coal sheds and bins in which it stores its coal kept for sale, and that there are now no per-

manent buildings of any kind on said land other than said coal sheds and bins; that the said Howard Mills Company has endeavored to purchase from the plaintiff the said tract of land so sought to be appropriated in said proceedings, and that the plaintiff has refused and still refuses to sell the same to the said Howard Mills Company or to place a price which it will accept therefor." The land sought to be appropriated adjoins that already owned, occupied, and used by the Howard Mills Company in its business.

Upon final hearing, a permanent injunction was granted. From that order, the Howard Mills Company brings the case here for review.

Smyth & Helm, for plaintiff in error. H. C. Sluss, Kos Harris, and V. Harris, for defendant in error.

GRAVES, J. (after stating the facts as above). Do the foregoing facts show the Howard Mills Company to be a public corporation having power to exercise the right of eminent domain? This is the question presented. The mills company insists that this question is answered in its favor by the statute of this state. In support of its claim, reference is made to various statutes relating to mills, among which is an act that took effect June 1, 1863, and is still in force, now being chapter 65, Gen. St. 1901. The first section of this act only is given in the brief of the plaintiff in error, but the provisions of the chapter as a whole so clearly indicate the class and character of the mills to which the act was intended to apply that it will be given in full. It reads:

"Mills and Millers.

"An act relating to mills and millers.

"Be it enacted by the Legislature of the State of Kansas:

"Section 1. That all water, steam, wind or other mills whose owners or occupiers grind or offer to grind grain for toll or pay, are hereby declared public mills.

"Sec. 2. All public mills shall grind for customers, in turn as the grain shall be brought in, and as well as the condition of the mill will permit.

"Sec. 3. That the owner or occupier of a public mill shall be accountable for the safe-keeping of all grain received for the purpose of being ground, and also for the articles in which such grain was received; and shall deliver the same, or the flour, meal, malt or other material, ordered to be made from such grain, together with the articles in which it was received, to the owners thereof or their agent, whenever called for.

"Sec. 4. That the owner or occupier of a public mill shall not be liable for the loss of any grain so received, nor for the articles in which it was received, unless said articles containing and accompanying such grain be branded or marked with the initials and full

surname of the owner thereof, nor for losses that may happen without the fault or neglect of the said owner or occupier, nor if by unavoidable accidents.

"Sec. 5. That the owner or occupier of a public mill shall, while receiving grain to be ground, give due attendance to his customers, and assist in unloading grain and loading the material made therefrom, when ground and demanded.

"Sec. 6. There shall always be kept, at a public mill, by the owner and occupier thereof, a half-bushel and a peck measure, tried and sealed by the proper authorities, and also proper toll dishes for the same; and shall keep posted up, in a conspicuous place in their mill, the rates of toll.

"Sec. 7. Every owner or occupier of a public mill, who shall desire to convert the same into a private mill, shall give at least thirty days' notice of such intention, by a proper advertisement, posted up in a conspicuous place in such mill.

"Sec. 8. That, if any owner or occupier of any mill, or their representatives, agent or miller, shall violate any of the provisions of this act, they shall, after due conviction thereof, before any court having jurisdiction of the same, be fined, for every such offense, in a sum not exceeding twenty dollars, at the discretion of the court, with costs for prosecution; said fine to be paid, one-fourth to the party aggrieved, and the balance into the fund for common schools, and moreover be liable, at the suit of the party, for damages."

Those familiar with the conditions existing when this law was enacted, will remember the practices of mill owners which created the occasion for its passage. It will also be recalled that in those days the power of the Legislature to confer the right of eminent domain upon, or authorize taxation in aid of, railroad corporations, was earnestly denied by eminent citizens of the state. The line where the right of the private citizen to hold and enjoy his property ended, and the right of a corporation to appropriate it for its purposes began, was more closely and jealously guarded then than in later years. It was even doubted, when this statute was enacted, whether the Legislature had the power to regulate grist mills, then owned almost exclusively by private individuals, as was contemplated by that law. To avoid trouble on this account they were declared to be public mills. It was not until 1871, that the constitutionality of taxation in aid of railroads was settled in this court. *Leavenworth Com'rs v. Miller*, 7 Kan. 495, 12 Am. Rep. 425. The opinion of Justice Valentine, in that case, concurred in by Justice Kingman, is probably the most exhaustive and elaborate of his many able decisions. The dissenting opinion of Justice Brewer presents in his peculiarly clear and forcible style a most able discussion of the entire question. These facts are mentioned as matters of common knowledge

which may be considered in connection with the statute above quoted. *State v. Kelley*, 71 Kan. 811, 81 Pac. 450, 70 L. R. A. 450.

The right of eminent domain was first conferred upon corporations other than railroads by section 88, c. 23, Gen. St. 1868, which reads: "Lands may be appropriated for the use of macadam, plank-road and telegraph corporations in the same manner as provided in this article for railway corporations as far as applicable." That section has been amended by adding additional corporations thereto until it now reads: "Lands may be appropriated for the use of macadam-road, plank-road, hospital corporation or association, telegraph, hydraulic, irrigating, milling or other manufacturing corporations using power, and for the piping of gas in the same manner as is provided in this article for railway corporations, as far as applicable." Section 1368, Gen. St. 1901. It is contended that the words "milling or other manufacturing corporations using power," used in this statute, when taken in connection with the law as to public mills, completely cover the mill in question. We are unable to concur in this conclusion. Chapter 65, Gen. St. 1901, does not seem to refer to mills such as the one owned by the Howard Mills Company. No such mill was within the state of Kansas when that law was enacted, and probably no member of the Legislature passing the act had ever seen such a mill. The language used in the statute applies to and describes the old-fashioned grist mill—a mill operated for the accommodation of the public; a mill upon which the citizens "for miles around" were compelled to depend for the meal and flour from which their daily bread was made; a mill where the customers came on horseback, in ox wagons, and other conveyances, and remained from a few hours to several days for their "turn" to be waited upon, and then received the meal, flour, shorts and bran, produced from their grain; a mill where the miller received the grist at the mill door, and cared for it until ground, and then returned it, less the toll taken, on demand, to the owner. In these mills, customer's sacks were lost, grists exchanged, excessive toll taken, and the rights of customers neglected in various ways. The statute in question was intended, as its provisions clearly indicate, to regulate mills of this kind, and none other. The words "public mills," as there used, apply to mills of this character only. The mill of the Howard Mills Company, as described in the agreed statement of facts, belongs to an entirely different category. It neither does, nor offers to do, such a grist mill business. It will be seen that the first section of the law of 1863 declares what mills shall be public mills, and immediately proceeds in the next section to prescribe regulations for "all public mills" showing quite clearly the class of mills to which the words "public mills" were intended to apply.

This leaves section 1366, Gen. St. 1901, to be considered. If this section is construed literally, and without reference to any other rule or law relating to the subject, it may be said to confer the power of eminent domain upon any milling or manufacturing corporation using power, without other condition or limitation; but such an interpretation would lead to results so unreasonable that it cannot be considered. The least that can be said is that by it is meant any milling or other manufacturing corporation whose functions and uses are of the same public character as other corporations upon which this right has been conferred. This brings us to the question: What is such a public use? The statute gives no answer. The question is perplexing and difficult. Few courts have attempted to give it a clear and definite answer. In the case of *Nash v. Clark*, 27 Utah, 158, 75 Pac. 371, 1 L. R. A. (N. S.) 208, 101 Am. St. Rep. 953, it is said: "There is no fixed rule of law by which this question can be determined. In other words, what is a public use cannot always be determined by the application of purely legal principles. This is evident from the fact that there are two lines of authorities, neither of which attempts to lay down any fixed rule as a guide to be followed in all cases. One class of authorities, in a general way, holds that by public use is meant a use by the public or its agencies—that is, the public must have the right to the actual use in some way of the property appropriated; whereas the other line of decisions holds that it is a public use within the meaning of the law where the taking is for a use that will promote the public interest, and which use tends to develop the great natural resources of the commonwealth." Many cases have negatively stated the rule, sufficiently for the decision in hand, but leave the matter open to modification whenever local circumstances make a change necessary. As stated by the Utah court, two rules may be deduced from the decided cases by which to determine whether a given use is public or private. The one, which seems to be sustained by the weight of authority, is thus stated by the Supreme Court of Minnesota in the case of *Minnesota Canal Company v. Koochiching Co.*, 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638: "The use is not public unless the public under proper police regulations has the right to resort to the property for the use for which it is acquired, independently of the mere will and caprice of the person or corporation in which the title of the property will vest upon condemnation." A more elaborate statement is made by the Supreme Court of Maine in the case of *Brown v. Gerald*, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. Rep. 545, as follows: "Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity—to wit, the

state—has a right to create and maintain, and therefore one which all the public has a right to demand and share in.' In a broad sense it is the right in the public to an actual use, and not to an incidental benefit. If it be a railroad company, the public have a right to be transported, and to have their goods carried from place to place, upon payment of reasonable tolls. The company must accommodate them, whether it will or no. If it be a canal or turnpike, or bridge, all may travel thereon. If it be a boom company, all who have logs in the river are entitled of right to the use of the water. These are the more ordinary kinds of quasi public corporations, and they illustrate better, perhaps, than any definition can express the particular personal quality of the use which the public as individuals have by right in the property of such corporations. It is the right of the public as individuals to use when occasion arises. The use must be for the general public, or some portion of it, and not a use by or for particular individuals." A few of the cases in which practically the same conclusions are reached are: *Gaylord v. Sanitary District*, 204 Ill. 576, 68 N. E. 522, 63 L. R. A. 582, 98 Am. St. Rep. 235; *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366; *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N. W. 849, 14 L. R. A. 114; *Fallsburg Power Company v. Alexander*, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855; *Cozard v. Kanawha Co.*, 139 N. C. 283, 51 S. E. 932, 1 L. R. A. (N. S.) 969, 111 Am. St. Rep. 779; *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964; *Matter of the Mayor of New York*, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. Rep. 828; *Ulmer v. Lime Rock R. Co.*, 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387. This rule was also approved in the case of *Irrigation Co. v. Klein*, 68 Kan. 493, 65 Pac. 687, where it is said: "The words 'public use,' ex vi termini, imply that the public is interested therein, and that in its sovereign organization and capacity the public retains the right of regulation and control, at least in a limited or qualified degree, over the exercise of any corporate power or function granted in the accomplishment of such public use."

The *Howard Mills Company* is simply a private corporation authorized by its charter to manufacture flour and feed for sale. The public has no more interest in it than in the corporation from which the land in question is sought to be taken. They are both useful and important business instrumentalities, and contribute to the growth and development of the locality where they are situated. This may also be said, however, of every legitimate business. To a limited extent every honest industry adds to the general sum of prosperity and promotes the public welfare. This is not enough; a business which may invoke the

right of eminent domain must be one in which the public has an exceptional and peculiar interest, and one which it might on proper occasion control and manage in the interests of the public. It seems clear that the mill in question does not sustain such a relation to the public, and therefore does not have the power to exercise the right of eminent domain.

The judgment of the district court in granting a perpetual injunction is affirmed.

(77 Kan. 688)

SCOTT v. THRALL et al.

(Supreme Court of Kansas. April 11, 1908.)

1. WILLS — CONTEST — EVIDENCE OF EXECUTION.

In an action to contest a will, the probate thereof is prima facie evidence of the due attestation, execution, and validity of the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 916, 917.]

2. SAME—BURDEN OF PROOF—ERASURE.

In such an action, the burden of proof to explain an erasure in a will is not upon the defendant in the first instance, but is upon the plaintiff to overcome the evidence afforded by such probate, and to show its invalidity by a preponderance of all the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 658.]

3. SAME.

Whether an erasure appearing upon a will duly admitted to probate was made before or after execution is a question of fact, to be determined by the court or jury trying the issue upon all the evidence, including the probate, aided by all reasonable presumptions and inferences.

4. EVIDENCE — OPINION EVIDENCE — HAND-WRITING.

It is not error to refuse to permit an expert in handwriting to testify, from an examination of a will and an erasure therein, that a person who wrote with a nervous hand was unable to make such an erasure, although the witness might properly testify that the hand of the person who wrote the will was nervous and unsteady.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2309, 2345-2347.]

(Syllabus by the Court.)

Error from District Court, Greenwood County; G. P. Alkman, Judge.

Action by H. T. Scott against F. G. Thrall and others to contest a will. Judgment for defendants, and plaintiff brings error. Affirmed.

Jackson & Darby and W. L. Huggins, for plaintiff in error. W. S. Marlin and R. P. Kelly, for defendants in error.

BENSON, J. This was an action to contest a will upon the ground that the testator was not of sound mind, and because of alleged alterations therein after it was signed and attested. The trial court found against the plaintiff, and sustained the probate of the will. The plaintiffs do not rely upon the first ground, but urge that the evidence proved the alterations as alleged, and that the court erred in refusing to set aside the probate.

The will was drawn by the testator, who was advanced in years and infirm, but had been a man of large business experience. He left two sons, and a grandson, the plaintiff, who was the only child of the testator's deceased daughter. The will indicates careful preparation, is good in form, apt in expression, and clear in terms. It gives to each of his other grandchildren, the children of his two sons, 10 shares of bank stock, and to the plaintiff, Harry T. Scott, \$5,000. The seventh clause of his will as probated is as follows: "I give and bequeath the remainder of my property and estate to my sons, E. W. Thrall and F. G. Thrall, in equal shares, and I desire said sons to be executors of my will, and they shall not be required to give bonds for the faithful performance of their duties." The plaintiff's contention is that, as originally written, the words, "and to my grandson H. T. Scott," were included in the above clause, between the words "Thrall" and "in," so that it read, "To my sons E. W. Thrall and F. G. Thrall, and to my grandson, H. T. Scott in equal shares," etc., and that these words were erased after attestation. The original will shows an erasure by scraping with a pen-knife or by the use of a rubber or otherwise in the right-hand margin after the name "F. G. Thrall," and between that line and the next one below at the left hand, indicating that whatever words were erased had been interlined. A photograph of the will plainly showing an erasure at this point was in evidence, and is in the record. Another photograph with the words which it is claimed were erased written into the erasure discloses the fact that such words fit the place where the mutilation appears. The capital letters and the loops below the line appear to fit into the erasure, which was carefully made. There is no doubt but these words might have been written into the place where the erasure occurred in the same handwriting. The will is dated December 11, 1900, and is duly attested. A letter was found in an envelope with the will, in the handwriting of the testator, as follows: "Eureka, June 1, 1903. To whom it may concern: I find in looking over by will to-day that through some oversight I failed to bequeath to my grandson, H. T. Scott, ten shares of First National Bank Stock, as I did to the rest of my grandchildren. It is my wish that he shall have the said ten shares of bank stock, which I omitted to bequeath to him in my will. [Signed] G. E. Thrall." The contention of the plaintiff is that the words so claimed to have been interlined were written there before signing, and that the erasure was made afterwards, and that the will should be probated with that clause as originally written, which would give to the plaintiff one-third of the residuary estate, or that the whole will should be rejected because of such spoliation. The defendants insist that it was properly probated in the condition in which it appeared, with the erasure, when

offered for probate. Both parties rely upon presumptions. The plaintiff relies upon the presumption that the interlined words, being harmonious with the context, and free from suspicious circumstances, were written in before the signing and attestation (*Neil v. J. I. Case & Co.*, 25 Kan. 510, 37 Am. Rep. 259; 2 Cyc. 242 [G]; 1 *Woerner's Law of Administration*, 98; 1 *Jarmon on Wills*, 118), and that it must be presumed that the erasure thereof was made after signing, because of the suspicious appearance of the instrument (*Threshing Machine Co. v. Peterson*, 51 Kan. 713, 33 Pac. 470; 2 Cyc. 234 [b]; *Crossman v. Crossman*, 95 N. Y. 145; *Matter of Barber's Will*, 92 Hun, 489, 37 N. Y. Supp. 235; 1 *Jarmon on Wills*, 98). The defendants rely upon the presumption afforded by the probate of the will. The statute of wills containing the provisions for contesting wills in the district court after probate includes the following: "The order of the probate court shall be prima facie evidence on the trial of such action of the due attestation, execution and validity of the will." Gen. St. 1901, § 7958; *Rich v. Bowker*, 25 Kan. 7. The defendants also claim that it must have been presumed in the district court that both the interlineation, whatever it was, and the erasure, were made after the will was signed. In support of this latter presumption, it is suggested that the above letter of June 1, 1903, shows that the testator had omitted something from the will that he desired to have in it, and that he may have written in the words so interlined, and, finding that he could not complete the intended bequest in orderly connection with the context, erased what he had so written.

Findings of fact were not requested, and none were made except the general finding for the defendant. The plaintiff contends, however, that the burden was upon the defendants to explain the erasure, and that without such explanatory evidence there was nothing to warrant the approval of clause 7 of the will as probated, and no evidence to support it, and that this court is not bound thereby, because it is not based on evidence. *U. P. Ry. Co. v. Shannon*, 38 Kan. 476, 16 Pac. 836. In support of the presumptions claimed by the plaintiff, testimony is referred to showing the friendly relations of the testator with this grandson, whom he appears to have held in high esteem, and his declarations that he had willed to each of his grandchildren 10 shares of bank stock, and that he would have but three direct heirs, his two sons, F. G. and E. W., and his grandson, Harry Scott. Reference is also made to the fact that for a short period before the death of the testator, when he was under the guardianship of his sons, they had the custody of the will, and produced it in the probate court in its present altered condition. Attention is also called to the age of the testator (79 years when the will was made), his weak physical condition afterwards, and the improbability of his being able to

make the erasure neatly as it was done. On the other hand, it is shown that the deceased was a man of affairs, and other circumstances are referred to tending to show the necessary ability and skill. Much has been written upon the subject of presumptions in case of altered instruments, and the burden of proof in connection therewith. It is difficult to formulate general rules. We must be content to apply settled principles to the particular facts in solving the given case. In *Neil v. J. I. Case & Co.*, supra, *Horton, C. J.*, said: "It is impossible to fix a cast-iron rule to control in all cases; but certainly the second rule, and the one contended for by plaintiff in error, is not the true one. Clearly, in ordinary cases, the alteration ought not to raise a presumption against the instrument, because the law never presumes wrong. The question as to the time of the alteration is, in the last instance, one for the jury. It is, like any other fact in the case, to be settled by the trier or triers of the facts. Generally the instrument should be given in evidence, and in a jury case should go to the jury, upon ordinary proof of its execution, leaving the parties to such explanatory evidence of the alteration as they may choose to offer. If there is neither intrinsic nor extrinsic evidence as to when the alteration was made, it is to be presumed, if any presumption is said to exist, that the alteration was made before or at the time of the execution of the instrument. Perhaps there might be cases when the alteration is attended with such manifest circumstances of suspicion that the court might refuse to allow the instrument to go before the jury until some explanation; but this case is not of that character." 25 Kan. 516, 37 Am. Rep. 259. Later Justice Johnston stated the principle thus: "The indications of subsequent alterations may be so obvious and suspicious in some cases as to bring discredit upon the instrument, and require the party offering the same to account for the apparent changes. But, in the absence of suspicious circumstances, no presumption can be indulged against the genuineness of the instrument." *Threshing Machine Co. v. Peterson*, 51 Kan. 713, 33 Pac. 470. Other authorities on this subject are collated in a note appended to *State v. Scott*, 49 La. Ann. 253, 21 South. 271, 36 L. R. A. 721 (739), and in 2 Cyc. 233. In *Wigmore on Evidence*, it is said: "It used to be sometimes said that an alteration (i. e., by erasure or interlineation), if apparent on the face of an instrument, placed on the offering party the burden of explanation by evidence. It was also (but inconsistently) said by some that the alteration was to be presumed innocent—i. e., made before execution—unless particular circumstances of suspicion were apparent. For wills, again, it was sometimes maintained that by exception alterations should be presumed to have been made after execution. But the modern

tendency is to avoid stating the problem in the form of such rules with exceptions, and, in particular, to abandon the so-called presumption against fraud and in favor of innocence, by which the alteration of a deed is presumed to have been made before execution; and to raise no genuine presumption in that regard. The first burden would thus be determined by the pleadings; and the question would usually go to the jury, upon all the evidence, whether the party claiming a specific tenor for the document has proved his case, although the second burden—i. e., of producing evidence—might be shifted by particular circumstances, under the ruling of the judge as to a sufficiency of evidence or a presumption." 4 Wigmore on Evidence, 3569, § 2525. In this case the burden of proof was upon the plaintiff under the pleadings and by force of the statute. The will in the condition in which it was when probated was prima facie valid. This is not an appeal, but an action to set aside the probate, and so there is no question here of the burden of proof, such as may arise where an instrument bearing signs of an alteration is offered in evidence by the person claiming under it. The defendants did not offer the will to prove its existence and validity, and so the burden was not upon them, as plaintiff insists, to explain the erasure. The plaintiff offered it to show the alteration as tending to prove its invalidity; the burden being upon him to produce such proof.

The vital question in the district court was whether the evidence of the plaintiff in support of his claim that the alteration had been made after the execution of the will was sufficient to overcome the prima facie effect of the probate, considered in connection with all the testimony. This was a question of fact upon all the evidence, including the will itself; the letter referred to; the photographs and testimony explanatory thereof; the physical and mental condition of the testator; the nature and situation of his property; the natural claims of the legatees upon his bounty; his relations with, and feelings toward, them; and all the circumstances appearing in the evidence, aided by all reasonable and proper presumptions. The conclusions of fact to be deduced from all this was for the court as the trier of the facts. *Railroad Co. v. Gelser*, 68 Kan. 281, 75 Pac. 68. In this conflict of evidence, the finding cannot be set aside by this court. *Well & Co. v. Eckard*, 37 Kan. 696, 15 Pac. 922; *Hill v. Ehrlich*, 66 Kan. 785, 71 Pac. 1127.

The plaintiff complains of the exclusion of evidence. A witness for the plaintiff, expert in handwriting, who made photographs of the disputed parts of the will, and made tracings of the words so claimed to have been interlined and erased, testified that these words so exactly fitted into the erasure that he believed that they had been written there, and that the person who wrote

the will wrote with a nervous, shaky hand. He was then asked this question: "Now, could a person that had a nervous, shaky hand, in your opinion as an expert, have made that erasure?" An objection was sustained to this question. It will be observed that the witness was allowed to testify that the handwriting was nervous and unsteady, a matter about which his skill and experience in handwriting might have afforded special knowledge, but the question objected to related to ability of the writer to control his hand in making the erasure, a matter about which one skilled in handwriting might have no special knowledge. The physical and mental condition of the testator was shown by the evidence, as well as his occupation, business experience, and habits, and from all this the court could determine as well as the witness whether he could make the erasure. Another witness was asked if he could form an opinion whether the writing so erased was that of the testator. As the erasure only left a few mere dots of ink, it seems unnecessary to comment on the ruling. Besides, the court appears to have been willing to hear a direct answer, but the witness insisted upon an explanation which the court would not hear, and so sustained the objection. We find no error in the rulings complained of.

The judgment is affirmed.

(77 Kan. 561)

CONTINENTAL CASUALTY CO. v. COLVIN.

(Supreme Court of Kansas. April 11, 1908.)

1. INSURANCE—EXTENT OF LOSS AND LIABILITY OF INSURER—ACCIDENT INSURANCE.

Where an accident insurance policy contains the provision that the company will pay "indemnity as scheduled below, in the event that said insured * * * shall receive personal, bodily injury, which is effected directly and independently of all other causes through external, violent, and purely accidental means * * * and which causes at once total and continuous inability to engage in any labor or occupation, * * *," and is followed by another provision that "if within ninety days from the date of the accident any one of the following losses shall result necessarily and solely from such injury, the company will pay," etc., *held*, that the words "such injury" refer to the injury first mentioned in the former clause, for the purpose of identification merely, and have no reference to the condition or degree of the injury immediately after it was received.

2. SAME — ACCIDENT EFFICIENT CAUSE OF DEATH — EFFECT OF OTHER CONTRIBUTING CAUSES.

In an action by the beneficiary named in such a policy to recover the stipulated indemnity for the death of the insured, who died from an accidental injury, the condition that such death must have resulted "necessarily and solely" from such injury will be satisfied by showing that the injury was the predominating and efficient cause of the insured's death. The fact that other conditions were set in motion by the injury, which may have contributed to such result, is immaterial.

3. SAME—NOTICE OF LOSS—TIME OF GIVING.

Where an accident insurance policy provides for the payment of a weekly indemnity to the insured if disabled by an accidental injury to

the extent described, and also provides for the payment to a beneficiary named in the policy a stipulated indemnity, in case of the insured's death from such an injury, and stipulates that "written notice of claim must be given by the insured or by the beneficiary to the company * * * fifteen days from the date of the accident causing the loss for which claim is made," the time within which notice must be given by the beneficiary does not begin to run until the death of the insured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1328.]

4. SAME—CAUSE OF LOSS—"INFECTION."

The word "infection," as used in the policy involved in this action, relates to external injuries, and does not include internal inflammations where pus is formed by the presence of pus germs.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3578.]

5. SAME — ACTIONS—EVIDENCE—ADMISSIBILITY—PROOFS OF LOSS.

In an action on an insurance policy, it is error to permit the proofs of loss furnished by the plaintiff to the defendant to be introduced in evidence on the trial, when objection is made thereto by the defendant, except for the purpose of showing that the requirements of the policy in that respect have been complied with. When they have been so erroneously admitted, however, and it appears that all the witnesses whose statements were in the proofs of loss so admitted testified in person on the trial and were subject to cross-examination, the error will be deemed harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1702; vol. 3, Appeal and Error, §§ 4161-4170.]

(Syllabus by the Court.)

Error from District Court, Harvey County; P. J. Galle, Judge.

Action on an accident policy by Mary M. Colvin against the Continental Casualty Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bowman & Bowman and Manton Maverick, for plaintiff in error. Branine & Branine, for defendant in error.

GRAVES, J. On December 19, 1904, the Continental Casualty Company issued an accident insurance policy to Ammazyah G. Colvin, of Newton. The beneficiary named in the policy was Mary M. Colvin, a sister of the insured. On January 9, 1905, the insured was accidentally injured, and died March 7, 1905. This action was commenced in the district court of Harvey county, December 21, 1906, by Mary M. Colvin, to recover the amount named in the policy. The petition was in ordinary form, reciting the policy, the injury, its progress and results. The answer was practically a general denial. The principal controversy arises over the conditions of the policy, and a reference to them will more clearly indicate the contention of the parties. For that purpose, it is here given as follows:

"In consideration of the warranties and agreements contained in the application heretofore and the payment of premium as therein provided does on this 19th day of December A. D. 1904 hereby insure Mr. Ammazyah G.

Colvin, in Class Spl., of the company, as a boiler-washer's helper, in the principal sum of one thousand dollars, with weekly indemnity of \$7.50, and subject to the conditions hereinafter specified, promises to pay to the insured or to his beneficiary, Mary M. Colvin, his sister indemnity as scheduled below, in the event that said insured, while this policy is in force, shall receive personal bodily injury, which is effected directly and independently of all other causes through external, violent and purely accidental means. * * * And which causes at once total and continuous inability to engage in any labor or occupation, and provided that neither such injury nor inability is in consequence of nor contributed to by any bodily or mental defect, disease or infirmity of the insured.

"Part I. Specific Indemnity.

"If, within ninety days from the date of the accident, any one of the following losses shall result necessarily and solely from such ninety days from the furnishing of proof: A. For loss of life, said principal sum. B. For loss of both hands, or for loss of both feet, or of the entire sight of both eyes, said principal sum. C. For loss of either hand * * * or loss of either foot. * * * One half of said principal sum. D. For the irrecoverable loss of the entire sight of one eye, one-quarter of said principal sum. * * *

"Part II. Weekly Indemnities.

"For Loss of Time.

"If such injury shall not result in any of the losses scheduled in part I, the company will pay for total loss of time necessarily resulting from injury, as before described, the weekly indemnity stated above for a period of not exceeding one hundred and four weeks.

"Part III. Special Indemnities.

"A. (Omitted; not material in this case.)

"B. In any of the losses covered by this policy and specified in parts I or II. * * * (4) Where the loss is occasioned or contributed to in any way by erysipelas, blood poisoning or infection; then and in all cases referred to in this paragraph B of part III, the amount payable shall be one-fourth of the amount which otherwise would be payable under this policy, anything in this policy to the contrary notwithstanding, and subject otherwise to all the conditions in this policy contained. * * *

"Part IV. (Omitted; not material in this case.)

"Part V. Indemnity Payments.

"Indemnity for loss of life is payable to the beneficiary hereinbefore named, if surviving; otherwise to the estate of the insured. All other indemnities are payable to the insured. Not more than one indemnity specified in part I will be paid under this poli-

cy, and all weekly indemnity shall terminate upon the death of the insured."

On the face fold on the back of said policy, there was printed in bold type the following:

"Important.

"In case of injury, notify the company immediately. Read your policy. No claim will be entertained unless written notice of injury is given to the company within fifteen days from the date of injury."

In the absence of any question upon the subject, we assume as facts established in the case that the policy was in force when the insured died; that the injury was sustained accidentally, as alleged, and death followed on the date named; and that proofs of loss were properly furnished by the beneficiary. The facts material to the controversy, briefly summarized, are: That the injury was received from a fall which precipitated the insured against the edge of timbers, whereby he was bruised on the left side of his chest with sufficient force to cause external soreness and discoloration of the skin. The insured did not regard the injury as serious when it was received, although quite painful. At the time of the accident he was employed as a boiler-washer's helper by the Atchison, Topeka & Santa Fé Railway Company, and, except the loss of six days, he continued to perform his duties as such employee, with the occasional assistance of his fellow servants, up to January 20th. January 31st he called a physician, Dr. Abbey, who pronounced the ailment to be pneumonia, or pleurisy, and gave treatment therefor. On February 14th, there being no improvement, another physician, Dr. Axtel, was called, who, upon examination and consultation with Dr. Abbey, decided that the former diagnosis was incorrect. The insured was removed to a hospital, where, on February 16th, an operation was performed by which it was ascertained that the chest cavity contained a large accumulation of pus. This was liberated and the cavity drained. The patient was very much exhausted, however, and on March 7th he died.

The insurance company denies liability on the ground that the injury is one not within the terms of the policy, for the reasons: First, it did not cause "at once total and continuous disability to engage in any labor or occupation"; second, the death of the insured was not caused "necessarily and solely from such injury"; third, notice in writing was not given to the company within 15 days after the date of the injury; fourth, death was caused in part by infection, and therefore the amount of recovery was excessive. The case was tried to a jury, and a general verdict was returned in favor of the beneficiary for the full amount of the policy. Judgment was entered on the verdict, motion for a new trial overruled, and the insurance company has brought the case here for review.

On the trial, the insurance company requested several instructions which were refused; it submitted several special findings of fact to be answered by the jury, which were denied; it objected to the instructions given by the court, and otherwise raised the questions now insisted upon. It will be unnecessary to repeat the demurrers, instructions, and various objections in detail, as they simply constitute different methods by which these questions were presented. The verdict is of course conclusive here as to any questions of fact properly presented to the jury. But the fundamental and controlling error urged against the district court consists of its erroneous interpretation of the policy, and its consequent misconception of the rights of the insurance company and of the duties of the beneficiary. The district court tried the case upon the theory that the propositions contended for by the insurance company had no application to the case, and for that reason they were overruled. This difference between court and counsel arises from their inability to agree upon the proper interpretation of the insurance policy, and this question of interpretation is now presented here for consideration.

In the construction of a written instrument it is well to keep in mind the purpose to be accomplished thereby, and attribute such meaning to its language and provisions as will harmonize with and best effectuate such purpose. The most casual examination of the policy in question indicates that it was intended to accomplish at least two purposes: First, to indemnify the insured for loss which might result to him during his life from accidental injuries received; and, second, to indemnify the beneficiary if the insured should lose his life on account of such an injury. The conditions and requirements of the policy were intended to apply to and carry out these two purposes, and a part of them were designed for one of such purposes only. The particular clauses of the policy involved in the construction insisted upon read:

(1) "In the event that said insured, while this policy is in force, shall receive personal, bodily injury, which is effected directly and independently of all other causes through external, violent and purely accidental means (suicide, sane or insane, not included,) and which causes at once total and continuous inability to engage in any labor or occupation."

(2) "If, within ninety days from the date of the accident any one of the following losses shall result necessarily and solely from such injury. * * *"

(3) "(4), where the loss is occasioned or contributed to in any way by erysipelas, blood poisoning or infection; then and in all cases referred to in this paragraph B of part III, the amount payable shall be one-fourth of the amount which otherwise would be payable under this policy."

(4) "Written notice of claim must be given by the insured, or by the beneficiary, to the company at its office from which this policy

is issued, and be received there within fifteen days from the date of the accident, causing the loss for which claim is made."

Where the insured is injured, and, claiming to be unable to follow his business, demands the stipulated weekly indemnity, it may be important for the insurer to be able to determine definitely the extent and duration of the disability, and for this purpose the degree of disability which creates liability upon the company might well be clearly and specifically defined in the contract; but in the case of death, caused solely by the injury, it is immaterial whether total disability occurred "at once" after the injury or not. It is insisted in argument that the words "such injury," at the close of clause 2, refer back to and include the whole of clause 1, and therefore the insurer cannot be liable to the beneficiary unless the death of the insured was preceded by an injury which "at once caused total and continuous inability to engage in any labor or occupation." We do not agree with this interpretation. It seems more in harmony with the objects of the policy and the liberal rules of construction which apply to instruments of this kind to say that the words "such injury" refer back to the injury mentioned in clause 1, for the mere purpose of identification, and do not have the effect of uniting both sentences into one, so as to make the provision, when considered as a whole, mean that, before a beneficiary can recover for the death of the insured, there must have been an accidental injury which resulted both in immediate and total inability and loss of life. Such does not seem to have been the intent of the parties. But even if the language is susceptible of such a construction, it does not follow that it ought to be adopted. The rule is practically universal that, when the language of an accident policy is susceptible of different constructions, that one must be adopted which is most beneficial to the insured. 1 Cyc. 243; *Travelers' Insurance Co. v. Murray*, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267; *Paul v. Travelers' Insurance Co.*, 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758.

In the case of *Driskell v. United States Health & Accident Ins. Co.*, 117 Mo. App. 362, 93 S. W. 880, where the court was considering the effect of language practically the same as that in this policy, it was said: "Where an accident policy provided for the payment of a monthly sum if the insured were disabled, to the extent described, solely by external, violent and accidental means, and also providing for a payment 'if death should result solely from such injuries,' the words 'such injuries' have no regard to the extent of disablement that immediately followed the injury."

The case of *Rorick v. Railway Employees' Association*, 119 Fed. 63, 55 C. C. A. 369, is of like import. In that case the court said: "An accident policy provided that the insurance thereunder should 'extend only to physical

bodily injury resulting in disability or death * * * effected * * * solely by reason of and through external, violent, and accidental means * * * which shall, independently of all other causes, immediately, wholly, totally, and continuously from the date of the accident causing the injury, disable the insured, and prevent him from doing and performing any work,' etc. It further provided that there should be no liability for more than one of the losses specified, on payment for any one of which the policy should terminate, and the first loss specified was 'loss of life occurring within 90 days from the date of the accident causing the fatal injury.' Held, that such provisions could not be construed to exempt the insurer from liability for death resulting from an accidental injury within 90 days, because such accident did not produce 'immediate, total, and continuous disability.'"

The facts which make the insurance company liable to the beneficiary are: First, the accidental injury to the insured; second, his death; third, the death was "necessarily and solely" the result of such injury; and, fourth, the death occurred within 90 days after the accident causing the injury. The condition of the insured between the time of the injury and his death is unimportant. The case of *Commercial Travelers v. Barnes*, 72 Kan. 293, 80 Pac. 1020, has been cited and commented upon, but that action was prosecuted by the insured to recover indemnity for loss of time, while this was commenced by the beneficiary. The cases are so unlike in all essential matters that we are unable to see how that case can be useful here.

We think that an accidental injury which causes the death of the insured within 90 days thereafter gives a right of action to the beneficiary under the policy involved in this case, whether total disability followed the injury "at once" or not. In opposition to this view, we have been referred to the case of *Continental Casualty Company v. Wade* (Tex.) 105 S. W. 35. We have also read the dissenting opinion of Justice Gilbert in the case of *Rorick v. Railway Employees' Association*, 119 Fed. 69, 55 C. C. A. 369. They both present that side of the question with clearness and force, but we are not inclined to follow them.

It is also contended that, if this right of action existed, it has been lost by failure to give notice as required by clause 4, above set out. No notice was given to the company until more than 15 days after the insured was injured. If such notice was necessary, the failure to give it worked a forfeiture of all rights under the policy. It will be seen from the foregoing clause, No. 4, that notice of the claim must be given by the insured or by the beneficiary. These parties cannot both have a claim at the same time. It would be a useless thing for the beneficiary to give notice of a claim not in existence and one that might never arise. Such a proceeding cannot be fairly assumed to have been contemplated by the parties, and it does not seem to be clear-

ly expressed by the language of the policy. Until the death of the insured, the beneficiary had no interest in or claim to the policy, and no rights under its provisions. A claim in favor of the insured arose after he received the injury, and, to preserve that claim, it was incumbent upon him to give the required notice. But the beneficiary, during the life of the insured, had no claim against the company, or any right under the policy to be protected. The language of the clause evidently contemplates that this duty will in some cases rest upon the insured and in others upon the beneficiary, for they are both mentioned. In the case of *Western Commercial Travelers' Association v. Smith*, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653, it is said: "When the provision, 'in the event of any accident or injury for which any claim shall be made under this certificate, or in case of death resulting therefrom, immediate notice shall be given,' is read in the light of the events to which it refers, and of the relation of the parties to the contract to each other, its natural and obvious meaning is that, in the event of any accident or injury which shall not result in death, immediate notice of such accident or injury shall be given, or, in the case of death resulting from any such accident or injury, immediate notice of such death shall be given, because in the one case it is the injury, and in the other it is the death, which conditions the existence of the claim. The conclusion is that this certificate required no notice of the accident or injury to be given to the association by the beneficiary of the death loss before the death occurred, and the due notice which the court finds she gave immediately after the death was a sufficient compliance with this stipulation of the agreement."

In the case of *Nax v. Travelers' Ins. Co.* (C. C.) 130 Fed. 985, it is said: "This leaves the question of notice. It will be noted the policy provides for two distinct claims thereunder—one by the insured for weekly indemnity, the other by a named beneficiary in the case of death. As no right or interest in the death benefit vested in the beneficiary until the death of the insured, it would seem that no duty in the way of notice was imposed on her until the death of the insured vested a claim in her against the insurer. Whatever, therefore, may have been the duty of the insured as to notice in order to secure indemnity, it is clear to us the notice the death beneficiary was to give was not a notice of the accident, but of death."

In the case of *Odd Fellows' Fraternal Accident Association v. Earl*, 70 Fed. 16, 16 C. C. A. 596, the requirement of the policy as to notice was as follows: "Written notice shall be given the said association at Westfield, Mass., within ten days of the date of the accident and injury for which claim of indemnity or benefit is made, with full particulars thereof, including a statement of the time,

place, and cause of the accident, the nature of the injury and the full name and address of the insured and beneficiary, and unless such notice and statement is received as aforesaid, all claim to indemnity or benefit under this certificate shall be forfeited to the association." The court said: "The notice here called for is plainly to be given when a claim for indemnity by the certificate holder, or of benefit by the beneficiary, is extant. If the incapacity, contemporaneous in origin with the date of the accident, has resulted, or if the mutilation or death has taken place within the 10 days, so that a claim for indemnity or benefit is outstanding, the 10 days' notice seems to be required. But we see in this language no express call for such a notice if no 'claim of indemnity or benefit' be then made."

In the case of *Rorick v. Railway Employees' Association*, 119 Fed. 63, 55 C. C. A. 369, it is said: "An accident policy, insuring only against 'physical bodily injury resulting in disability or death,' contained a provision that notice of the accident causing the disability or death shall be given in writing * * * within 15 days from the date of the accident causing the disability or death. * * * and failure to give such notice within said time shall render void all claims under this policy. Held, that under such policy the time for giving notice did not commence to run until either disability or death resulted from an injury, until which time there was no 'accident causing disability or death,' which brought the case within its terms, and that where an insured received a blow on the head which did not cause disability at the time, and was regarded as a trivial injury, but which resulted a few days later in both disability and death, a notice given four days after his death and within 10 days after his disability was in time." Notice was given by the beneficiary in this case within eight days after the death of the insured.

It is further contended that the death of the insured was not caused solely by the injury, but resulted in part by infection, by pneumonia, and other causes which under the terms of the policy would prevent any recovery, or at least would reduce the amount which the beneficiary was entitled to recover to one-fourth of the principal sum named in the policy. An injury may be said to be the sole producing cause of death when it stands out as the predominating factor in the production of the result. It need not be so violent and virulent as to have necessarily and inevitably produced the result regardless of all other circumstances and conditions. The active efficient cause that sets in motion a train of events which bring about a result without the intervention of any force from a new and independent source may be regarded as the direct and proximate cause. If the immediate cause of death is a disease produced wholly by an injury, the death must be at-

tributable to the injury and not to the disease. In this case, the insured was a strong young man in vigorous health at the time he received the injury, and his condition thereafter was clearly traceable to the injury as the effective and producing cause thereof; it must, therefore, be held that the injury was the sole cause of his death. The verdict is conclusive upon this question, even if it would otherwise be doubtful. The foregoing is sustained by the following authorities: *Driskell v. United States Health Ins. Co.*, 117 Mo. App. 362, 93 S. W. 890; *Western Travelers' Association v. Smith*, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653; *Travelers' Insurance Co. v. Melick*, 65 Fed. 178, 12 C. C. A. 544, 27 L. R. A. 629; *Masonic Accident Association v. Shryock*, 73 Fed. 774, 20 C. C. A. 3; *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Travelers' Insurance Co. v. Murray*, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267.

As to the effect of infection upon the amount of recovery, there was evidence tending to show that it was a contributory cause to the death of the insured. The insurance company requested the district court to give an instruction to the jury upon this subject which reads: "The jury are instructed that if from the preponderance of the evidence and under the instructions of this court they find the issues of this case for the plaintiff, and if they further believe from the preponderance of the evidence that the death of Ammaziah G. Colvin was occasioned or contributed to in any way by infection, then they should find their verdict for the plaintiff and assess the damages at \$250, with interest thereon at the rate of 6 per cent. per annum from July 6, 1905." This instruction was refused, and the only instruction given which might be said to refer to this subject was one which stated generally that before the plaintiff could recover it must be shown that the death of the insured "resulted necessarily and wholly from such injury." This was error. We have concluded, however, that the error was not prejudicial. The only evidence upon the question of infection was the testimony of the physicians who attended the insured during his last sickness—Drs. Abbey and Axtell. They testified in substance that a large accumulation of pus was removed from the chest cavity of the insured; that such pus was caused from inflammation and the presence of pus-producing germs; that germs of this character abound throughout the system of every person, are inactive during good health, but when the internal tissues are weakened, by an injury or otherwise, and become inflamed, then these germs attack the diseased parts and pus results. The process by which these germs come in contact with the inflamed tissue is, or may be, called infection. The inflammation and pus present in the chest cavity contributed to some extent to the death of the insured, and therefore these witnesses stated that infection contributed thereto.

One of these witnesses stated, however, that the word "infection" was not ordinarily used to describe such a condition, and it was not a good word to use for internal injuries, as it refers to bacteria, and is used with reference to external injuries which become infected from the air.

Among the special questions of fact which the insurance company requested the court to submit to the jury, two were given which, with their answers, read: "(13) Did the injury sustained by Ammaziah G. Colvin become infected? Answer: No. (14) Was the death of Ammaziah G. Colvin occasioned or contributed to in any way by infection? Answer: No." These answers were fully justified by the testimony. The jury evidently believed that the word "infection" as used in the policy was not intended to apply to the condition of the insured. The evidence of Dr. Axtell fully sustains this conclusion. It must be assumed, therefore, that the word "infection," as used in this policy, applies to external and not internal injuries. The refusal to give the instruction requested could not have been prejudicial, and it is, therefore, unavailing as a ground of error.

On the trial, the plaintiff offered in evidence the affidavits and other exhibits, which constituted the proofs of loss made to the insurance company. They were admitted over the objections of the defendant. Request was then made to the court to limit by instruction given then the application of this evidence to the purpose for which it was offered, being to show notice to the company, and that proper proofs were furnished in proper time; which request was denied. At the close of the testimony, an instruction was requested which reads: "The court instructs the jury that the written proof of loss which has been admitted in evidence in this case can be used by the plaintiff only for the purpose of tending to prove a compliance with the terms of the policy requiring proof of loss to be filed within a certain designated time, and that such proof of loss is not to be considered by the jury as evidence proving or tending to prove in behalf of the plaintiff any of the several matters and things at issue in this case beyond the mere fact of such compliance." This was refused, and nothing was given on that subject. This was error. *Commercial Travelers v. Barnes*, 72 Kan. 306, 80 Pac. 1020, 82 Pac. 1090. An examination of the proofs of loss offered, however, show that the same persons mentioned therein were witnesses on the trial of the case, and testified to the same facts and were subject to cross-examination by the defendant. The jury received nothing from these proofs of loss different from what was given to it in the usual and proper manner. We, therefore, conclude that the error could not have been prejudicial, and it does not, therefore, furnish a sufficient ground for reversal.

We have now considered all the questions

presented. They have been raised in numerous ways—by demurrers to the petition and the evidence, objection to the introduction of any evidence under the petition by presentation of instruction to the jury, requests for special findings of fact, and by motion for a new trial; but in each instance the foregoing questions were relied upon.

Generally, it has been insisted that parties have the right to make such contracts as they desire, and, when made, each party should be held to a performance thereof. This is good law. It is also claimed that the policy in this case was prepared so that expert testimony could be dispensed with in actions brought to enforce its provisions. This object is commendable. But, on the other hand, insurance companies should prepare their policies with such clearness that their requirements and conditions will be readily understood by the ordinary reader, who is expected to pay for and rely upon them for indemnity. The services of expert lawyers to impute to the language used a meaning not apparent to the common understanding would then be unnecessary also. Courts will not hasten to a construction which has the effect to forfeit the rights of the insured, or his beneficiary, under a policy which has been promptly paid for out of his meager wages, and relied upon as an indemnity to himself against injury, and a protection to his beneficiary in case of death; but they will readily adopt a just and reasonable construction which will prevent such a result.

The judgment of the district court is affirmed.

(77 Kan. 555)

GOFFINET v. SOPER et al.

(Supreme Court of Kansas. April 11, 1908.)

1. BOUNDARIES—OFFICIAL SURVEYS—APPEAL—BONDS.

A bond given to effect an appeal from a survey, by a party affected thereby, and running to the party or parties who requested the same, is sufficient to give the court jurisdiction of the case, although other persons may also be affected by the survey.

2. SAME.

The law favors appeals, and the statute (Gen. St. 1901, § 1821), being silent as to whom the bond should run, should be liberally construed in favor of a hearing upon the appeal. (Syllabus by the Court.)

Error from District Court, Marion County; O. L. Moore, Judge.

Application by Laura Soper for herself and minor wards for a survey. From the report of the surveyor, F. Goffinet appeals. From an order dismissing the appeal, he brings error. Reversed and remanded.

King & Wheeler and Dennis Madden, for plaintiff in error. W. H. Carpenter, for defendants in error.

SMITH, J. The defendant in error, Laura Soper, for herself and her minor wards, notified the county surveyor of Marion county to

survey certain lands therein. The surveyor notified the other landowners who might be affected by the survey, and at the time stated in the notice duly made the survey and made his report. The plaintiff in error in due time filed his notice in writing with the county surveyor of his intention to appeal therefrom, and filed his appeal bond with approved surety, and the county surveyor certified the appeal to the clerk of the district court, and also filed the requisite papers and reports. The appeal was docketed in the district court under the title "T. Goffinet v. Laura Soper et al." Thereupon the defendants filed their motion to dismiss the appeal on the ground that the appeal bond was insufficient to effect an appeal and to give the court jurisdiction of the action, for the reason that the surveyor's report showed that persons not named in the bond were affected by the survey, and that the appeal bond should run to all such as well as to Laura Soper and her wards. On the hearing of said motion the court sustained the same and dismissed the appeal. To reverse this order the case was brought here.

The only question in the case is whether the bond is void. If it was only defective or informal it was subject to correction, and the appellant made timely application to the court for leave to file an amended bond. The call for the survey was for the purpose only of establishing the northeast corner of a certain section of land and the quarter-section corner on the east side of said section. The petitioners for the survey owned the north half of the section, and Goffinet owned the south half thereof. It thus appears that the appellant, Goffinet, who gave the appeal bond, and the petitioners for the survey, were perhaps most directly interested in the establishment of these corners, although the owners of adjoining lands might also be affected. If the survey itself was not an adversary proceeding, it became such upon an appeal being taken. The statute implies that notice to the surveyor of the intention to appeal is notice to all parties that were notified of the survey, and no question is raised but that all the parties interested in the survey were notified thereof. In a sense, a notice of the survey to the parties interested in the survey gives such jurisdiction over them as to bind them by the results of the survey; and it is a generally recognized rule that when jurisdiction has once been established over parties to a proceeding, or in an action, no new notice is required of the subsequent steps therein until the matter in controversy be finally determined. Each party in interest over whom jurisdiction is acquired must at his peril take notice of each successive step leading to the final determination. We incline to the opinion that all the parties adverse to Goffinet are protected by the appeal bond which was given as fully as they would have been had each been named therein. However this may be, the bond was at least

sufficient to give the court jurisdiction of the case. If the bond was insufficient to protect any party or parties in interest, the court had jurisdiction on their application to require the appellant to make a sufficient bond to protect them. It does not, at least, lie in the mouth of Laura Soper or her wards to say that she and her wards were not protected by the bond, or to deny the jurisdiction of the court because others had not been properly brought into court, if such were the fact.

The order of the court dismissing the case, and the judgment therein, is reversed, and the case is remanded with instructions to reinstate the same, and to proceed in accordance with the views herein expressed.

(77 Kan. 557)

VALLEY TP. et al. v. STILES.

(Supreme Court of Kansas. April 11, 1908.)
HIGHWAYS—DEFECTS—NOTICE.

In an action against a township to recover for injuries caused by a defective culvert, where the only proof of notice to the township trustee of the defect is the statement of the plaintiff in his direct examination that he had a conversation with the trustee and gave him the information, but upon cross-examination plaintiff admits that in the conversation he failed to inform the trustee which one of several culverts was defective, the proof is insufficient to establish actual notice of the particular defect.

(Syllabus by the Court.)

Error from District Court, Miami County;
W. H. Sheldon, Judge.

Action by S. G. Stiles against Valley township and others. Judgment for plaintiff, and defendants bring error. Reversed.

L. S. Harvey and Thos. H. Kinsley, Co. Atty., for plaintiffs in error. Sheldon & Simpson, S. J. Shively, and E. Sheldon, for defendant in error.

PORTER, J. S. G. Stiles recovered a judgment against Valley township in Miami county for damages for injury to a mare, caused by a defective culvert in a township road. The township complains.

The case turns upon the question whether plaintiff's proof was sufficient to show actual notice to the township trustee of the defective condition of the culvert five days before the injury was received, as required by section 579, Gen. St. 1901. The plaintiff claimed that he notified Mr. Frank, the township trustee, of the defect in the culvert. His testimony on direct examination was as follows: "Q. Did you speak to any of the township officers in regard to the condition of the bridge? A. Yes, sir. Q. Who to? A. Mr. Frank; I told him about that bridge that wasn't safe; there was a hole in that culvert. He asked me who was road overseer; I told him. He said, 'Ain't it Mr. Eckert?' I told him I didn't think so. He said, 'I will go on my way home that night and see that bridge is fixed.'" On cross-examination he testified: "Q. You say you had talked with

Mr. Frank about that culvert? A. Yes, sir. Q. When did you have your first conversation with him about it? A. About a week or ten days before my horse got hurt. Q. Where? A. In front of Mr. Condon's seed store I told Mr. Frank there was a culvert on my road to town, and it was becoming dangerous. I notified Mr. Bushy two or three times and he ain't fixed it. He says, 'I think it is Mr. Eckert.' He says, 'I will go on my way home and see that culvert is fixed.' Q. There are two culverts on that road? A. Yes, sir. Q. This culvert where you claim the mare was injured was the farthest one west? A. Yes, sir. Q. In that conversation with Mr. Frank did you tell him that was the farthest one west? A. No, sir; I told him it was one west and one east of the Willow Branch schoolhouse. Q. You didn't tell him which one you wanted repaired? A. I don't think I stated the culvert." August Frank, the trustee, was a witness called by the plaintiff, and his testimony follows: "Q. You may state just what was said? A. He spoke to me about a bridge being out of fix—a hole—I don't know just how to put it. He spoke about being a hole in the foundation or plank of the bridge somewhere near Willow Branch schoolhouse, the way I understood him. The bridge was south of the schoolhouse—the big bridge south of the schoolhouse—first bridge there; but whether he meant that bridge I can't say positively. That is the way I understood it that he meant that bridge." At the conclusion of plaintiff's evidence the township demurred, and the court overruled the demurrer.

The law places the burden upon the plaintiff to prove notice to the township trustee of the defects which it is claimed caused the injury, and we have repeatedly held that to charge the township or the county with liability under the statute the notice to the trustee or to the chairman of the board of county commissioners must be actual notice of the particular defect. *Murray v. Woodson County*, 58 Kan. 1, 48 Pac. 554; *Parr v. Shawnee County*, 70 Kan. 111, 78 Pac. 449; *Erie Township v. Beamer*, 71 Kan. 182, 79 Pac. 1070; *Scruggs v. Com'rs of Leavenworth County*, 71 Kan. 848, 80 Pac. 595; *Finley v. Board of Com'rs of Labette County (Kan.)* 92 Pac. 1113. Were the question here merely one of a conflict between the plaintiff's testimony in chief and upon cross-examination which required a weighing of the testimony, we would be compelled to uphold the ruling of the court, because in that kind of a case it is for the jury to determine the conflict. *Acker v. Norman*, 72 Kan. 588, 84 Pac. 531. In the latter case it was said: "Doubtless there are instances where a demurrer should be sustained because, upon cross-examination, a party testifies in direct contradiction to his testimony in chief upon some vital fact essential to his recovery, where the latter controls the former state-

ment, and practically admits that the former was a mistake or untrue. If a demand be necessary to be shown to entitle the plaintiff to recover, and upon examination in chief he should state that he had made the demand, but upon cross-examination should correct his former testimony and state that he had not made the demand, or had made it upon the wrong person, and if no other evidence were given upon that essential point, a demurrer would lie."

We have quoted the testimony of the township trustee not for the reason that it contradicts in some respects that given by the plaintiff, for manifestly the plaintiff is not bound by the contradictions of a witness he is compelled to call who may be said to occupy an unfriendly position, but for the reason that it tends to corroborate the entire testimony given by the plaintiff himself as to the indefinite character of the notice conveyed by the conversation. The case therefore falls within the exception noted in *Acker v. Norman*, *supra*, and the latter statement of the plaintiff in explanation of the conversation had with the trustee must be held to control the general statement testified to in chief.

There was considerable testimony to the effect that there were other culverts on this particular road, two west of the schoolhouse and one east; and the plaintiff admits that he referred in the conversation to at least two of these, and that he did not call particular attention to the one he desired repaired. We are of the opinion that, in view of the construction that has heretofore been placed upon this statute, the plaintiff failed to show actual notice to the township trustee of the particular defect which caused the injury.

The judgment will be reversed, and a new trial ordered.

(77 Kan. 612)

CHICAGO, R. I. & P. RY. CO. v. BRANDON.
(Supreme Court of Kansas. April 11, 1908.)

1. CARRIERS—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—PRESUMPTIONS AND BURDEN OF PROOF.

Where a prima facie case is made out within the rule stated in *S. K. Ry. Co. v. Walsh*, 45 Kan. 653, 26 Pac. 45, in favor of a passenger injured by the derailment of the train upon which he was riding, it devolves upon the railway company, in order to be relieved from liability, to show that the accident could not have been avoided by the exercise of the utmost human prudence and foresight.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1283.]

2. TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Instructions should be considered and construed together as a whole, and the instructions given in this case when so considered were not misleading, and placed no unreasonable or impracticable burden upon the railway company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-717.]

3. SAME—FINDINGS—RESPONSIVENESS.

The findings of the jury that the spikes were loose in the ties, and that, in making use of soft wood ties not sufficient to hold the spikes,

the railway company failed to use the best methods of keeping its track and roadbed in safe and proper condition, support the allegations of negligence in the petition.

4. NEW TRIAL—GROUNDS—EXCESSIVE DAMAGES—ACCEPTANCE OF REDUCED JUDGMENT.

The rule that judgment may be entered for a reduced sum, accepted by the prevailing party, where passion or prejudice of the jury is not shown, stated in *U. P. Ry. Co. v. Mitchell*, 56 Kan. 324, 43 Pac. 244, is followed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 324.]

5. WRIT OF ERROR—RECORD.

An unsigned memorandum indorsed upon the findings of a jury, not referred to therein, and not in response to submitted questions, cannot be considered by this court as a part of the findings, in the absence of any action requested or taken thereon in the district court.

(Syllabus by the Court.)

Error from District Court, Jewell County;
R. M. Pickler, Judge.

Action by J. M. Brandon against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This was an action brought by J. M. Brandon against the railway company to recover damages for injuries received by him while a passenger on one of the railway company's cars, caused by a derailment of a portion of the train. The car in which Brandon was riding left the rails and ran for about 700 feet upon the ties. The plaintiff claimed that he received injuries to his spine, hip, and chest, and was otherwise injured. The defendant contended that the railway company was not guilty of any negligence, and therefore was not liable for the accident. The jury found for the plaintiff in the sum of \$1,908, and the defendant brings the case here.

It appears from the evidence that most of the ties were of soft wood, and some of oak. The ties were in ballast at the place of the derailment, the track was straight, and of new 80-pound rails. No tie was loosened on account of the derailment but the spikes were bent back and forced down into the ties. Six days before the accident the track had been regauged and again spiked upon the old ties, because one of the rails had been pushed out a little.

The railway company predicates error upon the refusal of the court to direct a verdict for the defendant, in refusing judgment in its favor on the findings of the jury, and in giving the following instructions: "(1) It is the duty of a railroad company in the construction of its railway and in keeping it in proper condition for the safe transportation of passengers to exercise the highest degree of care and skill practicable under the circumstances and then known to persons skilled in such work, but when such care and skill have been exercised its duty to the public has been sufficiently discharged in this respect. (2) If you find from the evidence under these instructions that the plaintiff has sustained injuries of the kind and character above set forth,

and such injuries were caused by reason of the roadbed being in an unsafe condition on account of the causes so alleged, * * * which might have been remedied or guarded against and averted by the exercise of defendant's employes of the highest degree of care and skill then practicable and then known to the servants having charge of such work, the plaintiff would in such case be entitled to recover. But if the cause of the accident was one which the highest degree of practicable skill, care and caution consistent with operating the road could not have provided against, then you should find for the defendant." "(6) It was the duty of the defendant railway company to use and employ the latest and best-known methods of keeping its track in good condition, including ties of the best quality of material, and if the defendant made use of ties of inferior quality at the place of the accident in question, and if by reason of the use of the quality of ties used the rails spread and caused the injury complained of by the plaintiff, and if human sagacity would have suggested that by the use of ties of first-class quality such injury could have been avoided and such injury would in fact thus have been avoided, then in that event you should find for the plaintiff provided you find he suffered injuries as a result of said accident which he could not by an exercise of due care on his part have avoided. (7) The jury are instructed in this case that it is incumbent upon the plaintiff to show that he was a regular passenger on the train in question and in his proper place in the car; that the car was thrown from the track, and that he was injured and the extent of his injury, if any; and that the accident might have occurred in the way and from one or more of the causes alleged. A showing of these facts is sufficient showing by the plaintiff to establish prima facie the want of that high degree of care and diligence which the law imposes on railroad companies in the transportation of passengers; it then in such case devolves on the company to show that the accident could not have been prevented by the exercise of the utmost human sagacity and foresight."

It is also urged that the findings were not sustained by the evidence, and that the amount of the damages was excessive. The findings were as follows: "(1) Was the defendant railway company careless, negligent, or inefficient in the operation of its railroad at the place where the derailment of the train and the alleged injury of the plaintiff took place? Answer. They were. (2) If you answer question No. 1 in the affirmative, then state in what particular the defendant was careless, negligent, or inefficient? Answer. By not using the proper kind of material for ties. (3) Did the defendant railway company at the place of derailment allow the ties of the roadbed to become loose? Answer. No." "(5) Were the spikes at the place of derail-

ment and immediately prior thereto loose? Answer. They were." "(7) Did the defendant railway company use the best methods of keeping its track and roadbed in a proper and safe condition? Answer. No. (8) If you answer the foregoing question in the negative then state in what particular it failed to use the best methods of keeping its track and roadbed in a proper and safe condition? Answer. By using soft wood ties which were not sufficient to hold the spikes." "(10) If you find for the plaintiff, what amount, if any, do you allow him for the alleged injury to his hip? Answer. \$100." "(12) If you find for the plaintiff, what amount, if any, do you allow him for the alleged injury to his spine? Answer. \$200. (13) At what rate of speed was the train upon which the plaintiff was riding running at the time of the derailment? Answer. Between 30 and 40 miles per hour. (14) At the time of derailment of the train upon which plaintiff was riding was such train running at the usual, ordinary, and schedule speed of such train? Answer. It was. (15) Was the speed of the train excessive at the time of the derailment? Answer. No. (16) Was the roadbed, at the place where the derailment occurred, in bad condition and unsafe for travel at the time of the derailment? Answer. No." "(18) Were the ties frozen solidly in the roadbed at the time and place of the derailment? Answer. Yes." "(20) How long before the time of the derailment did the passenger train No. 16 pass safely over the place of derailment? Answer. 40 minutes. (21) If you find for the plaintiff, how much, if any, do you allow him for the alleged injury to his chest? Answer. \$150. (22) Did the track walker pass over and examine the roadbed and track at the place of the derailment shortly before the derailment? Answer. Yes. (23) If you answer the last question in the affirmative, then state how long before the derailment he passed over the track at the place of the derailment? Answer. From 30 to 45 minutes."

The following memorandum was indorsed upon the findings:

Doctor bill.....	\$ 48 00
Sickness	500 00
Physical injuries.....	1,000 00
	<hr/> \$1,548 00

The negligence claimed is thus stated in the petition: "That shortly west of the station of Lebanon on the said defendant's railroad, and without fault or negligence on the part of plaintiff, and by reason of the careless, negligent, and inefficient management of the said defendant railway company in the operation of the said railroad, and by reason of the roadbed being in bad condition and unsafe for travel, viz.: Defendant allowed the ties to become loose, the spikes therein to become loose, and defendant failed to keep and maintain it in the proper condition, and by reason of the spikes becoming loose and

the ties loose and the rails not held firmly in place where said wreck occurred, and defendant's failure to use and employ the latest and best-known methods of keeping its track and roadbed and railroad in proper and safe condition for the safety of its passengers. * * * the said train was wrecked and left the track while running at such high rate of speed, and violently threw this plaintiff from his seat, and injured plaintiff severely, causing this plaintiff great bodily and physical pain and suffering, and resulting in lasting and permanent injury to plaintiff."

M. A. Low and Paul E. Walker, for plaintiff in error. Lee Monroe, E. P. Hotchkiss and Geo. A. Kline, for defendant in error.

BENSON, J. (after stating the facts as above). There was no error in refusing to direct a verdict for the defendant. The plaintiff having shown the derailment of the train in which he was riding as a passenger, and injuries resulting to himself therefrom, made a prima facie case, and the burden was thrown upon the defendant to show that the injuries did not result from a want of care on its part. *S. K. Ry. Co. v. Walsh*, 45 Kan. 653, 26 Pac. 45; *A., T. & S. F. Ry. Co. v. Elder*, 57 Kan. 312, 46 Pac. 310; *Railroad Co. v. Burrows*, 62 Kan. 89, 61 Pac. 439. Whether this prima facie case was overcome by the evidence was a question for the jury, and not for the court. *Railway Co. v. Gelser*, 68 Kan. 281, 75 Pac. 68.

It is argued that the jury did not find the negligence as alleged in the petition, and that in the absence of such finding the judgment should have been for the defendant. It was alleged in substance that the company allowed the spikes to become loose in the ties, and for that reason the rails were not held firmly in place, and failed to employ the best-known methods of keeping its track in safe condition, thus causing the train to leave the track. The jury found that the company was negligent in not using the proper material for ties, that the spikes were loose, and that by using soft wood ties not sufficient to hold the spikes, it failed to use the best methods of keeping its track and roadbed in a safe and proper condition. The findings sustained the allegations of negligence charged in the petition. It is argued that as there was no averment of negligence in using soft wood ties the finding in reference thereto was not within the issue. It was not the use of soft wood ties that the jury found to be unsafe, but the use of soft wood ties "which were not sufficient to hold the spikes," and it was found that the spikes so driven into ties not sufficient to hold them were loose. It is also urged that these findings are not sustained by the evidence. Something caused the displacement of the rail. The track was straight, the train moving at an ordinary rate of speed, and the wheels were shown to be in good condition. Only six days before,

the track had spread at the same place. The displaced rails had been restored to their proper position, and spiked down again upon the same ties. After this derailment the rails were found again forced out, and the spikes bent or forced down into the wood, thus permitting the rail to be pushed out and the track to spread. The jury found, in effect, that the rails were displaced because the spikes were loose, and that they were loose because the ties were insufficient to hold them. The fact that the same thing occurred shortly before at the same place was a circumstance to be considered with the other facts proven (3 Thompson on Negligence, § 2814); the deductions and inferences therefrom were for the jury. Their findings are not shown to be unreasonable or inconsistent.

The defendant presented two questions which the court refused to submit to the jury. One was this: "State in what particular the spikes were loose." That the spikes were loose is itself a particular—I. e., an item or detail of the condition of the track; not only was this defect stated, but also its cause. What more minute detail was desired was not suggested in the question. The other question was to ask the jury to state the condition of the track when the track walker passed over it shortly before the derailment occurred. While the condition of the track 40 minutes before the occurrence complained of was some evidence tending to show its condition at that time, the material fact was its condition at the time of the derailment. The court did not err in rejecting these questions. *Foster v. Turner*, 31 Kan. 58, 1 Pac. 145; *Mo. Pac. Ry. v. Reynolds*, 31 Kan. 132, 1 Pac. 150; *Railroad Co. v. Aderhold*, 58 Kan. 293, 49 Pac. 83; *City of Weir v. Herbert*, 6 Kan. App. 596, 51 Pac. 582.

The defendant complains that too great a burden was imposed upon it by that clause of the instructions requiring the company to show that the accident could not have been prevented by the exercise of the utmost human sagacity and foresight. The degree of care required of carriers of passengers with respect to cars and equipment applies to the roadbed and tracks (3 Thompson on Negligence, §§ 2796-7; Elliott on Railroads, vol. 4, § 1586), and the rule so stated in the instructions was declared to be the established law of this state in *Union Pac. Ry. Co. v. Hand*, 7 Kan. 380, and has since been affirmed in *Topeka City Ry. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754; *Mo. Pac. Ry. Co. v. Johnson*, 55 Kan. 344, 40 Pac. 641; *S. K. Ry. Co. v. Walsh*, 45 Kan. 653, 26 Pac. 45; *A., T. & S. F. Ry. Co. v. Elder*, 57 Kan. 312, 46 Pac. 310, and in *Railroad Co. v. Burrows*, 62 Kan. 89, 61 Pac. 439.

Complaint is also made of the sixth instruction wherein it was stated to be the duty of the company to use and employ the latest and best-known methods of keeping its track in good condition, including ties of the best

quality of material, and, if human sagacity would have suggested that by the use of ties of first-class quality such injury could have been avoided, then the plaintiff might recover, if certain other facts were proven. It is said that the language quoted increased the duty of the company in an unwarranted manner; that to use the best quality of material that human sagacity would suggest would require a prohibitive expenditure. But the very fact that material so difficult to obtain and so expensive as to prohibit its use would also preclude its suggestion to the mind as being required for such purpose. In *Indianapolis, etc., R. R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898, where the instruction held the company to the exercise of "the highest possible degree of care and diligence," it was said by Justice Swayne that these terms "do not mean all the care and diligence the human mind can conceive of, nor such as will render transportation free from any possible peril, nor such as would drive the carrier from his business." The court approved the charge saying: "The language used cannot mislead. It well expresses the rigorous requirement of the law, and ought not to be departed from." The courts have used varying terms in defining the duty of carriers of passengers in this respect but there is a general consensus of the meaning, which may be drawn by the average mind from the expressions used. In other instructions given the court stated that it was the duty of the company "in the construction of its railway and in keeping it in proper condition to exercise the highest degree of skill and care practicable under the circumstances, but when such care and skill have been exercised its duty to the public has been sufficiently discharged." Again, the court said: "But if the cause of the accident was one which the highest degree of practicable skill, care, and caution, consistent with operating the road could not have provided against, then you should find for the defendant." This expression, "practicable skill and care," was repeated in another place in defining the duty of the company. The fifth instruction, which is not copied because of its length, expresses the views of the defendant in this respect, since it follows very closely its request, and clearly indicates that no merely fanciful, unreasonable, or impracticable burden was intended to be put upon the company by the language objected to. Without approving all the expressions referred to, we must hold that they were not misleading, and that when the instructions are properly considered as a whole, as they naturally must have been by the jury, they were not erroneous. *Hays v. Farwell*, 53 Kan. 78, 35 Pac. 794; *State v. Atterbury*, 59 Kan. 237, 52 Pac. 451.

It is also urged that the amount of the recovery was excessive, and the district court so considered it, for a remittitur of \$200 was required. The court may do this unless it

appears that the excessive amount was allowed through passion or prejudice. *U. P. Ry. Co. v. Mitchell*, 56 Kan. 324, 43 Pac. 244; *Haldeman v. Johnson*, 8 Kan. App. 473, 54 Pac. 507. The jury in answer to special questions found the amount of damages for certain particular injuries, but were not asked to further specify, and returned a gross sum. It is claimed that the items appear in the memorandum that was found indorsed upon the findings, and that this shows the amount of the verdict to be excessive. We are not aware of any rule of practice by which we can treat this unsigned memorandum not appearing to be in response to any question submitted, as a part of the verdict, in the absence of any action requested or taken thereon in the district court, when the findings were returned.

The judgment is affirmed.

(77 Kan. 679)

BLEDSON v. SEAMAN.

(Supreme Court of Kansas. April 11, 1908.)

1. DIVORCE — DECREE — IMPEACHMENT — ESTOPPEL.

When both parties to an action for divorce appear in the court of another state and submit to its jurisdiction, and a decree, after trial on the merits, is obtained, the party in whose favor the decree is granted will not be permitted, in an action subsequently commenced in this state, to impeach such decree, on the ground that at the time the action was commenced and the decree entered neither party resided in that state, but both were residents of this state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 831.]

2. SAME.

The plaintiff and her husband resided in Kansas. The husband went to South Dakota for the purpose of obtaining a divorce. He commenced an action there for that purpose. Plaintiff was notified, and filed an answer and cross-petition, in which she prayed for a divorce, alimony, and the exclusive custody and control of their daughter, then eight years of age. She obtained a decree as prayed for. Seven years afterwards she commenced an action against the defendant, in Kansas, for alienating the affections of her husband. In her petition she alleged her marriage and also the decree of divorce, but averred that the Dakota court was without jurisdiction for the want of the required residence of the parties in that state. The defendant answered by pleading the Dakota judgment, and averring its regularity and legality. Plaintiff by reply admitted the judgment, but denied its validity, for the reason stated in the petition. The court gave judgment for the defendant upon the pleadings. *Held* not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 831.]

(Syllabus by the Court.)

Error from District Court, Shawnee County; A. W. Dana, Judge.

Action by Laura J. Bledson against Etta L. Seaman. Judgment for defendant, and plaintiff brings error. Affirmed.

This action was commenced in the district court of Shawnee county by Laura J. Bledson to recover damages suffered on account of the alienation of the affection of her husband,

A. Scott Bledsoe, by the defendant, Etta L. Seaman. The defendant moved for judgment in her favor on the pleadings, which motion was sustained, and judgment entered accordingly. The plaintiff by proceedings in error seeks to reverse that judgment. It will be unnecessary to a clear understanding of the points decided to set out the pleadings in full.

The material facts of the petition are substantially as follows: "Comes now said plaintiff, and for her amended petition herein against said defendant says: That heretofore, to wit, on the 22d day of May, 1889, at the city of Stockton, state of Kansas, this plaintiff, Laura J. Bledsoe, and A. Scott Bledsoe were intermarried, and as the fruits of said marriage there is now living, of the issue of said marriage, one child, a girl named Nellie, now 14 years of age. That from the time of said marriage until the summer of 1896 said A. Scott Bledsoe conducted himself toward said plaintiff as a loving and true husband, and said plaintiff lived happily with him. That said A. Scott Bledsoe was a minister of the gospel, and a pastor of the Christian Church, in good standing. That said plaintiff and defendant had, together, by their mutual efforts, accumulated a fair amount of property, of the value of at least \$2,000, and had continued to be prosperous and happy in each other's love and affection. That in 1896 said A. Scott Bledsoe was pastor of the Christian Church at Clay Center, Kan., and also at Dennison, Kan., preaching on alternate Sundays at each place. That in April, 1896, on a return trip from Dennison, he met at the station at Topeka the defendant, Etta L. Seaman, who claimed to be an inspired spiritualist lecturer. * * *

She was at that time a married woman; her husband being an aged man residing at Concordia, Kan. * * * For the express purpose of injuring said plaintiff and entailing and procuring the said A. Scott Bledsoe, her husband, to become alienated in feeling and affection for and to abandon said plaintiff as his wife, and to deprive her of the society, comfort, aid, and assistance of her said husband * * * said defendant * * * urged upon him the doctrine of free love, and procured him to visit her, * * * and eloped with him, and lived with him in criminal adultery in Arkansas, South Dakota, Iowa, Nebraska, and Kansas, and conspired with him to violate his duty as a husband and to commit adultery with her, * * * and at and during said times * * * conspired with him to fraudulently simulate a domicile in South Dakota, and to swear to and file a petition for divorce from this plaintiff, and in pursuance of her purpose to alienate his affection from this plaintiff, and in pursuance of said conspiracy, said defendant and said A. Scott Bledsoe went to South Dakota for the sole purpose of enabling him to obtain a divorce from this plaintiff. That said A. Scott Bledsoe had no other business there

than the prosecution of said divorce suit. That this plaintiff and A. Scott Bledsoe had never lived together as husband and wife in said South Dakota, and said A. Scott Bledsoe was never in said state, except as herein stated. That this plaintiff was never a resident of said state of South Dakota, and was never actually in said state, and that said A. Scott Bledsoe never was or became a bona fide resident of said state, and was never domiciled therein. That he was actually in said state less than six months prior to the commencement of his said action for a divorce, and that he had left said state permanently prior to the commencement of said action, and has never returned there, except temporarily to attend the trial of his said action for divorce, and that all the time he was in the state prior to the commencement of said action he was living, in pursuance of the purpose and conspiracy of this defendant aforesaid, with said defendant in criminal adultery and in violation of law and decency. That by the law of the state of South Dakota the courts of that state had no jurisdiction to entertain a petition or render a divorce, unless the plaintiff was and had been, for at least six months prior to the date of the filing the petition for the same, a bona fide resident of said state, and domiciled therein in good faith, and the courts of said state had no jurisdiction of the subject-matter of said action, and the decree of divorce rendered therein was and is entirely without jurisdiction and void; and notwithstanding said proceeding and decree, said A. Scott Bledsoe remained and still remains the husband of this plaintiff. That since leaving South Dakota said defendant, continuing in her said purpose and said unlawful and wrongful conspiracies, has lived with him in criminal adultery in the states of Iowa, Nebraska, and Kansas, and still continues to so live with him in adultery * * * in the city of Topeka, Kan., without the privity or consent of this plaintiff. That said defendant has been absent from the state of Kansas during all of said period, and until less than two years prior to the commencement of this action. That by reason of the premises the plaintiff has been deprived of the comfort, society, aid, and assistance which she otherwise would have had from the said A. Scott Bledsoe, and has suffered great distress of body and mind, to her damage in the sum of \$20,000. Wherefore, plaintiff prays," etc.

To this petition the defendant filed an answer containing: First. A general denial. Second. Facts substantially as follows: "That on or about March 7, 1898, A. Scott Bledsoe, the former husband of said plaintiff, commenced an action against Laura J. Bledsoe, the above-named plaintiff, in the circuit court in and for Davison county, in the state of South Dakota, a court of competent jurisdiction, wherein said A. Scott Bledsoe, as plaintiff, prayed for a divorce from

said Laura J. Bledsoe, as defendant in said action and plaintiff herein. That said Laura J. Bledsoe, as defendant in said action wherein A. Scott Bledsoe was plaintiff, employed counsel, and on or about April 30, 1898, filed an amended answer in said action against her, praying for a divorce on her part from said A. Scott Bledsoe, plaintiff in said action. That said action was duly tried in said court in Davison county on May 28, 1898, and was by the court decided in favor of said Laura J. Bledsoe, defendant in said action, and a decree of divorce and a judgment for alimony was duly and legally granted to said Laura J. Bledsoe on the ——— day of June, 1898," which judgment and decree reads: "This action having been brought to trial by the court, and a decision therein having been rendered for the defendant and filed, now on motion of Winsor & Mohr, the defendant's counsel, it is adjudged that the marriage between the plaintiff, A. Bledsoe, and the defendant, Laura J. Bledsoe, be dissolved, and the same is hereby dissolved accordingly, and the said parties are and each of them is freed from the obligations thereof. And it is further adjudged that the charge, control, and custody of Nellie Bledsoe, aged eight years, and the only issue of said marriage, is hereby awarded to the defendant, Laura J. Bledsoe, and that the plaintiff, A. Bledsoe, pay into the hands of the clerk of this court, on the 1st day of July, 1898, and on the 1st day of each and every month thereafter, up to and including the 1st day of January, 1911, when she shall become of age, the sum of \$25 for the support, maintenance, and education of the said child, Nellie Bledsoe, and for the support of the defendant, her mother, and that such sums be promptly transmitted by the clerk to the defendant at her post office address at Emporia, Kan., by post office money order or draft from bank of this city on a responsible bank in Chicago, Ill. And it is further adjudged that it shall be lawful for the defendant, Laura J. Bledsoe, to marry again, in the same manner as if the plaintiff, A. Bledsoe, were actually dead; but that it shall not be lawful for the plaintiff, A. Bledsoe, to marry again until the defendant, Laura J. Bledsoe, is actually dead. Adjudged that the defendant recover of the plaintiff ——— dollars and ——— cents, her costs in this action, to be taxed by the clerk. Done in open court at the city of Mitchell, this ——— day of June, 1898." That said proceedings, decree, and judgment have not been reversed nor appealed from, and are in full force and effect, and have at all times been recognized as valid and binding by said Laura J. Bledsoe, defendant in said action and plaintiff herein, as is shown by the fact that on July 16, 1904, the plaintiff herein commenced an action, No. 22,857, in this court to enforce the collection of the judgment for alimony rendered in her favor against said A. Scott Bledsoe, in said divorce proceedings,

which action is still pending and undetermined in this court, and to which reference is hereby made." Third. The two-year statute of limitations.

To this answer the plaintiff filed a reply which reads: "Comes now said plaintiff, and for her reply to the answer of defendant herein said plaintiff says that the decree of divorce referred to and set out in said answer is the same decree of divorce referred to and alleged to be void in the amended petition of the plaintiff herein, and in the petition of this plaintiff against A. Scott Bledsoe and this defendant, No. 22,857, in this court, referred to in the answer herein, a copy of which petition in said other action is attached to and made a part of the demurrer of this plaintiff to the answer herein, and the same is here referred to as a part of this reply, and this plaintiff further says that she has never recognized the same as legal or binding in said other action, or otherwise."

On motion the words "a copy of which petition in said other action is attached to and made a part of the demurrer of this plaintiff to the answer herein" were stricken out, and then the defendant moved for judgment on the pleadings, which motion was sustained.

Edwin A. Austin and Otis E. Hungate, for plaintiff in error. W. A. S. Bird and Geo. Overmyer, for defendant in error.

GRAVES, J. (after stating the facts as above). The principal part of the argument presented in this case is confined to a discussion concerning the jurisdiction of the circuit court in South Dakota, where the plaintiff obtained a divorce from her husband. This subject is fully discussed, and many authorities are cited by each party. In the view we have taken, however, this question is not controlling. The complaint made by the plaintiff is that the district court erroneously entered judgment in favor of the defendant upon the pleadings. This question must be determined from the facts alleged. The averments of these pleadings show, in substance, that A. Scott Bledsoe commenced an action in the state of South Dakota to obtain a divorce from his then wife, the plaintiff in this action. In that action she appeared and filed an answer and cross-petition, in which she asked for a divorce, for the custody of their infant child, and for alimony. The prayer of the cross-petition was granted, and she obtained the decree requested. This decree was entered in 1898, more than seven years before she commenced this action in Shawnee county. She has retained the exclusive possession and control of the child during that time. The judgment for alimony still stands in her favor. A party cannot invoke the jurisdiction and power of a court for the purpose of securing important rights from his adversary through its judgment, and, after having obtained the relief desired, repudiate the action of the court on the ground that it was with-

out jurisdiction. The question of whether the court had jurisdiction, either of the subject-matter of the action, or of the parties, is not important in such cases. Parties are barred from such conduct, not because the judgment obtained is conclusive as an adjudication, but for the reason that such a practice cannot be tolerated. People who invoke the action of a court, and through negligence or falsehood, mislead the court as to the existence of the facts upon which its jurisdiction depends, and obtain a judgment for relief, will not afterwards be heard to deny the validity of such judgment. 16 Cyc. 795-800; *Ogden v. Stokes*, 25 Kan. 517.

This rule has been frequently applied to actions for divorce, where the decree was obtained in one state and afterwards attacked in another. In the case of *In re Ellis' Estate*, 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. Rep. 514, it was held: "If both parties voluntarily appear in an action for divorce in the court of another state and submit to its jurisdiction, they are bound by the judgment, and cannot avoid it, in a collateral proceeding in this state, by proof that, when the action was brought and judgment rendered, neither of them was a resident of that state, but that both were residents of this state." The facts of that case show that Matthew Ellis died intestate. Eight years before that his wife, at his request, obtained a divorce from him in the state of Wisconsin, and he subsequently married and left as his widow Flora Ellis. The two women contested for his estate, each claiming to be his lawful widow. The former contended that the Wisconsin divorce obtained by her was void, for the reason that she was not a resident of that state at that time, and therefore the court did not have jurisdiction. This contention was overruled. In argument the court said: "It may seem anomalous that a judgment of divorce can be so far effectual between the parties as to extinguish all rights of property dependent on the marriage relation, without being effectual to protect them from accountability to the state for their subsequent acts. One reason why they ought not to be permitted, by going into another state and procuring a divorce, to escape accountability to the laws of their state is that their act is a fraud upon the state, and an attempt to evade its laws, to which it in no wise consents, and it may therefore complain. But the parties do consent, and why should they be heard to complain of the consequences to them of what they have done? Why should they be permitted to escape those consequences by saying: 'It is true that by false oath made by one of us, and connived at by the other, we committed a fraud in the Wisconsin court, and induced it to take cognizance of the case; but now we ask to avoid its judgment by proof of our fraud and perjury or subornation of perjury.' Because we do not think it can be done the parties must, so far as their individual interests are concerned, abide by the judg-

ment they procured that court to render."

This case resembles the one presented here quite closely. Bledsoe left Kansas, and went to South Dakota to obtain a divorce. His wife followed. In his petition he pleaded residence, as required by the law of that state. The wife filed a cross-petition, in which she alleged "that for more than three months before the commencement of this action the plaintiff has been and now is a resident of the state of South Dakota." Apparently the only reason for this allegation was a desire to leave the question of jurisdiction unchallenged. As an affirmative allegation of residence it was, perhaps, insufficient, but it might be construed as an admission of the plaintiff's averment of that fact. In the case of *Starbuck v. Starbuck*, 173 N. Y. 503, 66 N. E. 195, 93 Am. St. Rep. 631, it was held: "A party cannot be heard to impeach a judgment which he himself has procured to be entered in his own favor." In that action there was a controversy between two women, both claiming to be the widow of the deceased, and, therefore, entitled to a part of his estate. One of them left the deceased, who resided in the state of New York, and went to Massachusetts, where she obtained a divorce from her husband, who did not appear in the action. After the decree she remained in the state of Massachusetts. Her divorced husband subsequently married again. It was claimed that the Massachusetts divorce was void for the reason that the court did not have jurisdiction. The objection was overruled, and the decree sustained. In the case of *Waldo v. Waldo*, 52 Mich. 94, 17 N. W. 710, it was held: "An Indiana divorce cannot be impeached, in a purely collateral civil action in Michigan, by seeking to show that the residence of the complainant in the divorce suit was not such as to give the Indiana court jurisdiction." See, also, *In re Morrisson*, 52 Hun, 102, 5 N. Y. Supp. 90; *In re Swales' Estate*, 172 N. Y. 651, 65 N. E. 1122. The following cases, while not directly in point, are of the same general effect: *In re Richardson's Estate*, 132 Pa. 292, 19 Atl. 82; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Kirrigan v. Kirrigan*, 15 N. J. Eq. 146; *Ellis v. White*, 61 Iowa, 614, 17 N. W. 28.

While the rule applied in this case does not rest upon the doctrine of estoppel as that term is ordinarily understood, yet there are some facts present which indicate that an ordinary estoppel might be applied. The plaintiff complains of the defendant for having alienated the affections of her husband. Her right to recover for the acts complained of, which occurred before the divorce was granted, has been long since barred by the statute of limitations. When the plaintiff procured the divorce, the defendant, having knowledge thereof, had a right to assume that the plaintiff no longer had, or claimed, any rights to the affections or society of her former husband, A. Scott Bledsoe, and that any relations which she might assume with him

thereafter would not in any way infringe upon the rights of the plaintiff. The conduct of the plaintiff in this respect is almost tantamount to an express withdrawal of objection to the illicit relations existing between the defendant and the plaintiff's husband at the time of the divorce. But for the decree these relations might have ceased. By if, they were probably encouraged.

We conclude that the plaintiff should not be permitted to impeach the Dakota decree. This conclusion disposes of all the other questions in the case, and they need not be considered.

The judgment of the district court is affirmed.

(77 Kan. 654)

PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA v. DESPAIN.

(Supreme Court of Kansas. April 11, 1908.)

1. INSURANCE—ACTION ON ACCIDENT POLICY—INSTRUCTIONS.

In an action on a policy which insured plaintiff against the effects of bodily injuries sustained during the term of the policy and caused solely through external, violent, and accidental means, and wherein it was stipulated that a certain indemnity should be paid if the irrecoverable loss of the sight of both his eyes should result from such injuries independently of all other causes, and that the policy did not cover anything of which the sole or secondary or contributory cause is, or which occurs while the insured is affected by, or under the influence of, bodily infirmity, where the plaintiff averred that he lost his sight by reason of an injury sustained at a certain time, and where one of the defenses of the insurance company was that an injury received long before that time, and prior to the issuance of the policy, contributed to, if it did not wholly cause, the blindness of defendant, and where testimony tending to support that defense was produced by defendant, as well as another defense to the effect that the warranties, upon which the policy was issued, were false, it was the duty of the trial court to submit these questions to the jury.

2. SAME.

In instructing the jury the court should not restrict or ignore any of the issues formed by the pleadings and supported by the proof, and where defendant pleads several defenses and offers proof to sustain them, a charge by the court which ignores one or more of such defenses and authorizes the return of a verdict against defendant if the jury decides other issues in favor of the plaintiff is error.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; William G. Holt, Judge.

Action by William Despain against the Pacific Mutual Life Insurance Company of California. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Action on an accident insurance policy issued December 20, 1904, to William Despain by the Pacific Mutual Life Insurance Company of California, to recover \$2,000 as indemnity for the loss of the sight of both eyes resulting, as it was alleged, from an accidental injury sustained on January 1, 1905. The defense of the company was that plain-

tiff's loss of sight was due to an injury received in October, 1904, and that this injury was a sole or contributing cause of the loss of sight of one or both eyes. It was also alleged that the warranties in plaintiff's application for insurance were false, and, further, that the required notice of the injury was not given. In the reply it was alleged that there had been waivers of some of the conditions of the contract of insurance. Testimony was introduced tending to show that plaintiff lost the sight of his eyes from the injury of January 1, 1905, and a great deal of testimony in behalf of the defendant to the effect that the loss was occasioned in whole, or in part, by the October injury which was sustained before the policy was issued. In charging the jury the following instructions were given: "(1) The defendant issued an insurance policy to the plaintiff, on the 20th day of December, 1904, by the terms of which it agreed to pay the plaintiff the sum of \$250 if, solely by external, violent, and accidental means, the irrecoverable loss of the sight of one eye shall result to the plaintiff, within ninety days; and if, within the same time and by the same means, the irrecoverable loss of the sight of both eyes shall so result, the defendant agreed to pay the plaintiff the sum of \$2,000. In consideration of the issuance of the insurance policy sued on, the plaintiff agreed to pay the defendant the sum of \$25. Most of the questions arising from the evidence are questions of law, which have been settled by the court, and so that you will not be confused by these legal questions you will confine your deliberations to determining the questions of fact presented to you in the following instructions: (2) If, before the 20th day of December, 1904, the plaintiff received an injury to his right eye, which totally destroyed the sight of said eye, then he cannot recover any damages from the defendant by reason of losing the sight of his right eye; and if he lost the sight of his left eye by reason of an injury to his right eye received by him before the 20th of December, 1904, then he cannot recover any damages for the loss of the sight of his left eye. (3) On the other hand, if, before the 20th day of December, 1904, the plaintiff did not receive an injury to his right eye of sufficient force and severity to destroy the sight of his right eye, and on said day he had the sight of his right eye, and on the 1st day of January, 1905, received an external, violent and accidental injury to his right eye, whereby he lost, irrecoverably, the sight of his right eye as the result of an external, violent, and accidental injury received by him on the 1st day of January, 1905, within ninety days from that date, then he is entitled to a verdict against the defendant for the sum of \$270.12; and if, within ninety days from the 1st day of January, 1905, and after the plaintiff lost, irrecoverably, the sight of his right eye, he also lost irrecoverably the sight of his left eye as the result of an external, violent, and ac-

cidental injury to his right eye on the 1st day of January, 1905, then he is entitled to a verdict against the defendant for the sum of \$2,142.87. (4) If the plaintiff did not, on the 1st day of January, 1905, receive an external, violent, and accidental injury to his right eye, or if, on the 1st day of January, 1905, the plaintiff did receive an external, violent and accidental injury to his right eye, and the irrecoverable loss of the sight of his right eye did not result from said injury within ninety days from said date, then in either of such cases, you cannot render a verdict for the plaintiff and against the defendant for the loss of the sight of his right eye; and if the plaintiff did not lose, irrecoverably, the sight of his left eye within ninety days from the 1st day of January, 1905, as the result of an external, violent, and accidental injury to his right eye, received by him on the 1st day of January, 1905, then he is not entitled to any verdict against the defendant for the loss of the sight of his left eye; and it is only in case the plaintiff has lost, irrecoverably, the sight of both eyes, as the result, within ninety days, of an external, violent, and accidental injury received by the plaintiff on the 1st day of January, 1905, that he would be entitled to a verdict against the defendant for the sum of \$2,142.87. (5) The burden of proof is upon the plaintiff to establish to your satisfaction, by the preponderance of all the evidence, that on the 15th day of December, 1904, he enjoyed the sight of both his eyes, and that on the 1st day of January, 1905, the irrecoverable loss of the sight of one or both of his eyes was caused solely by external, violent, and accidental means, within ninety days from that date; and if the evidence upon such matters is evenly balanced, or if it preponderates or weighs more heavily against the truth or existence of said fact, then the plaintiff cannot recover, and your verdict should be for the defendant."

The remaining instructions had reference to rules for determining the credibility of witnesses and the weight of the evidence. The trial resulted in a verdict in favor of the plaintiff for \$2,142.87. The insurance company complains.

Rosenberger & Reed, for plaintiff in error.
C. O. Littick and T. B. Anderson, for defendant in error.

JOHNSTON, C. J. (after stating the facts as above). The principal complaint of the insurance company is that the trial court in its charge to the jury in effect excluded material issues and withdrew from the jury defenses which were vital and upon which there was strong supporting evidence. One of these was that the injury sustained by Despain about three months before the policy was issued contributed to, if it did not cause, the blindness of one or both of his eyes. Another was the defense that the poli-

cy was void by reason of the breaches of warranty in the application. Whether the blindness was solely or only partly the result of an injury sustained before the contract of insurance was made was a very important consideration in the case. The policy, upon which the action was brought, insured Despain against the "effects of bodily injuries sustained during the term of this policy and caused solely by external, violent, and accidental means," and provided that indemnity in the sum of \$2,000 should be paid in case "the irrecoverable loss of the sight of both eyes" should "result from such injuries within ninety days independently of all other causes," and further that "if the irrecoverable loss of the sight of one eye shall so result within ninety days the company will pay one-eighth of the principal sum of the policy." In the policy was the additional provision that the insurance did not cover "anything of which the sole or secondary or contributory cause is, or which occurs while affected by or under the influence of bodily infirmity." That the right eye of Despain was injured on October 9, 1904, is conceded, and that he went to the hospital where he remained and received medical treatment of the injured eye for about a month is not denied. The severity and effect of the wound then received is in dispute. The physician, who examined the eye when he came to the hospital, stated that he found a bruise on the nose near the corner of the right eye, a rupture of the eyeball about half an inch long, through which some of the humors or contents of the eye were escaping; that the crystalline lens of the eye had been dislodged and was found in the conjunctival sac that surrounds the eye, and considerable blood was also found within the eye. The dislodged lens was removed and thrown away and treatment, intended to facilitate the healing of the wound, was administered. The hospital physicians advised him that as the right eye would be of no further use it should be removed and that its retention would produce sympathetic epithelioma. One of the doctors testified that sympathetic inflammation ordinarily sets in from 6 to 12 weeks after the injury and effects the destruction of the other eye from within 3 to 6 months. The earliest appearance of that affection ever known to any of the witnesses was three weeks after the injury. The doctor who examined his eyes after the injury of January 1, 1905, said that injury was trivial in comparison with the former one and that it could not have been the cause of the loss of the sight of the left eye but that this loss must have been the result of the October injury. There was other medical testimony of the same character, and some of it was that the January injury might have accelerated the sympathetic affection of the left eye but that it could not have been the sole cause of the blindness of that eye. Despain, on the other hand, claimed and testified that the October injury to the right eye was slight,

that the wound to the right eye in fact healed and that the eye was restored to its normal condition by the middle of November, more than a month before the insurance policy was issued. In this state of the evidence it became very material for the jury to determine whether the October injury contributed to the loss of sight of either or both of the plaintiff's eyes. That hurt was not within the life of the policy and unless his blindness was the result of an injury sustained solely by external, violent, and accidental means within the life of the policy and independently of all other causes he was not entitled to indemnity. If the injury of October was the secondary or contributing cause of the blindness no recovery could be had under the policy. Now, the second and third instructions effectually eliminated any possible contributory effect of the injury inflicted before the policy was issued. In the second instruction the jury were told that the total destruction of the sight of the right eye before the issuance of the policy and the loss of the sight of the left eye by reason of that injury would bar a recovery, but the court stopped short of saying that if this injury contributed to the loss of sight no recovery could be had. In the third instruction the jury were in effect advised that if the injury of October was not of sufficient force and severity to destroy the sight of the right eye it would not weigh in the consideration of the case. By these instructions nothing short of the total destruction of sight by the prior injury was available as a defense. But for these restrictions, who can say that the jury might not have inferred that the October injury, although it did not absolutely destroy the vision of the right eye, did severely wound it and that the second injury only accelerated the effect of the first and in a degree contributed to the final loss of sight? Who can say that the sympathetic inflammation which caused the loss of the left eye was not wholly, or even partly, due to the first injury? The wound was serious, and according to the testimony of defendant the doctors told the plaintiff that the loss of vision of the left eye would necessarily follow from sympathetic affection if the right eye was not removed. He did not permit its removal and the pain and symptoms of sympathetic inflammation began to be manifest about the length of time after the October injury that the doctors said it usually appeared. There was expert testimony that the last injury could not have been the cause of the blindness of the left eye, and the insurance company might have argued to the jury that there was not sufficient time for the inflammation, resulting from the January injury, to be transmitted along the optic nerve to the left eye; and who can say that the jury might not, if opportunity had been given, have found that one injury caused the loss of sight of one eye while the other injury occasioned the loss of sight of the remaining eye? If the

October injury contributed to the loss of sight of the right eye, but the loss of the left eye was wholly the result of the January injury, the plaintiff could only recover for the loss of one eye. The insurance company would only be liable for \$250 if only one eye was lost as the result of the January injury, but if that injury caused the loss of both eyes it would be liable for the full amount of \$2,000. At any rate, the contributory effect of the first injury was of vital importance to the case, and should have been submitted to the jury. Plaintiff concedes that if there was testimony from which the inference might have been drawn that the October injury was a contributing cause of his blindness there would be ground for complaining of the instruction. He insists, however, that all of the plaintiff's evidence was to the effect that the blindness was wholly due to the January injury, and that all of the defendant's testimony tended to show that it resulted entirely from the October injury, and that, therefore, there was no necessity for submitting the question to the jury, or at least no prejudice from the failure to instruct upon the question. Who can say, however, that the jury might not have believed the plaintiff's evidence as to certain features and circumstances, and disbelieved it as to others, and why might not the jury have given credit to some of the defendant's testimony as to the severity and effect of one injury, or deemed the testimony of the plaintiff as to the extent of the other more worthy of belief? Since the jury are at liberty to accept so much of the testimony of a witness as it deems credible, and reject the remainder, and since it may, upon the whole testimony, draw its own inferences as to degree and extent, the plaintiff's claim that there was no occasion to submit the contributory effect of the first injury cannot be upheld. The same omissions and defects are manifest in other of the instructions.

No feature of the representations in the warranties written in the application, and which are confessedly false, was submitted to the jury. It was contended that the representations of the insured and his answers to the questions were correctly given by him, but incorrectly written in the contract by the agents of the defendant and, believing that they had written the answers correctly, he did not read them. On this proposition the testimony is in dispute. It was further claimed by the plaintiff that the policy was issued after the agents were correctly informed as to all the facts including the former injury, the hospital treatment, the payment of \$85 to plaintiff by the railway company because of that injury, and that the insurance company therefore waived the conditions which, upon the face of the contract, appeared to have been violated. There is a sharp conflict in the evidence as to the representations made by Despain, and also as to the negotiations between him and the agents at the

time the contract was made, and the parties are also in conflict as to the extent of the agent's authority. These questions of fact, dependent as they were in a degree upon conflicting testimony, should have been submitted to the jury. They were not mentioned, as we have seen, in the instructions, but were definitely eliminated from the case by the statement in the opening part of the charge to the jury, wherein the court said that "most of the questions arising from the evidence are questions of law, which have been settled by the court, and so that you will not be confused by these legal questions, you will confine your deliberations to determining the questions of fact presented to you in the following instructions." These distinct defenses, being in issue and supported by proof, could not be ignored, and the instructions of the court that a verdict might be returned against defendant if another issue was decided in plaintiff's favor was error. It is not necessary for a court to instruct the jury on an issue made by the pleadings if it is not supported by evidence, but, as was said in *Honick v. Railway Co.*, 66 Kan. 124, 71 Pac. 285: "We think the court should not, in giving instructions, restrict the issues formed by the pleadings and supported in the evidence. The claim of the parties as made by the pleading, if supported by evidence, should be fairly and fully stated to the jury by proper instructions."

There is complaint of other rulings made in the course of the trial, but as the questions will not necessarily arise on the new trial it is unnecessary to discuss or decide them.

The judgment of the court of common pleas will be reversed, and the cause remanded for a new trial.

(77 Kan. 721)

ANDERSON v. BOARD OF COM'RS OF CLOUD COUNTY.

(Supreme Court of Kansas. April 11, 1908.)

1. STATUTES—GENERAL AND SPECIAL ACTS—CONSTITUTIONALITY.

Section 17 of article 2 of the Constitution as amended in 1905 (Laws 1905, p. 907, c. 543) takes from the Legislature the right to determine finally when a general law can be made applicable, and devolves upon the courts the duty to determine it as a judicial question, without regard to any legislative assertion on the subject.

2. SAME—DUTY OF COURTS.

Where the validity of an act is assailed under section 17 of article 2, as amended by Laws 1905, p. 907, c. 543, the rule of statutory construction, which makes it the duty of the courts to uphold a law if it is possible to do so, has no application.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 56.]

3. SAME—BRIDGES—BONDS.

Chapter 72, p. 94, Laws 1907, providing for the erection and removal of bridges across the Republican river in Cloud county, and authorizing the board of county commissioners of said county to issue bonds to meet the expense there-

of, is repugnant to section 17 of article 2 of the Constitution, and therefore void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 108.]

(Syllabus by the Court.)

Error from District Court, Cloud County; W. P. Dillon, Judge.

Action by C. G. Anderson against the board of county commissioners of Cloud county. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Hugh Alexander, B. T. Bullen, and W. D. Vance, for plaintiff in error. Fred W. Sturges, Jr., for defendant in error.

PORTER, J. In April, 1907, the board of county commissioners of Cloud county appropriated the sum of \$8,000, for the purpose of removing and rebuilding a bridge across the Republican river, and afterwards proceeded to let the work by contract to the Western Bridge & Construction Company. The plaintiff, who is the owner of a 640-acre farm in Cloud county, brought suit to enjoin the proceedings. The court refused to grant a temporary injunction, and plaintiff brings the case here for review.

The facts are not disputed. The bridge in question is located upon a regularly established road, which leads north from the city of Concordia across the Republican river. The road is known as the "McCrary Road," and crosses the plaintiff's farm. That portion of plaintiff's land where his buildings are located is an island, by reason of there being a branch of the Republican river south of his improvements, which has its upper opening in the river above the bridge, and connects again with the river below. The bridge therefore furnishes the only means of getting to and from that portion of his farm on which his improvements are located. It is alleged that its removal would cause irreparable injury to the plaintiff. The bridge was built in 1903, at a cost of \$10,000. In the opinion of the board there is a necessity for its removal, on account of a change in the channel of the river, which has left it practically useless. The question of removing it, and of appropriating money and issuing bonds to pay for the expense, has never been submitted at any election to the voters of the county. It is admitted that the board are without power or authority in the premises, except as conferred upon them by chapter 72, p. 94, Laws 1907, for the reason that the expense of removing the bridge and building a new one will exceed the sum which the board are allowed to appropriate for such purposes without a vote of the people, that it is the intention of the board to remove the bridge to another road across the river a mile west of its present location, and that, for the purpose of meeting the expense thereof, they intend to issue and sell the bonds of the county without submit-

ting the proposition to the voters of the county at an election.

The sole contention is that the act of the Legislature under which the board are proceeding is unconstitutional. The title of the act reads as follows: "An act to provide for the erection and maintenance of a bridge, and removal of a bridge, or bridges, across the Republican river, in the vicinity of Concordia, Cloud county, Kansas, and to authorize the board of county commissioners of said county to issue bonds to provide funds for payment of the same." The first section provides: "That the board of county commissioners of Cloud county, Kansas, be and are hereby authorized and empowered, in their discretion, to erect and maintain such bridge or bridges for the use of the public across the Republican river and its various channels and cut-offs in the vicinity of the city of Concordia, Cloud county, Kansas, at such points as may be by said board of county commissioners selected; and to remove and relocate any bridge heretofore or hereafter erected by said county and which, by reason of changes in the channel of said river, has, in the opinion of said board, become useless to the general public." Section 2 empowers the board to issue the bonds of the county in such amount as may be necessary to meet the expense of such removal and erection, not exceeding the total amount of \$15,000. Section 3 provides that the bonds shall not be sold for less than par, and authorizes the registry of the bonds, and provides for their payment and cancellation. Section 4 authorizes the county commissioners to levy a tax annually to pay the bonds and create a sinking fund for their final redemption. Section 5 provides that none of the restrictions in any former statute shall apply to or in any way affect the issuance of bonds under this act. The ground upon which its validity is assailed is that it is a special act, and for that reason repugnant to the second clause of section 17 of article 2 of the Constitution. By its express terms the act is special, and applies to Cloud county alone. From 1859, when the Constitution was adopted, until the amendment of 1905 (Laws 1905, p. 907, c. 543), the language of section 17 of article 2 read as follows: "All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted."

In the early case of *State ex rel. v. Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503, this provision was construed, and the rule declared, that it was for the Legislature to determine whether their purposes could or could not be expediently accomplished by a general law. That rule has never been departed from by the court, in construing the second clause of the foregoing provision. *Rambo v. Larrabee*, 67 Kan. 634, 73 Pac. 915, and cases cited. This constitutional limitation is based upon the theory that the state is a unit, to be governed, throughout its length and breadth, on all sub-

jects of common interest, by the same laws, and that these laws should be general in their application and uniform in their operation. When it was adopted the evil effects of special legislation, enacted at the behest of private individuals or local communities, were well understood and appreciated. The makers of the Constitution were confronted with the experience of the older states, which had demonstrated that Legislatures were wholly unable to withstand the constant demands for private grants of power and special privilege. The same year that our Constitution was adopted the conditions in Illinois had reached such a stage that, in the language of the Supreme Court, the mischiefs of special legislation were "beyond recovery or remedy." In the opinion of the case of *Johnson v. Joliet & Chicago Railroad Company*, 23 Ill. 202, 207, Justice Breese said: "It is too late now to make this objection; since, by the action of the General Assembly under this clause, special acts have been so long the order of the day, and the ruling passion with every Legislature which has convened under the Constitution, until their acts of this description fill a huge and misshapen volume, and important and valuable rights [are] claimed under them. The clause has been wholly disregarded, and it would now produce far-spread ruin to declare such acts unconstitutional and void."

From time to time, in opinions written upon the subject, members of this court have expressed their individual dissent to the doctrine that the courts were bound by the legislative determination. In *Elevator Co. v. Stewart*, 50 Kan. 378, 382, 32 Pac. 33, 34, Justice Valentine said: "It can make but very little difference what might be the views of the individual members of this court, as the court is now constituted, if the questions now presented by counsel were original questions, presented to them for the first time now; for we think they have all been heretofore settled by numerous prior decisions of this court."

Mr. Justice Johnston in the case of *Eichholtz v. Martin*, 53 Kan. 486, 488, 36 Pac. 1064, 1065, used this language: "The old question so often raised is again presented: Was it competent for the Legislature to determine whether a general law could be made applicable, and whether a special law was necessary? If the question were a new one, the writer of this opinion would be inclined to the view that the courts should determine, in each case, whether this constitutional restriction had been violated or not; but the question has been put at rest by a long series of decisions, holding that the decision of the question is exclusively for the Legislature, and not for the courts." And in the same opinion the possibility of the adoption of an amendment is thus foreshadowed: "From the multiplicity of special acts recently enacted it appears that the constitutional limitation has little force; but, in view of the length of time that the rule has been established and followed, we are of the opinion that the question

should be regarded as settled, until the people shall change the Constitution, and declare that the decision of the lawmaking power, in respect to the necessity for special laws, is subject to judicial review."

As early as 1854 the same question, which was presented to this court in *State ex rel. v. Hitchcock*, supra, was before the Supreme Court of Indiana, and exactly the opposite construction was placed upon their Constitution. In the opinion in *Thomas v. Board of Commissioners*, etc., 5 Ind. 4, it was said: "It is, however, insisted that the Legislature have decided a general law to be applicable to the case under consideration, that from this decision there is no appeal, and that therefore it is not competent for this court to decide upon the validity of the law in question. If that position be correct, the twenty-third section has no vitality, nor is there any reason why it should have a place in the Constitution. It would impose no restriction upon the action of the Legislature, nor confer any power which that body would not possess in the absence of such a provision. If that section permits the Legislature to enact a special or local law *ad libitum*, in any case not enumerated, the principle involved would deprive this court of all authority to call in question the correctness of a legislative construction or its own powers under the Constitution. We are not prepared to sanction this doctrine. The maxim that 'Parliament is omnipotent,' has no place in American jurisprudence. Whether the Legislature have, in the case at bar, acted within the scope of their authority, is, in our opinion, a proper subject of judicial inquiry."

The Indiana court, however, receded from this position, and in 1868, the decision in the case quoted from was expressly overruled in *Gentile v. State*, 29 Ind. 400. In 1878 the Supreme Court of New Jersey, construing a similar constitutional provision, declined to adopt the construction that the determination of the Legislature, to the effect that a general law could not be made applicable, was binding upon the courts, and in the case of *Pell v. City of Newark*, 40 N. J. Law, 71, 81, 29 Am. Rep. 286, used this language: "It cannot be adopted by the courts without abandoning one of the most important branches of jurisdiction committed to them by the Constitution. That the Legislature would act in good faith must be presumed. Purity of motive and a desire to keep within the prescribed limitations must be conceded to its members at all times; but that the people should have deliberately framed and imbedded in their organic law an amendment to prohibit special legislation, where general laws might be passed, and, at the same time, should have intended to put legislative action beyond review, where there was a clear infraction of the prohibition, is a proposition to which it seems impossible to assent. The mere form in which a law

is enacted cannot be conclusive of the question."

The foregoing quotations indicate some of the many reasons that might have been urged in support of the other theory of constitutional construction, if this court had seen fit to adopt that theory when the case of *State ex rel. v. Hitchcock*, supra, was before it.

More than one-half of the states of the Union have sought to curb the growing evils of special legislation by constitutional prohibitions. And the courts, in construing provisions similar in language to our section 17 as it read before the recent amendment, have almost uniformly held it to be the province solely of the Legislature to determine when a general law can be made applicable. Whether the rule adopted in *State ex rel. v. Hitchcock* was sanctioned by the better reason, it undoubtedly was supported by the weight of authority. In many of the states the constitutional limitation is coupled with a specific enumeration of subjects with respect of which special laws are expressly forbidden. This is true of the Constitutions of all of the newer states, and the same plan has been adopted, in some of the older states, by amendment. In New York the Constitution enumerates 13 subjects upon which the Legislature is forbidden to pass a private or local bill. The Constitution of the state of Washington prohibits special legislation upon 18 subjects; that of North Dakota expressly names 35, and in addition thereto, the Constitution reads: "Sec. 70. In all other cases where a general law can be made applicable, no special law shall be enacted; nor shall the Legislative assembly indirectly enact such special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed."

The Constitution of Missouri was amended in 1875, and enumerates 32 subjects upon which special laws are prohibited, among which are the following: "Regulating the affairs of counties, cities, townships, wards or school districts; changing the names of persons or places; changing the venue in civil or criminal cases; authorizing the laying out, opening, altering or maintaining roads, highways, streets or alleys; relating to ferries or bridges; vacating roads, town plats, streets or alleys; authorizing the adoption or legitimation of children; locating or changing county seats; incorporating cities, towns or villages, or changing their charters; granting divorces; erecting new townships, or changing township lines, or the lines of school districts; creating offices, or prescribing the powers and duties of officers in counties, cities, townships, election or school districts; changing the law of descent or succession; regulating the practice or jurisdiction of or changing the rules of evidence in any judicial proceeding; regulating the management of public schools,

the building or repairing of school houses, and the raising of money for such purposes; fixing the rate of interest; affecting the estates of minors or persons under disability; regulating labor, trade, mining or manufacturing; creating corporations, or amending, renewing, extending or explaining the charter thereof; granting to any corporation, association or individual any special or exclusive right, privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track; declaring any named person of age; giving effect to informal or invalid wills or deeds; legalizing the unauthorized or invalid acts of any officer or agent of the state, or of any county or municipality thereof." In addition there is the following general limitation: "In all other cases where a general law can be made applicable, no local or special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject."

Minnesota amended her Constitution in 1892, and special laws upon 15 subjects are prohibited, and there is also a general limitation, couched in the identical language quoted from the Constitution of Missouri. The experience of those states, which have attempted thus to solve the problem, has demonstrated that it is impossible to anticipate the various subjects upon which this kind of legislation will be demanded. The fact that the people have not attempted, in our Constitution, to enumerate any of the specific subjects upon which the Legislature shall not pass special laws has the effect, necessarily, to expand rather than to limit the scope of the provision as it reads.

The inherent vice of special laws is that they create preferences and establish irregularities. As an inevitable consequence, their enactment leads to improvident and ill-considered legislation. The members whose particular constituents are not affected by a proposed special law become indifferent to its passage. It is customary, on the plea of legislative courtesy, not to interfere with the local bill of another member; and members are elected, and re-elected, on account of their proficiency in procuring for their respective districts special privileges in the way of local or special laws. The time which the Legislature would otherwise devote to the consideration of measures of public importance is frittered away in the granting of special favors to private or corporate interests or to local communities. Meanwhile, in place of a symmetrical body of statutory law on subjects of general and common interest to the whole people, we have a wilderness of special provisions, whose operation extends no further than the boundaries of the particular school district or township or county to which they were made to apply. For performing the same

services the sheriff or register of deeds or probate judge of one county receives an entirely different compensation from that received by the same officer of another county. The people of one community of the state are governed, as to many subjects, by laws wholly different from those which apply to other localities. Worse still, rights and privileges, which should only result from the decree of a court of competent jurisdiction after a full hearing and notice to all parties in interest, are conferred upon individuals and private corporations by special acts of the Legislature, without any pretense of investigation as to merits, or of notice to adverse parties.

Commenting upon the evils of special legislation, Mr. Samuel P. Orth, in the *Atlantic Monthly* for January, 1906 (volume 97, p. 69), uses this language: "The Romans recognized the distinction between private bills and laws. To them special laws were *privilegia* or *constitutionis privilegia*. In England they used to say, when a public bill was passed: '*Le roi le veut*'—it is the king's wish; and of a private measure: '*Soit fait comme il est désiré*'—let it be granted as prayed for. Here is the gist of the matter: A public law is a measure that affects the welfare of the state as a unit; a private law is one that provides an exception to the public rule. The one is an answer to a public need, the other an answer to a private prayer. When it acts upon a public bill, a Legislature legislates; when it acts upon a private bill, it adjudicates. It passes from the function of a lawmaker to that of a judge. It is transformed from a tribune of the people into a justice shop for the seeker after special privilege."

It has been estimated that fully one-half of the laws enacted by the state Legislatures in recent years have been special laws. Since 1859 the rapid growth of cities and towns has produced so many changes in social and economic conditions, and added so much to the complex necessities of local communities, that the demand upon Legislatures for this species of class legislation has increased, and the evil effects have multiplied. The Legislature of 1905, which differed in this respect but little from its predecessors, passed no less than 25 special acts relating to bridges, and 35 fixing the fees of officers in various counties and cities. Out of a total of 527 chapters more than half are special acts. This does not include appropriation laws which, from their nature, are inherently special. The first act passed by this Legislature declared a certain young woman the adopted child and heir at law of certain persons. Others changed the names of individuals. Many granted valuable rights and privileges to private corporations. Hundreds granted special favors to municipal corporations, and many others conferred special privileges upon individuals. Such were the conditions which induced the people, at the general election in 1906, to change the Constitution, by adopting the amendment to section 17 of article 2. The amendment was

submitted by the Legislature of 1905 (Laws 1905, p. 907, c. 543, § 1), and reads as follows, the amendatory part being italicized: "All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable no special law shall be enacted; *and whether or not a law enacted is repugnant to this provision of the Constitution shall be construed and determined by the courts of the state.*" The only change is to require the courts to determine, as a judicial question, whether in a given case this provision has been complied with by the Legislature. The amendment adds nothing to the mandatory character of the provision. As it read originally it was mandatory, and the validity of every law, enacted by the Legislature since the adoption of the Constitution, may be said to have depended upon a strict compliance with it. Under the construction adopted by the court, however, the way was open for the Legislature to disregard both the spirit and the letter of the provision; and, as we have attempted to show, both have been honored more in the breach than in the observance. It is apparent that had this section, as originally adopted, provided that the courts should determine the question, or had a different rule of construction been adopted by the court, many laws must necessarily have been declared invalid because repugnant to the provision.

Constitutions are the work of the people, not of Legislatures or of courts. The people give, and the people take away, constitutional provisions. The adoption of the amendment must be regarded as the sober, second thought of the people upon the subject, and as an emphatic declaration of their determination to strike at the root of the evil, and to rely upon the vigilance of the courts to restrain the action of the Legislature in the future. The Legislature no longer have the power of finally determining, either that a proposed law will have uniform operation throughout the state, or that a local condition exists which requires a special law. A cursory glance through the bulky volume of the session laws of the Legislature of 1907 indicates that the adoption of the amendment has not served any good purpose, unless the action of the courts shall give to it the effect which the people intended.

As observed, the provision has not been altered, except to take from the Legislature and give to the courts the final determination of the question whether a given act of the Legislature is repugnant to its terms. It still recognizes the necessity for some special legislation. It is still a limitation, and not a prohibition. Without some special laws state governments could not exist. An appropriation law, however general in its terms, is necessarily special. A law changing the boundaries of a judicial district is a special law, but one which may be required at any time, and to enact a general law upon the sub-

ject, might accomplish more evil than good. Again, conditions sometimes arise, and emergencies are created, which require the enactment of special legislation. The mere mention of the subject in the Constitution is a recognition of this necessity.

What is the attitude which the courts must take, in respect to this subject, since the amendment? In the quotations from the Missouri and Minnesota amendments, *supra*, it will be observed that they provide that the question "shall be judicially determined without regard to any legislative assertion on that subject," but without the addition of these words the attitude of the courts, in our opinion, must be the same. It will be the duty of the courts to determine the question without reference to anything the Legislature has declared, either in the act in question or in other acts.

It is obvious that the amendment has the effect to destroy the force of some of the former decisions of this court as precedents. The general canon of statutory construction, which makes it the duty of courts to uphold the validity of a law if it is possible to do so, can have no application in the future, where an act is assailed as repugnant to this provision, however much that principle may apply to objections falling under other provisions of the Constitution.

The Constitution expressly forbids special laws where a general law can be made to apply. When a special law is passed, therefore, the Legislature necessarily determines, in the first instance, that a general law can not be made to apply. But their determination is not final. There is, of course, a presumption that public officers have discharged their duties properly, and every act of the Legislature is presumed to be valid until there is a judicial determination to the contrary. But when a special law has been enacted, and its validity is assailed in the courts, the question is to be finally determined by the courts as a judicial question, uncontrolled by the determination of the Legislature. The courts must determine the question, as other purely judicial questions are determined, by reference to the nature of the subject, not upon proof of facts or conditions, but upon the theory that judicial notice supplies the proof of what courts are bound to know, and that courts must be aware of those things which are within the common knowledge, observation, and experience of men generally.

The first clause of this section of the Constitution involves the question of classification, which it is apparent does not enter into the present case. Here there will doubtless remain in the future an ample field, upon which lawyers may contend and courts and judges differ. It may be said in passing, however, that it will be the duty of the courts, when that question arises, to apply the established tests to determine whether an attempted classification of the Legislature

is a proper one, based upon some apparently natural reason, suggested by necessity and occasioned by a real difference in the situation and circumstances of the class to which it applies, or whether it is arbitrary or capricious, and excludes from its provisions some persons, localities, or things to which it would naturally apply except for its own limitations. It may be said, however, that it will not become the duty of the courts to invent reasons for upholding a law which is repugnant to either clause of this provision.

It requires no argument or discussion to demonstrate that the special act in question violates the Constitution. To enact a general law on the subject, giving to boards of county commissioners in every county in the state authority to build or remove bridges, appropriate funds, and issue bonds to meet the expense thereof, under such restrictions and limitations, upon their authority in the premises as the Legislature may deem wise and salutary, would not require more than ordinary skill in the science of legislation.

We are not concluded either way by the fact that a general law on the subject was in existence when a special act was passed. That fact, however, serves as an apt illustration of the adaptability of a general law upon the subject, and as an argument against the necessity for a special law. It is argued that the local conditions in Cloud county are such as to authorize an exception to be made, and to require this special act. It appears that the bridge which the board were intending to remove was built, in the first place, by authority of a special law enacted in 1903; that the claims for a special law at that time were that the river had abandoned its channel and left a former bridge useless. Everybody knows that the rivers of the Missouri valley frequently change their course, and create conditions similar to those which existed in Cloud county in 1906. The experience of Cloud county in this respect differs from that of many other counties in the state, if at all, only in the extent to which that county has suffered. From 25 to 30 special laws of this nature have been passed by almost every Legislature for years, and practically the same reasons urged for their enactment. No reason can be suggested why a general law upon the subject could not be made to apply with a uniform operation throughout the state wherever similar conditions are likely to arise. In fact, the only suggestion made as to why the general law, already in existence, authorizing the erection of bridges, is not sufficient to meet the conditions is that, in the opinion of the members of the board, the voters would defeat any proposition submitted. This amounts to a confession that in the act in question there inhere the vices which the amendment was designed to prevent. To hold that the reasons suggested are sufficient to warrant a special law would raise again the lid of Pandora's box only to permit its evils to escape.

It follows, therefore, that the act must be declared void.

The judgment will be reversed, and the cause remanded for further proceedings.

(77 Kan. 742)

GARDNER et al. v. STATE ex rel. BURCH,
County Atty.

(Supreme Court of Kansas. April 11, 1908.)

1. QUO WARRANTO—PARTIES DEFENDANT.

The state may bring an action of quo warranto to test the validity of a corporate organization either against the persons who officially undertake to exercise its powers and franchises or against the organization itself by the name it assumes; and in either case a valid and binding judgment of nullity may be rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, §§ 44, 45.]

2. SCHOOLS AND SCHOOL DISTRICTS—UNION OF DISTRICTS—STATUTORY PROVISIONS—MAJORITY OF VOTERS—WHAT CONSTITUTES.

According to section 1, c. 305, p. 557, Laws 1901, providing for the voluntary disorganization and consolidation of adjacent school districts, a majority of the voters in a district must vote for the proposition to disorganize and consolidate, or the proposition is lost. A majority of those who attend the meeting is not sufficient, unless that also be a majority of the voters in the district.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 66.]

3. SAME.

The statute referred to contemplates that all districts proposing to disorganize and consolidate must vote upon the same proposition which must carry in all or fail.

4. STATUTES—SPECIAL ACT—DISORGANIZATION AND CONSOLIDATION OF SCHOOL DISTRICTS.

Chapter 244, p. 384, Laws 1907, purporting to legalize and validate the steps taken in the matter of the disorganization and consolidation of certain school districts, is not a curative or confirmatory act. It is creative in its nature, and attempts to originate a union district from separate districts which it attempts to disorganize.

5. SAME.

The statute last referred to is a special act relating to the voluntary disorganization and consolidation of school districts. Under the power conferred upon it by section 17 of article 2 of the Constitution this court decides that a general law can be made applicable to that subject, and therefore that the special act is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 78.]

(Syllabus by the Court.)

Error from District Court, Saline County;
R. R. Rees, Judge.

Quo warranto by the state, on the relation of Charles W. Burch, county attorney, against William Gardner and others, to oust them from the exercise of powers claimed as the board of directors of a union school district. Judgment for the state, and defendants bring error. Affirmed.

Ritchie & Abel, for plaintiffs in error. Z. C. Milliken, H. C. Tobey, and C. W. Burch, for defendant in error.

BURCH, J. In the year 1901 the Legislature enacted a law providing for the volun-

tary disorganization and consolidation of adjacent school districts. A portion of the first section reads as follows:

"Whenever the inhabitants of two or more adjacent school districts of the state of Kansas desire to unite for the purpose of forming a single or union school district and conducting therein a graded school, the clerks of the several districts shall, upon a written application of five voters of their respective districts, or by order of the several school district boards, call a meeting of the voters of such districts at their respective schoolhouses, by posting up printed notices thereof in like manner as provided for calling school district meetings, and if a majority of the voters in each of two or more adjacent districts shall vote to unite for the purpose herein stated, the clerks of such districts shall thereupon, in writing, notify the county superintendent of such action; provided, that the vote in any district shall be made conditional upon its carrying in certain other named districts proposing to unite. Upon such notice, it shall be the duty of the county superintendent, and he is hereby authorized, at his discretion, to declare the districts so voting disorganized, and to designate a time and place for a meeting of the voters of said district so voting, for the purpose of electing a board of directors, consisting of a director, clerk, and treasurer, notice of which meeting shall be given by printed notices, posted in five public places in the districts uniting." Sess. Laws 1901, p. 557, c. 305, § 1.

If the territory of a union district lie in more than one county, the county superintendents of the various counties act together. In January, 1906, the question of disorganization and the formation of a union district was agitated in school districts numbered 8, 11, 81, and 87 in Saline county and joint district No. 7 of Saline and Ottawa counties. Petitions duly signed by the requisite number of voters were presented to the clerks of the districts named, each requesting the board of directors to call a meeting to vote upon the proposition of consolidation. None of the boards of directors acted, but in each district the clerk called a meeting. In district No. 8 the petition asked for an election to vote upon the proposition to consolidate with districts No. 81, No. 87, and No. 7. The clerk's notice of election called for an election to vote upon the proposition to unite with districts No. 11, No. 81, No. 87, No. 7, or any of them. At the election only two forms of ballot were used, one for and one against consolidation with districts No. 11, No. 81, No. 87, and No. 7. The proposition to consolidate the five districts carried. In districts No. 11, No. 81, No. 87, and No. 7 the petition and the notice called for an election to vote upon the proposition of consolidation with district No. 8. In each of those districts but two forms of ballot were used at the election, one for and one against con-

solidation with district No. 8. The proposition carried in district No. 81, lost in district No. 11, and lost in district No. 87. In district No. 7 there were 54 electors. Of this number 38 participated in the election. Twenty-seven votes were cast for, and 11 votes against, the proposition to consolidate with district No. 8.

The results of the various elections having been reported, the county superintendent of Saline county declared districts No. 8 and No. 81 to be disorganized, and joined with the county superintendent of Ottawa county in a similar declaration respecting joint district No. 7. The two officials further assumed to say that by the authority in them vested they had formed a consolidated or union district of the territory comprising former districts No. 8 and No. 81 in Saline county and joint district No. 7 of Saline and Ottawa counties to be known as union district No. 1, and a time and place was designated for a meeting of the voters to choose officers of such union district. Afterward an election was held at which William Gardner was declared elected director. Thomas Irwin was declared elected treasurer, and Howard Burke was declared elected clerk. Upon the attempt of the gentlemen to assume the functions of the board of directors of a union school district, the state, upon the relation of the county attorney of Saline county, initiated this litigation by bringing an action of quo warranto against them to oust them from the exercise of the powers they claimed. The ground of the action was that the attempt to disorganize districts No. 8, No. 81, and No. 7 and to organize them into a union district was illegal and wholly void. A demurrer to the petition on the ground of a defect of parties defendant in that union district No. 1 was not made a party was overruled. The case was tried upon its merits, the district court made findings of fact in detail of which the foregoing contains a summary, and made conclusions of law as follows:

"(1) That the proposition to disorganize joint school district No. 7 of Saline and Ottawa counties, and to consolidate with school district No. 8, Saline county, did not receive the vote of the majority of voters in said district and was lost.

"(2) That the method of voting was such that no one was given an opportunity of voting for the formation of the district that was to be formed.

"(3) That Union district No. 1 declared to have been organized by these proceedings is an illegal organization, and the defendants have no warrant or authority in law to perform the duties of members of the school board in such illegal school district.

"(4) That original school districts Nos. 7, 8, and 81 still exist and remain unaltered."

Before judgment was rendered upon the findings of fact and conclusions of law the Legislature of 1907 passed an act as follows:

"An act legalizing and validating the acts and steps taken in disorganizing school districts No. 8 and No. 81, in Saline county, Kansas, and joint school districts No. 7 of Saline and Ottawa counties, Kansas, and organizing said school districts into union school district No. 1 of Saline and Ottawa counties, Kansas, and legalizing the election of school officers therein and the acts of such officers.

"Be it enacted by the Legislature of the state of Kansas:

"Section 1. That all of the petitions and notices given and posted for the election held in school districts No. 8 and No. 81 of Saline county, Kansas, and joint school district No. 7 of Saline and Ottawa counties, Kansas, in the month of February, A. D. 1906, relative to the disorganization of each of said school districts and organizing each of said districts into union school district No. 1 of Saline and Ottawa counties, Kansas, and the election thereafter held in said districts for the purposes aforesaid, be and the same are hereby legalized and validated, the same as though said notices and the petitions therefor and all other steps taken in pursuance thereof had been made, had and taken in strict conformity to the provisions contained in section 6151 of the General Statutes of Kansas 1901.

"Sec. 2. That all acts and matters done and made of record by the county superintendents of Saline and Ottawa counties, Kansas, relative to the disorganization of said school districts No. 8 and No. 81 of Saline county, Kansas and joint school district No. 7 of Saline and Ottawa counties, Kansas, and the organization of said districts into union school district No. 1 of Saline and Ottawa counties, Kansas, be and the same are hereby legalized and made valid, the same as if said matters and acts had been done, performed and entered of record in strict conformity with the laws of the state of Kansas then existing therefor.

"Sec. 3. That the election of the school officers of said union school district No. 1 of Saline and Ottawa counties, Kansas, held in said district on the 13th day of June, A. D. 1906, and all acts of said officers, are hereby legalized and made valid, the same as if said acts had been fully authorized by the laws of the state of Kansas then existing."

Chapter 244, pp. 384, 385, Sess. Laws 1907.

An application to file a supplemental answer setting up this act was denied, and judgment was rendered for the state. The defendants prosecute error.

The demurrer to the petition was properly overruled. The courts have involved themselves in some confusion respecting the matter of parties to proceedings in cases of this character, although it ought to be free from difficulty. The state may proceed against parties assuming to be the officers of a corporation to oust them from the exercise of cor-

porate power on the ground no corporation exists. If the fact be established that no corporation exists, the parties proceeded against are of course shorn of their claimed authority, and the adjudication stands that there is no corporate body of which they might be officers. This is simple and logical. It is not necessary to appear to recognize for the purpose of suit the existence of something whose nonexistence is the very basis of the proceeding. The judgment is conclusive, because the persons who must make the visible display of corporate life, if there be any, are prohibited from claiming any further right to do so. On the other hand, there may be in full operation that which appears to be a corporation, which is fully organized, has a complete set of officers, acquires and holds property, makes contracts, brings and defends suits, exercises, in fact, all the powers and privileges and incurs all the liabilities of a corporation, and indeed which is a corporation as against all the world except the state. In such a case the state may accept the situation as it finds it, attack the apparent entity by the name it assumes to bear, bring it into court and there strip it of all its pretensions. This is also simple and logical, and there is no need to be nonplused by any of the scholastic difficulties with which ingenuity in linguistics and metaphysics may cloud either view.

The position of this court upon the subject is settled by two decisions—*State ex rel. v. Com'rs of Ford County*, 12 Kan. 441, and *State v. Railway Co.*, 74 Kan. 413, 87 Pac. 696. In the first case the Attorney General brought an action on behalf of the state against persons assuming to act as officers of a newly organized county, praying that they might be ousted from the exercise of the functions, powers, and duties of the offices they claimed, and that the county organization be declared null and void. The syllabus reads: "Where a county organization of a new county has been obtained through falsehood and fraud by presenting to the Governor a false and fraudulent memorial and false and fraudulent census returns, the Supreme Court may, in an action in the nature of quo warranto against the persons assuming to act as officers of such organization, inquire into said falsehood and fraud, and declare the organization illegal and void." In the second case a charter for a private corporation had been fraudulently procured, and the powers exercisable under such a charter had been perverted and abused. The Attorney General brought an action on behalf of the state against the corporation by name to have it adjudged to be a nullity. The syllabus reads: "For the purpose of procuring a decree enjoining a corporation from acting as such on the ground of the nullity of its organization, it is not necessary that the individual corporators or officers of the company be made defendants and process be served upon them as such; but the state by which the corporate

authority was granted is the proper party to bring such an action, through its proper officer, and it is well brought when brought against the corporation alone." It is not necessary to follow the circuit taken by the opinions in the two cases; the conclusion in each one having been so clearly and definitely formulated. The result is that the state may bring an action of quo warranto to test the validity of a corporate organization either against the persons who officially undertake to exercise its powers and franchises or against the organization itself by the name it assumes; and in either case a valid and binding judgment of nullity may be rendered.

The findings of fact returned by the district court are not questioned. The first conclusion of law was inevitable in view of the statute. The Legislature might have provided that a majority of the votes cast at the district meeting should control, and thus have left the question of disorganization to be determined by those who should attend the meeting. But it did not do so. The language is: "If a majority of the voters * * * shall vote," etc. A majority of the voters in a district must vote for the proposition before the district can disorganize and unite with another. In district No. 7 just half the voters voted to unite with district No. 8. They could not bind their neighbors. It required a majority, and the proposition lost. The second conclusion of law is correct, and because of the method adopted no individual in all the five districts voted for the union district which was declared to be formed. The people in No. 8 voted to unite with No. 11, No. 81, No. 87, and No. 7, and thus to form a union district composed of five districts. The people in No. 81 voted for a small district composed of their own and No. 8. The people in all the other districts voted upon the question of consolidation with No. 8. They declined to give up their separate organizations, and the net result was that the declaration of the two county superintendents did not have a solitary vote to support it. The statute contemplates that all the districts proposing to disorganize and to unite shall vote upon the same proposition which must carry in all or fail. The phraseology employed is somewhat bungling, but such is the clear intent, to prevent districts from being forced into a combination which would be repudiated if it were fairly presented for acceptance or rejection. The proceedings to disorganize and consolidate school districts are purely voluntary on the part of the people of such districts. They take action and notify the county superintendent of the result. True, the effect of this action is held in abeyance until the county superintendent declares it, and he has a discretion to withhold the declaration; but when the declaration is made it is merely the result of the vote of the people of the several districts concerned. He possesses no disorganizing and consolidating power of his own. From what

has been said it is clear that the third and fourth conclusions of law follow as a matter of course from the facts found.

If the supplemental answer tendered stated no defense, the refusal to allow it to be filed was not erroneous. The question presented is the constitutionality of chapter 244, p. 384, Laws 1907. The recent amendment to the Constitution (Laws 1905, p. 907, c. 543) provides as follows: "In all cases where a general law can be made applicable no special law shall be enacted; and whether or not a law enacted is repugnant to this provision of the Constitution shall be construed and determined by the courts of this state." Article 2, § 17. The power and duty of the court under this amendment is fully discussed in the case of *Anderson v. B'd Co. Com'rs of Cloud Co.* (opinion by Mr. Justice Porter filed this month) 95 Pac. 583. The act of 1907 is clearly special, and the question is if a general law could have been made applicable. It is claimed that this is a curative act. If so, the question is if a general curative act might have been made applicable. If, however, the act is a piece of purely creative legislation, the question is if the subject of the disorganization and consolidation of adjacent school districts may properly be included within the scope of the general law. Although curative in form, section 1 is utterly nugatory as a curative measure.

The petitions in the three districts concerned made a definite request which did not include the consolidation of districts No. 8, No. 81, and No. 7 at all. They were not defective or irregular because of that fact. They simply expressed a wholly different desire, and when legalized and validated they merely become sufficient for the clerks of the several districts to call elections upon propositions which do not relate to the formation of a union district from the three districts affected. The notices did not relate to the consolidation of the three districts named. They were not defective or irregular in that they did not do so. They were just what they purport to be, and when legalized and validated they merely served as warnings to the people of elections which did not have for their object the formation of so-called "Union District No. 1." No district voted to consolidate districts No. 8, No. 81, and No. 7, but the elections were not defective or irregular on that account. To validate and legalize the election in No. 8 is to declare legal and valid the vote to form a union district composed of No. 8, No. 11, No. 81, No. 87, and No. 7. To validate and legalize the election in No. 81 is to declare legal and valid a vote to form a union district composed of No. 81 and No. 8; and to validate and legalize the election held in No. 7 is to declare legal and valid a vote refusing to disorganize or consolidate at all.

If the three districts had voted to consolidate with each other notwithstanding the fact that the petitions and notices did not

contemplate such action, the Legislature might have declared the vote valid and binding. Then there would have been a creative result based upon defective preliminary proceedings to be legalized so that it might avail. But such is not the case. It is impossible for the Legislature to put into the petitions a request for an election to vote upon the consolidation of districts No. 8, No. 81, and No. 7. It is impossible for it to put into the notices information which they were not intended to afford, and which they did not convey. While it may override the result of an election, it cannot change the vote of a man or of a district for one proposition into a vote for another proposition, or change a vote against a given proposition into a vote for it. Therefore the result of section 1 is to legalize and validate conduct on the part of the majority of the voters in the three districts concerned which prohibited the formation of so-called union district No. 1, and which left the corporate integrity of the separate districts unimpaired.

If section 1 had been omitted and section 2 had provided simply that the declaration of disorganization by the two county superintendents should have the same force and effect as if it had been made with jurisdiction, section 2 might perhaps be regarded as curative. But the Legislature did not wish to be in the attitude of saying that acts of the county superintendents not founded upon a vote of the districts affected should be binding. It plainly intended that the scheme of the law of 1901 should be adhered to, and so by section 1 it made a futile effort to create and supply the integral, antecedent steps of petitions, notices, and votes. Only upon the consideration that the acts of the two county superintendents rested upon a foundation thus made legal did it undertake to validate their conduct. Section 2 being thus bound up with section 1, its only effect is to say that a pure fabrication is to be taken as duly and regularly declared and recorded.

From what has been said, it is clear that the act comes to nothing when regarded as curative or confirmatory. It does not and cannot fill the office of remedying defects in the formation of something which the people endeavored to create and only failed in creating because of irregularities in the proceeding. If it has any force at all, it is to bring into existence and stamp as theirs measures which the people never took, and in opposition to their votes to declare as theirs a result which the people never had in contemplation and did not bring about. If it accomplishes this,

it simply originates a union district from three separate districts which it disorganizes. Such being the only possible effect of the act, it requires no argument to show that a general law may be made applicable to the subject. The conclusion inevitably follows from a consideration of the nature of the subject and the Legislature has never experienced any difficulty in framing a general law to reach the desired end. Article 7, c. 76, p. 269, Laws 1861, effectually dealt with the matter. This act was carried upon the statute books (Comp. Laws 1862, c. 181, § 63; Gen. St. 1868, c. 92, § 63) until 1876 when the school laws were revised. It then was re-enacted as article 7, c. 122, p. 260, Sess. Laws 1876. The act of 1901 which evidently supplanted the act of 1861, although the latter was not then expressly repealed, shows what may be done by general law upon the subject.

It is clear that the attempt to create a union district by sections 1 and 2 of the act of 1907 was void, and section 3, being a part of the same legislative scheme, fails also.

The supplemental answer stated no defense, and the judgment of the district court is affirmed.

(77 Kan. 363)

DENG et al. v. LAMB et al.

(Supreme Court of Kansas. April 11, 1908.)

Error from District Court, Scott County; Charles E. Lobdell, Judge.

Action between Charles Deng and others and Thomas Lamb and others. From the judgment Deng and others bring error. Reversed and remanded.

D. A. Banta (William Osmond, of counsel), for plaintiffs in error. J. S. Simmons, for defendants in error.

PER CURIAM. This case involves the constitutionality of chapter 368, p. 534, Laws 1907, entitled "An act providing for a special tax levy for the construction and equipment of a county high school building for Scott county, Kansas." The act is special, and under the authority of the case of *Anderson v. Board of County Commissioners of Cloud County* (just decided) 95 Pac. 583, is held to be repugnant to the provisions of section 17, article 2, of the Constitution, and therefore void for the reason that a general law could plainly be made applicable.

The judgment will be reversed, and the cause remanded for further proceedings.

STATE ex rel. WEBB v. DISTRICT COURT OF SECOND JUDICIAL DISTRICT et al.

(Supreme Court of Montana. May 11, 1908.)

1. CONTEMPT—STATUTES—CONSTRUCTION.

Code Civ. Proc. § 2170, specifies certain acts and omissions in respect to a court of justice or a proceeding therein which constitute contempts, and subdivision 9 declares that any other unlawful interference with the process of proceedings of the court shall constitute a contempt. *Held*, that such subdivision includes acts other than those enumerated in the preceding subdivisions, whether done in the presence of the court or not.

2. SAME — ATTEMPT TO INFLUENCE JURORS — "INDIRECT CONTEMPT."

An attempt by a party to a suit to improperly influence jurors then in attendance on the court, during the recess and away from the courthouse, constitutes an "indirect contempt" within Code Civ. Proc. § 2170, subd. 9, providing that any other unlawful interference with the process or proceedings of a court than the acts previously specified will constitute a contempt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, §§ 36-41.]

For other definitions, see Words and Phrases, vol. 4, p. 3558.]

3. SAME—AFFIDAVIT—REQUISITES—INTENT.

Code Civ. Proc. § 2172, declares that when a contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt. *Held*, that as the statute prescribes no form in which the charge must be presented, a general statement, in an affidavit charging a party with willfully attempting to influence jurors, was sufficient to confer jurisdiction to punish as for a contempt, without a specific allegation that the acts were done with intent to then and there unlawfully interfere with the proceedings of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, §§ 143-146.]

4. SAME—NATURE OF PROCEEDING.

A proceeding for contempt of court is criminal in its nature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 124.]

5. SAME—INTENT.

While in general it is always necessary, in a criminal case, to allege the intent in some manner, it need not be separately stated, whenever in the nature of the case it is a part of the act or acts charged, or where the statute creating the offense is silent as to intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, §§ 143-146.]

6. SAME — MISCONDUCT AFFECTING JURY — "CONTEMPT."

Pen. Code, §§ 190, 193, declare that a person who offers a bribe to a juror, who may be called to hear and determine any question or controversy, with intent to influence his vote or decision, is guilty of a felony. *Held*, that such provisions include offers made to members of a jury panel, and are not limited to offers made to jurors sworn in a particular case, so that an attempt to corrupt members of a jury panel constituted a "contempt," without reference to whether they had been drawn to try the case with reference to which it was sought to influence them.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1489, 1492; vol. 8, p. 7614.]

7. SAME—AFFIDAVITS.

An affidavit charged that relator approached affiant, who was a friend of H., a member

of the panel from which a trial jury was to be called to try a case in which relator was interested, and asked him concerning H., stating that he (relator) thought H. could do something for him, and wanted to see him about it, that relator was willing to make it right with any "of the boys that stayed by him." Another affidavit charged that relator walked behind affiant into a cigar store, invited him to have a cigar, and then said: "You are on the jury. It must be tiresome work on the jury. I have a case coming up there, and I hope the boys will do the right thing by me," whereupon deponent walked away from relator, and had no further conversation with him. *Held*, that such affidavits were sufficient to show an attempt by relator to influence such jurors, and were sufficient to confer jurisdiction of a proceeding against him for contempt.

8. SAME—EVIDENCE.

Evidence *held* sufficient to sustain a conviction of relator for contempt in attempting to influence certain jurors.

9. CRIMINAL LAW — "ACCOMPLICE" — TESTIMONY.

Relator went to S., and engaged him in a conversation concerning H., who was a juror, stating that relator wanted to see H. to ascertain if he could do something for him with reference to a case he had coming up for trial. S. replied that H. was a square sort of a fellow, whereupon relator stated that he was willing to make it right with any of the boys who stayed by him, and S. then stated that he would not say anything to any one except H., that he would have to tell him. *Held*, that such facts did not indicate that S. agreed to act as relator's agent to communicate with H., but rather that he refused to be a party to relator's purpose to influence H., and that S. was therefore not an "accomplice" within Pen. Code, § 2089, declaring that a conviction shall not be sustained on the uncorroborated testimony of an accomplice.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 75, 79; vol. 8, p. 7561.]

10. SAME—DEFINITION—"ACCOMPLICE."

An "accomplice" is one who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime. One may be an accomplice by being present and joining in the criminal act, by aiding and abetting another in its commission, or advising and encouraging its commission; but knowledge and voluntary action are essential in order to impute guilt, as one may unconsciously assist in forwarding the criminal scheme without being an accomplice (citing 1 Words & Phrases, p. 75).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 71-87.]

11. SAME—REVIEW—FINDINGS.

A finding by the trial court, based on sufficient evidence that a person was not an accomplice, will not be set aside by the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3084.]

Brantly, C. J., dissenting in part.

Citation against John Webb, directing him to show cause why he should not be punished for contempt for unlawfully interfering with the proceedings of the court by attempting to improperly influence certain jurors. A judgment was rendered for writs of supervisory control and certiorari. Application for writ of supervisory control discharged, application dismissed, and judgment affirmed.

C. M. Parr and John J. McHatton, for relator. H. A. Frank, for respondents.

BRANTLY, C. J. On March 25, 1908, there were filed in the district court of Silver Bow county, in department 2 thereof, the Honorable George M. Bourquin being the presiding judge, the four several affidavits which follow:

"Frank Boucher, being first duly sworn, on oath deposes and says: That he is the defendant in the above-entitled action. [John Webb, Plaintiff, v. Frank Boucher, Defendant.] That said action was commenced on or about the 18th day of June, 1907, by the filing of a complaint therein, and ever since has been, and now is, undisposed of, undetermined and pending in department 2 of the above-entitled court. That said action was originally set for March 7, 1908, for trial, and has been regularly continued from time to time to March 31, 1908.

"[Signed] Frank Boucher."

"L. J. Smith, being first duly sworn, on oath deposes and says: I am commonly called 'Smithie.' I am a hackman, and have my stand in front of P. C. Gillis' cigar store, on Main street, in the city of Butte, Mont. That C. H. Hickman is a member of the trial jury now in attendance on department 2 of the above-named court, and has been such jurymen for more than four weeks last past. That said Hickman is also a hackman, and has his stand at the same place I have mine. Deponent further says that on Friday afternoon, on March 13, 1908, at about 5 o'clock p. m. on said date, John Webb came to me at my stand and said: 'Where is Hickman?' I said: 'I don't know where he is. He is on a jury up there, and maybe he is not out yet.' I further said: 'What do you want? He and I are kind of partners here.' Webb then said: 'I want to see him. I understood he was on the jury. I have got a case coming up with Frank Boucher. I am suing him for \$5,000, and I thought maybe Hickman could do something for me. That was all I wanted to see him about.' At this time we were talking about said Hickman. I then said to Webb: 'Hickman is a pretty square sort of a fellow in my opinion. If he happens to be on your jury, and he thinks you have anything coming to you, why you'll get it; otherwise, you won't.' Webb then said: 'Don't say anything about this to anybody.' I said: 'I won't to anybody except Hickman. Of course, I will have to tell Hickman.' Said Webb then said: 'Of course. It is just this way: I worked about five years over there. I put in them windows and doors. I have got this money coming to me, and Boucher is trying to beat me out of it; and if I get a verdict in my favor I'll make it right with him.' At this time we were talking about said Hickman. Webb further said: 'I am willing to make it right with any of the boys that stay with me.' Deponent further says that about this time said Hickman drove up, and I said to Webb: 'There is Hickman now. You can have a talk with him yourself; but,' I said, 'I don't think you can do anything

with him, unless the evidence would make him feel that you are entitled to it.' I then left the said Webb, and had no further conversation with him, and immediately thereafter spoke to Hickman about the matter. Deponent further says that, during his conversation with said Webb (but at what particular part of it deponent does not now remember), said Webb asked this deponent to speak to said Hickman about the matter, and deponent told said Webb he had better see Hickman himself.

"[Signed] L. J. Smith."

"C. H. Hickman, being first duly sworn, on oath deposes and says: That he is a hackman, with a stand in front of P. C. Gillis' cigar store, on Main street, in the city of Butte, Mont., and is well acquainted with, and to some extent connected in business with, L. J. Smith, commonly known as 'Smithie,' who is also a hackman, with a stand at the same place. That deponent is now, and has been for more than four weeks last past, a member of the regular panel of trial jurors in attendance upon department 2 of the above-named court. That said L. J. Smith came to me at said stand about 5 p. m., on March 13, 1908, and said: 'Do you know that fellow that was talking to me there?' I said: 'Yes.' Said Smith then said: 'He has a case coming up in Bourquin's court, and he said he would make it right with any of the boys who would stand with him.' Said Smith then told me that said Webb asked if I was all right, and said Smith answered that I was on the square, and that if he (said Webb) had any damages coming I would give them to him, and if he didn't I wouldn't.

"[Signed] C. H. Hickman."

"W. Edgar Wright, being first duly sworn, deposes and says: That he is now and for more than four weeks last past has been a member of the regular panel of trial jurors in attendance upon department 2 of the above-named court. That on or about the 6th day of March, 1908, John Webb walked behind deponent and one Solveson from the Thornton Hotel, in the city of Butte, Mont., to P. C. Gillis' cigar store in said city. That at said last-mentioned place said Webb invited deponent to have a cigar, and then said, in substance, to deponent: 'You are on the jury. It must be tiresome work on the jury. I have a case coming up there, and I hope the boys will do the right thing by me.' Deponent then walked away from the said Webb, and had no further conversation with him.

"[Signed] W. E. Wright."

Thereupon the court issued a citation requiring John Webb, the relator, to show cause why he should not be adjudged guilty of contempt for unlawfully and willfully interfering with the proceedings of the court by attempting to improperly influence Jurors Hickman and Wright, then in attendance upon the court. The relator, having appeared by his counsel at the appointed time, entered a plea

of not guilty. After hearing the evidence, the court found him guilty, and sentenced him to imprisonment in the county jail for five days, and to pay a fine of \$200, with additional imprisonment until the fine should be paid or satisfied. Thereupon application was made to this court for writs of supervisory control and certiorari to annul the judgment, the grounds of the application being (1) that the affidavits upon which the conviction is founded do not state sufficient facts to show a contempt; and (2), assuming that they do, that the evidence is insufficient to justify conviction. The theory upon which application was made for both writs is that, while upon certiorari the court may determine the question of jurisdiction arising upon the sufficiency of the allegations contained in the affidavits, it may not, upon the review afforded by this writ, examine the evidence to determine its sufficiency to sustain the finding and judgment. Hence, following the course pursued in *State ex rel. Sutton v. District Court*, 27 Mont. 128, 69 Pac. 988, the supervisory power of the court was invoked to determine this question, in case the conclusion was reached that the district court had jurisdiction.

Section 2170 of the Code of Civil Procedure provides: "The following acts or omissions, in respect to a court of justice, or proceeding therein, are contempts of the authority of the court." The first eight subdivisions of the section enumerate various specific things which are contempts. Some of these are direct, while others are indirect or constructive contempts. Subdivision 9 reads, "any other unlawful interference with the process or proceedings of a court." This includes acts other than those enumerated in the preceding subdivisions, whether done in the presence of the court or not. The acts charged here constitute an indirect contempt, for they did not occur in the presence of the court. It is said that the affidavits are not sufficient in form to state a contempt, in that nowhere in them is it alleged that the acts done were done with intent then and there unlawfully to interfere with the proceedings of the court. A sufficient answer to this contention is that the statute does not require the affidavit to be drawn in strict conformity with the rules of criminal pleading, as in case of informations or indictments. Section 2172 of the Code of Civil Procedure declares: " * * * When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officer." This provision does not prescribe any form, nor require any characterization, of the act charged as a contempt in order to confer jurisdiction. It merely requires a statement of the facts constituting the contempt. In the absence of some requirement of statute prescribing the form in

which the charge must be presented a substantial and general statement will give the court jurisdiction to proceed. *Jordan v. Circuit Court*, 69 Iowa, 177, 28 N. W. 548; *State ex rel. Filscher v. District Court*, 65 Minn. 146, 67 N. W. 796. The particular act with the attendant circumstances furnishes its own characterization, if the statement be complete and substantial enough to justify a conclusive inference of knowledge and intent in the contemnor at the time the act is done.

It is said that a contempt proceeding is criminal or quasi criminal in character, and that, in setting forth the act constituting the contempt, the intent with which it is done should be alleged. That it is a proceeding of a criminal nature is true. *State ex rel. Gemmell v. Clancy*, 24 Mont. 359, 61 Pac. 987; *State ex rel. Flynn v. District Court*, 24 Mont. 33, 60 Pac. 493. But it is not always necessary in charging a crime formally, in an indictment or information, to allege the intent separately. Speaking generally, it is always necessary to allege the intent in some way; but, whenever in the nature of the individual case it is a part of the act or acts alleged, it need not be separately stated. *Bishop, New Criminal Procedure*, § 521. So, also, if the statute creating the offense is silent as to intent, no allegation on the subject is necessary. *Id.* § 523; *State v. Broadbent*, 19 Mont. 467, 48 Pac. 775. The affidavits do not in terms allege that the relator knowingly and intentionally attempted to corrupt Jurors Hickman and Wright; nevertheless, that it was his intention to do so is a conclusive inference from the facts stated. That this was a contempt under the statute is too clear to require discussion. Though the attempt was unsuccessful, nevertheless the relator took every step necessary to convey the information to Hickman that he would reward him and others who would render a favorable verdict; and while his passing conversation with Wright might in itself, if nothing else appeared, be treated as the result of thoughtless ignorance, it is characterized by his behavior with reference to Hickman, and indicates the attitude of mind entertained by him. In *Ruff v. Rader*, 2 Mont. 211, one of the questions before the court was whether members of the panel had formed or expressed an opinion upon the merits of the case so as to disqualify them from sitting as jurors in the case. It appeared that one White had talked with the plaintiff after becoming a member of the panel. In this connection the court said: "Before entering upon a discussion of the questions herein, we wish to say that jurors, summoned to attend court in that capacity, who will talk with parties having causes for trial about their causes, and thereby form an opinion of the merits of the cause, are guilty of contempt of court, and should receive the highest punishment therefor; and a party who would approach a juror and talk with him out of court about his case is like-

wise guilty of contempt, and should be punished accordingly. Such conduct shows corruption of the gravest character, or gross ignorance amounting to criminality."

It does not matter whether a juror be actually sworn upon a particular case or is only a member of the panel from which a trial jury is to be selected. A person who offers a bribe to a juror who may be called to hear and determine any question or controversy, with intent to influence his vote or decision, is guilty of a felony. Pen. Code, §§ 190, 193. These provisions clearly include offers made to members of the jury panel, and do not refer to those members only who have been sworn in a particular case, whose votes it is sought to influence in the case. Such conduct undermines the very foundations of justice, and is justly condemned by the law as a high crime. For the same reason it is a contempt of the most flagrant character, and demands summary punishment as an unlawful interference with the proceedings of the court; for its direct tendency is to bring courts generally, and for the time being the particular court, into disrepute, and, in so far as it has this tendency, is distinctly an interference with the proceedings of the court. While the affidavits do not charge the offering of a bribe—for no specific sum was named to Smith in the conversation relator had with him—yet the result of the conversation was communicated to Hickman; and, so far as the result of the matter was concerned, there was a clear attempt corruptly to influence the juror, or at least to open up the way for further negotiations looking to that end, in case Hickman manifested a disposition to enter into them. We cite the following cases, some of which involved approaches to jurors actually sworn to try a particular case, while others involved approaches to members of the panel only: *In re Gorham*, 129 N. C. 481, 40 S. E. 311; *Emery v. State* (Neb.) 111 N. W. 374, 9 L. R. A. (N. S.) 1124; *State v. Doty*, 32 N. J. 403, 90 Am. Dec. 671; *Langdon v. Circuit Judges*, 76 Mich. 358, 43 N. W. 310; *Wells v. District Court*, 126 Iowa, 340, 102 N. W. 106. In the case of *In re Buckley*, 69 Cal. 1, 10 Pac. 69, it was held a contempt, under a statute similar to ours, for one even to profess to litigants that he could influence the decision of a court and secure for them a favorable decision. The affidavits are sufficient to show an attempt on the part of Webb to influence Jurors Hickman and Wright, and the court had jurisdiction to proceed.

The evidence is sufficient to sustain the charge. The case of *Webb v. Boucher* was pending in court, and was set for trial. The evidence warrants the finding that the statement by Webb to Smith that he would make it right with Hickman if he got a verdict in his favor, and that he was going to make it right with any of the boys that stayed with him, was actually made, and that it was

communicated to Hickman. This is testified to circumstantially by Smith, and he is corroborated, to some extent at least, by Hickman, who came up just as the conversation ended, and saw Webb leaving Smith, who immediately detailed the conversation to him. As corroborative of the statements of Smith, and as an indication that Webb did not deem the matter closed by Smith's statement of the character of Hickman when approached by Webb, the trial court attached significance to the fact, testified to by Hickman, that, on at least two occasions afterward, Webb accosted Hickman to make inquiries about the movement of trains leaving Butte, when there was no apparent necessity for it, and that at a prior time he invited Wright to have a cigar, and then drew him, a comparative stranger, into a conversation about the case. Webb denied all the statements made by Smith. He denied that he even knew or had a conversation with Smith. He admitted, however, that the conversation took place with Wright, but insisted that it was opened by Wright. There was a conflict in the testimony in almost every particular; but the trial court, after seeing the witnesses and hearing them testify, concluded that the facts warranted a finding of guilty, and with this finding we do not think this court should interfere. No one heard the conversation between Smith and Webb; and, so far as concerns that feature of the case, the finding is based upon the testimony of Smith. Nevertheless, if the trial judge believed Smith, which he undoubtedly did, his evidence was sufficient to justify the finding.

But counsel for relator insist that by his own showing Smith was the accomplice of Webb, and hence that Webb could not, under the statute (Pen. Code, § 2089), be found guilty upon Smith's uncorroborated testimony. Since a trial for a contempt is a criminal proceeding, we think the statute should apply in proper cases. In this case, however, it has no application, because it is clear that Smith was not an accomplice of Webb. This is manifest from the testimony of Smith, the substance of which is stated in his affidavit, in that he did not undertake to act as the voluntary agent of Webb to communicate with Hickman. The only inference that can be drawn from his statement to Webb is that he intended to tell Hickman for the purpose of putting him on his guard, and that he did so. While he did not refuse directly to be a party to Webb's apparent purpose to influence Hickman, he clearly indicated that he would not be a party to the scheme, in that he expressed the opinion that Hickman could not be influenced, and that he agreed to be silent as to every one else but Hickman, while as to him he felt bound to tell him—that is, to warn him—as to Webb's purpose. And this notion is further borne out by the testimony of Smith, who stated that as soon as Hickman came up, Webb went away; that thereupon he called Hick-

man's attention to Webb, asking Hickman if he knew Webb, and that he at once repeated the conversation to Hickman. He also further stated that he did not do this at the instance of Webb. The theory of the court was that Smith did not act in aid of Webb's scheme in repeating the conversation, and was therefore not an accomplice, but that, inasmuch as the information Webb desired Hickman to receive was actually conveyed to him by Smith, though not intentionally in aid of the design, Webb was not to be held guiltless, because, though he told Smith not to speak of the matter, he did not object when Smith stated his purpose. In view of this fact, added to Webb's prior behavior toward Wright, and his subsequent conduct toward Hickman, the court correctly concluded that Webb, finding that his communication would reach Hickman, was satisfied to leave the matter at that, and wait to see whether Hickman would respond to the advances thus made.

An accomplice is one who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime. 1 Words & Phrases, 75. One may become an accomplice by being present and joining in the criminal act, by aiding and abetting another in its commission, or, not being present, by advising and encouraging its commission; but knowledge and voluntary action are essential in order to impute guilt. One may unconsciously assist in forwarding the criminal scheme. In such case he is not criminal, but merely an unconscious and therefore an innocent agent. State v. Allen, 34 Mont. 403, 87 Pac. 177. Whether Smith was an accomplice of Webb, consciously and voluntarily communicating the conversation had with him to Hickman, for the purpose of aiding Webb's design, or whether he merely sought to put Hickman on his guard, was a question for the court upon the evidence; and since the evidence furnishes ground for this latter inference, we cannot say that the court was wrong in its conclusion. It matters not that this court might, if the hearing had been had before it, have reached a different conclusion upon the evidence. The district court had before it the witnesses in person, and saw them and heard them testify. This important element of the testimony we cannot weigh and consider. The court evidently gave it full weight, and we cannot say that the evidence as a whole does not clearly and convincingly establish relator's guilt.

The foregoing conclusion is that of my Associates. I do not concur in it. Smith was an accomplice of Webb, or he was not. If he was, the evidence is not sufficient to warrant the conclusion of Webb's guilt of an attempt to influence Juror Hickman. If Smith was not an accomplice, there is no foundation in the evidence for the conclusion that Webb used him as an unconscious, and therefore innocent, medium of communication. While

the conduct of Webb, if the statements of Smith are to be taken as true, shows a criminal and wicked heart, yet if, when he found out that he could not influence Hickman, he abandoned his purpose, he could not be held guilty on the ground that afterwards Smith thought it his duty to warn Hickman. He cannot be held responsible for Smith's act in this regard. I think the evidence shows that Webb concluded that Smith's estimate of the character of Hickman was correct, and abandoned his purpose to attempt to influence him altogether. If so, Webb's conduct did not interfere with the proceedings of the court. I do not think the evidence sufficient to justify the conclusion that Webb intended to influence Juror Wright. The incident at Gillis' cigar store was the result of an accidental meeting; and while any conversation between Wright and Webb touching the case was improper, what little did occur was the result of thoughtless ignorance on the part of both, rather than of any corrupt design, or any design, on the part of Webb.

The order to show cause on application for writ of supervisory control is discharged, and the application in that regard is dismissed. The judgment of the district court is affirmed.

HOLLOWAY and SMITH, JJ., concur.

MULLEN v. CITY OF BUTTE.

(Supreme Court of Montana. May 11, 1908.)

1. NEW TRIAL—GROUNDS—VERDICT AGAINST EVIDENCE.

It is the duty of the trial judge, if satisfied that a verdict was not warranted by the evidence, to set it aside on proper motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 135-148.]

2. APPEAL—DISCRETION—NEW TRIAL—REVIEW.

Whether a new trial should be granted because the verdict is against the weight of the evidence is peculiarly within the legal discretion of the trial judge, the exercise of which will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3871-3873.]

3. NEW TRIAL—GROUNDS—VERDICT AGAINST EVIDENCE—CREDIBILITY OF WITNESSES.

Where plaintiff's right to recover depended largely, if not entirely, on the testimony of a witness whose credibility was impaired in many material particulars by his own evidence on a prior trial, and the court determined that the witness was not worthy of belief, the court did not err in setting aside a verdict for plaintiff, nor was its action in so doing objectionable as invading the province of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 141.]

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Action by Pat Mullen against the city of Butte. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Peter Breen, Jesse B. Roote, and A. C. McDaniel, for appellant. Edwin S. Booth and Wm. E. Carroll, for respondent.

SMITH, J. This is an appeal by the plaintiff from an order of the district court of Silver Bow county granting the defendant a new trial. The action was begun to recover damages alleged to have been sustained by the plaintiff by reason of an injury to his infant son.

The complaint alleges that the defendant city negligently maintained a sidewalk in a dangerous and unsafe condition, "by permitting an excavation to exist on the west side of said sidewalk, * * * which excavation abutted upon said sidewalk, and was of a depth of about six feet, * * * without any railing or barrier sufficient to protect persons using said street and sidewalk * * * from falling or stepping into said excavation." It is then alleged that Thos. Mullen, the infant son of plaintiff, while passing along the sidewalk, "stepped or fell into the aforesaid excavation, and struck with great force on his left leg in the region of the knee," receiving permanent injuries. The principal witness on the part of the plaintiff was one Walter Coughlin, who testified that from a house opposite the place of the accident he saw the infant, who was about five years of age, fall, stumble, or jump off the sidewalk at a place where the railing was so defective as to afford no protection to him. The boy was found at the bottom of the excavation upon or near the foot of a flight of steps leading from the sidewalk to the rear door of a saloon building running parallel with the sidewalk at the place in question. Coughlin did not go to the rescue of the boy, but he was picked up by another witness who was attracted to the spot by his crying. The space between the sidewalk and the saloon building was littered with broken bottles, and the boy's leg was found to be badly cut and lacerated, and was bleeding profusely. Blood was found on several broken bottles, and on the ground for some few feet from the place where he was discovered, in the direction of a spot directly underneath a point in the sidewalk, where the railing was partially or wholly absent. One witness testified that there was a piece of broken bottle on the lower step near where the boy was found. On the part of the defendant it was shown that the boys of the neighborhood, including the Mullen boy, were in the habit of playing about these steps, and sliding down a railing on the side thereof from the sidewalk to the space below where the broken bottles were scattered. Plaintiff had a verdict and judgment for \$6,500, which were afterwards vacated by the court on defendant's motion. One ground of the motion was insufficiency of the evidence to justify the verdict. In its order granting a new trial the district court incorporated its reasons for making the same. The entire order is found in the record, and both parties request that we examine and consider it.

Acting upon that request, we quote the order: "Plaintiff's case depends upon proof that his infant son fell from the elevated sidewalk

where rails were absent, and upon, and was cut by, a mass of broken bottles upon the ground below. The only evidence that the accident so happened was the testimony of one Walter Coughlin, who claims to have been sitting some 30 feet away at the time, and whose testimony is to the effect that the infant staggered or slipped, or stumbled or tripped and fell or jumped off the sidewalk at that time and place. If the infant jumped off, of course, the defendant is not liable. And for this uncertainty the plaintiff's case fails. Neither Coughlin's appearance nor manner while testifying commended him to credibility, but otherwise; and he was so discredited on material matters by his testimony at an earlier trial wherein the infant himself sued the city for damages for his injuries that had the court the right to comment to the jury upon witnesses and testimony, as have the federal courts, it would have felt constrained to advise the jury that Coughlin was unworthy of belief. To cite some few of the facts wherein Coughlin's contradictions appear, at the infant's trial he testified that on the day of the accident he was employed at the Berkley mine day shift, and had come home from work, and was sitting on the porch when he saw the boy go off the sidewalk. At this trial he testified he was then employed at said mine on night shift, and was sitting on the porch waiting to go to work when he saw the boy fall or jump off the walk. There was evidence by the mine owner's bookkeeper that the Berkley mine was not being worked at that time. At the earlier trial Coughlin testified positively that after the boy fell off the walk he saw him picked up off the ground below, while at this trial he testified he did not see the boy after he went off the walk until the boy was brought up and was being carried along the street. The fact is no one saw the boy on the ground; he being found on the stairway. Coughlin at the earlier trial further testified to frequent visits to see the injured boy at his home for some two weeks after the accident, giving details as to the time of various visits and who were present. At this trial he testifies he never saw the boy after the accident, and did not visit him. And it appears the boy when injured was immediately taken to the hospital, and kept there for several weeks. Coughlin attempts to explain away his testimony at the earlier trial by saying he was drunk when then testifying; but his testimony then, with its mass of detailed circumstances, shows otherwise. His testimony at the earlier trial was a careful narrative, weaving a multitude of circumstances about, and to give color of credibility to, the main event he professed to have seen, and shows none of the hesitancy, embarrassment, and confusion that characterized both him and his testimony at this trial. He now apparently has lopped off details he formerly testified to (which at this trial are shown by other evidence to be utterly false) to avoid clear inconsistency with the facts bound to be estab-

lished by proof—has learned and shaped his testimony to fit the case. These self-contradictions were of material matters. They involved circumstances related to lend credibility to other material matters, the main event, and so were themselves material. * * * From the evidence aside from Coughlin's testimony it appears highly probable the child was cut while engaged in its customary play on the ground or stairway, and not by a six-foot fall from the sidewalk upon a mass of broken bottles upon the ground below. However, it was not for defendant to prove how the child was hurt, but it was for plaintiff to prove the child was hurt because of defendant's negligence; that is, by a cut from a fall from the sidewalk where unsafe from defendant's negligence. I am of the opinion the jury was misled, and that the verdict is not sustained by the evidence, and is probably due to the sympathy the unfortunate child's condition awakened. It is proper to note, too, that there was evidence that plaintiff has offered money to an alderman of the city to vote favorably upon plaintiff's claim here involved when it was before the city council for allowance or disallowance. Under these circumstances, it is the duty of the court to grant a new trial. Thereby the court does not invade the province of the jury (who are exclusive judges of the credibility of witnesses) any more than in any case of conflicting evidence where a new trial is granted. It is not a final determination, as would be granting a motion for nonsuit, but merely referring the issues to another jury. The court, yielding due consideration to and respect for the jury's office and verdict, yet is charged with the grave duty of (on this motion) supervising it, considering witnesses, their testimony, conduct, demeanor, and credibility; and, if satisfied, as here, that the jury has been misled and imposed upon by falsehood resulting in an improper and unjust verdict, the court is in duty bound to set aside the verdict and grant a new trial."

It will be seen from the foregoing that the district judge who had the witness Coughlin before him, and who was in a position to observe his appearance and demeanor while testifying, in view of the contradictory statements made by him on two different occasions as to what he saw, concluded to disregard his entire testimony. The witness who picked the boy up testified that he saw Coughlin at the place where he said he was. This is the only corroborating evidence in the case. No witness save Coughlin claimed to know how the boy was injured. If he fell off the sidewalk, the city was probably liable. If he was hurt while playing about the broken bottles or while sliding down the railing of the steps, it was not. The fact that he was injured throws no light upon the question as to how he received the injury. Without Coughlin's testimony the plaintiff made out no case. The trial court was of opinion that the evidence was insuffi-

cient to justify the verdict. Coughlin may have been where he says he was, and still not have seen the boy fall. If he did not see the fall, then there was no testimony that would justify a verdict for the plaintiff under the pleadings as they are found in the record. It was the duty of the trial judge, if satisfied that the verdict was not warranted by the evidence, to set it aside upon proper motion. *Harrington v. Butte & Boston Min. Co.*, 27 Mont. 1, 69 Pac. 102; *Fournier v. Coudert*, 34 Mont. 484, 87 Pac. 455. In the case of *Hamilton v. Nelson*, 22 Mont. 539, 57 Pac. 146, this court said: "Whether or not a new trial should be granted for the reason that the verdict is against the weight of the evidence is a question peculiarly within the sound legal discretion of the trial judge, who has the advantage of seeing the witnesses, of hearing their testimony orally delivered, and of observing their demeanor and conduct upon the stand. Hence the exercise of such discretion will not be disturbed by this court."

But it is contended by the appellant that this is not a case of conflicting evidence, but one wherein the evidence of the plaintiff, though weak, was uncontradicted. It is also urged that the trial court in discarding the testimony of Coughlin invaded the province of the jury, who are the exclusive judges of the credibility of the witnesses. In his first contention the appellant is in error, because the testimony of the witness was in many material particulars contradicted by his evidence on the first trial. But, aside from this, while the credibility of the witnesses is, in the first instance, a question exclusively for the jury, it is the duty of the trial court in ruling upon a motion for a new trial to pass upon the weight of the testimony. If the testimony of the prevailing party is not sufficient in weight to justify a verdict in his favor, a new trial should be granted; and, when a trial court determines that the testimony is not of sufficient weight to sustain a verdict and therefore sets the same aside, this court will not interfere unless that sound legal discretion lodged in the district court is abused. If Coughlin's testimony in the opinion of the district court was without weight, then the plaintiff's case failed. We do not mean to be understood as holding that, where a witness has testified positively to a fact not in itself impossible or improbable and not contradicted, the trial court would be justified in disregarding such testimony, because that question is not before us; but in this case, in view of what the record discloses regarding the witness Coughlin, we are not disposed to hold that the court below abused its discretion or was not justified in ordering a new trial.

The order is affirmed.
Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

LIUTZ v. DENVER CITY TRAMWAY CO.

(Supreme Court of Colorado. April 6, 1908.
Rehearing Denied May 4, 1908.)

1. STREET RAILWAYS—CARE REQUIRED BY OPERATORS.

It is the duty of persons operating a street car to exercise ordinary care and vigilance to avoid injuring the pedestrians, but what constitutes such care and vigilance must be ascertained from the circumstances of each case, for the question must be determined by what a man of ordinary prudence would have done under similar circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 172-176, 195-203.]

2. SAME—INJURY TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.

A pedestrian is required to exercise ordinary care to avoid being injured by an approaching street car, and whether that degree of care has been exercised must be determined by the attending circumstances of each case, for the question depends on what a reasonably prudent and cautious person would have done under similar circumstances, and, if a failure to exercise such degree of care is the proximate cause of an injury, there can be no recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 204-209.]

3. SAME—ACTIONS—EVIDENCE—SUFFICIENCY—CONTRIBUTORY NEGLIGENCE.

Where decedent signaled to the motorman of an approaching street car that she desired to enter, and started across the street toward a point where the car should stop, and the car could be boarded from either side, and decedent stepped on the track in front of it when it was within five or six feet of her so that she was caught on the fender, thrown off and run over, decedent's negligence was the proximate cause of her injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 186.]

4. SAME—NEGLIGENCE OF COMPANY.

Where a car was something over half a block distant at the time it was signaled by plaintiff's intestate, and approaching on a slightly down grade at the rate of about eight miles an hour, and the gong was being sounded, when she stepped in front of it and was struck, defendant company was not negligent, nor liable for failure to avoid the injury, notwithstanding decedent's negligence, though it might have been had she not indicated her knowledge of the car's approach by signaling it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 219.]

5. SAME — EFFECT OF PUBLIC'S RIGHT TO STREET.

Where decedent intruded herself in front of a street car while it was in motion and after she had signaled it to stop, the abstract question of the relative rights of pedestrians and street car companies to the use of the streets is not involved, for, both having rights upon streets, both are bound to exercise reasonable care in enjoying them, the one to avoid being injured, the other to avoid inflicting injuries, and the rights of the parties must be determined from the record by ascertaining whether they violated the law in respect to such duties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 193.]

6. SAME—FAILURE TO EXERCISE CARE AFTER DISCOVERY OF PERIL—QUESTION FOR JURY.

Whether defendant was negligent in backing a street car after decedent was run over is a question for the jury, where there was a conflict in the testimony, and the question was one on which different intelligent persons might differ.

Error to District Court, City and County of Denver; P. L. Palmer, Judge.

Action by John Lutz against the Denver City Tramway Company. Judgment for defendant on a directed verdict, and plaintiff brings error. Reversed and remanded.

L. J. Stark, George S. Redd, and George Stidger, for plaintiff in error. Chas. J. Hughes, Jr., Gerald Hughes, and Albert Smith, for defendant in error.

GABBERT, J. Plaintiff in error brought an action to recover damages from the defendant in error for the death of his wife, which was caused by her being run over by a car operated by the defendant. The complaint is in two counts. In the first count it is averred, in effect, that deceased, without fault upon her part, in attempting to cross Larimer street, in the city of Denver, was run over and injured so as to cause her death by a car operated by the defendant company, and that such injuries were occasioned through the negligence of the person operating the car. It is also alleged in this count that the car which ran over deceased was equipped with a rail guard or fender, to which was attached an appliance by which the motorman could have dropped it upon the track and thus have prevented the deceased from being run over, but that he did not do so; that at the time of the injury there was in force an ordinance of the city requiring the defendant to equip its cars with rail guards, to be run as near the rails as practicable, and connected with an appliance by which the motorman could drop it; and that the motorman operating the car by which deceased was injured negligently and carelessly omitted to carry the rail guard as near the rails as practicable, in that at the time deceased was injured it was carried at a height of from 10 to 14 inches above the rails. By the second count, in addition to the matters alleged in the first, excepting the averments with respect to the rail guard, it is charged that after the car in question had run over the deceased, and while she was still upon the track and between the wheels, the persons in charge of the car so negligently moved it that she was fatally injured. The defendant answered, denying negligence upon its part, and pleading affirmatively that the deceased was guilty of contributory negligence, which was the proximate cause of her injury. At the close of the testimony the court, on motion of defendant, directed the jury to return a verdict in its favor. Plaintiff has brought the case here for review on error.

The action of the trial court was based upon the ground that the contributory negligence of deceased was the proximate cause of her injuries. To review this action necessitates a consideration of the evidence, and we shall first consider the testimony which relates to the cause of action set out in the

first count of the complaint, omitting for the present any reference to that bearing on the manner the rail guard was carried or operated. Deceased, a young woman between 22 and 23 years of age, and in possession of all her faculties, had started from the south side to cross Larimer street a little east of its intersection with Twenty-Fifth street in a diagonal direction towards the latter street, with the evident intention of boarding a car of the defendant which was then approaching from the east. She signaled the car as she left the curbing. She was carrying on her right arm an infant about four months old, and walked rapidly across the street in the direction we have indicated. At the time the car was signaled it was distant something over half a block, and approaching on a slightly down grade at the rate of about eight miles an hour, which it is not claimed was an excessive speed. This car was so arranged that passengers could board it from either side. Its usual place, and where the ordinances of the city required it, to stop and receive passengers, was on the west side of the intersection of Twenty-Fifth and Larimer streets. As the car approached, the gong was sounded. Plaintiff appears to have paid no attention to its approach, but continued on her course with her right side partially towards the car, and, when it was within 5 or 6 feet of her, stepped upon the track over which the car was moving, with the result that she was first caught on the fender, then thrown off, and run over. The car was stopped within about 25 feet after she stepped upon the track. The car collided with her a few feet east of the east line of Twenty-Fifth street. It was in good order, and the brakes were in good working condition. One of the witnesses, who gave a very clear statement of the occurrence, in testifying with respect to the deceased stepping upon the track, stated (quoting from her testimony): "She stepped almost immediately in front of the car, and she got just one foot in front of the car before the fender struck her. It was almost instantaneous, the fender striking her. As soon as she stepped on the track, almost instantly, the fender struck her. Just as that occurred the motorman was winding the brakes and ringing the bell. I think about the time she stepped in front of the car he commenced to take up the brake. He was taking the brake up before, but he stopped the car more sudden, and did not ring the bell any more." It is the duty of persons operating a street car to exercise ordinary care and vigilance to avoid injuring pedestrians. What constitutes a proper degree of care and vigilance upon their part must be ascertained from the circumstances of each case, because what would constitute ordinary care with respect to a particular case from its own facts would have to be determined by what a man of ordinary prudence would have done under similar circumstances. *Philbin v. Denver City Tramway Co.*, 36 Colo. 331, 85

Pac. 630; *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203. It is also the duty of a pedestrian to exercise ordinary care to avoid being injured by an approaching car, and whether or not this degree of care has been exercised must be determined by the attendant circumstances of each case in which this question arises, for likewise it must also be determined by what a reasonably prudent and cautious person would have done under similar circumstances. See authorities above cited, and *Kernan v. Market St. Ry. Co.*, 137 Cal. 326, 70 Pac. 81; *W. Chicago St. R. Co. v. Nilson*, 70 Ill. App. 171; *Connelly v. Trenton Pass. Ry. Co.*, 56 N. J. Law, 700, 29 Atl. 438, 44 Am. St. Rep. 424. If he fails to exercise this degree of care, and such failure is the proximate cause of his injury, he cannot recover. Tested by these rules, it is clear that the defendant was not guilty of negligence, and that the contributory negligence of the deceased was the proximate cause of her injuries. The evidence bearing on these questions is not conflicting, and is of such a character that but one inference can fairly be drawn therefrom. This is the test to apply in determining whether the questions of negligence and contributory negligence are to be determined by the court or should be submitted to a jury. The deceased had signaled the car. It was not being run at an excessive rate of speed. The gong was being sounded. It could be entered on the side from which the deceased approached. Having signaled the car, the motorman was thereby informed that she knew it was approaching. She did not step upon the track until the car was within 5 or 6 feet of her. It had not reached the point by more than the width of Twenty-Fifth street where ordinarily it would stop in response to her signal, and in obedience to the ordinances of the city, to take her on board. In such circumstances we do not see how it is possible to reach any other conclusion than the one that the motorman, as a reasonably prudent person, was justified in assuming that she had no intention of attempting to cross the track in front of his car in such close proximity as to imperil her safety. As soon as she did, he endeavored to stop it as quickly as possible. It, therefore, appears that he was not negligent. The deceased knew that the car was approaching, because she had signaled it to stop, with the evident intention of boarding it when it reached the intersection of Twenty-Fifth and Larimer streets, where it stopped to take on passengers. She was walking rapidly and diagonally across Larimer street in that direction. She did not attempt to pass in front of the car beyond the point where possibly she might have been justified in assuming that, in response to her signal and the requirements of the ordinances of the city, it had stopped, or would halt, so that she could pass in safety. She appears to have been in possession of all her faculties. There was nothing

ing occurred between the time she signaled the car and when she stepped upon the track to distract her attention. In addition to her actual knowledge that the car was approaching, the gong was being sounded; and yet, when the car was within but 5 or 6 feet of the point where she attempted to cross the track, she stepped in front of it and was injured. Certainly this was not the exercise of that reasonable degree of care that a person of ordinary prudence and caution would have exercised under the same circumstances, so that the testimony not only establishes that the defendant company was not negligent, but that the failure of the deceased to exercise that degree of care which the law imposed upon her was the proximate cause of her injury. *Griffith v. Denver Tramway Co.*, 14 Colo. App. 504, 61 Pac. 46.

Counsel for plaintiff contend that, even though the deceased was negligent, the defendant company could have avoided injuring her after the motorman became aware of the fact that she was in peril. Our conclusion that the defendant company was not negligent practically disposes of this question. As we have already said, her actions did not indicate that it was her purpose to cross in front of the approaching car. She knew that it was approaching, because she had signaled it, and the gong was being sounded. Possibly, if she had not indicated to the motorman that she knew of the approach of the car, the case might be different; but when she had conveyed to the motorman the information that she did know of its approach, then, although she was walking rapidly towards the track over which the car would pass, but where it was not customary to stop for passengers, there was nothing to indicate to the motorman that she was in a position of peril until she actually stepped upon the track, when, according to the testimony, it was too late to prevent the car striking her, although it appears from the evidence that he made every effort to do so. Counsel cite many cases in support of their contention which we have so far considered, which it is not necessary to review at length. They are not applicable, because they are based upon the proposition that the motorman should have discovered from the actions of the injured party that it was his purpose to cross the track in front of the approaching car, or evidently was not aware of its approach, or the person injured was an infant, or the evidence bearing on the question of his alleged negligence was conflicting or of a character from which different intelligent minds might draw different conclusions. These are the features which distinguish these cases from the one at bar; or, to reiterate why the motorman in the present case was not negligent, it appears he was aware that the deceased knew the car was approaching, and in such circumstances as justified him in assuming that she would not put herself in a place of danger by attempting to cross in

front of it, when it was in such close proximity that it would be dangerous to do so.

It is also urged that the defendant company had no exclusive or superior right to deceased to the use of the part of the street where she was injured, and that she was but exercising her right to cross the street, and hence, it is claimed, was justified in assuming that the car would not be run upon her. The abstract question of the relative rights of pedestrians and street car companies to the use of the streets over which the latter operate their cars is not involved, for whatever they may be, both having rights upon such streets, both are bound to exercise reasonable care in enjoying these rights, the one to avoid inflicting injuries, and the other to avoid being injured. So that, as we have already pointed out, the rights of the parties to this case must be determined from the part of the record under consideration by ascertaining whether or not the law in this respect was violated.

Counsel for plaintiff seem to predicate negligence of the defendant upon the fact that the motorman did not slow down the car in obedience to the signal of plaintiff to stop and receive her. In the circumstances of this case we do not think that question is involved, but, if it is, the contention is without merit, for two reasons: (1) When the collision occurred, the car was distant more than the width of Twenty-Fifth street from the point where it would customarily stop to receive her, hence deceased was not misled by assuming that it had stopped, or was about to do so; and (2) it appears from the testimony that prior to the time the deceased stepped upon the track the brakeman was applying the brakes, with the evident purpose of stopping the car at the place where it was required to stop.

It is also contended that it was negligence to not carry the fender nearer the rails, and that the motorman was negligent in not lowering it when deceased stepped upon the track. There is the testimony of one witness to the effect that he noticed the fender shortly after the deceased was injured, and he thought it was about one foot above the rails. There is no testimony bearing on the question of how near the fender should be to the rails in practical operation, neither is there any testimony that the motorman did not attempt to lower it, or that he had time to do so after the deceased stepped upon the track. For these reasons we express no opinion on the questions argued by counsel touching the fender further than to say that no case was made against the company by the testimony under the allegations of the first count on that subject.

Counsel for the defendant insist that the pleadings are not such as to warrant an investigation of the question of whether or not the company was liable because of its failure to avoid injuring deceased after she was in a position of peril. We express no opinion

on this question, because, assuming that the first count does present this question, the evidence establishes that it is without merit.

The facts alleged in the second count with respect to the alleged negligence of the persons in charge of the car in failing to exercise a proper degree of care in extricating the deceased present an entirely new situation, to be determined without regard to what occurred before; because, in considering the case as made by the second count on this question and the testimony bearing thereon, the questions of the negligence of the defendant and the contributory negligence of the deceased, considered in disposing of the first count, are entirely eliminated. By the averments of the second count now under consideration and the testimony relative thereto, there is involved the application of the well-settled law that, although the contributory negligence of the injured party placed him in a position of danger, yet the defendant, with knowledge of his peril, must exercise a proper degree of care to save him from injury in that situation.

The testimony on the questions now to be considered is far from satisfactory, is not very clear, and, in some respects, is conflicting. There is testimony, however, to the effect that when the car stopped the deceased was lying on her stomach, with the trunk of her body outside the rails; that when she was extricated her right limb was broken in several places below the knee, and this limb practically severed from her body at the trunk by a wound which had crushed the pelvic bone at the right side and the bone of the limb at the thigh; that this was the injury that caused her death; that when the car stopped the front wheel of the front truck of the car was between her limbs, close to the trunk; that the motorman and conductor alighted and after a hasty examination backed the car; that in doing so the wheel passed over her, whereby she received the fatal injury to which we have referred. We cannot believe, as seems to be assumed by counsel for plaintiff, that the action of the motorman and conductor in moving the car was prompted by any thought to wantonly and willfully injure the deceased, nor is there anything in the record to justify such an assumption; but the law demands that in attempting to extricate her they should have exercised that degree of care to prevent further injury which reasonably prudent persons would have exercised under similar circumstances. If they did, then the law will hold them blameless, although they inflicted further injury; but whether or not they did exercise that degree of care which the law imposes was a question which should have been submitted to the jury for its determination, because there was not only some conflict in the testimony with respect to the position of the deceased, as well as for the further reason that whether or not in the circumstances they exercised a proper degree of care was a ques-

tion which different intelligent persons might differ upon. In connection with this question there would be the further one of whether or not moving the car to extricate deceased inflicted the fatal injury. If the fatal injury was not so caused, then plaintiff's case would fail. The questions presented by the second count which we have considered should have been submitted to the jury under appropriate instructions.

The judgment of the district court is reversed, and the cause remanded for a new trial in accordance with the views expressed in this opinion.

Reversed and remanded.

STEELE, C. J., and CAMPBELL, J., concur.

HOWE v. FRITH.

(Supreme Court of Colorado. April 6, 1908.)

1. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE—IMPROPER GROUNDS OF RECOVERY.

Where a plaintiff seeks recovery of damages on several grounds, but the complaint does not specify the amount of damages suffered from any one of the causes stated, and there is a verdict and judgment for a lump sum, if evidence was improperly admitted in support of any ground relied on, and on which plaintiff had no right to recover, the judgment must be reversed, for it cannot be determined what influenced the jury in reaching the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

2. LANDLORD AND TENANT—LEASE—CONSTRUCTION—DAMAGES FROM TURNING OFF HEAT.

Where a lease providing for monthly payments of rent in advance for room and heat contains covenants of forfeiture for nonpayment of rent, and the right of re-entry in such case, with or without process of law "using such force as might be necessary," and the heat is turned off after the rent is not paid for two months, no right of action accrues to the tenant.

3. SAME—COVENANT TO NOT CLAIM DAMAGES FOR TRESPASS—TURNING OFF HEAT.

Where the lease provided that no action of trespass or the like should be brought by the tenant in case the lessor should forcibly dispossess the tenant of the premises under the terms of the lease, the tenant thereby estopped himself to claim damages from the shutting off of the heat.

4. SAME—RIGHT TO RE-ENTRY—FAILURE TO ENFORCE RIGHT—EFFECT OF INJUNCTION.

The fact that a landlord was prevented by injunction from recovering possession of premises which a tenant had forfeited under the terms of the lease by nonpayment of rent does not relieve the tenant from the rule that an action will not lie for rendering the premises uninhabitable, nor from an express waiver of any right of action for such trespass.

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Action by Hillian Frith against Charles H. Howe for damages for violation of the covenants of a lease. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. C. Kingsley and Richard McKnight, for appellant. C. C. Brown, for appellee.

MAXWELL, J. Appellant, Howe, by a written lease granted appellee, Mrs. Hillian Frith, a lease of three rooms on the second floor of a business block in Denver for the purpose of conducting a millinery business, for the term of one year from January 1, 1902, at a monthly rental of \$35, to be paid in advance on the 1st day of each month, lessor agreeing to furnish heat to the apartments. The lease contained the usual covenants, and further provided that if any part of the rent should remain unpaid when due, or any default should be made by the lessee in any of the covenants by her to be kept, the lessor should have the right to declare the term ended, and enter into possession of the premises, with or without process of law, and expel and remove the lessee, using such force as might be necessary, and this without first making any demand for the rent or giving any notice that the lease was forfeited, and that no action of forcible entry, unlawful detainer, trespass, or like action should be brought by the lessee in case the lessor should forcibly dispossess her of the premises under the terms of the lease. It further provided that, if at any time the term should be ended at the election of the lessor, the lessee would surrender possession peaceably immediately upon such termination, and that, if the lessee should remain in possession after notice of any default, or after termination of the lease in any of the ways provided, she should be deemed guilty of forcible detainer under the statute, subject to all the conditions named in the lease, and to eviction and removal, forcibly or otherwise, with or without process of law. The complaint, after setting forth the lease, alleged, in substance, that the premises were entered only by means of a hallway on the first floor leading from the street and up a flight of stairs to the second floor, and thence along and through a hallway to appellee's rooms; that appellee rented the premises for the purpose of carrying on a millinery business, and that the principal part of her sales were made during the months of September, October, and November, and the same number of months during the spring; that October 1, 1902, appellant, without appellee's knowledge, and in violation of the covenants in the lease, tore up the stairway leading to the plaintiff's rooms, as well as the partition and plaster of the hallway, rebuilt the stairway, and again tore it out and rebuilt it, removing the plaster and replastering, and thereby, for 21 days, deprived plaintiff and her customers of ingress to and egress from the leased premises, causing plaster, moisture, etc., to be taken and carried into her rooms, thereby damaging her goods and furniture; that at that time the plaintiff was carrying a \$5,000 stock of goods, manufactured and in the course of being manufactured, of a delicate nature; that in tearing down said partition and plaster lime dust, dirt, and moisture were carried into plaintiff's apartments and upon her goods,

damaging them, and by reason of these conditions during 21 days, from the 1st day of October, plaintiff's customers were unable to get to her place of business; that in violation of the terms of the lease appellant on November 4, 1902, willfully shut off the heat from plaintiff's apartments, and at great expense she was obliged to and did procure oil stoves for heating purposes; that while the heat was so shut off plaintiff took a severe cold, and ever since was sick, to her great damage; and that by reason of the premises she suffered \$3,000 damages. The answer admitted the execution of the lease, that the stairs and halls referred to in the complaint were the only means of ingress to and egress from the apartments, denied all other allegations of the complaint, and counterclaimed for three months' rent and damages to the premises. The reply put in issue the counterclaim. Trial to a jury resulted in a judgment against appellant for \$1,800, from which is this appeal.

From the above statement of the complaint it appears that plaintiff sought damages upon three grounds: (1) Damages to her stock and furniture; (2) loss of profits; (3) damages by reason of expense incurred, illness, and physical suffering caused by shutting off the heat from the apartments.

It will be noticed that the complaint does not specify the amount of damages suffered from any one of the above causes; and, as the verdict and judgment is for a lump sum, and as we have no means of knowing what influenced the jury in arriving at its verdict, if evidence was admitted over the objection of appellant in support of any one of the grounds upon which appellee relied, which was not a ground upon which appellee ought to have recovered, the judgment must be reversed. The evidence shows that between October 1st and 10th appellant made certain alterations in the hall and stairway leading to appellee's apartments, which interfered somewhat with the ingress to and egress from the apartments; the extent, nature, and character of such interference being left very much in the dark by reason of conflicting evidence upon this point. It is admitted that appellee did not pay the rent due under her lease for the months of September and October, and that October 31st appellant served a written notice on appellee to pay the rent due, or surrender possession of the premises within three days; that November 5th or 6th appellant shut the steam heat off from the apartments, and that appellee continued to occupy the apartments until December 31st, the end of the term. Over the objection of appellant, appellee and her husband testified to the expenses incurred in procuring gas and oil stoves and fuel therefor for the purpose of heating the apartments during the three months the heat was shut off; that appellee was made very ill with pneumonia, followed by rheumatism, and that she was confined to her bed until she vacated the premises, and

has been ill ever since; that she suffered great pain and contracted bills for medical attendance. The attending physician testified to the illness of appellee, its duration until February following, going into his treatment of the case in detail.

The court instructed the jury, in substance: That the plaintiff sought to recover damages on account of the alleged shutting off by the defendant of the heat to said premises leased to plaintiff, by reason of which she contracted a cold and was made sick, and for a period of time she was put to the expense of otherwise heating the said premises; and that, if the jury found from a preponderance of the evidence that the defendant wrongfully and without the consent of the plaintiff shut off the heat to the rooms leased to the plaintiff during a part of the time plaintiff was occupying the same under the lease, this was a breach of the contract of leasing on the part of the plaintiff, and the damages which plaintiff was entitled to recover on account thereof are such as may fairly and reasonably be considered as arising therefrom, or such as may reasonably be supposed to be in the contemplation of the parties at the time they made the lease, and as a probable result of such breach, and, in determining the amount of damages, the jury should take into consideration any money expended by the plaintiff in heating said apartments, and also any inconvenience suffered by the plaintiff on account thereof as shown by the evidence. As above stated, the lease contained covenants of forfeiture for nonpayment of rent, the right of re-entry, with or without process of law, "using such force as might be necessary," and this without making any demand for the rent, and for peaceable surrender of possession by the tenant. In *Goshen v. People*, 22 Colo. 270, 44 Pac. 503, it is said: "While our statute of forcible entry takes away the right that existed at common law to make entry by force, although the right to possession may exist, a license to make such an entry does not contravene this statute, and the landlord may, under the provisions contained in this lease, enter and remove a tenant upon covenant broken, if he uses no unnecessary force to accomplish the purpose. [Citing cases.] * * * He was not obliged to resort 'to remedies given by the laws of the state,' but could avail himself of the right to re-enter, under the stipulation in the lease, using no more force than was necessary to remove the complaining witness, and, if he so entered, his possession at the time the assaults and batteries are alleged to have occurred was lawful, and he had the right to defend that possession by resort to force, if necessary." Under covenants in leases reserving to the landlord the right of re-entry for covenants broken, it has been held that the landlord may render the tenement uninhabitable by removing doors, windows, and other portions of the structure, even to the extent of demolishing the tene-

ment, and that such acts, where no more force was used than was necessary to accomplish the re-entry, confer no right of action upon the tenant holding without any right of possession. *Meador v. Stone*, 48 Mass. 147; *Mugford v. Richardson*, 88 Mass. 70, 83 Am. Dec. 617; *Allen v. Kelly*, 17 R. I. 731, 24 Atl. 776, 16 L. R. A. 798, 33 Am. St. Rep. 905; *Todd v. Jackson*, 26 N. J. Law, 525. The act of the landlord in this case in shutting off the heat from the apartments was within the rule announced by the authorities, and no right of action accrued to the tenant by reason of such act. Further than this, as above shown, a covenant of the lease stipulated that, in case the tenant was forcibly dispossessed from the premises by reason of the forfeiture of the lease by nonpayment of rent, no right of action for trespass or like action should be brought by the tenant. So that, if the law was otherwise than as above stated, by the covenants of the lease, the tenant estopped herself from recovering damages caused by shutting off the heat from the apartments.

Counsel for appellee meet this state of facts by contending that appellant did not avail himself of the license to re-enter granted by the lease, but permitted the tenant to occupy the premises until the end of the term, and thereby waived the notice of forfeiture served October 31st. In the light of the facts disclosed by this record, such contention is utterly untenable. The complaint shows that November 20th appellant commenced suit in a justice court in forcible entry and unlawful detainer against appellee to recover possession of the premises, the prosecution of which suit was stayed by an ex parte injunction issued by the court below in this action, and that the court, upon motion of appellant, refused to dissolve such injunction. The fact that a court through its injunctive writ prevented the re-entry of the landlord under the license granted by the lease does not relieve the tenant from the rule of law above stated; nor does it release the tenant from the covenant of the lease, whereby she waived her right of action against the landlord on account of the acts she now complains of. The court erred in admitting evidence over the objection of appellant as to any damages suffered by appellee after the service of the notice of forfeiture of the lease October 31st in instructing the jury as above indicated, and in refusing instructions requested by appellant on this point. We must presume that the evidence introduced upon this branch of the case was considered by the jury and entered into the amount of the verdict. To what extent we are unable to determine. The jury might have rested their entire verdict upon this objectionable evidence.

This conclusion renders it unnecessary to consider the other errors assigned and argued that question the correctness of rulings upon the admission of evidence, and other instruc-

tions of the court. *Marr v. Wetzel*, 3 Colo. 2, 8; *Crymble v. Mulvaney*, 21 Colo. 203, 211, 40 Pac. 499.

For the reason stated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

STEELE, C. J., and HELM, J., concur.

CHOCTAW, O. & G. R. CO. v. BURGESS et al.

(Supreme Court of Oklahoma. May 13, 1908.)

REMOVAL OF CAUSES—ADMISSION OF TERRITORY—TRANSFER OF CAUSES—WAIVER OF RIGHT.

The Oklahoma enabling act (Act June 16, 1906, c. 3335, § 16, 34 Stat. 276, as amended by Act March 4, 1907, 34 Stat. 1286, c. 2911, § 1) provides that "all cases pending in the United States Court of Appeals in the Indian Territory arising under the Constitution, laws, or treaties of the United States, * * * and in cases of diversity of citizenship where there shall be more than two thousand dollars in controversy, exclusive of interest and cost, shall be transferred to the proper United States circuit or district court for proper disposition: Provided, that such transfer shall not be made in any case where the United States is not a party except on application of one of the parties in the court in which the case is pending, at or before the second term of such court, after the admission of said state." Where such case is transferred to the Supreme Court of this state by operation of such provision, and is regularly assigned for hearing at the first term of said court, and the attorney of record for the plaintiff having had notice thereof, and said cause having been regularly reached for trial on the calendar, and no one appearing for said plaintiff in error, but the attorney of record appearing for defendant in error, and said cause then and there being regularly submitted for final decision, said plaintiff in error waives its right to thereafter move for said cause to be transferred to the proper United States circuit or district court. This constituted an election to proceed in the state courts, and precluded the plaintiff in error from thereafter transferring said cause to such federal court for review.

Kane, J., dissenting.

(Syllabus by the Court.)

Appeal from the United States Court for the Southern District of the Indian Territory.

Action by Myra Burgess and husband against the Choctaw, Oklahoma & Gulf Railroad Company. Judgment for plaintiff. Defendant brings error. Motion to transfer cause to United States court denied.

This cause came to this court from the United States Court of Appeals for the Indian Territory by virtue of the terms of the enabling act (Act June 16, 1906, c. 3335, § 16, 34 Stat. 276, as amended by Act March 4, 1907, 34 Stat. 1286, c. 2911, § 1), being one of the causes pending on the docket of said court not finally disposed of at the admission of the state into the Union. The petition or complaint of the defendant in error, the plaintiff in the court below, alleges that the plaintiff in error, the defendant in said court, is a corporation duly organized and existing and doing business in the Indian Territory under and by virtue of the laws in force in said territory, and as such is authorized and empowered to sue and be sued in its cor-

porate name. It is further alleged in said complaint or petition that the plaintiffs Myra B. Burgess and W. N. Burgess, her husband, and each of them, are citizens of the United States, residing in the Southern District of the Indian Territory. On the 9th day of January, A. D. 1908, under order of this court, the docket was set and assignment of cases made for the first term of this court, this cause being set for hearing on January 21, 1908, and notice of such setting was given to the attorneys of record for both the plaintiff and defendant in error. On the 21st day of January, 1908, this cause in due course was reached on the calendar for trial, no attorney for the plaintiff in error appearing at that hearing, but the attorney of record, A. C. Cruce, appeared for the defendant in error, and said cause was duly submitted for the final determination and judgment of said court. Thereafter, on the 24th day of January, A. D. 1908, plaintiff in error filed its petition for removal, alleging that by virtue of the terms of the enabling act, approved June 16, 1906, as amended March 4, 1907, said cause should be removed to the United States Circuit Court for the Eastern District of the State of Oklahoma for final disposition, and alleging that at the time of the institution of said suit in the lower court the defendant therein, the plaintiff in error in this court, was, ever since and still is, a corporation organized under and by virtue of a certain act of Congress of the United States, to wit, an act entitled an act to authorize the purchase of the property and franchises of the Choctaw Coal & Railway Company to organize a corporation and to confer upon the same all the powers and privileges and franchises vested in that company, approved August 24, 1894 (Act Aug. 24, 1894, c. 330, 28 Stat. 502), that its principal place of business is and at all times herein mentioned has been in the city of Philadelphia, and that it has been at no time a resident of the Indian Territory or of the state of Oklahoma. The petitioner further avers that this is a civil case pending at the time of the organization of the state of Oklahoma, aforesaid in the United States Court of Appeals for the Indian Territory, and arose under the Constitution and laws or treaties of the United States within the meaning of the second section of an act of Congress of the United States of March 3, 1875 (18 Stat. 470), c. 137, as amended March 3, 1887 (24 Stat. 553), c. 373, and August 3, 1888, and section 16 of the enabling act. At the same time the plaintiff in error tendered a good and sufficient bond. Thereafter, on the 29th day of January, A. D. 1908, plaintiff in error filed an amendment to said petition, wherein it is averred that this is a controversy between citizens of different states, and that more than \$2,000, exclusive of interest and costs, is involved therein. All of the foregoing facts appear as a matter of record.

On the same date plaintiff in error, through

its attorney, Thomas R. Beeman, made application in open court to have the name of C. O. Blake substituted for that of C. B. Stuart as attorney of record, which application was granted. Thereafterward, on the 2d day of March, 1908, the said Thomas R. Beeman filed his affidavit in said cause, and, among other things, deposed: "That C. O. Blake, Esq., of El Reno, Okl., is the attorney of the above-named Choctaw, Oklahoma & Gulf Railroad Company, and that affiant is assistant attorney of said company; that as such assistant attorney affiant was given charge of this cause, and filed in this court on January 24, 1908, and prior to the opening of its session for that date, a petition and bond for the removal of said cause to the United States Circuit Court for the Eastern District of the State of Oklahoma; * * * that during the argument on said motion [referring to the Hendricks Case] in this court on said date affiant for the first time learned that the cause in which this affidavit is filed had theretofore, on the 21st day of January, 1908, been submitted to said court upon argument made by the counsel for the appellee; and that notice had been given to the counsel of record in this case, C. B. Stuart, Esq., of McAlester, Ind. T., now state of Oklahoma, being attorney of record for said defendant railroad company [appellant], which said cause was originally filed in the Court of Appeals for the Indian Territory, and submitted to that court for its decision [said cause having been submitted to the United States Court of Appeals for the Indian Territory for final determination prior to the admission of the state into the Union, but remained undetermined on such date, and no change having been made in the attorney of record in said cause, as well as the other causes pending in this court to which the plaintiff in error was a party, transferred from said court from that time until said January 24, 1908]. Whereupon receiving such information affiant requested this honorable court to substitute said C. O. Blake in each of said causes in place of C. B. Stuart, and affiant then and there advised this court that neither affiant nor C. O. Blake had received any notice of this cause for submission," etc.

Thereafter, on the 17th day of March, A. D. 1908, there was filed with the clerk of this court the affidavit of A. C. Cruce, as one of the attorneys of record for the defendants in error, wherein he states: "That he is informed and believes that Thomas R. Beeman, whose affidavit has heretofore been filed in this court, was at the time of the trial of this cause in the court below the assistant attorney of the said Choctaw, Oklahoma & Gulf Railroad Company, and that he has continuously held said position up until the present time; that during the time the Honorable Chas. B. Stuart was the general attorney of the appellant in Oklahoma and Indian Territory the said Beeman was the assistant attorney of the appellant under the said Stuart. The affiant also states that a number of oth-

er cases wherein this defendant was appellant were pending in the United States Court of Appeals for the Indian Territory on the date that said territory was admitted into the Union as a state; that in all of such cases that came into this court as the successor of the United States Court of Appeals for the Indian Territory the said Stuart was the attorney of record for the appellant; and that the name of said Stuart in all of such cases, including this cause, appeared as sole attorney for the appellant, and that in none of said causes was any change of attorney made upon the records of this court, nor any suggestion made to the clerk of this court for any such change, until after this cause was argued and submitted to this court on the 21st day of January, 1908. * * * The affiant further states that on the 21st day of January, 1908, as the attorney for the appellee, he appeared in this court, and that when this cause was regularly reached on the call of the docket of this court on the afternoon of said date he made an oral argument before this court, in which he attempted to refute the contention made by the appellant in its brief heretofore filed in the United States Court of Appeals for the Indian Territory; that at no time during said argument, or at any time prior thereto, was any objection made by the appellant to the hearing of this cause by this court, and no motion or request of any kind was made to this court asking that this cause be transferred to the United States Circuit Court for hearing. Affiant further states that at the conclusion of said argument this cause was finally submitted to this court for final determination upon the said oral arguments and briefs heretofore filed herein, and that the same was taken under consideration by this court."

Blake, Blake & Low, for plaintiff in error.
Cruce, Cruce & Bleakmore, for defendants in error.

WILLIAMS, C. J. (after stating the facts as above). The only question to be determined in this court is whether or not the plaintiff in error has waived its right to have this cause transferred to the United States Circuit Court for the Eastern District of the State of Oklahoma. Section 16 of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 276, as amended by Act March 4, 1907, 34 Stat. 1286, c. 2911, § 1) provides: "All cases pending in the Supreme and district court of Oklahoma Territory arising under the Constitution, laws, or treaties of the United States, * * * and in all cases where there is a controversy between citizens of said territories prior to admission and citizens of different states, or between a citizen of any state, and citizens or subjects of any foreign state or country, and in which cases of diversity of citizenship there shall be more than two thousand dollars in controversy, exclusive of interest and costs, shall be transferred to the proper United States circuit or district court for final

disposition: Provided, that said transfer shall not be made in any case where the United States is not a party except on application of one of the parties in the court in which the cause is pending, at or before the second term of such court, after the admission of said state, supported by oath, showing that the case is one which may be so transferred, the proceedings to effect such transfer, except as to time and parties, to be the same as are now provided by law for the removal of causes from a state court to a circuit court of the United States. * * *

In the case of *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151, the court says: "In the order setting aside the judgment it is recited inter alia that 'at the time of the trial of said action the same had been removed to the circuit court of the United States, and this court had no jurisdiction to try and determine the same.' This point is urged in this court. The above recital seems to contradict the record. The record shows that a request was filed by the defendant under the provisions of the enabling act, under which this state was admitted into the Union, for such a transfer of the case, and the request was denied. Furthermore no such claim is made in the application to set aside the judgment, and it is not clear that that point is in the case. But in no event is it well taken. The action was commenced in 1887 in the district court of Cass county in the late territory of Dakota. There was diverse citizenship, the defendant not being a resident of such territory; and, had North Dakota been a state at the time, the action could have properly been transferred to the United States Circuit Court. Under the terms of the enabling act, after North Dakota became a state, cases in that condition might, upon request filed, be transferred to the proper federal circuit court. But it has frequently been held under such circumstances that any action in the case after statehood by which a party submits himself to the jurisdiction of the state court, and the state court acts thereon, precludes such party from subsequently removing the case to the federal court. *Gull River Lumber Co. v. School District No. 39*, 1 N. D. 408, 48 N. W. 340; *Wing v. Railroad Company*, 1 S. D. 455, 47 N. W. 530; *Ames v. Railroad Co.*, 4 Dill. (U. S.) 257, Fed. Cas. No. 324; *Gaffney v. Gillette*, 4 Dill. (U. S.) 264, Fed. Cas. No. 5,168; *Carr v. Fife* (C. C.) 44 Fed. 713; *Murray v. Mining Co.* (C. C.) 45 Fed. 387. The state court, as the successor of the territorial court, acquired jurisdiction of this case in November, 1889, subject to be divested as in the enabling act specified. In June, 1890, the defendant moved upon affidavits for a continuance of the case, and such motion was granted. At the December term, 1890, this was repeated, and the motion denied. Thereupon the request to transfer to the Federal Circuit Court was filed and denied. If the right to the transfer depended upon the decision of any question of fact, such a question as the question of diverse

citizenship or the like, the filing of the application at once divested the state court of all jurisdiction to determine that question, and consequently of all jurisdiction of the case. *Miller v. Sunde*, 1 N. D. 1, 44 N. W. 301, and cases there cited. But the court was bound to take notice of its own records, and those records showed conclusively that the defendant had waived his right to have the case transferred. It was as if a party should file a petition for removal on the ground of diverse citizenship and at the same time admit upon the record that no diverse citizenship existed. With the admission of the nonexistence of the only fact that could give the federal court jurisdiction standing upon the record, the state court could not be ousted of jurisdiction, as jurisdiction must rest somewhere. The order setting aside the judgment cannot be sustained upon the ground that the case had been transferred to the federal court."

In the case of *Sargent v. Kindred* (C. C.) 40 Fed. 489, the court says: "Were the requests in these cases filed in time? There is no express limitation of the time in the proviso or the statute. The statutes relative to removal of causes from the state courts are not applicable to this class of transfers. By the enabling act the survival and disposition of all cases pending in the territorial courts were provided for. The laws of the United States were given force and effect immediately upon the admission of the state and the federal courts created and established. By the Constitution of the state of North Dakota such courts were created and established. The laws of the territory were adopted as the laws of the state so far as applicable, and the consent of the state given to receive and accept jurisdiction of pending cases by these courts to the extent of their jurisdiction. By the operation of law these cases were immediately transferred to the state district court in and for Cass county; and in the absence of a request, duly filed, to transfer the same to this court, by either party, that court had jurisdiction to proceed and determine. The federal character of these cases does not appear in the pleading made and filed in the territorial court, or as they were in the state court prior to the filing of the request to transfer to this court. But, as now appears from the transcript of the record filed in this court, they are of a federal character, and this court might have jurisdiction thereof, if it had existed when these actions were commenced. It was proper to make clear, and show by written requests, as was done in both of these cases, that they were in fact of a federal character. *Kenyon v. Knipe* (C. C.) 40 Fed. 309. But the question recurs, when must the request be filed? Can it be filed at any time before the trial, as contended by defendant's attorney, although the party so filing the request has prior thereto voluntarily and actively invoked the jurisdiction of the state court in the action? I cannot accept this contention of the learned counsel for the

defendant. At the time of the admission of the state this defendant had the right to submit to the jurisdiction of the state court, or file a proper request and have the cases transferred to this court; but he could not do both. He was then placed in a position where he must, before taking active steps in these actions, determine to which tribunal he would submit. Silence or passive inaction in such cases for a reasonable time perhaps would not have estopped him; but any decisive action by which he actively invoked the jurisdiction of the state court, with knowledge of his rights and of the fact, must necessarily have determined his election to remain in and submit to the jurisdiction of that court. This well-recognized common-law principle is peculiarly applicable to the construction of the statute in question in relation to the point here involved. The case of *Ames v. Railway Company*, 4 Dill. (U. S.) 252, Fed. Cas. No. 324, construing the Colorado act of June 26, 1876, c. 147, 19 Stat. 61, decided by Judge Dillon and concurred in by Justice Miller, is in point. On June 26, 1876, a bill was filed in the territorial court of Colorado by Ames and others for the foreclosure of a mortgage and the appointment of a receiver. An answer by the defendant and a replication by the plaintiffs were also filed in the territorial court. The motion was made in the territorial court for the appointment of a receiver, which was resisted. The motion was pending and undecided when the state was admitted on the 1st day of August, 1876, and was decided by the state court early in August, and a receiver appointed by that court. The receiver was unable to obtain possession of the property; and the state court, on application of the plaintiffs, ordered out a writ of assistance to put the receiver in possession. The pleadings did not show citizenship of the plaintiffs, and for that reason it did not appear to be a case of federal character. On October 24, 1876, the plaintiffs caused to be filed with the clerk of the state court an affidavit showing citizenship of plaintiffs, and the solicitors for the plaintiff gave notice to the clerk that the cause was transferred to the federal court, and it would appear from the opinion of Judge Dillon that the files and records were transferred to the federal court. A motion to docket the case in the federal court was made before Judge Dillon. The court dismissed the motion on the ground that the plaintiff had, by invoking the action of the state court in obtaining an order for the appointment of a receiver, and subsequently procuring a writ of assistance, elected to remain in the state court, and that such election was irreversible."

Special attention is directed to the language in the foregoing, where it is said: "Can it be filed at any time before the trial, as contended by defendant's attorney, although the party so filing the request has prior thereto voluntarily and actively, invoked

ed the jurisdiction of the state court in the action?" In the cases where the courts have held that the right to transfer to the federal court had been waived, it was where some preliminary act had been taken by the state court prior to the final determination or closing of the trial of the case. In this case, before this motion to transfer was filed, the case had been called for trial and submitted for final judgment.

In the case of *Hecht v. Metzler* (C. C.) 82 Fed. 343, the court said: "But an election of forum once made would be binding and irrevocable. So long as no proceeding in the action was had in the state courts, it could not be contended that an election had been made. When the plaintiff appealed to the Supreme Court of the state, he elected to further prosecute the case in the state courts. The defendant was then required to make his election. A failure to then remove the case must be taken as a waiver of right."

The petition for removal filed on the 24th day of January, A. D. 1908, as amended on the 29th day of January, A. D. 1908, in view of the allegations in said petition as amended, construed in connection with plaintiff's complaint in the court below, the defendant in error here, and other matters of record in this case, it appearing that said cause had theretofore, to wit, on the 21st day of January, 1908, been regularly submitted for final determination by this court, notice having theretofore been had on the attorney of record of all parties thereto on the 9th day of January, A. D. 1908, is all that we can properly consider. The question is attempted to be raised by the affidavit filed on the part of the plaintiff in error that the attorney of record for said plaintiff in error was not in fact at that time the attorney for said plaintiff in error; and, if it is competent to raise a question of fact to be determined by this court before we conclude as to whether or not there is a waiver of the right to have this case removed to the federal court, then it is not a question for this court to pass on, but it is proper to remove same to the federal court, and such question of fact can then and there be determined. The plaintiff and defendant in error, however, took notice of the orders of this court and the setting of the dockets thereof for the first term after the admission of the state into the Union.

In the case of *Walton v. Sugg*, 61 N. C. 98, 93 Am. Dec. 580, the court says: "In that case the affidavit of the attorney was filed, and in that it was stated that at the time of service of notice on him he was not the attorney, but had been paid his fee and discharged, and that he so informed the marshal when he served the notice. Yet the notice was held to be sufficient. If the opposite party wish to be present at the taxation of costs, and doubt if the other party will give him notice of it, he may obtain from the clerk of the rules a rule to be present at the taxa-

tion. In fair practice, however, it is usual to give notice of taxation without being ruled to do so. 1 Arc. Pr. 225."

In the case of the *United States v. Curry*, 6 How. (U. S.) 106, 12 L. Ed. 363, the attorney who represented the plaintiff in the trial below, after recovering judgment, was by his client paid off and discharged. No permission was obtained from the court to withdraw from the case, and no change was made upon the record of the court as to the attorney authorized to represent the plaintiff. After the attorney withdrew from the case a citation in error was served on him, and he at the time advised the marshal that he had withdrawn from the case and was not authorized to accept service. Chief Justice Taney held the service good, however, in the following language: "So, too, as to the service of the citation on the attorney. It is undoubtedly good, and according to the established practice in courts of chancery. No attorney or solicitor can withdraw his name after he has once entered it on the record without the leave of the court. And while his name continues there the adverse party has the right to treat him as the authorized attorney or solicitor, and the service of notice on him is as valid as if served on the party himself. And we presume no court would permit an attorney who had appeared at the trial, with the sanction of the party, express or implied, to withdraw his name after the case was finally decided. For if that could be done, it would be impossible to serve the citation where the party resided in a distant country, or his place of residence was unknown, and would in every case occasion unnecessary expense and difficulty, unless he lived at the place where the court was held. And, so far from permitting the attorney to embarrass and impede the administration of justice by withdrawing his name after trial and final decree, we think the court should regard any attempt to do so as open to just rebuke."

Again, in the case of *Walton v. Sugg*, supra, the court says: "Pending a suit the client cannot change his attorney without leave of the court."

In the case of *Grant v. White*, 6 Cal. 56, the court says: "The notice it seems was served on Mr. Kewen after his connection with the case had ceased, and the defense of it had been turned over to Mr. Crockett. To avail the defendant of this objection, there should have been a regular substitution of counsel in the mode pointed out by the statute."

In the case of *Board of County Commissioners of the Funded Debt of the City of San Jose v. Younger*, 29 Cal. 147, 87 Am. Dec. 164, the court says: "So long as he remains attorney of record, the court cannot recognize any other as having the management of the case. If the party for any cause becomes dissatisfied with his attorney, the law points out a remedy. He may move the court for leave to change his attorney, as provided in

section 10 of the act concerning attorneys and counselors."

In the case of the *State, to the Use of the Bank of Missouri, v. Hawkins*, 28 Mo. 366, the court says: "The books say that an attorney of record cannot be changed but by an order of court. There is some policy in this rule, as by our statutes the attorney of record in some cases is made the person to receive notices. If a change of attorney can be made secretly without any notice, a door would be opened for collusion by which these statutes would be evaded and suitors might be entrapped. There is nothing which prohibits a client from authorizing as many persons as he pleases to receive his money, and if they do receive it, so far as he is concerned, he will be bound by their act. But if there is an attorney of record, the authorizing of another by a client to receive the money on an execution does not divest an attorney of record of his authority."

In the case of *Boyd v. Stone*, 5 Wis. 240, the court says: "He was the solicitor of record, and the only one the complainant could serve his amended bill upon. Stone, then, neglecting to file his answer within 30 days, the complainant was unquestionably entitled to an order that the bill as amended be taken as confessed as to Stone and a decree of foreclosure and sale of the mortgaged premises. It appears very clear to us that such was the proper and regular decree at this stage of the proceeding."

In the case of *Waterhouse v. Freeman et al.*, 13 Wis. 340, the court says: "The demurrer last served by counsel, who are not attorneys of record, was properly returned by the plaintiff's attorney. He was not bound to recognize them as having anything to do with the case until they were regularly substituted for the attorneys of record. It was therefore a matter of discretion with the court, after the time for answering the amended complaint had expired, to determine upon what terms the defendants might plead." It is the right of every client to change his attorney at his volition by substituting a new solicitor of record. The right must be exercised, however, by application to the courts, which will hold the client to fair dealing with its officers, and may in its discretion require the clients to discharge the attorney's claim for services in the suit as a condition of substitution. *Wilkinson v. Tilden* (C. C.) 14 Fed. 779. While it is generally true that a client may change his attorney at will, he must make the substitution in a proper mode. First, he must obtain the consent of the court to the substitution. "This restriction is necessary to preserve regularity in the conduct of suits, and to prevent the confusion and abuses which might ensue if a party were at liberty to change his solicitor without any control of the court. Without this restriction a solicitor might be deprived of his lien for costs, the proceedings might be delayed or entangled by repeated changes of solicitors, and the

court could never know when a case is legitimately before it by the true representatives of the parties.' Per Chancellor Sanford, *Hopk. Ch.* 369. To the same effect see *Boeram v. Jerome*, 1 Wend. (N. Y.) 293; *Wolf v. Trochelman*, 5 Rob. (N. Y.) 611; *Ginders v. Moore*, 1 Barn. & C. 654; *Robinson v. McClellan*, 1 How. Prac. (N. Y.) 90; *Hoffman v. Van Nostrand*, 14 Abb. Prac. (N. Y.) 336; *Stevenson v. Stevenson*, 3 Edw. Ch. (N. Y.) 340; *May v. Pike*, 4 Mees. & W. 197; *Stewart v. Common Pleas*, 10 Wend. (N. Y.) 597; *Rex v. Middlesex*, 2 Dowl. Pr. 147; *McPherson v. Robinson*, 1 Doug. 217; *Perry v. Fisher*, 6 East 549; *Margerem v. McIlwaine*, 2 N. B. 509; *Sloo v. Law*, 4 Blatchf. 268, Fed. Cas. No. 12,958; *Supervisors v. Brodhead*, 44 How. Prac. (N. Y.) 426. Generally, if the party desiring to change his attorney does so without obtaining the consent of the court and an order of substitution, the opposite party may still treat the first attorney as the acting attorney. *Powell v. Richardson*, 1 W. Bl. 8; *McPherson v. Robinson*, 1 Doug. 217; *Grant v. White*, 6 Cal. 55; *Boeram v. Jerome*, 1 Wend. (N. Y.) 293; *Trust v. Repoor*, 15 How. Prac. (N. Y.) 570; *Robinson v. McClellan*, 1 How. Prac. (N. Y.) 90."

It was the duty of the plaintiff in error to take notice of all the orders made by this court assigning said cause for trial at its first term, and it was not necessary that actual notice should be made on plaintiff in error, or its attorney, that said cause might properly stand for trial at said term. However, actual notice upon the attorney of record of plaintiff in error was sufficient notice, and, if said plaintiff in error had discharged said attorney prior to that time without substituting another as attorney of record, it did so at its peril, and it is legally bound by every notice that was served or brought to the attention of said attorney of record. So in this case we have a case that was properly heard and submitted for final judgment. In the cases heretofore referred to and cited as to the question of waiving the right of removal they involve preliminary motions and actions prior to the time of the final trial. This case is a stronger case of waiver than any heretofore found in the books. The plaintiff in error is bound by its constructive notice that this cause was properly set for trial on the 21st day of January, A. D. 1908, and is concluded by the notice that was given its attorney of record, and, notwithstanding such notice, it permits this cause to come on for hearing, and on due call of the calendar to be submitted for final determination. We submit that prior to such final submission that, if it desired that said cause should not be continued to final determination in the state court, it was its duty to elect that it should be transferred to the federal court by filing a proper application in this court, and that, failing so to do, it has made its election, and that it is irrevocable, and that this cause must continue to final judgment in this court.

Section 23 of the enabling act of North Dakota, approved February 22, 1889, c. 180, 25 Stat. 683, provides: "• • • But no writ, action, indictment, cause or proceeding now pending or that prior to the admission of any of the states mentioned in this act shall be pending in any territorial court in any of the territories mentioned in this act shall abate by the admission of any such state into the Union, but the same shall be transferred and proceeded with in the proper United States circuit or district or state court, as the case may be: Provided, however, that in all civil actions, causes and proceedings in which the United States is not a party transfers shall not be made to the United States circuit or district courts, except on written request of one of the parties, and in the absence of such request such causes shall be proceeded with in the proper state courts." In this enabling act there is no limitation as to the time in which this application shall be made. In nearly all of the cases construing this enabling act it was contended by the counsel seeking such removal that such party had until such case was called for trial to make application for removal, but uniformly the courts held that the very moment that such party by any act, positive, express, or implied, indicated an election for such cause to remain in the state court, such election was binding and irreversible.

In the Oklahoma enabling act it is provided that transfer shall not be made in any case where the United States is not a party except on application of one of the parties in the court in which the case is pending, and at or before the second term of said court after the admission of the state into the Union. This undoubtedly is a limitation upon the time in which such application can be made. In literal terms it provides that such application may be made at any time before the termination of the second term of such court, but if prior to such time such party has by any act, express or implied, done anything that amounts to an election, he is therefore precluded from making such application for such transfer.

If the plaintiff in error's contention that it has until the expiration of the second term of this court after the admission of the state into the Union to move to transfer said cause to the federal court, regardless of what action may have been theretofore had relative to the submission of said cause, it would be necessary to hold, in effect, that no cause could with any assurance be submitted for final determination until after the adjournment of the second term. And it cannot be contemplated that Congress intended that the wheels of this court should stand still as if paralyzed until the expiration of its second term in order that parties might have opportunity up to such time to transfer proper cases to the federal court. But the reasonable conclusion is that such parties should have until the expiration of the second term

to move for said transfer, unless prior to that time in law they have made an election for the same to remain in the state court, and the election once made would remain irreversible and irrevocable. These cases came to this court by operation of law, and this court came into existence and being by operation of law, and the plaintiff in error took constructive knowledge of the setting of this case, and its attorney of record had actual knowledge of the setting of the same for trial in law. When same was submitted for the final judgment of this court without objection plaintiff in error consented for this court to take jurisdiction of said cause, and when jurisdiction had been assumed under such circumstances it became complete, and the plaintiff in error is bound by the same, and cannot be heard now to reverse its election.

Motion to transfer overruled. All the Justices concur, except KANE, J., who dissents.

(21. Okl. 60; 1 Okl. Cr. 167)

DRIGGERS v. UNITED STATES.

(Supreme Court of Oklahoma. May 13, 1908.)

1. CRIMINAL LAW—CONSPIRACY—ACTS AND STATEMENTS PRIOR TO FORMATION.

Where the guilt of one of several defendants, jointly indicted for a felony, is sought to be established by evidence showing, or tending to show, a conspiracy between him and the others for the commission of the crime, evidence as to acts or statements of the others must be confined to such statements as were made, or acts done, at times when the proofs in the case permit of a finding that a conspiracy existed, and where the acts or statements of one of the defendants, prior to the formation of the conspiracy, are inadmissible as evidence against others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 989-1001.]

2. WITNESS—IMPEACHMENT—PRIOR CONSISTENT STATEMENT.

It is a general rule that where evidence of contradictory statements is offered to impeach the credit of a witness, evidence of statements made by him on former occasions consistent with his evidence are inadmissible. But, where it is charged that the evidence of the witness is a recent fabrication, and is the result of some relation to the party or cause, or of some motive or personal interest, his evidence may be supported by showing that he had made a similar statement before that relation or motive existed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1288.]

3. CRIMINAL LAW—HEARSAY EVIDENCE—FOREIGN EVIDENCE—DEATH OF WITNESS.

Proof of the return of an officer on a subpoena that the witness is dead, the same not being authorized or required by law, and by the oral evidence of witnesses that they had been informed of his death, is insufficient to establish this as a fact to render competent in a final trial the testimony of such witness taken and transcribed at the preliminary examination.

4. SAME—ACCOMPLICE—INSTRUCTION.

Whether a witness is an accomplice requiring corroboration to support a conviction is a question of fact for the jury, and hence an instruction that under Mansf. Dig. § 2259 (Ind. T. Ann. St. 1899, § 1602), a conviction cannot be had on the testimony of an accomplice unless corroborated was sufficient, and it was not error not to further charge that a certain witness was an accomplice. If defendant regards the word "accomplice" as a technical one requiring

a definition by the court, he should so request, but not ask an instruction that a certain witness is an accomplice; that being a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1098, 1720.]

5. HOMICIDE—INSTRUCTION—"MUTUAL COMBAT."

A charge that if defendant was informed and believed that the deceased had taken possession of a field claimed by him, and that he would be there with an armed party on the morning of the killing, and that they had made threats against the life of defendant, and the defendant, knowing all of these things, voluntarily organized a party, arming them with deadly weapons for the purpose of meeting said parties in deadly conflict, going to the place of the killing, and a conflict ensued, and the deceased was killed, then such conflict was a "mutual combat," and all parties who knowingly and intentionally engaged in it are guilty of murder, was not, under the theory of the prosecution and the evidence in this case, erroneous.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4648.]

(Syllabus by the Court.)

Appeal from the United States Court for the Southern District of the Indian Territory, Sitting at Pauls Valley; J. T. Dickerson, Judge.

B. F. Driggers was convicted of murder, and brings error. Reversed and remanded.

October 3, 1903, the grand jury of the United States Court for the Southern District of Indian Territory returned its indictment, charging B. F. Driggers, Tom McCarter, John Underwood, and Ted Bennett, with the murder of Robert G. Brady, and L. W. Goff as a principal, in the second degree as to each of them. Goff was placed on trial at Ada; and after his conviction, the venue was changed, for the trial of the other defendants, to Pauls Valley, at which place the appellant in this case was placed on trial, in June, 1905, and the jury returned a verdict finding him guilty in the manner and form charged, without capital punishment. A motion for new trial was filed and overruled, the defendant saving his exception, and the case was taken to the United States Court of Appeals of Indian Territory by writ of error. On September 26, 1905, the court affirmed the judgment of the lower court. 104 S. W. 1166. A petition for rehearing was filed, which was pending at the time Indian Territory was admitted as a state, and the case is in this court by virtue of the terms of the enabling act. On the consideration of the petition for rehearing this court granted it, and on the hearing on the merits of the case the Attorney General, represented by Hon. W. A. Leadbetter, filed his answer to the contentions of appellant, and admitted error in the record sufficient to require us to reverse the prior decision rendered herein. He admitted that the admission of the testimony of witnesses Rhea and Saddler was erroneous, and then said: "There are other errors in the case, which will doubtless receive the attention of the court." In view of the fact that we con-

cur in the conclusion reached by the Attorney General's office, it will be unnecessary for us to discuss in detail and at length many of the propositions urged upon the attention and considered by Mr. Justice Clayton, who wrote the opinion for the United States Court of Appeals of Indian Territory, but will confine our discussion to those matters which, at the trial of the case anew, will probably arise again.

The scene of the homicide was at a farm, located near the little town of Jesse, in the Chickasaw Nation in Indian Territory. An Indian woman by the name of Colbert owned this land, which she had leased to a merchant by the name of McNeal. He, in turn, had rented the place, for the year 1902, to one of the defendants named in the indictment (Goff) and a man by the name of Riley. A crop of cotton had been raised on one part of the land, and a crop of corn on the other, the two crops joining, but without any fence or other division between them. Driggers, the defendant, who lived in that neighborhood, some time in the month of October, 1902, bought the right to run his stock in the cornfield after the corn was gathered, paying therefor the sum of \$50. Riley and Goff had not picked their entire crop of cotton; and, there being no fence between the cornfield and the unpicked cotton, the defendant Driggers did not turn his cattle in, under an agreement with his vendors that they would protect him and see that he was permitted to turn in after the cotton crop was gathered. Goff claimed that he had rented the land from McNeal for the year 1903, and it was under this asserted right of his that he agreed that Driggers might have the benefit of the stock field, notwithstanding the fact that the cotton crop was not all gathered at the end of December, 1902. McNeal testified that he had not rented to Goff, but the evidence shows that if he had, he changed his mind, and rented the land to Robert G. Brady, the deceased, who was living in that neighborhood, running cattle, and who, desiring to use the stock field, the day before the homicide, started to run a fence across the land dividing the cotton field from the stock field, so that his cattle might run therein without interfering with the unpicked cotton crop. While he was engaged with his hands in the construction of this fence, Goff came to him in the afternoon, and, according to the testimony of Kelley, said to Brady: "What the hell are you doing here? This is my land." I told him McNeal had rented the place to Brady. I walked on down the line a piece, and walked on up to where Brady was. Goff, it seems to me, stayed there a while, and went back and came back with an Indian, Tom McCarter [who was a son-in-law of the woman who owned the land]. Q. What was then said? A. Well, there wasn't a great deal said, more than Brady told him. He says he didn't want to hear any more of his noise. He [Goff] said: 'If you put any

cattle in here'—I understood him to say he would kill the cattle. As we started away, he said: 'If you put any cattle in here, I will kill you.' He stood there and talked, and he says: 'Put them in, and I will be with you, God damn you.' Brady didn't seem to pay any attention to him."

This testimony was offered on the theory that a conspiracy had been formed between Goff and the defendant McCarter, which was subsequently joined by Driggers, and that it was admissible, as against Driggers, by virtue of this fact. It was objected to on the part of defendant, and its admission is assigned as one of the errors. Goff immediately went down to where Driggers lived for the purpose of informing him of the presence of Brady on the land, of the adverse claim, and the building of the fence. Driggers was not at home, but returned that night about 10 or 11 o'clock, and then learned that Brady was going to turn cattle in the cornfield. During the rest of that evening, and that night, the defendants here gathered together Winchesters and shotguns and ammunition, and arming themselves with them, appeared next morning inside the field, along the highway where it was expected Brady would drive his cattle near to turn them in. Driggers testified that he and Kelley were enemies, and that he expected that he would accompany Brady when he came with the cattle; that he expected to drive them out if they were turned in; that his presence and his purpose in going to the field with the parties named, armed as they were, was that he believed that, when Brady saw they were there, he would not come up; that he supposes that he was there to resist any trouble that Kelley would bring about, and that he thought he would keep the cattle out. On the morning of the difficulty a man by the name of French Curtiss came down, ahead of the Brady party, in a wagon, with some wire and posts for the purpose of completing the wire fence; and on arriving at a point in the road near where Driggers and Goff and the other parties stood inside the field, and on the south side of the cross-fence, Goff told him to go back, and to get back quick. Curtiss testified that Driggers told him to go back and to tell them not to bring the cattle there. A short time after Curtiss turned back, the cattle were driven down the road by Brady, Kelley, and two brothers by the name of Saddler. Across the road, and nearly opposite the place where the defendants stood on the inside of the field, was a farm inclosed in a wire fence, the gate to which was either open or down, and when the cattle came opposite this point, some of them ran into this inclosure. The deceased, turning his horse out of the highway, ran in and drove these cattle out, crossed the road and stopped near the Driggers party, got down from his horse, and, according to the evidence of the prosecution, began to arrange his saddle blanket, or at least handle his saddle, and it is at this

time, it is asserted, without any overt act on his part, he was fired upon by the party with which defendant was connected, fell to the ground, arose, staggered or ran across the highway, and fell lifeless. Kelley, who had not dismounted, was also fired upon, receiving wounds, and his horse was killed. The Saddler boys both retreated. According to the testimony of the defendant, Brady rode up within four or five feet of the fence near where Driggers stood, got down off of his horse, pulled up the knee wire of the wire fence about $2\frac{1}{2}$ feet, took hold of the post, when defendant said: "Brady, don't you pull that fence down." He jerked the fence down and ran backwards, grabbed for his gun and jerked at the fence, all at the same time, and ran backwards, trying to get his gun; pulled it out, so that defendant saw it, who told him not to pull it. That he then shot him, or shot at him, with a No. 12 shotgun, loaded with B. B. shot, when he was about 12 or 15 feet from the fence. That he then shot at Kelley, whose horse fell with him across the road near the other fence.

The witness Tom McCarter, who was jointly indicted with Driggers, but who was offered as a witness on the part of the government, testified that at the time Brady got on the ground, and about the time the shooting commenced, he heard Driggers say to him: "Brady, don't you do that." Kelley, who was placed on the stand as a witness for the government, testified: "When Brady came out of the gate with those cattle, he rode in a northwest direction in the middle of the lane, and got off of his horse in the neighborhood of the middle of the lane. I had stopped, was simply moving a little at this time, on the right of Brady. I was watching to see what he was doing, and to see what these parties were doing. And he kind of put his hand on the saddle, just as though he was going to pull the saddle up, and raised his head to look. That was the first time he looked towards them. And Driggers shot." Contradicting and impeaching Kelley and the testimony which he gave in reference to what Brady was doing at the time the shooting was done, the defendant introduced a witness by the name of Boatright, who testified that, on the same day of the shooting, at his home Kelley stated that Brady got off his horse, and went over and took hold of the fence post, and that Driggers shot him. The government then, for the purpose of supporting Kelley and his testimony, and to show that the statement which he made on the witness stand was in consonance with previous statements which he had made concerning the same matter, consistent with his evidence, introduced witness Rhea, who had a talk with Kelley, the defendant, after he was wounded, concerning these matters. He testified that: "Kelley at that time did not say anything about the fence any more than Brady went inside the fence and drove some cattle out, came out, and got down off

of his horse, pulled his saddle up, and just as he turned his head, the shooting commenced." To this testimony of Rhea the defendant objected and excepted, and that it is error is most strenuously insisted.

On the preliminary examination, which took place before a United States commissioner, Jim Saddler, one of the parties who accompanied Brady to the scene of the homicide, testified concerning the affray. It is not necessary for the purpose of this case to recite his testimony here, but it was most material, and in many ways in conflict with the evidence of the defendant. On the trial of the cause he was not present, but the government introduced his written evidence as transcribed by the commissioner, upon a showing that by general report Saddler was dead, one witness testifying that his wife told him that her husband was dead; and the return of the subpoena, which was issued for him, made by the marshal who sought to serve it, while not appearing in the record, is conceded to have been, by both parties, returned that he was dead. The record is voluminous, a great number of witnesses being introduced, and a great amount of evidence being offered, but the foregoing statement of facts is sufficient for the purpose of this opinion.

H. M. Carr, Crawford & McKown, Cruce & Cruce, Moman Pruett, and Potter, Bowman & Potter, for appellant. Charles J. West, Atty. Gen., and W. A. Leadbetter, Asst. Atty. Gen., for the State.

DUNN, J. (after stating the facts as above). From the conclusion to which the court has come, that it will be necessary to reverse the case and grant to defendant a new trial, we will note the assignments of error only which in the new trial granted will be liable to again arise.

The first and second assignments of error, made by appellant, are the usual ones, that the verdict was contrary to the law and the evidence. The third assignment of error is an averment that: "The court erred in permitting the government witness, Kelley, to testify, over the objection of defendant, to a conversation between the deceased, Brady, and one Goff, on the day before the difficulty, because the defendant was not present at such conversation, and because no conspiracy is shown to have existed at that time between the said Goff and the defendant, and the said testimony was purely hearsay." This evidence was admitted by the court under the theory that a conspiracy existed between Goff, McCarter, and the defendant, or between Goff and McCarter, and afterward joined by Driggers, at the time these utterances were made. Under no other theory could this evidence have been admitted. The rule is as well established as any other that, after a conspiracy has once been formed, whether to bring about and effect the purpose finally accomplished or not, that evidence of acts

and expressions of one of the co-conspirators is admissible against the others, whether the conspirator against whom it is introduced was present or not. This, under the view taken by the authorities that, when a conspiracy is created, the parties so agreeing constitute a separate and distinct individuality, and that the act of one is the act of all, and that the expression of one is the expression of all made in pursuance of the conspiracy. Greenleaf on Evidence, vol. 3, § 94. When evidence is offered of an act or conversation of a party in his absence, who is charged with being a party to a conspiracy, the primary question to be determined is, whether or not the conspiracy had been formed at the time, or had the conspiracy ceased. If it had not been formed, or if it had ceased, then the act or statement is inadmissible. In the case of *People v. Kief*, 126 N. Y. 661, 27 N. E. 558, the rule is laid down in the following language: "Where the guilt of one of several defendants, jointly indicted for a felony, is sought to be established by evidence showing, or tending to show, a conspiracy between him and the others for the commission of the crime, evidence as to acts or statements of the others must be confined to such statements as were made, or acts done, at times when the proofs in the case permit of a finding that a conspiracy existed, and where the acts or statements were in furtherance of the common design. The acts or statements of one of the defendants prior to the formation of the conspiracy, or subsequent to its termination by the accomplishment of the common purpose, or by abandonment, are inadmissible as evidence against the others."

The evidence of which complaint is made is the statement Goff made to Brady the day before the shooting, when Brady was on the land constructing a fence, when Goff said to him: "If you put any cattle in here, I will kill you"—this being further connected with the offense by Goff's statement to Brady at the time of the shooting, when he said, with an oath: "I told you the other day that I would kill you." The evidence of the relationship between these parties is set out in the statement of facts, and we submit that under it there must be great doubt as to whether or not the conspiracy was formed at the time Goff used that language. It is true, if one had been formed, and Driggers joined it afterwards, his joining it would be an adoption by him of the things done or said by the others in furtherance of the general plan formed prior to his joining it. *State v. May*, 142 Mo. 135, 43 S. W. 637. Whether there is any evidence of a conspiracy is primarily a question to the court. There must be some tangible material evidence of the conspiracy or a promise of its production, before a court can properly admit evidence of statements made in the absence of the party against whom they are used, when he, in fact, was not

present, and knew nothing of them. This evidence need not be direct and positive or conclusive, in fact, but there should be some, and it is for the court to say, in the first instance, whether or not it exists. This does not apply, of course, where it is sought to show, by the very language itself, that it was a part of the formation of the conspiracy. Goff testified that he had rented this place for the year 1903, and that he was entitled to the possession of it. There is nothing in the record to show that at the time Brady started to run his cross-fence over this land, that either Goff or Driggers or Tom McCarter or any of the other parties had any information that such was his intention. The fence was well under way when Goff discovered it, and, going over where the work was going on, forbade continuance of it. He then left and returned, Tom McCarter accompanying him. There is no evidence, from either McCarter or Goff or from any other source, as to why they went back, or what their purpose was. Goff again continued the conversation that he had begun before. McCarter said nothing, taking no part in the conversation, nor doing any act which would show that there was any concert of action whatever between them or of any formation of a conspiracy. He was simply present. He said nothing. He did nothing. Certainly Goff could not form a conspiracy with himself. It might be asked why McCarter went over there with Goff, what his purpose was, if it were not the beginning of a conspiracy? We cannot say what his purpose was. We do not know. There is no evidence in the record to show. He was living on the place. It belonged to his mother-in-law, and this, in our judgment, is clearly as strong and pertinent a reason as the one ascribed to it by the district attorney, and is more in cognizance with the strict policy of the law, which presumes innocence and not guilt. It is true that, immediately after this took place, Goff went to Driggers' house. McCarter immediately began to take action to get ammunition and a gun, and that as soon as Driggers returned home, and on being informed of the circumstances, he likewise began to make preparations for the affray, but to us it seems more reasonable to conclude from the evidence that these acts were simply carrying out the purpose of the threat made by Goff, and the intent then formed, than was the threat part of a conspiracy formed prior to its being spoken. There is evidence of the conspiracy being formed immediately afterward. We cannot find any evidence that it was formed before. Hence we hold that this admission of the statement of Goff to Brady in the absence of Driggers was prior to any conspiracy formed and, it not being shown that he consented or assented thereto, was erroneous.

The fourth assignment of error raises the question of the admissibility of the evidence

of Rhea, which was offered to support the testimony given by Kelley when it was sought to impeach him by Boatright, who testified, in reference to the statements made by Kelley, contrary to those which he had given upon the witness stand. In view of the contrariety of opinion existing among the text-writers and judicial expressions of the courts of the United States, and in view of the further fact that this question is a new one in this jurisdiction, we are impelled to give it a more extended examination than we otherwise should. It is the contention of defendant that this was prejudicial error, and he cites a number of authorities to sustain his position. The theory adopted by some of the states in admitting this testimony is that, the credibility of a witness being impeached or assailed by proof of contrary statements made out of court, the witness may support his evidence, and his credibility is sustained by showing his consistent statements, made at or about the time when it is alleged the prior inconsistent statement was made; and some of the courts, unreservedly and without qualification, adhere to the doctrine that this evidence is admissible. Others hold that it is admissible under any circumstances, while others, with another line of authorities, and in our judgment by far the greater weight and number, hold that where it is attempted to be shown that the statement on the stand is a late fabrication, brought about by the changed situation of the witness to the case or the parties to it, or because of a motive recently formed, then the evidence of prior statements, consistent with those made on the stand under oath, is properly admitted. The states which hold broadly and without qualification that such evidence is admissible appear to be the following: Texas, North Carolina, Missouri, and Indiana. The decisions of the courts of these states, which we have examined, and in which it is so held, are as follows: *Jones v. State*, 38 Tex. Cr. R. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719; *Easterwood v. State*, 34 Tex. Cr. R. 400, 31 S. W. 294; *Lee v. State*, 44 Tex. Cr. R. 460, 72 S. W. 195; *State v. Exum*, 138 N. C. 599, 50 S. E. 283; *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *Hicks v. State*, 165 Ind. 440, 75 N. E. 641. The rule generally adopted in those states is expressed by the Supreme Court of Indiana, in the case of *Hicks v. State*, *supra*, in the following language: "Where a witness is impeached by evidence of contradictory statements, he may be supported by corroborating statements made at about the same time as the alleged contradictory statements."

On the other hand, the following states seem to hold squarely against the admissibility of such testimony under any circumstances: Mississippi, Maine, Iowa, Georgia, Colorado, and Alabama. The cases decided by these courts, which sustain this doctrine, and which we have examined, are as follows:

Head v. State, 44 Miss. 731; *Ware v. Ware*, 8 Me. 42 (this was a case decided in 1834, and our researches do not disclose that the rule has been changed); *State v. Porter*, 74 Iowa, 623, 38 N. W. 514; *Cook v. State*, 124 Ga. 653, 53 S. E. 104 (but, in this connection, see the case of *Sweeney v. Sweeney*, 121 Ga. 293, 48 S. E. 984); *Davis v. Graham*, 2 Colo. App. 210, 29 Pac. 1007. In this case it will be noted, however, that there is a limitation placed upon the rule, which is that statements, made after the alleged contradictory matter, are not admissible. *Sonneborn v. Bernstein*, 49 Ala. 168. This case expresses the earlier doctrine of Alabama, and went to the extraordinary extent of holding, where a witness was impeached, not by proof of contradictory statements made by him, but by a showing that his general character for truth was bad, that even these conditions may be supported, or his testimony may be corroborated by showing that, prior to the commencement of the action he made statements out of court, uniform and consistent with his testimony in court. This doctrine, however, was directly overruled, and the case went with it, in *McKelton v. State*, 86 Ala. 594, 6 South. 301, in which the court said: "A witness having been impeached by proof of contradictory statements made by him on the preliminary examination of the defendant before a committing magistrate, it is not permissible to sustain or corroborate him by proving that, just before his examination as a witness on that occasion, he made statements to the magistrate in substance the same as his testimony on the trial." The view entertained on this question in that state is further complicated by the holding in the case of *Nichols v. Stewart*, 20 Ala. 358: "Proof of declarations, verbal or written, made by a witness out of court, is, as a general rule, inadmissible in corroboration of testimony given by him on the trial of a cause"—this case being one in which the testimony of a witness was contradicted by showing contrary statements out of court, but it was allowed to be corroborated by evidence of prior consistent declarations. These different divergent opinions, cited from the Alabama court, are given to show how mixed some of the courts are on the proposition, but Alabama is not alone. Other states have made holdings practically as conflicting. The rule generally adopted in the above states is expressed by the Supreme Court of Mississippi in the case of *Head v. State*, *supra*, in the following language: "To discredit a witness it is competent that he had made discordant statements at other times and places; but to re-establish his credibility, or to support what he has deposed on the trial, it is inadmissible to prove that he has made the same statements to third persons."

We now come to a consideration of the authorities which aver the rule so well expressed by the Tennessee Supreme Court in the

case of *Legere v. State*, 111 Tenn. 368, 77 S. W. 1059, 102 Am. St. 781, that we adopt its language for our expression of the same: "It is a general rule that where evidence of contradictory statements is offered to impeach the credit of a witness, evidence of statements made by him on former occasions, consistent with his evidence, are inadmissible. But where it is charged that the evidence of the witness is a recent fabrication, and is the result of some relation to the party or cause, or of some motive or personal interest, his evidence may be supported by showing that he had made a similar statement before that relation or motive existed." Arrayed in support of the doctrine declared by the court will be found the Supreme Court of the United States, Arkansas, California, Kansas, Illinois, Louisiana, Michigan, Massachusetts, New Hampshire, New York, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, and Washington. The cases examined, in which the appellate tribunals of the United States and the states named have adhered to the rule last declared, are as follows: *Ellicott and Meredith v. Pearl*, 10 Pet. 412, 9 L. Ed. 475. Arkansas: *Burks v. State*, 78 Ark. 271, 93 S. W. 983. California: *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413; *People v. Turner*, 1 Cal. App. 420, 82 Pac. 397. Illinois: *Chicago Railway Co. v. Mattheson*, 212 Ill. 292, 72 N. E. 443; *Id.*, 113 Ill. App. 248. Kansas: *County Commissioners v. Vickers*, 62 Kan. 25, 61 Pac. 391; *State v. Petty*, 21 Kan. 54; *State v. Hendricks*, 32 Kan. 559, 4 Pac. 1050. Louisiana: *State v. Waggoner*, 39 La. Ann. 919, 3 South. 119. Michigan: *Stewart v. People*, 23 Mich. 63, 9 Am. Rep. 78. Massachusetts: *Commonwealth v. Jenkins*, 10 Gray, 485. New Hampshire: *Reed v. Spaulding*, 42 N. H. 114. New York: *Robb v. Hackley & Welton*, 23 Wend. 50. North Carolina: *Wallace v. Grizzard*, 114 N. C. 488, 19 S. E. 760. Pennsylvania: *Commonwealth v. Brown*, 23 Pa. Super Ct. 470; *Crooks v. Bunn*, 136 Pa. 368, 20 Atl. 529. South Carolina: *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661. South Dakota: *State v. Caddy*, 15 S. D. 167, 87 N. W. 927, 91 Am. St. Rep. 666. Tennessee: *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085. Vermont: *State v. Flint*, 60 Vt. 304, 14 Atl. 178. Washington: *State v. Coates*, 22 Wash. 601, 61 Pac. 726. From the foregoing collaboration on the proposition involved it will be readily seen on which side of the balance the great weight of judicial expression rests. We, therefore, declare the doctrine of this jurisdiction to be as annunciated by the Supreme Court of Tennessee above quoted, which may be epitomized by saying that such evidence is not admissible to support an impeached witness, except in those cases where not only his veracity is attacked, but his motive is also impugned. This being so, we will now consider the evidence to which objection is urged.

The learned Mr. Justice Clayton, speaking for the court in his decision in this case states: "We think the court erred in admitting the evidence of Rhea. But was this prejudicial error?" He then urges that it was not in the following language: "The point in controversy was: Did the deceased at the time he was shot lay his hand on the post? And, if Kelley's testimony was contradicted, it was only on this point. We have already pointed out that the tearing down of the fence under the circumstances was not a felony, and that act did not justify defendant in shooting and killing Brady; and, therefore, if he were killed because of that, it was murder, and if he were not killed because of that, it was immaterial." We clearly appreciate the force of the argument presented, but to our mind the error which was committed was not so much in reference to the substantive facts to which the evidence related, as it was to the effect which it had upon the testimony of both Kelley and the defendant. The portion of the opinion quoted, relating to the tearing down of the fence, and that this act did not justify defendant in shooting and killing Brady, calls for reference to the terms of the Annotated Statutes of 1899 of Indian Territory, relating to justifiable homicide. Paragraph 890 is as follows: "Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony." And paragraph 1008 of the Annotated Statutes of 1899 of Indian Territory, which provides: "If any person shall willfully or maliciously burn or otherwise destroy any rail or plank fence, or other inclosure, * * * shall be deemed guilty of a felony."

And it being made to appear by the evidence of defendant that, at the immediate time of the homicide or the shooting, Brady was in the act of pulling out or tearing down the fence, and that if his acts brought him within the purview of the statute last cited, this in itself appeared to be a justification for defendant's action. The decision holds, and we think correctly, that they did not constitute a felony, and hence was no defense to defendant, even though he were relying upon it. The deceased carried his revolver in a scabbard under his arm inside of his shirt, which was open in the front, and in addition thereto, had a slit in it. His revolver was found partially drawn from its receptacle, when he was examined, immediately after his death, as he lay upon the ground where he fell. It was the contention of Driggers that the deceased was engaged in drawing his revolver and throwing down the fence at the immediate time the shooting began, and that he did not shoot until he saw the revolver partially drawn and in the hand of Brady. Kelley was the government's principal witness. He had been

an officer in that country holding commission from the United States marshal's office. Driggers testified that he and Kelley were enemies, and there was outside evidence tending to support him. Kelley and the defendant were the principal witnesses in this case as to what took place at the immediate instant of the shooting. They both claim to know, and they alone testify on that point, although there was other evidence tending to sustain the government in its contention that, when Brady got off of his horse, he was engaged in fixing his saddle and blanket and did not have hold of the fence at the time the shooting began. Driggers was entitled to no more than the law gave him, but he was on trial for his life, and was entitled to all that the law gave him. If, as we have seen, from the authorities cited, a witness, contradicted or impeached by proof showing or tending to show that he has made statements out of court contrary to his evidence in court, may be supported under those conditions only where the party producing the impeaching evidence charges that the testimony of the witness is a recent fabrication, due to a late altered relationship to the parties or the cause or of some new motive, then if these conditions did not exist, Rhea should not have been permitted to have sustained Kelley, and in view of the fact that there is no evidence charging these things, or tending to show that his attitude toward the cause or the parties was in any wise altered, it was improper to admit this evidence; and while we agree with Justice Clayton that it was error, we cannot say it was not prejudicial. If it was not lawful to sustain Kelley in this matter, Driggers was entitled to be relieved of the support given the adverse witness' evidence, and of the imputation which such support cast upon his own. If the jury believed that Kelley was telling the truth when he stated that Brady did not have hold of the post, they necessarily believed that the defendant was guilty of falsehood. If they believed that Kelley told the truth, and that Driggers falsified, in reference to the fact mentioned, which occurred contemporaneously with the shooting, there can be no question that they would, at the same time and with good reason, come to the conclusion that Kelley also told the truth in reference to the shooting, and that here again Driggers was falsifying. It was this effect which the evidence in support of Kelley had, which to us appears to have constituted its chief prejudicial effect, rather than of the mere conflict in the evidence as to whether Brady did or did not take hold of the fence.

Was the evidence of Jim Saddler admissible? It will be observed that Saddler's evidence was taken before the United States Commissioner. He was not present at the trial of this cause, and his evidence as transcribed was admitted and read to the jury, over the objection of defendant, upon proof

of the officer's return, on the subpoena issued for him, showing that he was dead; and also it appears by the testimony of other witnesses that they had been told that he was dead. The question now presents itself, taking into consideration the duty of the court in the admission of evidence under circumstances of this character, was this proof of legal sufficiency as a foundation for secondary evidence? Paragraph 1995 of the statutes of Indian Territory provides: "A subpoena may be served by the sheriff, coroner or any constable of the county whose return thereof shall be proof of the service."

Encyclopedia of Pleading & Practice, under the title "Returns" (volume 18, p. 963), states: "An official return is the best evidence of the doings of the officer under the mandates of the writ or process, and is sufficient as proof of the facts which the officer is authorized and required to certify."

The question then arises, was the marshal in this case authorized and required to certify to the death of the witness, to secure whose attendance he endeavored to serve the subpoena? Was this the return authorized by the statute? This question is answered by the Supreme Court of the United States in the case of *Walden v. Craig*, 14 Pet. 147, 10 L. Ed. 393, wherein Mr. Justice McLean, who delivered the opinion of the court says: "It is admitted that the marshal's return of service, or nonservice, which he indorses on the process, and of which he has official knowledge, becomes matter of record, and is binding on the parties. But the marshal can only know, in common with other citizens, of the decease of a person named in the writ; and if he indorse the fact of such decease, though it may be spread on the record, it is clearly not binding on the parties. Shall a rumor which shall, in the opinion of the marshal, justify such indorsement make the fact a matter of record? It may excuse the officer, but it does not bind the party whose rights are involved." The officer in the case at bar may have known, in common with the other citizens, of the decease of the witness Saddler; but his return thereof on the subpoena, not being authorized and required by law, was clearly not binding on the defendant. When he went beyond the statutory requirements and certified to a fact not made by law a part of his official duty, such certificate or such statement then contained no greater evidentiary or probative force than if made by any other person, one not an officer. *Obermiller v. Core*, 25 Ark. 562. This being true, the question then arises, what force was the evidence of the other parties called and examined, who testified that they had been told that Saddler was dead?

We have examined a number of authorities on this proposition, and as usual, on close questions of this kind, there is contrariety of opinion among the courts. *Alabama* (Burton v. State, 107 Ala. 68, 18 South. 240), *Michigan* (*Wheeler v. Jenison*, 120 Mich. 422, 79 N. W.

643), and Iowa (*Spaulding v. Railway Co.*, 98 Iowa, 205, 67 N. W. 227) hold that the matter is addressed to the sound discretion of the court, and that hearsay evidence is admissible to prove the absence of a witness from the jurisdiction, and sufficient to sustain the admissibility of secondary evidence. While this is true in the cases cited, in Alabama and Iowa the same courts have also held to the contrary on the same proposition. For instance, a later case in Alabama (*Mitchell v. State*, 114 Ala. 1, 22 South. 71) holds: "Where an officer, who had for execution the subpoena for an absent witness, and had returned it 'not found,' testifies that he had hunted for the witness, and she could not be found in the county, but he did not know that she had left the state, he cannot, for the purpose of laying a predicate for the introduction of evidence of the testimony of such absent witness given on the preliminary trial, further testify as to what was the report in the neighborhood where the witness lived as to her whereabouts, or that it was the general report in her neighborhood that she had gone out of the state; such evidence being merely hearsay and inadmissible." In an earlier case in Iowa (*Baldwin v. Railway Co.*, 68 Iowa, 37, 25 N. W. 918) the court holds: "Under the provisions of section 3777 of the Code the shorthand reporter's notes of the testimony of a witness cannot be used on the trial of another cause, without first showing, as in the case of the use of a deposition, that the witness himself cannot be produced in court; and evidence that the witness was reputed to have left the state was not sufficient for the purpose." The fact relied upon was the death of Saddler, and it was sought to prove it by showing hearsay statements that he was dead. No fact stated before the court established Saddler's death. All that anything in the evidence proved was that the parties who testified had been informed by others that this was a fact. This was unquestionably unalloyed hearsay, and was inadmissible to prove the fact; and as a fact it must be proved to admit the evidence. Hearsay evidence is admissible in many instances, but where it is sought to introduce the evidence of a witness taken on a prior trial, based on the fact of his death, this death must be shown as a fact. And the court, in overruling the objection of defendant to the introduction of Saddler's testimony, committed error. All that these witnesses testified to could have been true, and Saddler may not only have been alive, but actually within the jurisdiction of the court. If he was, he should have been produced in person. If he was not, this should have been proven as other facts, by the testimony of some one who knew it.

The defendant took formal exception to but one instruction given by the court. This was the instruction relating to the law of mutual combat, but he offered to the court, and requested that they be given to the jury

as the law of the case, six instructions which, with the exception of No. 2, related generally to rights which he claimed, growing out of his possession of the field over which the controversy arose. All of these were refused, and defendant urges error therefor. Instruction No. 2, which he offered, relates to the instruction in reference to Tom McCarter, who was one of the defendants jointly indicted with Driggers. Justice Clayton, speaking for the Court of Appeals in the decision heretofore rendered in this case, so accurately states the law applicable that we adopt that portion of the opinion as ours, and agree with that court that there was no error in refusing this instruction in view of the one given. His language is as follows: "The eighth assignment of error complains of the charge of the court relating to the necessity for corroborating testimony of an accomplice before conviction can be had. The defendant requested the following instruction: 'You are instructed that Tom McCarter, the witness introduced by the government, is an accomplice in the offense charged against the defendant, and a conviction cannot be had upon his testimony, unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that an offense was committed, and the circumstances thereof.' The charge of the court was as follows: 'Under the laws of Arkansas (section 1602, Ind. T. Ann. St. 1899) it is provided as follows: "A conviction cannot be had in any case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof." An exception was saved to the refusal of the court to give the requested instruction, but none saved as to the charge given. The only difference between them is that in the requested instruction the court is asked to charge the jury that Tom McCarter was an accomplice, while the instruction given left that question to the jury. Whether McCarter was an accomplice or not was a question of fact, to be determined by the jury. The court is not required to affirmatively charge that a witness is an accomplice. Where he is admitted to be such, or the facts place this beyond dispute, the court may so charge, without invading the rule that charges should not be upon the weight of the evidence. Whether or not a witness is an accomplice is a question of fact, and the charge may be so framed as to submit this as an issue to the jury. It was not necessary, in this case, to instruct the jury that Anderson was an accomplice.' *Dill v. State* (Tex. Cr. App.) 28 S. W. 950. 'It is urged that it was plain from the testimony of the witness Kelley that he was an accomplice of the defend-

ant, if defendant committed the crime alleged, and the court should have so instructed the jury; but the court fully and carefully instructed as to the weight and effect of the testimony of an accomplice, and to have gone further and told them that Kelley was an accomplice would have been clearly a charge with respect to matters of fact, which is not allowed.' *People v. Sansome*, 98 Cal. 235, 33 Pac. 204. See, also, *Spears v. State*, 24 Tex. App. 537, 7 S. W. 245. If the plaintiff in error regarded the word 'accomplice' as a technical, legal one, requiring, at the hands of the court, a definition, he should have requested it, and not by asking a declaration on the part of the court that McCarter was an accomplice, for this would be a finding of fact from the proof. And this was the effect of the requested instruction. 'While in one sense it is undoubtedly the duty of the judge to give instructions to the jury covering the entire law of the case, as respects all the facts proved, or claimed by the respective counsel to be proved, still, if he omits something, and is not asked to supply the defect, the party who remained voluntarily silent cannot complain.' 1 Bishop, Cr. Proc. § 98; *Carroll v. State*, 45 Ark. 548. The court followed the language of the statute, and in this case it was amply sufficient, and there was no error in refusing the requested instruction."

In reference to the right which Driggers had, claiming, as he did, the possession and the right of possession of the field under contest, he requested the court to give the following instruction: "If the jury find from the evidence that the defendant Driggers had rented the stock field, referred to in the testimony, from Goff and Riley, and was in possession of the same, then the deceased would not have the lawful right to eject the defendant therefrom by force of arms. And if you further find from the evidence that the deceased attempted to take the possession of said stock field from the defendant Driggers with force of arms, under such circumstances as reasonably indicated to defendant that it was the purpose of the deceased to use deadly weapons in obtaining possession of said stock field, then defendant Driggers had the legal right to meet force with force, and if the deceased by any act then done manifested an intention to kill defendant Driggers or to inflict serious bodily injury upon him, then the defendant had the legal right to kill the deceased; and if you so find, you will acquit the defendant. If the jury believes from the evidence that defendant Driggers was in his own field and on his own premises, and that he was advised that the deceased had threatened to take possession of his property by force, and in good faith believed, as a reasonable man, that deceased intended to kill him or do him great bodily injury in order to get possession of the field, and whilst so in his own field deceased came there and undertook to en-

ter the field by tearing down the fence, and in a violent threatening manner reached for his pistol, and with said pistol partly drawn in a threatening manner undertook to enter the field where defendant was, and that defendant believed, as a reasonable man, that deceased intended to kill him or do him great bodily injury, and acting under the influence of said belief, whilst deceased was so endeavoring to enter the field, defendant killed him (deceased), the killing would be justifiable."

We believe from a reading and careful consideration of these instructions that they correctly state the law in reference to the right Driggers had in the premises and his right of defense in resisting the efforts of Brady to secure or to take possession of the land. These being correct, the question now arises, did the court give these instructions to the jury, or did the charge which he gave contain substantially the same matter? The court's instructions on this subject are as follows: "You are instructed that a man may use force to defend his real or personal property, in his actual possession, against one who endeavors to dispossess him without right, taking care that the force used does not exceed what reasonably appears to be necessary for the purpose of defense and prevention. But in the absence of an attempt to commit a felony, he cannot defend his property, except his habitation, to the extent of killing the aggressor for the purpose of preventing a trespass; and if he should do so, he would be guilty of a felonious homicide. Life is too valuable to be sacrificed solely for the protection of property. Rather than slay the aggressor to prevent a mere trespass, when no felony is attempted, he should yield, and appeal to the courts for redress. You are instructed that, although you may believe from the evidence that the deceased had rented the lands in controversy, and was entitled to the possession thereof, still he was not justified in driving his cattle thereon, or taking possession of the land by force, if the same was in the actual possession of the defendant. But the court would instruct you that an attempt of the deceased to drive his cattle on the premises would not of itself be a felony. If you believe from the evidence beyond a reasonable doubt that the defendant, either by himself, or acting with others, armed himself, and had others with him who were armed, for the purpose of going to the stock field in question and preventing the deceased from driving the cattle into said stock field, and that his purpose in being so armed was to prevent an entry into said stock field on the part of the deceased with said cattle, and if you further believe that it was his purpose and intention in being thus armed and present at said place to make an assault upon and kill the deceased, or otherwise attempt to injure him with a deadly weapon, if the deceased attempted to drive said cattle into said stock field, and in pursuance of said purpose he

did shoot at and others acting with him did shoot and kill the deceased, then in such case such act upon the part of the defendant, if the deceased was thereby killed, is murder, although you may believe that the deceased was fired upon and his death ensued thereafter by reason of the fact that he may have attempted to pull down the fence for the purpose of entering the said cattle."

It will be observed that the instructions given by the court were probably predicted upon the testimony which Kelley gave concerning the threat made by Goff on the day previous, to the effect that if Brady put the cattle into the field, he would kill him; either this, or upon the facts which developed between the time this threat was made and the affray. If upon the former, then it was incorrect, as the evidence we have found was incompetent; and if upon the latter, it seems to us that it scarcely takes into consideration, to the extent to which defendant was entitled, his evidence given as to why he went to the field, and the contention made in reference to his claim of right there. His claim being, as stated by his counsel in his brief, that "he was on his own premises, trying to protect his own property against the wrongful trespass of the deceased, and while so protesting, and while making no effort to kill the deceased, the deceased assaulted him with a deadly weapon," and that the homicide took place, not by reason of the attempted trespass on the property, destruction of the fence, nor the turning in of the cattle on it by deceased, but because of the alleged attempt of deceased to draw his revolver and inflict death or great bodily harm upon the defendant. The instructions given by the court present the theory of the prosecution, and state the law in relation thereto without error; but the defendant was entitled to have the law declared in reference to the facts which he contended the evidence reasonably tended to show, and if there was any evidence in the record upon which the instructions offered could properly be predicated, they should have been given.

The instruction asked and refused stated that: "Driggers had the legal right to meet force with force, and if the deceased by any act then done manifested any intention to kill defendant Driggers, or to inflict serious bodily injury upon him, then the defendant had the legal right to kill the deceased; and if you so find you will acquit the defendant." And, further, that if, while defendant was peaceably in his own field, "the deceased came there and undertook to enter the field by tearing down the fence, and in a violent threatening manner reached for his pistol, and with said pistol partly drawn in a threatening manner undertook to enter the field where defendant was, and that defendant believed, as a reasonable man, that deceased intended to kill him or do him great bodily injury, and, acting under the influence of said belief, whilst deceased was so endeavor-

ing to enter the field, defendant killed him (deceased), the killing would be justifiable." We believe this instruction, taken in conjunction with the elaborate and correct statement of the law of self-defense, correctly stated the rule, which defendant was entitled to have declared.

As above stated, exception was reserved to but one instruction, given by the court, which was one on mutual combat, and is as follows: "If you should believe from the evidence that the defendant B. F. Driggers was informed and believed that the deceased and one Tom Kelley had taken possession of a certain stock field the day previous to the killing, which stock field was also claimed by the defendant, and the defendant was informed and believed that the said Kelley and the deceased, or either of them, would be at the field in question on the morning of the killing, and that the man Kelley or the deceased had made threats against the life of this defendant, and that the defendant believed that Kelley and the deceased and others would be at the field in question, having in their possession deadly weapons, as mentioned heretofore, and you further believe that the defendant, knowing all these things, voluntarily organized or assisted in organizing a company of men, arming himself and such men with deadly weapons, guns, and revolvers loaded, and that such preparation was for the purpose of meeting the said Kelley and the said deceased in deadly conflict, and that the defendant proceeded to the place of the killing with said company and with said arms, and that at such time and place a conflict ensued with deadly weapons, and the deceased was killed, and the defendant participated in the shooting, then such conflict would be what is known in law as a 'mutual combat.' And if in such combat a party is killed, all parties, who knowingly and intentionally engaged in the conflict, are guilty of murder." After the jury had retired and had been out about 20 hours, it returned back into the court, and presented to the court the following question: "Your honor, does the charge of what is known as 'mutual combat' cut out the right of self-defense?" The court, in answer to this inquiry, added to the instruction above quoted, after the words "guilty of murder," the following language: "And cannot claim the right of self-defense if you can so find."

This instruction was predicated upon the contention of the prosecution in this case. The expression "mutual combat" about as clearly conveys the meaning of what is required to constitute it as any definition could. It means, in different language, though probably not more clear, an agreement or meeting of minds between two parties to fight, whether with or without arms. It means a coming together, with a mutually understood purpose for a violent contest. The government took the position that the evidence in this case established that Driggers and his

party knew that Brady and his party were coming to the field armed, for the purpose of driving cattle in on this field and take possession thereof at all hazards. That they knew, or had reasonable ground to believe, that Driggers and his party would be armed, with the purpose and intention, as declared to Brady by Goff on the day before, of killing him if they carried out this purpose. That Driggers and Goff gathered together men, arms, and ammunition for the purpose of using them in preventing these things on the part of Brady, thereby, through these acts, creating the agreement to fight, and in view of this claim which, it must be conceded, may be said to find reasonable support in the evidence, in our judgment the instruction given was not erroneous.

Counsel for defendant in their briefs inveigh against it most vigorously, denominating it "a fiery and fierce résumé of the most strained construction of the evidence against the plaintiff in error, with many exaggerations to his detriment, which suggests many conclusions and deductions of which the evidence is wholly incapable." While it is true the instruction improperly includes a revolver with the other weapons which defendant's party had, yet it will be noted that this instruction in fact assumes nothing as proved or as true, but places upon the prosecution the very highest possible burden of proof in the case. It does not assume, as is asserted, that Brady had possession of the field, but requires the jury to find from the evidence that Driggers was informed and believed that Brady had taken possession of the field, and requires proof that defendant was informed and believed that Kelley and the deceased would be at the field in question on the morning of the killing, having in their possession deadly weapons, and further requiring the jury to find and believe that defendant, knowing of these things, voluntarily organized a company of men, and armed them "for the purpose of meeting said Kelley and the said deceased in deadly conflict." If this fact was not proved by the evidence, then the law of mutual combat did not apply, and the instruction fell with it. But to find this the jury were compelled to find against all of the evidence given by defendant on this point, and to find that the extreme contention of the prosecution was true. We do not see that the defendant could complain of this.

This instruction placed a heavy burden upon the prosecution, and to our mind in fact, instead of being adverse to the defendant, was really favorable to him. Of course, in passing on this instruction we do not presume to say that the evidence in this case established mutual combat. All that we hold is that there was evidence in the case sufficient, under the claims of the prosecution, upon which to predicate this instruction, and under it the government was entitled to have the law referring thereto declared. It is strenuously

urged that it should have contained a saving clause, providing for the contingency of defendant's withdrawal from the coming fray. There is no question on the law on the subject, for the defendant, even though he went to the field for the purpose of engaging in a mutual combat, if he, in good faith, withdrew, and sought to avoid the difficulty before the fatal moment, and if, while in this attitude, the deceased himself brought about, by his acts, a condition wherein the life of defendant was endangered, or where he in good faith believed it was, then the right of self-defense would exist in him, and he would have the right to defend his life as against the deceased, notwithstanding his previous intentions to engage in a combat. But did he withdraw? Counsel urge and insist that, when defendant sent word to Brady not to come there, he could not turn the cattle in; that this amounted to a withdrawal. We cannot consent to this. It seems to us that it was an effort, on an invitation at least, to induce Brady and his party to withdraw, not a withdrawal of Driggers. He remained where he was, with his gun and his party, and awaited the arrival of the deceased, who, with his party, came on, and the conflict ensued.

We believe we have now covered practically all of the propositions urged in this court which will be likely to again arise in a new trial hereof, and we believe that a trial, conducted along the lines and within the limitation herein prescribed, will safeguard the rights of both the state and the defendant. The decision is accordingly reversed, and the case remanded to the district court of Garvin county, with instructions to grant the defendant a new trial. All the Justices concurring, except WILLIAMS, C. J., who was disqualified.

Ex parte PATMAN.

(Supreme Court of Oklahoma. April 15, 1908.)

1. HABEAS CORPUS—OBJECT OF WRIT.

The writ of habeas corpus is not designed to operate as a writ of error or certiorari, and does not have their effect. It deals with irregularities which render proceedings void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, §§ 1-4.]

2. SAME—PROCEDURE—REVIEW OF FACTS.

The court on habeas corpus will not, for the purpose of discharging the relator, consider the sufficiency of facts relied on as evidencing that he is being prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may have testified or produced evidence in another court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 4.]

3. SAME.

The writ of habeas corpus cannot be resorted to for the purpose of discharging the relator on a plea set up in the petition praying for such writ that by indictment in a court of competent jurisdiction he is being prosecuted or subjected to a penalty or forfeiture for or on account of

any transaction, matter, or thing concerning which he may have so testified or produced evidence in such court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 4.]

(Syllabus by the Court.)

Application of Thomas Patman for writ of habeas corpus. Writ denied.

Prior to the admission of the state of Oklahoma into the Union the relator, Thomas Patman, was jointly indicted with Ben Titsworth and Eugene Titsworth by a grand jury in the United States Court for the Western District of the Indian Territory, at Muskogee, charging them with the crime of murder. Relator in his petition in this action states that he had knowledge and was in possession of facts that tended to establish the guilt of said Eugene F. Titsworth of the crime of murder of which he, the said Eugene Titsworth, was indicted of the crime of murder, and the petitioner was not excused by the said state of Oklahoma from giving such facts of which he was in possession and acknowledged to against said Eugene Titsworth to his attorneys at the trial of said Eugene Titsworth, but was called upon by the state of Oklahoma to testify in said cause on the part of the state of Oklahoma, and did so testify, and that the evidence given and testified to by the said petitioner did tend to incriminate and did incriminate this petitioner under the laws of the state of Oklahoma and under the Constitution of said state of Oklahoma, and that this petitioner is being held in the United States jail at Muskogee by the respondent, R. B. Ramsay, as sheriff of Muskogee county, state of Oklahoma, and is being prosecuted and subjected to the laws of the state of Oklahoma on account of the matters and things about which the prisoner testified to and gave evidence of, and is now, in consequence of the charge of this petitioner, deprived of his liberty by the said R. B. Ramsay, sheriff of Muskogee county, state of Oklahoma, in violation of the provisions of the Constitution of the state of Oklahoma under article 2, § 27, and under the act of Congress of February 11, 1893, c. 83, 27 Stat. 443 (U. S. Comp. St. 1901, p. 3173). The relator therein prays for the issuance of a writ of habeas corpus directing and commanding the said sheriff to bring the body of said petitioner before this court that the matters and things therein alleged may be duly inquired into, and that after due examination of the same he be discharged from jail and given his liberty.

Said petition was duly filed with this court on March 11, 1908, and writ of habeas corpus was issued on the 20th day of March, A. D. 1908, returnable on the 28th day of March, A. D. 1908. On said date the respondent duly made his return which was as follows: "(1) That he has the body of said Thomas Patman in his custody in his official capacity as such sheriff. (2) That he holds said Thomas Patman under and by virtue of an order of

commitment of the district court of Muskogee county, state of Oklahoma, same being in conformity to law in all respects; said relator having been transferred to him as such sheriff by the United States marshal of the Eastern district of the state of Oklahoma; said relator having been held by the United States marshal under and by virtue of an order of commitment issued in a certain criminal prosecution by indictment for the crime of murder alleged to have been committed in the Western District of the Indian territory prior to the admission of Oklahoma into the Union, and which said prosecution by indictment was pending in the United States Court for the Western District of the Indian Territory upon November 18, 1907. (3) Copy of the order showing the return of the indictment against the said defendant in the United States Court for the Western District of the Indian Territory on the 23d day of October, A. D. 1907, showing that the said relator was indicted separate and alone of the crime of murder and not jointly with Eugene Titsworth and Ben Titsworth, charging said Thomas Patman with having, on the 5th day of July, 1907, in the Western District of the Indian Territory, murdered one Sam Roberts, and showing that said relator was held without bail, and that on the 24th day of February, A. D. 1908, he was delivered by the said United States marshal for said district to the respondent, as sheriff of Muskogee county."

Chas. E. Bagg and Williams & Williams, for relator. Chas. West, Atty. Gen., and W. C. Reeves, Asst. Atty. Gen., for respondent.

WILLIAMS, C. J. (after stating the facts as above). The relator being held in custody by the sheriff of Muskogee county to answer an indictment pending and undetermined in the district court of said county for the crime of murder, a writ of habeas corpus is prayed for by relator, not that he may be enlarged on bail, but it is claimed by him that he is entitled to an absolute and unconditional discharge from custody.

In the case of *Perry v. State*, 41 Tex. 480, the court says: "The right to discharge is based upon the fact of appellant having previously been convicted in said court on another indictment for theft of a steer, found at the same term of the court as the indictments under which he is now held in custody. All of said indictments, it is insisted, having been found on the same evidence, and on account of the same transaction, are therefore claimed to be for one and the same supposed offense. An application for a habeas corpus for the purpose and under the circumstances for which this was made is certainly novel and without precedent in the courts of this state. It would seem to have long since been much too well established by the common law as well as our statutes that an indictment not void upon its face, regularly returned to and pending in a court hav

ing jurisdiction thereof, could only be disposed of by some appropriate proceeding in such court for an experiment such as the present. The practice at common law in the court of King's Bench is thus stated in Willmot's Opinions, 106 (Hurd on Habeas Corpus, 331): 'In imprisonment for criminal offenses the court can act upon it only in one of three manners: (1) If it appear clearly that the fact for which the party is committed is no crime, or that it is a crime, but he is committed for it by a person who has no jurisdiction, the court discharges. (2) If doubtful whether a crime or not, or whether the party be committed by a competent jurisdiction, or if it appears to be a crime, but a bailable one, the court balls him. (3) If an offense, not bailable, and committed by a competent jurisdiction, the court remands or commits him. It is certainly essential to the proper discharge of its duties, and the due and efficient administration of the law that whenever a court assumed to act in a matter, and over parties within its jurisdiction, it is its right and duty to proceed to its final determination without interference from any other tribunal.' The writ of habeas corpus was not designed to operate as a writ of error or certiorari, and does not have their force and effect. It does not deal with error or irregularities which render proceedings voidable merely, but such only as render them absolutely void."

In the case of *Ex parte Crofford*, 39 Tex. Cr. R. 548, 47 S. W. 538, the court says: "Relator was placed upon trial before a jury in the district court of Montague county on the charge of murder. The jury retired to consider their verdict on the 10th of August. On the morning of the 12th, in the absence of the defendant, the jury was brought into court and discharged from further consideration of the case. It is shown by the judgment of the court that the court adjudicated the question as to the probability of their agreeing to a verdict. The defendant was not present, and not consulted in regard to the discharge of the jury. In fact he was in jail at the time. He resorted to the writ of habeas corpus for the purpose of seeking his discharge on the ground that he had been placed in jeopardy and could not be tried again; and this is the only ground alleged by the relator, and upon the hearing of the writ remanded relator to custody, and this appeal is prosecuted therefrom. This is not a novel case in Texas. Since the case of *Perry v. State*, 41 Tex. 488, the decisions have been uniform that the writ of habeas corpus cannot be resorted to for the purpose of discharging an applicant on a plea of former jeopardy. See, also, *Darrah v. Westergage*, 44 Tex. 888; *Ex parte Schwartz*, 2 Tex. App. 74; *Griffin v. State*, 5 Tex. App. 457."

In this case, the relator being held by virtue of an indictment pending in a court of competent jurisdiction, and over parties within its jurisdiction, it is certainly its right

and duty to proceed to its final determination without interference from any other tribunal. In the case of the *United States v. Armour & Co.* (D. C.) 142 Fed. 818, Humphrey, district judge, says: " * * * That the officer or agent of the corporation, if the facts bring him within the purview of the law, may plead such immunity." In the case of *Hale v. Henkel*, 201 U. S. 63, 26 Sup. Ct. 376, 50 L. Ed. 663, the Supreme Court of the United States says: "The suggestion that a person has testified compulsorily before a grand jury may not be able, if subsequently indicted for some matter concerning which he testified, to procure the evidence necessary to maintain his plea, is more fanciful than real." Where shall the party charged with a crime by indictment plead such immunity? Certainly not in another court in a proceeding for writ of habeas corpus, but in the court where the indictment is pending, just like any other plea in abatement or bar may be made and entertained.

Writ of habeas corpus denied. All the Justices concur.

(20 Okl. 687)

DE GRAFFENREID et al. v. IOWA LAND & TRUST CO.

(Supreme Court of Oklahoma. April 18, 1908.)

1. INDIANS—LANDS—ALLOTMENT—TITLE ACQUIRED—STATUTORY PROVISIONS.

A citizen of the Creek Nation, by the Commission to the Five Civilized Tribes duly enrolled as a Creek freedman, who on April 22, 1899, selected her allotment upon the public domain of said nation, and received a certificate of allotment therefor, describing the lands, is seized of an equitable estate in fee therein, the sole effect thereon of section 6, of the act of March 1, 1901 (31 Stat. 803, c. 676), being to place said allotment on an equal footing as to rights and title with allotments theretofore made under and by virtue of Act June 28, 1898, c. 517, 30 Stat. 495, and does not operate as a legislative grant of the legal title in fee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indiana, § 30.]

2. SAME—DESCENT.

A citizen of the Creek Nation, by the Commission to the Five Civilized Tribes duly enrolled as a Creek freedman, who on April 22, 1899, selected her allotment upon the public domain of said nation, and received a certificate of allotment therefor, describing the lands, is seized of an equitable estate in fee therein, which upon her death on June 7, 1902, descended, both surplus and homestead, to her heirs, according to the laws of descent and distribution of the Creek Nation, as provided in Act March 1, 1901, § 7, c. 676, 31 Stat. 863, known as the "Original Agreement."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indiana, § 49.]

3. SAME.

The provision of the Indian appropriation act, passed by Congress on May 27, 1902 (32 Stat. 258, c. 888), repealing the provisions of the said original agreement made by the Creeks, in so far as it provided for descent and distribution according to the Creek law of descent and distribution, and substituting therefor chapter 49 of Mansfield's Digest (Ind. T. Ann. St. 1890, c. 21), did not, by virtue of the joint resolution of Congress, take effect until July 1, 1902.

4. SAME.

Where a citizen of the Creek Nation, by the Commission to the Five Civilized Tribes duly enrolled as a Creek freedman, who, on April 22, 1899, selected her allotment upon the public domain of said nation, and received her certificate of allotment therefor, describing the lands, and on June 7, 1902, died, before patent issued, a patent afterwards issued to the heirs of such person, without naming them, vested in said heirs the title to the lands therein described; said heirs to be determined by judicial construction.

5. SAME.

Upon descent cast by such Creek freedman on June 7, 1902, intestate, without child or the issue of child or children her surviving, leaving her surviving an intermarried noncitizen father, and an intermarried noncitizen husband, a mother, three sisters, and a brother, all citizens of the Creek Nation, her mother as her "nearest relation" is entitled to inherit an undivided one-half interest in her allotment, under section 6 of the laws of descent and distribution of the Creek Nation (Act March 1, 1901, c. 676, 31 Stat. 863), and the intermarried noncitizen husband of the intestate the remaining undivided one-half interest therein, under chapter 10, § 8, Comp. Laws Creek Nation 1900, in force in the Creek Nation at the time of descent cast, construed with article 3, § 1, of said Compiled Laws.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indians, § 49.]

6. SAME—AGREEMENTS WITH INDIAN NATIONS—CONSTRUCTION.

In construing an agreement made by Congress with the Creek Nation and submitted to the citizens of the nation for their ratification by popular vote, it is manifestly unfair to construe it in any other manner than that in which it was obviously understood by them at the time, taking the terms employed in their common and ordinary acceptance; they being a simple and dependent people.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indians, § 6.]

7. STATUTES—CONSTRUCTION WITH REFERENCE TO OTHER STATUTES.

In arriving at the intent of the Legislature in enacting a statute, not only must the whole statute and every part of it be considered, but where there are several statutes in *pari materia*, they are all, whether referred to or not, to be taken together and one part construed with another in the construction of any material provision. Statutes are in *pari materia* which relate to the same person or thing, or to the same class of persons or things.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 303.]

8. DESCENT AND DISTRIBUTION—"HEIRS" CONSTRUED TO MEAN "CHILDREN."

The word "heirs" in section 8 of the Creek law of descent and distribution, set forth in Perryman's Digest of 1900, is construed to mean "children" in this case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indians, § 49.]

For other definitions, see Words and Phrases, vol. 4, pp. 3241, 3264; vol. 8, pp. 7677, 7678.]

9. SAME—MURDER OF INTESTATE BY PERSON ENTITLED TO INHERIT—EFFECT.

In the absence of express provision excluding the husband from inheriting from his wife under the laws of descent and distribution of the Creek Nation in force at the time of descent cast, the operation of said laws is not affected by the fact that the husband murdered his wife, but not for the purpose of at once obtaining the inheritance.

(Syllabus by the Court.)

95 P.—40

Error from the United States Court for the Western District of the Indian Territory, at Muskogee; Wm. R. Lawrence, Judge.

Action by the Iowa Land & Trust Company against R. P. De Graffenreid and others to quiet title, or for partition or sale of the premises as their respective interests might appear. Judgment for plaintiff, and defendants sued out a writ of error to the United States Court of Appeals in the Indian Territory, whence the same came before the Supreme Court of Oklahoma by virtue of Enabling Act June 16, 1906, c. 3335, 34 Stat. 267. Reversed and remanded with instructions.

On June 7, 1902, Castella Reeves, herein-after called Castella Brown, died intestate in the Creek Nation, Ind. T., without child or children or the issue of such surviving her. She left surviving Cynthia Tolliver, her mother, Viola Brown Mathews, Shellie Brown, and Henrietta Stewart, her sisters, and George Brown, a brother, all duly enrolled citizens of the Creek Nation, but not of Indian blood. She left also surviving George Brown, her father, not a citizen of the Creek Nation, and Ben Reeves, her husband, "who was at no time a citizen of said nation." She was murdered by her said husband, Ben Reeves, who, at the January term of the United States Court in the Indian Territory at Muskogee, was tried and convicted, and sentenced to life imprisonment. Prior to her death, to wit, on April 22, 1899, Castella Brown selected her allotment, and on the same day received a certificate of allotment from the Commission to the Five Civilized Tribes No. 1,330 for the S. E. $\frac{1}{4}$ of section 9, township 18 N., range 18 E., in the Creek Nation, Ind. T. After her death, to wit, on July 26, 1905, Cynthia Tolliver, her mother, for a valuable consideration, made, executed, and delivered to the Iowa Land & Trust Company a warranty deed to said lands in fee, which was duly recorded, and said company placed in possession of said lands, which they have since retained. On August 16, 1905, said Henrietta Stewart and her husband, J. R. Stewart, for a valuable consideration, also made, executed, and delivered to said company a warranty deed to her undivided interest in said land, which was duly recorded. On August, 1905, George Brown, her brother, a single man, for a valuable consideration, also made, executed, and delivered to said company a warranty deed to his undivided interest in said land, which was duly recorded. On July 15, 1904, Ben Reeves, her husband, to compensate Robert P. De Graffenreid, his attorney, for his services in defending him for the murder of his wife, Castella Brown, made, executed, and delivered to said Robert P. De Graffenreid a warranty deed to his undivided one-half interest in said land, which was duly recorded. On September 23, 1904, Shellie Brown, her sister, for a valuable consideration, made, executed, and delivered to J. P. Allen, J. S.

Calfee, and B. L. Hart a warranty deed to her undivided interest in said lands, which was duly recorded. On September 24, 1904, said Allen and wife, Calfee and wife, and Hart and wife, for a valuable consideration, made, executed, and delivered to the Creek Land & Improvement Company a quitclaim deed to all their right, title, and interest in said lands, which was duly recorded.

At the time of the death of Castella Brown, the Creek laws of descent and distribution were and are as follows:

"Sec. 6. Be it further enacted that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons and in all cases where there are no children, the nearest relation shall inherit the property."

"Sec. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no heirs, and an heir's part if there should be other heirs in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner."

"Sec. 1. All noncitizens not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have the right to live in this nation and enjoy all privileges enjoyed by other citizens, except in participation in the annuities and final participation in the lands."

On January 7, 1907, the Iowa Land & Trust Company, a corporation, filed its complaint in equity in the United States Court in the Indian Territory, Western District, at Muskogee, against said Robert P. De Graffenreid, Creek Land & Improvement Company, and Viola Brown Mathews, a sister, and George Brown, the father of Castella Brown, deceased, to cancel their deeds as a cloud on plaintiff's title and to quiet the same, or for partition or sale as their respective interests might appear. Answers were filed; defendants De Graffenreid and Creek Land & Improvement Company each relying on their respective deeds aforesaid, and Viola Brown Mathews relying on her right to one-fifth of the land as a sister and heir of Castella Brown. The case was tried by the court on the pleadings, disclosing substantially as stated, and the following agreed statement of facts:

"It is agreed by and between the parties to this case that this cause may be submitted to the court and tried upon the pleadings and the following statement of facts, as all of the facts applicable to a determination of this controversy. Said facts being as follows:

"(1) Castella Brown was a duly enrolled citizen of the Creek Nation, not of Indian blood, and was enrolled as a freedman.

"(2) That she was the lawful and acknowledged wife of Ben Reeves, mentioned in the pleadings, and was such lawful and acknowl-

edged wife of Ben Reeves at the date of her death on June 7, 1902.

"(3) That Castella Brown, as such citizen of the Creek Nation, made selection of her allotment on April 22, 1899, and received on that date, from the Commission to the Five Civilized Tribes, a certificate for the same, No. 1,330.

"(4) That on September 22, 1904, a patent describing the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, section 9, township 18 N., range 18 E., lying in the Creek Nation, being 120 acres of land selected by Castella Brown as above, said ——— was executed and delivered to the heirs of Castella Brown, deceased.

"(5) That on September 22, 1904, a patent describing the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 9, township 18 N., range 18 E., being the homestead and part of the land selected aforesaid by Castella Brown was executed to the heirs of Castella Brown, deceased, by the Principal Chief of the Creek Nation and approved by the Secretary of the Interior.

"(6) That Ben Reeves, the husband of Castella Brown, was not an enrolled citizen of the Creek tribe of Indians, but lived and resided in the Creek Nation, and had lived and resided in the Creek Nation for a number of years before the death of his said wife.

"(7) That the Creek Nation or tribe of Indians had a form of government, republican in form, had a written Constitution providing for the three co-ordinate branches of government, to wit: the executive, judicial, and legislative, that the Principal Chief was the principal executive officer, that the National Council was the legislative body, and that the Supreme Court and the district courts were the judicial bodies.

"(8) That the Creek Nation as a political sovereignty had a written and codified form of laws, and that the complaint filed by plaintiff gives a correct copy of the Creek law applicable to the descent and distribution of the estate of Castella Brown, deceased, as contained in the Creek printed statutes.

"(9) It is also agreed that the Constitution of the Creek Nation, as in force at the times mentioned in the complaint, under article 3 of the Constitution, as shown by section No. 1, is as follows: 'The supreme law-defining power in this nation shall be lodged in the high court, to be composed of five (5) competent, recognized citizens of the Muskogee Nation, who shall have attained the age of twenty-five years. They shall be chosen by the National Council for a term of four years, and shall be paid as provided for by law.'

"(10) It is also agreed that there was, in fact, a legally organized and constituted Supreme Court of the nation, and that said Supreme Court of the Creek Nation, at its October term, 1893, in the case of Edward Gibson v. J. P. Davison et al., delivered a written opinion, a copy of which is filed as part of this agreed state of facts, and attached here-

to as Exhibit A, said written opinion being a copy from the records of the Supreme Court of the Creek Nation. And it is further agreed that on October 22, 1896, in answer to a question propounded to it by the National Council of the Muskogee Nation, the Supreme Court of that nation delivered a written opinion, a copy of which, from the records of said court, is hereto attached, and made a part of this 'agreed state of facts,' marked 'Exhibit B.'

"(11) Ben Reeves is a native-born citizen of the United States, and was such citizen at the date of the death of his wife, Castella Reeves.

"(12) It is agreed that the various deeds and conveyances alleged in the complaint to have been made by the persons therein mentioned were in fact executed and delivered as alleged in the complaint.

"(13) The National Council of the Creek Nation, as approved April 6, 1894, enacted the following law, which was in force at the times mentioned in the pleadings, to wit:

"Noncitizens, Intermarried—Courts to Have Jurisdiction of the Property.

"Sec. 76. The courts of this nation shall have and exercise jurisdiction over all controversies arising out of or pertaining to property rights acquired in this nation, and situated in the same by noncitizens who have intermarried with citizens of this nation and by reason of such marriage secured rights and privileges in this nation under which said property was acquired and accumulated by them. The jurisdiction of our courts shall extend to controversies over property and property rights acquired by intermarried noncitizens of our nation, who by virtue of this intermarriage with citizens, acquired such property rights and privileges and that irrespective of whether such controversies are between noncitizens and citizens of the Muskogee Nation or between any persons whomsoever, who claim in this nation property rights under and through such intermarried noncitizens which are by them acquired in the manner aforesaid; and all persons hereafter intermarrying with citizens of this nation shall thereby be deemed to consent that the courts of this nation exercise all jurisdiction over property rights and privileges that they acquire in this nation by virtue of their said marriage.

"Sec. 77. All property brought into this nation by noncitizens in consequence of intermarriage of such noncitizens with citizens of this nation shall likewise be under the jurisdiction of the courts of this nation.

"Approved April 6, 1904."

"Made by the counsel for all parties on this May 10th, 1907.

"Gibson & Ramsey,

"Attys. for Deft. De Graffenreid.

"Thomas & De Meules,

"Attorneys for Plaintiff.

"West & Mellette,

"Attorneys for Defendant Creek Land & Imp. Co."

On May 11, 1907, the court decreed, in effect, that the devolution of the land in controversy was governed by the Creek law of descent and distribution and passed in fee to Cynthia Tolliver, mother of Castella Brown, deceased, and from her to the plaintiff, the Iowa Land & Trust Company; that Ben Reeves, the husband of Castella Brown, being a noncitizen of the Creek Nation, could not inherit from his wife, who was a citizen; that George Brown, the father of Castella Brown, deceased, for the same reason could not inherit, and ordered that the deed from Ben Reeves to defendant De Graffenreid and the deed from Shelle Brown to Allen, Calfee, and Hart, and from them and their respective wives to defendant the Creek Land & Improvement Company, be removed as a cloud upon the title of the plaintiff, the Iowa Land & Trust Company. On May 13, 1907, defendants De Graffenreid and Creek Land & Improvement Company sued out a writ of error, and prosecuted their cause to the United States Court of Appeals in the Indian Territory, and the same is now before us for review by virtue of the terms of the enabling act (June 16, 1906, c. 3335, 34 Stat. 267).

Frank Scruggs, N. A. Gibson, and George S. Ramsey, for plaintiff in error De Graffenreid. West & Mellette, for plaintiff in error Creek Land & Imp. Co. C. L. Thomas and Edgar A. De Meules, for defendant in error.

TURNER, J. (after stating the facts as above). Before determining the devolution of the allotment of Castella Brown let us determine its legal status prior to her death.

The Indian appropriation bill of March 3, 1893 (27 Stat. 645, c. 209) provides:

"Sec. 15. The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Choctaws, Chickasaws and Seminoles; * * * and upon the allotment of the lands held by said tribes the reversionary interest of the United States therein shall be relinquished and shall cease.

"Sec. 16. The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee (or Creek) Nation, and the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that territory now held by any and all such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes respectively as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis

of justice and equity, as may with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a state or states of the Union which shall embrace the lands within said Indian Territory."

Accordingly, this commission, hereafter called the "Dawes Commission," was appointed, and entered on the discharge of its duties, and under the sundry civil appropriation act of March 2, 1895 (28 Stat. 939, c. 189), two additional members were appointed. Pursuant to a resolution of the Senate of the United States of March 29, 1894, this commission visited the Indian Territory, and reported back to that body May 7, 1894 (Senate Report No. 377, 53d Congress, 2d Sess.) in full, as to the condition of the Five Civilized Tribes. Afterwards its annual report (Sen. Misc. Doc. No. 24, 3d Sess. 53d Cong.) in part says: "All the functions of the so-called governments of these five tribes have become powerless to protect the life or property rights of the citizen. The courts of justice have become helpless and paralyzed. * * * The day of isolation has passed. Not less regardless have they been of the stipulation in their title that they should hold their territory for common and equal use of all their citizens. Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at concealment is thought necessary. * * * The United States also granted to these tribes the power of self-government, not to conflict with the Constitution. They have demonstrated their incapacity to so govern themselves, and no higher duty can rest upon the government that granted this authority than to revoke it when it has so lamentably failed." In the Indian appropriation bill of June 10, 1896 (29 Stat. 339, c. 398), the commission was "directed to continue the exercise of the authority already conferred upon them by law and endeavor to accomplish the objects heretofore prescribed to them and report from time to time to Congress, * * *" and it was further provided "that said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after said hearing they shall determine the right of said applicant to be so admitted and enrolled." By the act of June 7, 1897 (30 Stat. 84, c. 3), it was provided: "That said commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this act if in conflict therewith as to said nation."

On September 27, 1897, pursuant to this authority, the Dawes Commission made an

agreement with certain commissioners representing the Creek Nation, providing for the enrollment of its citizens and the allotment of its lands in severalty among them. This agreement was, according to stipulation, afterwards submitted to and rejected by the Creek Council, and, as such, never became operative between the parties. In the meantime, and in view, no doubt, of the condition in which the territory would be left by a failure to ratify this and other agreements pending with other tribes, Mr. Curtis of the Indian committee of the House prepared a bill, designed to transfer the control of the property rights of the Five Civilized Tribes from those nations to the United States. The result was the passage by Congress of an act entitled "An act for the protection of the people of the Indian Territory and for other purposes," approved June 28, 1898 (30 Stat. 495, c. 517), known as the "Curtis Bill." That act provides: "Sec. 30. That the agreement made by the commission to the Five Civilized Tribes with the commission representing the Muskogee (or Creek) Tribe of Indians on the 27th day of September, eighteen hundred and ninety-seven, as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect if ratified before the 1st day of December, eighteen hundred and ninety-eight, by a majority of the votes cast by the members of said tribe at an election to be held for that purpose; and the executive of said tribe is authorized and directed to make public proclamation that said agreement shall be voted on at the next general election; to be called by such executive for the purpose of voting on said agreement; and if said agreement as amended be so ratified, the provisions of this act shall then only apply to said tribe where the same do not conflict with the provisions of said agreement; but the provisions of said agreement, if so ratified shall not in any manner affect the provisions of section 14 of this act, which said amended agreement is as follows: [Setting forth the agreement.]"

Thus it will be seen that, in addition to section 11, which, in effect, provided for the surface allotment of the lands of the Creek Nation without the consent of the tribe, it provided for the resubmission, with certain modifications, of the agreement of September 27, 1897, for ratification by vote of the Creek people, and that, if ratified, its provisions, so far as they differed from the bill, should supersede it. After much delay an election was finally called for November 1, 1898, and the agreement submitted in its amended form, as set forth in said act, but which failed of ratification by some 150 votes. On April 1, 1899, after said agreement was thus defeated, under rules prescribed by the Department of the Interior, the Dawes Commission opened the land office at Muskogee " * * * to give effect to the provisions of said act according to its design, and to enable every member of the Creek tribe to select and have set apart

to him lands to be allotted to him in amount approximating his share" of the lands of the tribe.

On April 22, 1899, Castella Brown, being a regularly enrolled freedman and citizen of the Creek Nation, but not of Indian blood, and as such entitled to do so, made selection and took her allotment on the lands in controversy in this cause and received from said commission a certificate of allotment therefor numbered 1,330, and, so far as this record discloses, entered upon and took possession of the land. This was done pursuant to the terms of the Curtis bill, which reads: "Sec. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under acts of Congress, and known as the 'Dawes Commission' shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same. * * *

"On March 8, 1900, said commission negotiated another agreement with the representatives of the Creek Nation, which, as amended, was approved by Congress (act March 1, 1901, c. 676, 31 Stat. 863), and which was, on May 25, 1901, ratified by the Creek Council, and thereby became effective, and known as the "Original Agreement." Section 6 provides: "All allotments made to Creek citizens by said commission prior to the ratification of this agreement, as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said commission." Now, on the day of her death, with this certificate and this act of Congress relating thereto as her only muniments of title to the land allotted of what did she die seised? There can be no doubt that the certificate alone vested in her an equitable estate in fee to the lands. In order to procure it she had caused herself to be enrolled as a Creek freedman, had appeared before the commission to the Five Civilized Tribes, authorized by law to make allotments, had selected the lands upon which she desired to file, and had been filed thereon by the commission, and had received a certificate from the chairman of the commission to that effect, describing the lands. Nothing required by law remained to be done to pass to her the entire title of the Creek

Nation and the "reversionary interest" of the United States except the delivery of the patent.

A very close analogy lies between the method of acquiring title to the land in controversy and that of acquiring title to the public lands of the United States. 26 Am. & Eng. Enc. of Law, p. 403, says: "A person who has acquired a complete right to a patent for public lands, but to whom a patent has not been issued, is usually regarded as an equitable owner, the United States or the state holding the naked legal title in trust for him." In Wisconsin Central Railroad Co. v. Price Company, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687, Mr. Justice Field, in delivering the opinion of the court, in substance, stated: "After public lands have been entered at the land office and a certificate of entry obtained, they are private property, the government agreeing to make conveyance as soon as taken, and in the meantime holding the naked legal title in trust for the purchaser, who has the equitable title. In Carroll v. Safford, 3 How. (U. S.) 441, 11 L. Ed. 671, the court said: "When the land was purchased and paid for it was no longer the property of the United States, but of the purchaser. He held for it a final certificate. * * *

"It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect it is considered as belonging to the realty." In Wirth v. Branson, 98 U. S. 118, 25 L. Ed. 86, the Supreme Court of the United States said: "This rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location."

The certificate of allotment in this case bears a very close analogy to the certificate of entry to public lands of the United States. In Witherspoon v. Duncan, 4 Wall. (U. S.) 210-218, 18 L. Ed. 339, the court said: "In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property. * * * The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser who has the equitable title." See, also, Railroad Co. v. Prescott, 16 Wall. (U. S.) 603-608, 21 L. Ed. 373; Rail-

road Co. v. McShane, 22 Wall. (U. S.) 444-461, 22 L. Ed. 747. In *Porter v. Parker*, 68 Neb. 338, 94 N. W. 123, there was an allotment of land under the following statute: "That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made or in case of his decease, of his heirs, according to the laws of the state of Nebraska, and at the expiration of said period the United States will convey the same by patent to said Indian or his heir as aforesaid, in fee discharged of said trust. * * *" In passing on it the court held: "In our opinion, an allottee and patentee of lands in severalty, pursuant to the above-mentioned act of Congress, is seised of an equitable interest and estate in fee, which upon his death before the issuance of a final patent therefor by the United States, descends to his heir or heirs at law according to the laws of inheritance of this state."

In *Carter v. Ruddy*, 56 Fed. 542, 6 C. C. A. 3, this question came up on an action of ejectment. Plaintiff in error, plaintiff below, claimed title by deed from one Walter Bourke who was a half-breed Sioux Indian, to whom was issued scrip under the act of July 17, 1854 (10 Stat. 304, c. 83), entitled "An act to authorize the President of the United States to cause to be surveyed the tract of land in the territory of Minnesota belonging to the half-breeds or mixed bloods of Dakota or Sioux Nation of Indians, and for other purposes." The act authorizes the President to exchange, for a relinquishment of the interest of said Indians, derived by the ninth article of the treaty of Prairie du Chien of the act of July 15, 1830 (7 Stat. 330), certificates or scrip for the same amount of land to which each Indian would be entitled in case of a division of the said reservation pro rata among the claimants, "which certificates or scrip may be located upon any of the lands within said reservation not now actually occupied by actual and bona fide settlers. * * *" In other words, the exchange was of a general title for the opportunity to acquire titles in severalty of specific tracts of said reservation, actually occupied by each Indian, or the right to acquire, acre for acre, other lands of the public domain not reserved, upon which improvements might be made. The scrip was not transferable. A piece of scrip for 80 acres issued under said act to Walter Bourke. In effect, the court held that this scrip conveyed the equitable title, and was not sufficient upon which to maintain an action of ejectment. The court said: "The scrip and its location were not the legal title. They were

but the means of obtaining it. * * * It is well settled that one having only equitable title cannot maintain ejectment in the federal courts"—citing authorities.

In *Quinney v. Denney*, 18 Wis. 510, the Supreme Court of Wisconsin, in construing an act of Congress providing for the allotment of lands to the Stockbridge Indians, said: "The principal and controlling question in the case is whether the respondent, as allottee under the act of Congress of March 3, 1843 (see 5 Stat. c. 101, p. 645), took such an estate in the premises allotted to him as he could convey by deed, or whether this conveyance to James Joshua in 1845 was void for want of assignable interest in the grantor. On the part of the respondent it is contended that the deed to Joshua passed no title, and that in fact the allottee under the act took no assignable interest in the land until the patent issued to him in 1860. We deem this an erroneous view of the effect of the act of Congress." After setting forth the provisions of the act, the court said: "It appears that all the requirements of this law were complied with up to the issuing of the patent for the lands by the President. Now we are of the opinion that this act created or gave to the allottee an equitable estate or title in the land allotted to him, which could be sold and transferred by deed, and that when the patent subsequently issued to him, it inured to the benefit of his grantee"—citing many authorities.

That these certificates were intended to convey only the equitable title, and hence might not be, before the patent issued, sufficient upon which to maintain an action of ejectment, and hence the allottee might be without remedy in the courts to obtain possession of his allotment, seems to have been in the purview of Congress when it provided in the Curtis bill: "Sec. 29. The United States shall put each allottee in unrestricted possession of his allotment and remove therefrom all persons objectionable to the allottee." And again in the act of March 1, 1901, as amended by the supplemental agreement: "Sec. 8. The Secretary of the Interior shall, through the United States Indian agent in said territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment in unrestricted possession of his land and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make his allotment as herein provided, and receive a certificate therefor, he shall be immediately thereupon so placed in possession of his land. * * *"

But it is contended, in effect, by plaintiff in error that section 6 of the "Original Agreement," supra, operated upon and was a confirmation of the selection of the allotment of Castella Brown, made under article 11 of the Curtis bill, and was, in effect, a legislative grant of the absolute title, both legal and

equitable, to her of the lands so taken in allotment, and that the subsequent issuance of the patent to her or her heirs was mere evidence of title already conferred and added nothing thereto. In other words, it is contended that section 6 of this agreement intended to make all prior allottees favored objects of the law, and confer upon them absolute and immediate title to their allotments by legislative grant, thereby placing them on a higher plane than those to come after them. Let us see whether section 6 will bear such a construction. Lewis' Sutherland Stat. Con. § 347, says: "It is indispensable to a correct understanding of a statute to inquire, first, what is the subject of it, what object is intended to be accomplished by it? When the subject-matter is once clearly ascertained, and its general intent, a key is found to all its intricacies. * * *"

At the time this act was passed the Dawes Commission had been in existence for several years, negotiating with the Five Civilized Tribes with a view to making a roll of their citizens, and inducing them, by agreement, to take their lands in severalty. The agreement of September 27, 1897, had failed of ratification by the Creek Council, had been embodied in the terms of the Curtis bill, and submitted for ratification to a vote of the Creek people, and had been rejected by them. Since the opening of the Creek allotment office on April 1, 1899, up to June 30, 1901, 10,617 persons appeared before the commission, and made application to select allotments. Of this number 9,557 received a preliminary allotment of 160 acres, and 1,060 made partial selections. The selections made up to and including June 30, 1901, covered an acreage of 1,626,917 acres. Up to the time of the ratification of this original agreement (May 25, 1901) these allotments were made under the general provisions of the Curtis bill, for the reason that the agreement of September 27, 1897, had failed of ratification, and, inasmuch as it was the policy of the United States to accomplish allotment "with the consent of such nations or tribes of Indians, so far as may be necessary," and inasmuch as a vast number of allotments had then been made without the consent of the Creek people, in order to put the legal efficacy of those allotments beyond question and to save, perhaps, the United States the vast labor and expense of making them over again and to thus facilitate the work of the commission, section 6 was embodied in that agreement. In that section the commissioners were not dealing with the subject of title to allotments, but with the work of making allotments. The matter of patent and the legal title to allotments was dealt with elsewhere in the agreement.

In construing this section, it is urged, in effect, that it should be done as though it read: "[The titles to] all allotments made to Creek citizens by said commission prior to the ratification of this agreement, as to which

[said allotments] there is no contest * * * are confirmed. * * *" This cannot be done, for the reason that we believe the intent of that part of the section was to confirm the work of allotment already accomplished, as stated, and to provide that "said commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore. * * *" We are not unmindful of the authorities cited in support of the proposition that the words of this section carry with them a legislative grant, but those were cases where the United States was vesting title to its own lands, and not to lands of another, in which, according to the act of March 3, 1893, it only claimed a "reversionary interest." Besides, this very agreement, under the head of "Titles," specifically provides how the legal title shall be obtained: "Sec. 23. Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the Principal Chief with blank deeds necessary for all conveyances herein provided for, and the Principal Chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate. * * * All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his deed. * * *"

Furthermore, upon the face of section 6 no such intention appears; and when we remember that said section comprises a part of an agreement with a simple and dependent people, which was submitted to them for their approval, it would be manifestly unfair to construe it in any other manner than that in which it was obviously understood by them at that time, taking the terms employed in their common and ordinary acceptance. Such, it seems, is the rule of construction of instruments owing their force and effect to the ratification of the people, and such shall be our rule of interpretation in this case. In speaking of the Constitution of the state, the court, in *Manly v. State*, 7 Md. 135, said: "The whole must be considered with a view to ascertain the sense in which the words were employed, and its terms must be taken in their ordinary and common acceptance, because they are presumed to have been so understood by the framers and by the people who adopted it. This is unquestionably the correct rule of interpretation. It * * * owes its whole force and authority to its ratification by the people, and they judged of it by the meaning apparent on its face, according to the general use of the words employed, where they do not appear to have been used in a legal or technical sense." In *State v.*

Mace, 5 Md. 337, the court said: "Although it is a well-recognized canon of construction that where legal terms are used in a statute, they are to receive their technical meaning, unless the contrary plainly appears to have been the intention of the Legislature, the principle, however, does not apply to the interpretation of the organic law, which is to be construed, according to the acceptance of those who adopted it, as the supreme rule of conduct, both for officials and individuals; and, in conformity with this view, it has been habitual for the supreme judiciary of the United States to derive light and instruction from the commentaries from the framers of the federal Constitution." Cooley's Constitutional Limitations, 101, says: " * * * For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people; and it is not to be supposed that they have looked for any dark or abstruse meaning of the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." *K. Hobart Hills v. City of Chicago*, 60 Ill. 86. To give to section 6 the construction contended for would seem to defeat the intent of the agreement which undoubtedly was to give to no citizen of the Creek Nation the advantage of another citizen in the equal distribution of the common property; and hence we repeat that said section should be construed as the people adopting it, no doubt, understood it at that time, which was that the allotments made to Creek citizens prior thereto, "as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed"—that is, are to stand as made, and need not be made over again, and, as made, are to stand on equal footing with those to be made under that agreement—and that "the commission shall continue the work of allotment, as heretofore, conforming to the provisions herein." Thus it will be seen that at the time of her death Castella Brown had received her allotment, and stood seised in fee of the equitable title thereto; that nothing remained to be done, except the formal execution and delivery of the patent, to vest in her the legal title, and that section 6, supra, added nothing thereto.

The subsequent execution and delivery of the patent to the heirs of Castella Brown, deceased, which was done September 22, 1904, describing surplus and homestead, was a mere ministerial act by which the title to the lands described therein inured to and vested in her heirs or their grantees. *John J. Oliver et al. v. Robert Forbes*, 17 Kan. 113. "Where an ancestor holds land by entry and survey, and has done all acts necessary to entitle him to a patent, he acquires an inchoate and alienable title which, upon his death, descends to his heirs; and where a patent afterwards

issues to his heirs, they take the completed title by descent, and not by purchase." 26 Am. & Eng. Enc. of Law, 431, and cases cited. To put this beyond question as to the public lands of the United States, to which the lands in controversy bear a close analogy, the Revised Statutes of the United States provides: "Sec. 2448. Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died or who hereafter dies before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees or assignees of such deceased patentee as if the patent had issued to the deceased person during life." U. S. Comp. St. 1901, p. 1512. So it would seem that, whether the patent issued to Castella Brown after her death, or to her heirs after her death, the result would have been the same. The absolute fee-simple title to the lands in question would, in either event, have vested in her heirs. *Wm. H. Clark v. Abble S. Lord*, 20 Kan. 390. This statute, it has been held, was "intended to cover all cases where any rights belonging to the United States existed in lands which could be relinquished by patent, even though the lands were not strictly public lands, and an interest therein was held by the patentee himself." 26 Am. & Eng. Enc. of Law, 433, and cases cited. But to put this matter beyond a peradventure, the act of Congress of April 26, 1906 (34 Stat. 138, c. 1876), known as the "Second Curtis Bill," provides: "Sec. 5. That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottees died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under direction of the Secretary of the Interior to the party entitled to receive the same: Provided, the provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes of the Department of the Interior at the date of approval of this act."

Having thus determined that at the time of her death Castella Brown was seised of an equitable estate in fee to the lands in question, which, upon the execution and delivery of the patent thereto after her death, ripened into an absolute estate in fee for the benefit of her heirs, let us next determine what

law of descent and distribution is to determine the devolution of this allotment. It is contended by plaintiff in error Creek Land & Improvement Company that at the time of her death, June 7, 1902, "the Arkansas statute of descent and distribution, as embraced in chapter 49 of Mansfield's Digest (Ind. T. Ann. St. 1890, c. 21), and interpreted by the decision of the Supreme Court of Arkansas, was in force in the Creek Nation of the Indian Territory, and controlled the descent and devolution of the title to the property involved in this controversy." With this contention we cannot agree. We think it sufficient to say that if these laws were ever applicable to the devolution of real property in the Creek Nation, they were repealed by implication by sections 6, 7, and 28 of the act of March 1, 1901, called the "Original Agreement." As stated, this agreement was ratified May 25, 1901. The report of the Dawes Commission shows that from April 1, 1890, the date of the opening of the allotment office at Muskogee, up to June 30, 1901, 10,617 persons had appeared before it, and made application to select allotments. Of this number 9,557 received preliminary allotments of 160 acres, and 1,060 made partial selection, covering in all 1,626,917 acres. Section 6 of that act confirmed those allotments, and of necessity that many enrollments, and provided that they " * * * shall, as to appraisement and all things else [which includes as to how they shall go on descent cast] be governed by the provisions of this agreement; and said commission shall continue [not go behind] the work of allotment of the Creek lands to citizens of the tribe as heretofore, conforming to provisions herein. * * * " This fixed the status of those allotments, including that of Castella Brown. Then, as if to dispose of the whole subject of the descent of all allotments which had been made or would be made thereunder before descent cast, the agreement provides: "Sec. 7. Lands allotted to a citizen hereunder [which includes that of Castella Brown] shall not in any manner whatsoever or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior. * * * [Limitation.] Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years [another], for which he shall have a separate deed, conditioned as above: Provided, * * * the homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue [Castella Brown

had none] then he may dispose of his homestead by will [she made none] free from limitation herein [the last above] imposed, and if this be not done [no will made] the land [What land? The homestead? No, or it would have said so, What lands are we talking about? Lands allotted to citizens hereunder—the whole allotment] shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation." What limitation? The last above on the homestead. Hence, as the lands in controversy were "lands allotted" within the purview of the first words of this section, they fell squarely within it, and their devolution is governed according to the laws of descent and distribution of the Creek Nation in force at the time of the death of Castella Brown.

But there was a vast number of citizens of the Creek Nation who were entitled to be enrolled when the land office opened April 1, 1890, but who, up to the time of making this agreement had not been enrolled, several of whom had died, and others who might die before receiving their allotments. Accordingly it was provided in the same agreement: "Sec. 28. All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be [not those who had been] enrolled under [section 21 of the Curtis Bill] shall be placed upon the rolls to be made [the names already enrolled were to stand] by said commission under said act of Congress, and if any such citizen [i. e., one entitled to enrollment on April 1, 1899] has died since that time, or may hereafter die, before receiving his allotment of land and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly." In short, sections 6 and 7 of this agreement fix the descent of the allotment (both surplus and homestead) in cases where the allottee receives his allotment before he dies, and section 28 fixes it in cases where he dies before receiving his allotment. In either case it was intended to "descend to his heirs according to the laws of descent and distribution of the Creek Nation." This, we think, is a literal construction of these sections, as was intended. "The land" referred to in section 7, and "the lands" referred to in section 28, mean one and the same thing, and both have reference to the entire allotment. This meaning must be given to "the land" referred to in section 7, in order to carry out the intention of Congress. To confine it as simply referring to the homestead would convict Congress of a grave oversight, or as intending an absurdity, in that under both statutes the homestead would descend under the laws of descent and distribution of the Creek Nation. Under section 28 the surplus would also so descend, while under sec-

tion 7 the surplus would descend under the laws of descent and distribution of Arkansas, as set forth in chapter 49 of Mansfield's Digest (Ind. T. Ann. St. 1899, c. 21). This would create endless confusion, and hence we will not attribute to Congress any such intention. Black on Interpretation of Laws (section 30) says: "Every statute is construed with reference to its intended scope and the purpose of the Legislature in enacting it; and when the language is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute." The scheme was a complete provision for the devolution of real property taken or to be taken in allotment under the terms of this agreement, and therefore repealed chapter 49 of Mansfield's Dig. (Ind. T. Ann. St. 1899, c. 21), if the same was ever in force in the Creek Nation; but on this we express no opinion.

But it is contended that before the death of Castella Brown, the Indian appropriation bill, approved May 27, 1902 (32 Stat. 258, c. 888), substituted the laws of descent and distribution of Arkansas for those of the Creek Nation provided for in the "Original Agreement," by the following provision: "And provided further, that the act entitled 'An act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians, and for other purposes,' approved March 1, 1901, in so far as it provides for descent and distribution according to the laws of the Creek Nation is hereby repealed and the descent and distribution of lands and moneys provided for in said act shall be in accordance with the provisions of chapter 49 of Mansfield's Digest of the Statutes of Arkansas in force in Indian Territory" and that the same should govern in this case. It would seem that the point is well taken, were it not for the following joint resolution passed on the date the above was approved, and which makes said act effective only "from and after July 1, 1902," a date subsequent to the death of Castella Brown: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the act entitled 'An act making appropriations for the current and contingent expenses of the Indian Department: to fulfill treaty stipulations with the various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes,' shall take effect from and after July first, nineteen hundred and two, except as otherwise specifically provided therein." As we can find nothing in the act referred to wherein it is "specifically provided" that the laws of descent and distribution of Arkansas should be immediately effective, we conclude that such was not the intent; and therefore that part of the Indian appropriation bill, supra, approved May 27, 1902, does not affect our inquiry in this case.

Now, who were the heirs of Castella

Brown under the Creek law of descent and distribution at the time of descent cast? The agreed statement of facts recites: "(4) That on September 22, 1904, a patent describing the West $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 9, township 18 N., range 18 E., lying in the Creek Nation, being 120 acres of the land selected by Castella Brown as above said was executed and delivered to the heirs of Castella Brown, deceased. (5) That on September 22, 1904, a patent describing the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 9, township 18 N., range 18 E., being the homestead and part of the land selected aforesaid by Castella Brown, was executed to the heirs of Castella Brown, deceased, by the Principal Chief of the Creek Nation, and approved by the Secretary of the Interior." From which we infer that the patent issued "to the heirs of Castella Brown, deceased," leaving it to judicial construction as to who they were, and the distributive share of each. *Clark v. Lord*, 20 Kan. 390. It is further agreed: "(8) That the Creek Nation, as a political sovereignty, had a written and codified form of laws, and that the complaint filed by plaintiff gives a correct copy of the Creek law applicable to the descent and distribution of the estate of Castella Brown, deceased, as contained in the Creek printed statutes."

Turning to the complaint, we find those Creek laws of descent and distribution to be:

"Sec. 6. Be it further enacted that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons and in all cases where there are no children, the nearest relation shall inherit the property."

"Sec. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no other heirs, and an heir's part if there should be other heirs in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner."

"Sec. 1. All noncitizens not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have the right to live in this nation and enjoy all privileges enjoyed by other citizens, except in participation in the annuities and final participation in the lands."

It is urged by Creek Land & Improvement Company that this law does not provide a complete and intelligent system by which the property of deceased Creek citizens can be distributed, or which the courts can enforce, for the reason, as is contended, that the Creeks, up to the time of allotment, had no such thing as an individual ownership of land in the Creek Nation, but a bare right of possession and use, a simple chattel interest, which passed like other personal property. As a historical fact we have no doubt the statement is true, but as Congress has declared that these lands shall descend "ac-

cording to the laws of descent and distribution of the Creek Nation," we will not stop to comment upon the wisdom of the act, but proceed, as is our duty, to carry the same into effect "to the best of our learning and ability."

As Castella Brown died intestate without child or the issue of child or children her surviving, leaving her surviving a husband, father, and mother, three sisters, and a brother, let us first determine which of them is her "nearest relation," for such must inherit the property under section 6, *supra*. Webster's International Dictionary (1907) defines the word "relation" to be "a person connected by consanguinity or affinity; a relative; a kinsman or kinswoman." Bouvier's Law Dictionary defines a relative to be "one connected with another by blood or affinity; a relation; a kinsman; a kinswoman." Without doubt the "nearest relation" is meant by section 6 to be some one person, and that person to be neither husband nor wife of the deceased, as they are provided for in section 8. Besides it has been held by the great weight of authority that a husband cannot properly be considered a relative of his wife, or a wife a relative of her husband. Bacon on Benefit Societies and Life Insurance, § 260-a, says: "There seems to be no authority for holding that the word 'relation,' in its strict, legal, and technical sense, includes husband or wife. On the contrary, authorities are found very direct and explicit to the point that they are not relations. Thus in 2 Williams on Executors, p. 1004, it is laid down that: 'No person can regularly answer the description of relations but those who are akin to the testator by blood. A wife, therefore, cannot claim under a bequest of her husband's relations, nor a husband as a relation of his wife.' The Supreme Court of Pennsylvania (Storer v. Wheatley's Ex'rs, 1 Pa. 506) has decided that in a will the terms 'my nearest relations or connections,' do not include the testator's wife. The decision says: 'A wife is no more a relation of the husband than he is of himself.' The English rule is the same (14 Ves. 372). The word 'relations' includes only relations by blood, and not connections by marriage, even a husband or wife"—citing authorities. Kimball v. Story, 108 Mass. 382; Worsley v. Johnson, 3 Atk. 761. "The phrases 'related to,' 'relations,' and 'next of kin,' whether used in a statute, will, or contract have, by a perfectly uniform course of decisions, been held to include only relations by blood, and not connections by marriage, not even a husband or a wife." Sup. Council Or. Cho. Friends v. Bennett, 47 N. J. Eq. 39, 19 Atl. 785, 24 Am. & Eng. Enc. of Law, 278, says: "The definition commonly given of 'relative' or 'relation' is 'a person connected with another by consanguinity or affinity'; but in view of the decisions it would seem that the word has not, technically, so extensive a meaning as this, and is more properly confined to connections by consan-

guinity alone"—citing authorities. "It has been held frequently that in its strict technical sense the word 'relative' or 'relation' does not include a husband or a wife." Neither is this "nearest relation" intended to be a child of the intestate, for the children are provided for in the same section; and, besides, it has been held that children are not relatives. Hargadine v. Pulte, 27 Mo. 423.

Then, if the term "nearest relation" excludes the husband and wife and the children, as Castella Brown had her surviving a father and mother and sisters and a brother, let us see which one of these fall within the term. In Swasey v. Jaques, 144 Mass. 135, 10 N. E. 758, 59 Am. Rep. 65, Field, J., speaking for the court, said: "It is certainly difficult to distinguish between the expressions 'next of kin,' 'nearest of kin,' 'nearest of kindred,' and 'nearest blood relations'; and primarily the words indicate the nearest degree of consanguinity. * * *" And so we are of the opinion that "nearest relations" indicates the "nearest degree of consanguinity," and is equivalent to "next of kindred." Therefore the inquiry is, which is "next of kindred" to Castella Brown, her father and mother, or her sisters and brother? Chancellor Kent in volume 4 of the thirteenth edition of his Commentaries, p. 395, answers the question for us when he says: " * * * But the next of kindred to the intestate, I presume, must be the parents, if living. They are nearer of kin than brothers and sisters. * * *" And so we say that the parents of Castella Brown are her "nearest relations"; and now the question is, which one of them is her "nearest relation," Cynthia Tolliver, her mother, or George Brown, her father? The latter of whom is not before the court. In determining between the parents of Castella Brown as to which of them is her "nearest relation," and therefore entitled to take this inheritance, let us take a general view of the situation. In so doing we shall not exercise, although we have a very wide field of inquiry. In Davison v. Gibson, 56 Fed. 446, 5 C. C. A. 546, the court said: "The court, in making up its opinion of the law of the case, is not limited in its researches to legal literature. It may consult works on collateral sciences or arts or history, touching the topic on trial, and may appeal to the public archives for this purpose"—citing many authorities.

On August 11, 1852, the United States, pursuant to treaty made with the Creeks on February 14, 1833, by patent ceded to the Muskogee or Creek Nation in fee all the lands within the boundary heretofore claimed by that tribe within this state. That patent, in reciting said treaty, quotes: "Art. 3. The United States will grant a patent in fee simple to the Creek Nation for the land assigned said nation by this treaty of convention, whenever the same shall have been ratified by the President and Senate of the United States * * *"—and proceeds to convey the lands, "to have and to hold the same un-

to the said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned to them." Since then, as said in *Davison v. Gibson*, supra, "the Creek Nation has been long recognized by the United States as 'a domestic dependent nation' (*Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25), as a state in a certain sense, although not a foreign state or a state of the Union (*Holden v. Joy*, 17 Wall. 211, 21 L. Ed. 523), as a distinct community, with boundaries accurately described (*Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483), and as a domestic territory (*Mackey v. Cox*, 18 How. 100, 15 L. Ed. 299). The right of local self-government has been accorded to the Creek Nation from the earliest times. The laws and customs of the nation adopted for the government and protection of the members thereof by birth or adoption have never been interfered with by the United States. Rights acquired under these laws and customs have been respected and enforced."

Furthermore, it is agreed in this case: "(7) That the Creek Nation or tribe of Indians had a form of government republican in form, had a written Constitution providing for the three co-ordinate branches of government, to wit, the executive, judicial, and legislative, that the Principal Chief was the principal executive officer, that the national council was the legislative body, and that the Supreme Court and the district courts were the judicial bodies. (8) That the Creek Nation, as a political sovereignty, had a written and codified form of laws. * * * (9) It is also agreed that the Constitution of the Creek Nation, as in force at the times mentioned in the complaint under article 3 of the Constitution, as shown by section No. 1 is as follows: The supreme law-defining power in this nation shall be lodged in a high court, to be composed of five (5) competent, recognized citizens of the Muskogee Nation, who shall have attained the age of twenty-five years. They shall be chosen by the National Council for the term of four years, and shall be paid as provided for by law. (10) * * * There was, in fact, a legally organized and constituted Supreme Court of the nation, and that said Supreme Court of the Creek Nation. * * * Thus, although we see in the Creeks, at the time of the enactment of the statute under construction, a tribal form of government, with the fee to its lands in the tribe, yet we also see in them a keen appreciation of the rights of property, hedged about by safeguards of law suitable to their condition. We also see that there existed among them from the earliest times the rights of separate property in the wife. In *Davison v. Gibson*, 56 Fed. 446, 5 C. C. A. 546, the court further say: "In Col. Hawkins' History of the Creeks and Their Customs and Laws, published in the collections of the Georgia Historical Society (volume 3, pt. 1, p. 74) it is said: 'Marriage gives no right to the husband over the property of his wife,

and when they part she keeps the children and the property belonging to them.' * * * Mr. Schoolcraft makes substantially the same statement as Col. Hawkins, in reference to the customs and laws, on this subject of the Creek and some other nations in the Indian Territory." *Schoolcraft's History of the Indian Tribes*, pt. 1, p. 283.

Now let us see how, according to tribal customs, this property descends. Speaking of the tribal organization of the American Indian, "The American Race," by Daniel G. Brinton (1901), at page 45, says: "The gens is 'an organized body of consanguineal kindred.' * * * An indeterminate number of these gentes make up the tribe; * * * each gens * * * electing its own chieftain, and deciding on all questions of property * * * within its own limits. Marriage within the gens is strictly prohibited, and descent is traced and property descends in the female line only. This is the ideal theory of the American tribal organization, and we may recognize its outlines almost anywhere on the continent. * * * The same work (page 48) says: "Where maternal descent prevailed, it was she who owned the property of the pair, and could control it as she listed. It passed at her death to her blood relatives, and not to his. Her children looked upon her as their parent, but esteemed their father as no relation whatever." The same work (page 85), in speaking of the Chahta-Muskokis, says: "The gentle system, with descent in the female line, prevailed everywhere. The Creeks counted more than 20 gentes. * * * In the towns each gens lived in a quarter by itself, and marriage within the gens was strictly prohibited. * * * The chief of each town was elected for life from a certain gens, but the office was virtually hereditary, as it passed to his nephew on his wife's side, unless there were cogent reasons against it." In "A Migration Legend of the Creeks," by Albert S. Gatschet of the United States Bureau of Ethnology, Washington, D. C. (volume 1, p. 153), in speaking under the head "The Creek Government," says: "Among the Creeks, Seminoles, and all other Maskoki tribes descent was in the female line. Every child born belonged to the gens of its mother, and not to that of its father, for no man could marry into his own gens. In case of the father's death or incapacity the children were cared for by the nearest relatives of the mother." The same work (page 156) says: "Several gentes, with their families, united into one town or settlement, live under one chief, and thus constitute a tribe. * * * The town elects him for life from a certain gens. * * * When the miko dies the next of kin in the maternal line succeeds him, usually his nephew. * * * See, also, *Coll. Ga. Hist. Society*, vol. 1, p. 693. Also in *Coll. Ga. Hist. Socy.* p. 74, under the head of "Adultery," we find: "They cut off the hair of the woman, which they carry to the square in tri-

umph. If they apprehend but one of the offenders and the other escapes, they go and take satisfaction from the nearest relation."

In construing this statute (section 6), then, it will be seen that "nearest relation" is a term of peculiar meaning and great antiquity in the laws of that tribe, and in view of that fact, and that Castella Brown derived her inheritable blood from her mother, and not from her father, who was an intermarried noncitizen, would it be too much to attribute the intent of the lawmakers of that statute to be that the same should be so construed as to keep the property in the gens of the mother? We are fully persuaded that such construction was intended. Further, if these parties were both citizens, by blood, of the tribe, would it be too much to say that the "nearest relation," as between the father and mother of the intestate, was intended to be that parent on the part of whom the property descended or was derived and into whose gens it should go on descent cast? With this construction this section would follow closely the idea of descent contained in chapter 18, § 1, Comp. St. D. C., and would be, by supplementing it with the law of the forum at the time of descent cast (*Davison v. Gibson*, supra), in substance: "Sec. 6. Be it further enacted that if any person die without a will, having property and children, the property shall descend to the child or children and their descendants, of any, equally, and if no child or descendant, and the estate descended to the intestate on the part of the father, then to the father, and if no father living, then to the brothers and sisters of the blood of the father, etc. If the estate descended to the intestate on the part of the mother, then to the mother, and if no mother living, then to the brothers and sisters of the blood of the mother," etc.

We are therefore clearly of the opinion that the "nearest relation" in this case was intended to be Cynthia Tolliver, the mother of Castella Brown, the intestate, and that she is entitled, under section 6, to take the inheritance, unless the contention of the plaintiff in error *De Graffenreid* can be successfully maintained, and that is that Ben Reeves, the husband of Castella Brown, her surviving, is entitled to one-half of her allotment under: "Sec. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no heirs, and an heir's part if there should be other heirs in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner," which, he says, should be construed to read: "Sec. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no children, and a child's part if there should be other heirs in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner." He admits that Ben Reeves is an intermarried noncitizen of the

Creek Nation, and, in effect, that when section 8 was enacted such were not intended to take, but insists that, since that time, the Creek law has been changed, and permits such to inherit from the citizen wife.

In considering this construction, let us take another general view of the history of this tribe. After the issuance of the patent aforesaid, by the United States to the Creek Nation, the Creek people migrated from their homes in the East, and settled upon the lands therein described. For a long time they were comparatively free from intrusion, but in the course of time noncitizens sought to and did settle among them. After repeated futile efforts to exclude them by legislation, the National Council passed an act, which we find in the Compilation of the Creek Laws of 1890 (article 4, p. 66), which reads: "Sec. 1. No noncitizen shall have a right to reside in or to own any kind of property within the Muskogee Nation, except by permit, and any noncitizen, without a permit, who shall make any improvements within the Muskogee Nation, shall forfeit the same to the nation." This section shows in a marked degree the temper of the tribe as displayed towards noncitizens who had not intermarried with citizens thereof. In short, it is plain he had few rights that the tribal government felt called upon to respect. It seems that the rights of the intermarried noncitizens were somewhat more respected, for in that article we find: "Sec. 2. This article shall not be construed so as to interfere with persons who are intermarried with citizens of the Muskogee Nation, or so as to interfere with any rights guaranteed by treaty." Up to as late as October 28, 1893, the Supreme Court of the Creek Nation, in the case of *Edward Gibson v. J. P. Davison*, cited on page 19 of the record, "dismiss the case for want of jurisdiction of Edward Gibson," although at that time he was an intermarried noncitizen of the Creek Nation, and the husband of Julia Gibson, deceased. It was not until April 6, 1894, that the Creek courts ever asserted jurisdiction over the property, much less the persons of intermarried noncitizens, and that was by virtue of the act of that date, set forth on page 18 of the record, and recited in the agreed statement of facts herein. In the light of these facts let us see what act of the Creek Council, if one there be, admitted an intermarried noncitizen to share in the deceased wife's allotment.

Under the circumstances, we think that he who asserts the right should prove it, at least by fair intendment. But it would seem that the act of April 6, 1894, shows a recognition of certain rights theretofore acquired by intermarried noncitizens. In part, it says: "The jurisdiction of our courts shall extend to controversies over property and property rights acquired by intermarried noncitizens of our nation, who, by virtue of this intermarriage with citizens, acquired such property rights and privileges, * * *" and

would seem to refer to the act of the Creek Council, set forth in the Compilation of 1890 (page 66), supra: "Sec. 1. All noncitizens, not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have the right to live in this nation and enjoy all privileges enjoyed by other citizens, except participation in the annuities and final participation in the lands." Now, whatever might have been within the purview of the Creek Council at the time of the enactment of sections 6 and 8 of their statutes of descent and distribution, this section 1, perhaps, and of necessity the act of April 6, 1894, supra, was enacted in view of fast approaching allotment, and gives, without reserve, to the intermarried noncitizen, "all privileges enjoyed by other citizens, except participation in the annuities and final participation in the lands." This act was intended to and did extend to the intermarried noncitizen the right to inherit under tribal law, and put him on the same footing, under that law, with all other citizens, except, as so aptly expressed by the learned judge of the United States Court for the Western District of the Indian Territory in the case of *Edward Porter et al. v. Eck E. Brook*, "that he shall not be counted in making up the great fraction which shall express what share of the soil shall belong to each citizen; that is, he shall not receive an allotment."

In holding this we are not unmindful of the two cases decided by the Supreme Court of the Creek Nation, set forth in full in the very able brief of *Iowa Land & Trust Company*, especially the *Rogers Case* (decided October 21, 1895), cited on page 10, and which passed upon the rights of *John T. Rogers*, an intermarried white man, under the Creek law, by virtue of descent cast by his wife in 1881. The court in that case held that he was "not an heir at law" of his wife, that such "must necessarily be a bona fide citizen entitled to all the rights, privileges, and immunities of our body politic," and that "no citizen by marriage can acquire such rights." But since that time, as shown by section 1, supra, of the Compilation of 1890, as the Creek Council passed an act expressly providing that intermarried noncitizens "shall have the right to live in this nation and enjoy all the privileges enjoyed by other citizens, except," etc., we think it thus vested in the intermarried noncitizen the prerequisites mentioned in that decision to constitute an heir at law, and that *Ben Reeves* falls within the terms thereof. In this we are borne out by a later decision of the Supreme Court of the Creek Nation. This case is quoted in full on page 19 of the record. It was decided by that court in 1893, only a short time after section 1, supra, was put in compilation, and passed upon the rights of an intermarried noncitizen to inherit from his citizen wife, who had died in 1891. It appears in that case that section 1 was un-

der construction by the Supreme Court of the Creek Nation, and was certainly so by the United States Circuit Court of Appeals, where the case was afterwards tried. The opinion of the Supreme Court of the Creek Nation in that case, "relative to *Edward Gibson*, finds that he is not a bona fide citizen of the M. N. [Muskogee Nation], and simply entitled to his own property, and an heir's part of the *Julia Gibson* estate; therefore, dismiss the case for want of jurisdiction of *Edward Gibson*." This controversy, to be sure, was over personal property, but the construction was made by that court in the face of impending allotment, which came shortly following the creation of the *Dawes Commission* in 1893, and was, no doubt, made with full knowledge of its far-reaching effect. And, furthermore, when in the "Original Agreement" the Creek people said that the allotments made thereunder should descend under the laws of descent and distribution of the Creek Nation, it necessarily follows that they meant that therein the intermarried noncitizen husband should receive out of his citizen wife's allotment an heir's part under section 1, supra, pursuant to the ruling of the Supreme Court of the tribe in the *Gibson Case*. It is well settled that: " * * * Whenever Congress in legislating for the District of Columbia or the territories has borrowed from the statutes of a state provisions which had received in that state a known and settled construction before their enactment by Congress, that construction must be deemed to have been adopted by courts, together with the text which it expounded, and the provisions must be construed as they were understood at the time in the state." 26 Am. & Eng. Enc. of Law, p. 702. And as there is no reason why the laws of the Creek Nation and the decisions of its Supreme Court should be placed upon a different footing from those of any other state or territory of the Union (*Mackey et al. v. Cox*, 18 How. 100, 15 L. Ed. 290), we are of the opinion that when Congress, by the terms of the "Original Agreement," adopted the laws of descent and distribution of the Creek Nation, supra, it, at the same time, adopted the construction placed thereon prior thereto by the Supreme Court of that nation, and that we are bound by that construction.

But that decision simply holds that he is entitled to an "heir's part," and it yet remains for us to determine, if we can, what is meant by an "heir's part." Since section 8, supra, was not intended, then, at the time it was enacted, to cover intermarried noncitizens, but was made to do so by section 1, supra, and the decision of the Supreme Court of the Creek Nation, let us first get what light we can from the face of these sections construed with section 6, before attempting its final construction. In other words, let us look to the face of all three, with a view of construing them all together. Construing the word "heir" or "heirs," as used in sec-

tion 8, in its technical sense, and understood by the profession generally, the intent would appear on its face to be to postpone the inheritable right of the husband until after that of the remotest heir of the blood of the wife. It would thus seem that he was only intended to take one-half of the estate to avoid an escheat, if such there were under the Creek law. Or, if there should be discovered even the remotest heir or heirs of the blood of the wife, the husband should share it with him or them in equal parts. This intent might be plausible if the statute was enacted to apply alone to the inheritable right of an intermarried noncitizen husband, but when we know that it was intended to protect also the inheritable right of a citizen husband, and the inheritable right of a citizen wife, we cannot believe that such was the intention.

What, then, is meant by those words in that section, and what did the Supreme Court of the Creek Nation in the Gibson Case mean by an "heir's part?" It is clear that they were not so used in their technical sense, but in the common acceptation of those words. But, suppose they were used in their technical sense, who are heirs? Bouvier's Law Dictionary says an "heir" is "he who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements, or hereditaments immediately upon the death of his ancestor." What law? The law of the country where the land is situated. In this case the Creek law. "An heir is whoever by the laws of the country hath right to inherit or succeed to the estate immediately upon the death of an owner, and is different as the law varies in different countries." *Larabee v. Larabee*, 1 Root (Conn.) 555. What right have we to believe that there are heirs under the Creek law other than is named in sections 6 and 8 under construction, and which is agreed to be the law of descent and distribution of the Creek Nation in force at the time of descent cast in this case? None whatever. Then who are denominated "heirs" under that law? The children, the "nearest relation" (in this case the mother), and the husband or wife of the deceased. Then, in this case, as there are no children, the "nearest relation" and this husband, it seems, would share equally this estate, since he is to have "one-half of the estate if there are no other heirs, and an heir's part if there should be other heirs." This is using the word "heir" as interchangeable with the word "heirs." In *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. 387, the court said: "The word 'heir' is 'nomen collectivum,' embraces all legally entitled to partake of the inheritance, and is interchangeable with the plural term 'heirs.'"

But, let that be as it may, we are clearly of the opinion that those words were not used in any technical but in their common sense, and that the word "heir" or "heirs" were used in the sense of "child" or "chil-

dren." "Child" and "heir" in common speech are often used as synonymous. *Smith v. Sheehan*, 87 N. H. 344, 39 Atl. 332. The technical distinction between the terms is not to be resorted to in construction except in nicely balanced cases. *Appeal of Lockwood*, 55 Conn. 157, 10 Atl. 517. In *Butler v. Huestis et al.*, 68 Ill. 602, 18 Am. Rep. 589, the court say: "More latitude has been given to the construction of wills than deeds, and there is the highest authority for saying, to effectuate the clear intention of the testator, we may construe the words 'heir,' 'issue,' 'children,' interchangeably"—citing *Braden v. Cannon*, 1 Grant Cas. (Pa.) 60; *Bowers v. Porter*, 4 Pick. (Mass.) 198; *Eby v. Eby*, 5 Pa. 461. 5 Am. & Eng. Enc. of Law (page 1093) says: "But where it is necessary to give effect to the instrument, or where there are other words showing that 'children' was used in the sense of 'heirs,' the term will be construed as a word of limitation equivalent to 'heirs' or 'heirs of the body'—[citing authorities]. So the term 'heirs' has been construed as equivalent to 'children'—citing authorities.

As stated, section 8, supra, is found in *Perriman's Compilation of the Creek Laws of 1890*, in chapter 10, under the head of "Administration of Property." In that same chapter we find: "Sec. 3. The administrator shall, at all times, be required to make and provide liberal means for the support and education of all heirs of the deceased, to make any trade that may be of advantage to such estate, and to advise and direct the affairs of such heirs until they shall have become of age, according to the laws of this nation, or until such heirs shall marry, in which event the administrator shall turn over to such heirs of his or her inheritance everything connected with the estate that may have been placed in his care, or its equivalent in money or other property." As these sections are in *pari materia*, let us ascertain in what sense the word "heirs" was used in the latter, as it is evident that they were used in the same sense in the former section. The rule is: "In arriving at the intent of the Legislature in enacting a statute, not only must the whole statute and every part of it be considered, but where there are several statutes in *pari materia*, they are all, whether referred to or not, to be taken together, and one part compared with another in the construction of any material provision. Statutes are in *pari materia* which relate to the same person or thing, or to the same class of persons or things. * * *" 26 Am. & Eng. Enc. of Law, p. 620. Section 3 requires the administrator to "make and provide liberal means for the support and education of all heirs of the deceased." This solicitude would scarcely be displayed except for the children of the deceased or the children of a deceased child.

We are therefore of the opinion that by the first use of the word "heirs" in section 8, the

word "children" was intended, and that by the use of the word "other" before "children" was intended to include grandchildren or the descendants of any child living at the death of the intestate, so that it should read in connection with:

"Sec. 6. Be it further enacted that if any person die without a will, having property and children, the property shall descend to the child or children and their descendants, if any, equally, and if no child or descendants, and the estate descended to the intestate on the part of the father, then to the father, and if no father living, then to the brothers and sisters of the blood of the father, etc. If the estate descended to the intestate on the part of the mother, then to the mother, and if no mother living, then to the brothers and sisters of the blood of the mother: Provided."

"Sec. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no children or their descendants, and a child's part, if any such there be, in all cases where there is no will. The husband surviving shall inherit of the wife in like manner."

Hence, we are of the opinion that Cynthia Tolliver is entitled to an undivided one-half interest in the allotment in controversy, and Ben Reeves, husband of Castella Brown, her surviving, the remaining one-half, unless the last remaining contention of the Iowa Land & Trust Company can be maintained, and, that is, that Ben Reeves, by murdering his wife, Castella Brown, was precluded from "qualifying" as her heir, and that the appellant De Graffenreid by conveyance from him took nothing.

It is not contended that Ben Reeves murdered his wife for the purpose of obtaining possession at once of her property, or his share of it, by inheritance. The record simply discloses that he murdered her, was duly convicted, and is now serving a sentence of life imprisonment therefor. In fact the record would seem to negative any such presumption, as the deed from him to De Graffenreid was made some two years thereafter, and after he had entered upon the service of his sentence. But if it were true that he murdered her for the purpose of at once getting possession of her property by inheritance, we do not think that would disqualify him from inheriting. 14 Cyc. p. 61, says: "By the weight of authority, in the absence of express provisions excluding from inheritance an heir murdering the intestate, the operation of the statute of descent is not affected by the fact that the ancestor was murdered by the heir apparent in order to obtain the inheritance at once, and therefore an heir who murders his ancestor in order that he may inherit the estate at once is not disqualified from taking"—and authorities cited. That being the rule, when the killing is done for the purpose of inheriting, it follows, a fortiori, that the same should be the rule

when no such intention appears, and therefore we hold that Ben Reeves, because of the fact that he murdered his wife, Castella Brown, is not disqualified from inheriting from her under the Creek law of descent and distribution, and therefore the plaintiff in error De Graffenreid took, by his conveyance set forth in this cause, his entire interest in the allotment of said Castella Brown.

It follows that the judgment of the lower court should be reversed and remanded, with instructions to enter judgment in conformity with this opinion. All the Justices concurring.

CAMP et al. v. NEUFELDER et al.

(Supreme Court of Washington. May 15, 1908.)

1. CONTRACTS—PERFORMANCE—APPROVAL OF ARCHITECT—WITHHOLDING APPROVAL.

Where plaintiffs contracted to furnish certain materials to repair a building, the work to be performed to the satisfaction of an architect named, who could approve or reject any and all work, and the specifications provided that all sidewalk lights should be of the J. make or equal, and plaintiffs asked the supervising architect for permission to use other lights than the J. lights, which they claimed were equally good, but the architect arbitrarily refused to permit such substitution and directed them to put in only the J. make of lights, plaintiffs could treat the directions of the architect as a direction by the owner; and while they might have put in lights equal to the J. lights, and recovered on the contract by showing that the architect's objections thereto were arbitrary, they could also obey the architect's instructions, and recover any excess price which they were required to pay for the J. lights over the price for which they could have purchased lights equally good.

2. SAME—INSTRUCTIONS—BUILDING CONTRACTS—OPTION TO USE APPLIANCES.

Where plaintiffs contract to furnish certain materials in repairing a building, and the specifications required that the sidewalk lights be of certain dimensions and of the J. make or equal, defendants had the option to use the J. lights or any other lights equal to them, and the installation of either would be in compliance with the contract.

Mount and Rudkin, JJ., dissenting.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by E. H. Camp and H. Teroller, co-partners, against E. C. Neufelder and others to foreclose a lien on a building. From a judgment for defendants, plaintiffs appeal. Reversed and remanded for new trial.

Carkeek & McDonald, for appellants. Roberts & Hulbert and Kerr & McCord, for respondents.

FULLERTON, J. On February 15, 1905, the respondent, Neufelder, entered into a contract with the respondent F. McLellan & Co., by the terms of which the latter agreed to furnish the necessary materials, and reconstruct and remodel, according to plans and specifications agreed upon, a certain building owned by the former situated in the city of Seattle. F. McLellan & Co. sublet

the furnishing and putting in place of a part of the required materials to the appellants Camp and Teroller, and among the enumerated articles to be furnished and put in place by them were certain prism lights. These were described in the specifications in the following language: "All sidewalk lights to be 3x3" reflecting prism lens set in cement; all frames to be what is known as bar-lock construction. All joints must be made and guaranteed water tight. These lights shall be of the W. B. Jackson make, or equal, and shall be constructed to carry a safe load of 350# per sq. ft." The contract provided that the work must be performed to the satisfaction of the architect named in the contract, who had the right to approve or reject any and all work. When the appellants in the course of their work reached the sidewalk, they informed the architect that they had several prism lights equal to the W. B. Jackson light which they wished to submit to the judgment of the architect, that a selection might be made therefrom. The architect refused to examine or consider them, stating, in effect, that there were no prism lights equal to the W. B. Jackson light, and that no other or different light would be accepted or approved by him. The appellants thereupon put in the W. B. Jackson lights, at a cost, as they claim, of some \$600 more than lights equal to the W. B. Jackson lights would have cost them, and subsequently claimed this amount as an extra, filing a lien upon the building to secure the payment of the same. This action was instituted to foreclose the lien so filed. At the trial the court refused to allow the appellants to show that there were lights equal to the W. B. Jackson light that could have been procured and put in by them at a saving to themselves, holding that, since the lights were actually put in and were lights permitted by the contract, no right of action accrued to them to recover the extra costs. Judgment was entered accordingly, from which this appeal is taken.

The respondents present the case in this court on somewhat different grounds from that taken by the trial judge. Although they do not entirely abandon the position taken by him, they contend (1) that a proper construction of the specifications calls for the installation of the W. B. Jackson lights if they are procurable, and the substitution of others only in the case that these lights cannot be obtained; and (2) that, since the contractors were bound to complete the building to the satisfaction of the architects, his decision on the question of the character of the lights to be put in was final, and the contractors for that reason have no cause of complaint. But it has seemed to us that neither the reason given by the trial judge nor the reasons suggested by the respondents justify the judgment entered. The mere fact that the contractors put in the W. B. Jackson lights at the instigation of the architect does

not estop them from claiming of the owner the loss sustained thereby. The architect, while he stood in the relation of umpire in some of his aspects under the contract, stood in the relation of agent for the owner in this instance; that is to say, he was the person selected by the owner to determine the character of the material that should go into the work, and in this respect was the owner's agent, and in the performance of this duty was as much bound to act fairly and impartially as the owner would himself be bound had there been no selection of an intermediary. The contractor, therefore, had the right to treat the direction given by the architect as a direction given by the owner, and can recover any loss suffered because thereof if the direction was so far arbitrary as to be without the terms of the contract. No doubt the contractors could have very properly put in lights equal to the W. B. Jackson lights, and recovered on the contract by showing that the architect's objections thereto were arbitrary, and not in the exercise of an independent and honest judgment, but this was not their only remedy. They were justified in obeying the architect's instructions, and in seeking to recover for the loss sustained thereby.

Nor can we agree that the respondents' interpretation of this clause in the specifications is correct. Manifestly the appellants were given the option either to put in the W. B. Jackson lights, or lights equal to the W. B. Jackson lights; and, this being so, the installation of either would be a compliance with the contract.

The last objection made by the respondents, while of more moment, seems to us also to be without foundation. While it is true that the contractors were bound to perform to the satisfaction of the architect, yet it was equally true that they had a right to demand that he exercise an independent and honest judgment, and that he should not arbitrarily refuse to consider or determine matters submitted to his judgment. If the contractors did in fact produce lights equal to the W. B. Jackson light, they had the right, not only to install them, but the right to have the architect's approval of them before they were installed, and it was the architect's duty to give them the benefit of his honest judgment in passing upon the character of the lights produced. If he did not do this, but arbitrarily refused to consider or pass upon them, and arbitrarily directed that the W. B. Jackson lights be put in, his conduct was so far a fraud upon the rights of the contractors as to entitle them to submit to the courts the question whether or not the lights they desired to substitute were lights proper to be installed under the contract, and whether or not they have suffered loss by the architect's action.

The judgment is reversed, and the cause remanded for a new trial.

HADLEY, C. J., and CROW, ROOT, and DUNBAR, JJ., concur.

MOUNT, J. (dissenting). The appellants in this case did what they agreed to do for a fixed price. They did no more. But they seek now to claim a greater price and to foreclose a lien for the excess, because they could have furnished another make of prism light at a cheaper price. The mere statement of the proposition ought to be sufficient to affirm the judgment. But, assuming that the appellants had a right under the contract to substitute some other light for the "Jackson light," one equal to that light, the contract does not provide that the appellants shall decide upon the substitute, but expressly provides that the work shall "be performed to the satisfaction of the architect." Whether the architect is the agent of the owner makes no difference here. If the agreement had provided that the work must be performed to the satisfaction of the owner, he would then decide which light was satisfactory, and he might do so arbitrarily as the architect did, so long as he did so in good faith. *Childs Lumber & Mfg. Co. v. Page*, 28 Wash. 128, 68 Pac. 373; 24 Am. & Eng. Enc. of Law (2d Ed.) p. 1236. It is clear to my mind that the respondents desired a certain kind of building with certain named sidewalk lights, "W. B. Jackson make, or equal," and that the contract reserved the right to the architect to be satisfied when some light other than the particular one specified was offered to be substituted. The contract was entered into, of course, upon the basis of the cost of the "Jackson make," and the respondents had a right to that particular light, or to be satisfied with some other make.

The judgment, in my opinion should be affirmed. I therefore dissent.

RUDKIN, J., concurs.

FARNSWORTH v. TOWN OF WILBUR et al.

(Supreme Court of Washington. May 11, 1908.)

1. INJUNCTION — JURISDICTION — MANDATORY AND PROHIBITIVE POWERS.

The powers of a court of equity to grant injunctive relief are mandatory, as well as prohibitive, so that the court by mandate may compel the undoing of those acts that have been illegally done, as well as prohibit the doing of such illegal acts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 4.]

2. SAME—CONSUMMATED TRANSACTIONS.

Where suit was brought by a taxpayer to restrain a town and its officers from making an attempted compromise and settlement of a judgment in favor of the town, it was error to grant a decree restraining the execution of such compromise and settlement after it had been carried out, but the court, though the complaint only asked preventive relief, should have permitted its amendment to conform to the proof, and then

entered a decree setting aside such attempted compromise and settlement, and restraining its consummation.

3. MUNICIPAL CORPORATIONS—TOWN COUNCIL—COMPROMISE OF CLAIM—POWERS.

While a town council may legally compromise doubtful or disputed claims while acting in good faith and with ordinary discretion, they cannot, under the guise of a compromise, surrender a valuable claim where there is no longer room for a substantial controversy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 2181.]

Appeal from Superior Court, Lincoln County; W. T. Warren, Judge.

Action by E. L. Farnsworth against the town of Wilbur and others. Decree for complainant, and defendants appeal. Reversed, with instructions.

E. F. Scarborough and Neal, Sessions & Myers, for appellants. Merritt, Hibschman, Oswald & Merritt, for respondent.

FULLERTON, J. This is an action for injunctive relief. It was tried upon the following agreed statement of facts: "(1) That the town of Wilbur is a municipal corporation of the state of Washington, organized and existing as a city of the fourth class under and by virtue of the laws of the said state relative to municipal corporations.

"(2) That the defendants L. Lewis, W. W. Howells, F. T. Bump, W. J. Browne, and James A. Muir are the duly elected, qualified, and acting members of the town council of the town of Wilbur.

"(3) That the defendant Peder Faldborg is the duly elected, qualified, and acting town treasurer of said town of Wilbur.

"(4) That on or about the 13th day of March, 1906, judgment was entered by the superior court of the state of Washington in and for the county of Lincoln, in an action wherein the defendant the town of Wilbur was the plaintiff, and wherein one J. E. Nave one E. H. Lewis and one C. A. Person were defendants, for the sum of \$1,000 and costs, and that thereafter the said J. E. Nave, E. H. Lewis, and C. A. Person duly appealed to the Supreme Court of the state of Washington from the judgment aforesaid. That on the 9th day of October, 1906, the said appeal was by the said Supreme Court dismissed, and that the said judgment was at the time of the dismissal of the appeal a valid, legal, and binding claim against the said J. E. Nave, E. H. Lewis, and C. A. Person to which there was no further defense of any nature, and said judgment still remains a valid, legal, and binding claim against said defendants J. E. Nave, E. H. Lewis, and C. A. Person, unless it has been satisfied, settled, and discharged by reason of the facts hereinafter set forth, and that no part thereof has been paid, except the sum of \$290.95, as hereinafter set forth. That an execution has been issued by the clerk of the superior court of the state of Washington for said county upon the judgment aforesaid, and that said execution

is now in the hands of the sheriff of Lincoln county for the satisfaction of said judgment.

"(5) That on the 21st day of November, 1906, at a regular meeting of the town council of the town of Wilbur, composed of the defendants L. Lewis, W. W. Howells, F. T. Bump, W. J. Browne, and James A. Muir, a resolution was introduced, seconded, and passed by the said defendants, to the effect that the said judgment should be satisfied and discharged upon the payment by the said defendants in the action wherein the judgment was entered of the costs and expenses therein incurred by the said town of Wilbur, aggregating the sum of \$290.95, and that the said town council and the defendants above named as members of the said council then and there agreed with the said J. E. Nave, E. H. Lewis, and C. A. Person to accept from them in full satisfaction of the said judgment as a full discharge of all their liability to the said town of Wilbur under said judgment the sum above referred to and amounting to \$290.95, as aforesaid.

"(6) That the said J. E. Nave, E. H. Lewis, and C. A. Person, in pursuance of the resolution of the said town council of the said town of Wilbur, hereinbefore mentioned, paid to the treasurer of said town, and the treasurer accepted from the said defendants, the sum of \$200, and the said defendants paid to the clerk of the above-named court the sum of \$90.75 in full satisfaction and discharge of the said judgment, and thereafter the treasurer of the said town council of the said town of Wilbur paid the said sum of \$200 into the treasury of the said town of Wilbur, which was thereafter used and expended by said town in its usual and ordinary course of business, and that the said town council of the said town of Wilbur has instructed the sheriff of Lincoln county, Wash., not to proceed under the execution placed in his hands referred to in paragraph 5 of the plaintiff's complaint herein.

"(7) That the plaintiff is a resident and taxpayer of the said town of Wilbur, and pays annually to the said town of Wilbur large sums of money as taxes, and that the said settlement of the said judgment by the defendant, as hereinbefore mentioned, will increase the taxes of this plaintiff and all other taxpayers of the said town of Wilbur to the extent of the reduction made on this judgment by said town council.

"(8) That the said J. E. Nave, E. H. Lewis, and C. A. Person are the owners of property in Lincoln county not exempt from execution of the value of at least \$1,200."

On the facts so stipulated the trial court held that the town council was without power to settle and satisfy the judgment on the terms recited in the resolution, and entered a decree as follows: "It is ordered, adjudged, and decreed that the defendants L. Lewis, W. W. Howells, F. T. Bump, W. J. Browne, James A. Muir, and Peder Faldborg, and their successors and each and all of them be,

and they are hereby, perpetually enjoined from making any settlement with J. E. Nave, E. H. Lewis, and C. A. Person upon the judgment and claim involved in this action for any sum whatsoever less than the full amount due to said town of Wilbur under said judgment; that they and their successors and each of them be perpetually enjoined from carrying out the agreement made with said Nave, Lewis, and Person for the settlement of said judgment for less than is due thereon to the defendant, the town of Wilbur; that they and each of them and their successors in office be, and they are hereby, perpetually enjoined and restrained from interfering in any manner whatsoever with the sheriff of Lincoln county in his efforts or attempts to proceed under the execution issued in said action; and that the said town of Wilbur, the town council of said town, the defendants above mentioned as councilmen, and their successors in office be, and they are hereby, required and commanded to have an execution issued on the said judgment and to take all other necessary steps and proceedings to collect in full all sums due to said town of Wilbur under and by virtue of said judgment against J. E. Nave, E. H. Lewis, and C. A. Person, and that they proceed immediately to collect for the said town of Wilbur and pay into the treasury of said town all sums due to said town in and by virtue of said judgment, to which defendant excepts and exception allowed."

From the judgment so entered, the town and its officers appeal.

In this court the appellants make two principal contentions: First, that the court was without power to enjoin a transaction that the proofs showed had been then committed; and, second, that a municipal corporation in this state has power and authority to compromise and satisfy a final judgment in its favor by taking a part for the whole, even though the judgment debtor has property out of which the judgment can be made on execution.

The judgment is irregular. The acts which the appellants were enjoined from committing were performed at the time the judgment was entered as fully and completely as the parties were capable of performing them, and the proper judgment would have been one vacating and setting aside the attempted compromise and settlement, and restraining the parties from carrying out the agreement. Such a judgment is within the powers of the superior court to enter when sitting as a court of equity. The powers of the court to grant injunctive relief are mandatory as well as prohibitive. It may by its mandate compel the undoing of those acts that have been illegally done, as well as it may by its prohibitive powers restrain the doing of illegal acts. Nor was it material in this case that the complaint asked for preventive relief rather than for a mandatory injunction vacating and setting aside what had

been done. The plaintiff based his complaint for relief on the facts then in his possession. He did not know that the acts contemplated had been consummated. After the facts developed he was entitled to amend his complaint so as to make the pleadings and proofs correspond had objection been then taken as to its sufficiency. No such objection having been taken, this court will treat it as sufficient.

The second contention is of more difficulty, but we think the court rightly held that the attempted settlement was beyond the powers of the town council. It is true the council has the exclusive management of the fiscal affairs of the town, and must be accorded a somewhat wide discretion as to the manner in which it will conduct such affairs, yet we think this power does not enable them to give up to third persons the actual property of the town. No doubt the town council may legally compromise doubtful or disputed claims where they act in good faith and with ordinary discretion, but they cannot under the guise of a compromise surrender up valuable rights or claims over which there is no longer room for a substantial controversy. Such an attempt is a gift rather than a settlement of a doubtful or disputed claim, and gifts to private individuals are beyond the powers of the town.

For the irregularity first mentioned, however, the judgment must be reversed, with instructions to modify it in the particulars mentioned. It will be so ordered.

HADLEY, C. J., and CROW, MOUNT, and RUDKIN, JJ., concur.

RYNO v. SNIDER.

(Supreme Court of Washington. May 14, 1908.)

1. TAXATION—TAX TITLES—ACTIONS TO SET ASIDE TAX FORECLOSURE—NECESSARY PARTIES—RECORD OWNER UNDER TAX DEED.

Where a delinquent tax certificate is foreclosed by B., the owner thereof, even if the foreclosure and tax deed are actually void, a sale to the purchaser and a conveyance by him to S. would amount to an equitable transfer of the tax certificate lien to S., who would thereby become the equitable assignee of B.; and where the tax judgment was regular on its face, and the tax deed and conveyance to S. were of record when proceeding to vacate the foreclosure judgment was begun, and S. had no notice of such proceedings, an order therein vacating the foreclosure judgment is void as to S. notwithstanding notice to B.'s attorney.

2. SAME—ACTIONS TO TRY TAX TITLE—PLEADING—ALLEGATION OF TENDER OF TAXES, ETC.—NECESSITY—STATUTORY PROVISION.

Ballinger's Ann. Codes & St. § 5679 (Pierce's Code, § 8734), providing that, in actions for the recovery of land sold for taxes against the person in possession, the complainant must state that all taxes, etc., paid by the purchaser at tax sale, his assignees or grantees, have been fully paid or tendered and payment refused, contemplates that a tender shall be made to such purchaser or his successor in interest so that he may refuse the tender or avoid litigation by accepting it; and, while it is proper to pay to the treas-

urer any delinquent taxes due to the county or to the holder of a certificate of delinquency not yet foreclosed, a complaint in ejectment against the grantee of a purchaser at a tax sale which fails to allege tender to the defendant fails to state a cause of action.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Ejectment by Harry Ryno against Anton Snider. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with instructions.

Byers & Byers, for appellant. A. O. MacDonald, for respondent.

CROW, J. Action in ejectment brought by Harry Ryno against Anton Snider to recover possession of real estate in King county. After alleging that he had on August 31, 1906, acquired the fee-simple title, that he then became entitled to possession, and that the defendant, being then in possession, has ever since wrongfully withheld the same; the plaintiff further alleged "that the defendant herein claims title to the said real estate by reason of a tax title, which said tax title is void and worthless; that plaintiff's grantors have paid to the county treasurer of King county, Wash., the officer entitled by law to receive the same, the full amount of the taxes, interest, and cost due to the said defendant by reason of the said tax title, and which are a lien on the said property." A demurrer to the complaint having been overruled, and the issues having been completed by answer and reply, findings of fact and conclusions of law and judgment were made and entered in favor of the plaintiff, from which the defendant has appealed.

Appellant first contends that the trial court erred in overruling his demurrer to the complaint, and in denying his motion for a nonsuit. In his complaint the respondent alleged that the appellant claimed the land under a void tax title; but he failed to allege that prior to the commencement of this action he had paid or tendered to the purchaser at the tax sale, or to the appellant as his grantee, the taxes, penalty, interest, and costs paid by them or either of them in acquiring their tax title, or that such payment had been refused. On the trial there was no evidence showing or tending to show that any such payment had been made or tendered to the appellant or his predecessor in interest. The evidence admitted does show that one J. E. Brady had foreclosed a delinquent tax certificate on the land; that under the foreclosure judgment the county treasurer had sold the land to one H. B. Kennedy, to whom he executed and delivered a tax deed; that Kennedy afterwards conveyed to the appellant, Anton Snider; that the respondent claims the foreclosure proceedings were void; that more than two years after the execution and delivery of the tax deed to H. B. Kennedy, and more than one year after appellant

had acquired his title thereunder, one James McNaught, named as owner in the original certificate of delinquency, not a party to the foreclosure proceeding, but who claimed that he still owned the land, upon notice to the attorney of J. E. Brady, and without notice to the appellant Anton Snider, made in the foreclosure action an application for and obtained an order vacating a foreclosure decree; that neither the former attorney of the original plaintiff, J. E. Brady, nor any other person, appeared to resist such application; that McNaught then paid to the treasurer of King county the taxes, penalty, interest, and costs included in the judgment, but that he made no tender thereof to Kennedy or appellant; and that the respondent by mesne conveyances thereafter deraigned title from McNaught. There is no evidence that appellant at any time prior to the commencement of this action had any knowledge, actual or constructive, that McNaught had made application for and obtained an order vacating the tax foreclosure and deed, or had made any payment to the treasurer.

The respondent contends that in cases of this character the county treasurer is the officer, who, under the law, is entitled to receive delinquent taxes, penalty, interest, and costs when a foreclosure decree and sale have been vacated, and that it was only necessary to make payment to him. The allegations of the complaint as well as the evidence show that respondent knew the appellant was in possession of the land, claiming title to the same under the tax foreclosure, sale, and deed. Respondent's predecessor knew that the appellant's predecessor, Kennedy, could not have obtained his tax deed without payment of his bid at the tax sale, which in this instance was the full amount of the judgment. Such payment satisfied the judgment held by Brady, the original plaintiff, who thereafter ceased to have any interest in the taxes, the judgment, or the land. If the foreclosure and tax deed were actually void, the sale to Kennedy and his conveyance to appellant amounted to an equitable transfer of the tax lien to appellant, who thereby became the equitable assignee of Brady, and notice of any application to vacate the judgment should have been served upon him which was not done. *Smithson Land Co. v. Brautigam*, 16 Wash. 174, 47 Pac. 434; *Investment Securities Co. v. Adams*, 37 Wash. 211, 79 Pac. 625. Respondent's predecessor, McNaught, had notice of such equitable assignment of the tax lien to the appellant before he made application for the vacation of the judgment, as the tax deed to Kennedy and his deed to appellant were then of record. The satisfaction of the judgment by the tax sale was also notice that Brady had ceased to be a party in interest. Under such circumstances notice to Brady or his attorney was without validity, as it in no manner affected any

rights of the appellant. The tax judgment which was regular upon its face recited that summons had been regularly and duly served upon the defendants as the law in such cases required. The order of vacation, having been entered without notice to appellant, was as to him void. The direct result of such a condition of the record is that the present action is now being prosecuted to obtain possession of land which has been sold for taxes, and is held by appellant under an alleged tax title. Section 5679, Ballinger's Ann. Codes & St. (Pierce's Code, § 8734), provides that, in an action for the recovery of lands sold for taxes against the person in possession, the complainant must state that all taxes, penalties, interest, and costs paid by the purchaser at tax sale, his assignees or grantees, have been fully paid or tendered, and payment refused. As above stated, this action has been brought to recover possession of land sold for taxes. It is prosecuted against appellant in possession as grantee of Kennedy, who, as purchaser at the tax sale, paid all taxes, penalty, interest, and costs for which the tax judgment had been entered. Section 5679, supra, clearly contemplates that under such circumstances a tender shall be made to such purchaser or his successor in interest, so that he may have an opportunity either to refuse the tender or to avoid litigation by accepting the same. It does not contemplate that he may be subjected to the costs and annoyance of an action for possession, in which the validity of his tax title will be questioned, without any previous tender having been made to him, which he might at his election have accepted. In *Merritt v. Corey*, 22 Wash. 444, 61 Pac. 171, in passing upon sections 5678 to 5680, inclusive (Ballinger's Ann. Codes & St. [Pierce's Code, §§ 8733-8735]), this court said: "By these provisions of the statute a payment of the taxes, penalties, interest, and costs paid by a purchaser, or his assignor or grantor, for lands sold for taxes, or a tender of such payment, is made a condition precedent to the right to institute an action for the recovery of land so sold. * * * Where, as it appears here, the tax was a just charge against the land, and the sale is sought to be set aside because of fatalties in the proceedings leading up to the sale, it is an equitable rule, and within the power of the Legislature to require the amount paid to the state to be repaid or tendered to the purchaser as a prerequisite to the right to maintain the action." In *Moyer v. Foss*, 41 Wash. 130, 83 Pac. 12, we again said: "Inasmuch, therefore, as it is not made to appear that the tax was void on its face, the appellants cannot maintain an action to recover the land sold to satisfy the tax without first paying or tendering to the person claiming under the tax title the amount of the tax with interest, penalties, and costs for which the land was sold." Under the sections above mentioned it would be proper

to pay to the treasurer any delinquent taxes due to the county, or to the holder of a certificate of delinquency not yet foreclosed; the same being a payment of delinquent taxes which had not yet been recovered by either of them through the medium of a tax foreclosure and sale. In this instance the judgment in favor of J. E. Brady had been fully satisfied, and neither he nor the county had any further claim. Any sum necessary to be paid under the statute as a condition precedent to the prosecution of this action for a recovery of the land should have been tendered to the holder of the title under the tax deed, or some good and sufficient reason should have been alleged and shown for failing to make such tender. For want of any allegation of a tender to the appellant, the complaint failed to state a cause of action; and, as its allegations were not afterwards aided or supplemented by proof, the appellant's motion for a nonsuit should have been granted.

The judgment is reversed, and the cause remanded, with instructions to enter a nonsuit and dismiss the action.

HADLEY, C. J., and MOUNT, ROOT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

HERNDON v. SALT LAKE CITY.

(Supreme Court of Utah. April 23, 1908.)

1. PLEADING—ALLEGATIONS—CONCLUSION OF LAW—ADMISSIONS.

An allegation in a complaint that a city was charged with the duty of maintaining streets in a safe condition for public travel is a mere conclusion of law, and the city is not bound by it by reason of its admission thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 12-28½.]

2. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

An instruction that a city is required to use ordinary care to keep its streets in a reasonably safe condition for travel, and that whether the streets are in such a condition is a question of fact to be determined in each case by the particular circumstances, correctly states an abstract proposition of law, applicable to a street the whole width of which has been opened and worked for public travel, but is inapplicable to a street only part of which has been prepared for public travel, and is misleading in such a case, as leading the jurors to assume that it is the duty of a city to make and keep all of its streets in a reasonably safe condition throughout their entire width at all times and under all circumstances.

3. SAME.

Instructions should in all cases apply the law to the existing facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

4. NEGLIGENCE—ACTIONS—INSTRUCTIONS.

In negligence cases, where the duty varies with the conditions, a mere general statement of the law with regard to the duty generally imposed is insufficient.

5. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—INJURIES TO TRAVELERS—NEGLIGENCE.

The gist of an action for personal injuries caused by a defective street is the negligence of the city, and there can be no actionable negligence unless the city did or omitted to do something which, in the exercise of ordinary care, it should have done, or omitted to do.

6. SAME.

A city, opening and undertaking to put the whole width of a street in condition for travel, and inviting the public to use the whole width, must exercise ordinary care to maintain the whole width in a condition reasonably safe; but a city, working only a part of the street, and putting that into condition for travel, is required only to maintain that part in a reasonably safe condition.

7. SAME.

A city, in opening a street for travel, possesses primarily the discretion to determine whether it will prepare the whole width of the street for travel, though in the business portions of the city, or where travel and the convenience of the public require it, the whole width of the street must generally be made passable and in a reasonably safe condition, while in outlying portions it may determine what portions of the streets it will prepare for travel.

8. SAME—QUESTION FOR JURY.

Whether a city, opening for travel only a part of the width of a street, opened a sufficient part, may be a question of fact.

9. SAME.

Whether the streets are maintained in a reasonably safe condition for travel throughout their entire width where the whole width is open, or over that portion which is opened and prepared for travel, is a question of fact to be determined by the jury from the facts in the case.

10. SAME—INSTRUCTIONS.

Where, in an action for injuries to a traveler, caused by a defective street, it appeared that the street had not been prepared for travel throughout its entire width, and that the accident occurred in that part which had not been prepared for travel, the court must instruct the jury specially with regard to the duty of the city to prepare for public travel such part of the street as is reasonably sufficient for public travel; and, where the question arises as to whether the city has prepared a sufficient width for travel, the jury should be required to find from the facts whether or not the space prepared was reasonably sufficient.

11. SAME—PLEADING.

In an action for personal injury, caused by a defective street, because of the failure of the city to prepare a sufficient part of the street for public travel, the complaint should allege as a ground of negligence the failure of the city to prepare a sufficient part for public travel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1711, 1712.]

12. SAME—EVIDENCE—INSTRUCTIONS.

Where, in an action for personal injuries, caused by a defective street, it appeared that the street was 132 feet between the lot lines, that the city had prepared only a part of the width for public travel, and that the injuries occurred at a place outside of such prepared part, the refusal to charge that the city was not required to make passable the whole width of the street, but was only required to improve and make passable such portion thereof as was reasonably necessary for the needs of the public, was erroneous, especially in view of the giving of a charge that the city was required to use ordinary care to keep its street in a reasonably safe condition for travel.

13. SAME.

Where, in an action for personal injuries, caused by a defective street, the evidence showed that the city had prepared only a part of the street for public travel, and that the accident occurred at a place outside of such part, it was error to fail to charge that it was the duty of plaintiff to pursue the traveled part of the street, and that, if he departed therefrom negligently or heedlessly, or for his own convenience, he assumed the risk, and could not recover.

14. SAME—BARRIERS.

A city as a general rule is not required to put up barriers to prevent travelers from driving off the traveled portions of the streets, and barriers are generally required only where an obstruction or excavation is placed in the traveled part of the street, or where the excavation is so near the traveled part that it makes it a dangerous place to pass over, for barriers are intended to make the passageway safe, and not to mark or define the limits of the way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1655.]

15. SAME—WARNING SIGNALS.

A city, opening and preparing only a part of the street for use, and permitting the remaining portion to remain rough with obstructions on it, need not as a general rule mark the limits of the traveled portion, or place signals at or near the obstructions to warn travelers; and it is the duty of the traveler to remain within the traveled portion, and, if that portion is not reasonably sufficient for public use, he may complain on that ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1657.]

16. SAME—BARRIERS.

Where a city maintains a street on two levels, one considerably higher than the other, and the two are divided by an abrupt declivity, and both levels are open for travel, it may be incumbent on the city to place a barrier along the upper level to prevent accidents in driving over the edge; the barrier being simply for the purpose of making the driveway reasonably safe.

17. SAME—INSTRUCTIONS.

In an action for personal injuries, caused by a defective street, only a part of which was opened and prepared for public travel, the jury, on it appearing that the accident occurred on a part of the street not prepared for public travel, should be instructed with regard to the duty of a city in opening and preparing its streets, and when and for what purpose barriers are required, and if, in view of all the circumstances, the street was not reasonably safe without barriers, the city would be liable.

18. SAME.

In an action for personal injuries, caused by a defective street, only a part of which was prepared for public travel, the jury, on it appearing that the accident occurred on a part of the street not prepared for public travel, should be instructed that it is not ordinarily the duty of a city to place lights or warning signals or to put up barriers along the margin of its streets, or to mark or define the traveled portions of them, and that the signals and barriers are required only to point out obstructions or excavations in the traveled part.

19. SAME.

Unless the duty to light the streets is imposed on a city by statute or by its charter, the failure to maintain lights in the streets is generally not negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1656, 1657.]

20. SAME—CONTRIBUTORY NEGLIGENCE.

The absence of lights in the streets of a city may be important on the question of contributory negligence of a traveler injured because of a defective street.

21. TRIAL — REFUSAL TO GIVE INSTRUCTIONS COVERED BY THOSE GIVEN.

It is not error to refuse requested instructions covered by the court's general charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

22. SAME.

Requested instructions containing correct statements of the law, but ending by directing the jury to determine the whole case on a single issue not decisive of the whole case, are properly refused.

23. EVIDENCE—OPINION OF WITNESSES—CONCLUSION.

On the issue of the sufficiency of the prepared portion of a street in view of the public travel, witnesses cannot testify directly that the portion prepared for travel was sufficient for public travel, since that is a mere conclusion of the witnesses, and the reasonable sufficiency of the street is the ultimate fact to be found by the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2186-2195.]

24. MUNICIPAL CORPORATIONS—STREETS—SAFE CONDITION.

In an action for personal injuries, caused by a defective street, only a part of which had been prepared for public travel, if it was of sufficient width and reasonably safe within that width to permit plaintiff to pass over it at the time, and he departed from the traveled part without cause, he cannot complain that the street was not worked to a wider extent, on the sole ground that others at other times may have required more space in passing over it.

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Action by George L. Herndon against Salt Lake City. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Ogden Hiles and H. J. Dininny, for appellant. James Ingebretzen and A. L. Hoppaugh, for respondent.

FRICK, J. This is an action for damages for personal injuries claimed to have been caused by an alleged defect in one of the streets of Salt Lake City. The negligent acts complained of are alleged to be substantially as follows: (1) Negligence in maintaining a "dugway" in the intersection of Twelfth East and Second South streets in such manner as to cause an embankment to form from three to five feet in height, which was allowed to remain diagonally across the intersection of said streets; (2) the failure of the city to construct and maintain a railing or barrier along the traveled part of said intersection and said embankment "to prevent persons and vehicles on said traveled part from passing over said bank," and (3) the failure of the city to place and maintain a light or other signal at or near said embankment to warn persons using the street of the existence thereof. Briefly stated, the facts developed at the trial were substantially as follows: Second South street runs east and west, and Twelfth East street runs north and south. These two streets intersect or cross each other in the eastern part of the city, and within a block or two from the easterly limits of the city. At the point where these two streets

meet and cross is a natural bluff running in a northeasterly and southwesterly direction. This bluff is of considerable height, and rises abruptly, forming a sort of bench. The natural topography of the land both above and below this bluff is comparatively level, inclining somewhat to the west. These two streets meeting, as they do, at the point where this bluff parts the lower from the upper level, made both streets practically impassable in the natural state of the ground. The bluff was worked down somewhat, and in doing so it left a somewhat steep incline to the north on Twelfth East street, and to the west of Second South street. Both of these streets are 132 feet wide between lot lines, and have been platted and surveyed for many years. In order to make the streets passable the city made a roadway on the east side of Twelfth East street going up the hill to the south, and also one on the west side of this street. On Second South street a roadway was prepared on the north side of that street, and in doing so the south side of this roadway was cut down somewhat, and it is this that is called the "dugway" in the complaint, and the raise caused by this cut is called the "embankment" or "bank." This work left a portion of the centers of both streets in an unfit condition for travel, the principal part of which fell within the intersection, and was lengthened out somewhat to the north and west of the intersection, so that this unwrought portion of these two streets at the point aforesaid resembled somewhat the form of a boot or stocking tapering to a point at both extremities. By reason of the declivity at the point in question the city, in making a passage or driveway on the north side of Second South street going east, caused the embankment or bank, as stated above, to be formed along the south margin of the traveled portion of the street, which, the testimony shows, was from two to three feet high, descending somewhat abruptly from the top of the embankment to the worked and traveled portion of the street. These drive or passage ways around this unworked portion, as the testimony discloses, were all the way from 20 to 30 feet in width, and all were reasonably smooth and passable for teams and vehicles. It also appears that the travel at that point was not very heavy, and that the city both to the south and east of the intersection was somewhat sparsely settled. In view of the foregoing, in going either up or down the hill, a person driving over this intersection, in order to continue on in the driveway prepared by the city, would have to drive either to the right or left in passing around the unworked portion lying in the center of the intersection of these two streets. The unworked portion had no well-defined banks along its upper or eastern and southern margin, but on the lower part there was more or less of a bank, as above stated. In the center of the intersection, and upon the unworked portion thereof, stood an electric light pole with an

arc lamp upon its top. The pole and light were the same as those used for lighting all parts of the city. At the time of the accident there were some weeds on the unworked part of the intersection which had grown up during the preceding summer and fall. The electric light was lit, but made a dim light, as some of the witnesses described it. Under the conditions above described, on October 31, 1905, the respondent, at about 6:15 o'clock p. m., in making the turn west on the intersection of Twelfth East street to drive west on Second South street with a team and heavy carriage, departed from the traveled part of the street or intersection and drove diagonally across the unworked part, and in doing so one of the front wheels of the carriage went over the embankment forming the north margin of the unworked part of the street, and threw him from the seat, and he fell to the driveway below and was injured. Just before driving north he had driven south over this intersection, but, as the night was dark, he said he had not noticed the actual condition of the street, and in going back, in order to relieve his horses somewhat from the pressure of the carriage, respondent says: "I made a wide turn to go down easy, and as I came to the slant of the hill I got too far over. I didn't make a sharp turn, because I was afraid the team would get away from me down the hill." It is thus reasonably clear that respondent, instead of turning west along the worked part of the street, drove off the driveway and drove onto and across the unworked portion, and thus encountered the bank which was along the south margin of the northerly driveway, and in going over this bank was thrown from the carriage seat and injured. Mr. Zerbe, a witness for respondent, was with him on the driver's seat at the time, and he testified that he could see that respondent was driving off the traveled part of the street, but did not see the bank ahead of them. There was no other light or signal excepting the arc lamp on the pole described above, nor was there any barrier along the bank, or other sign of warning. The jury returned a verdict for the respondent upon which the court entered judgment, and the city presents the record for review on appeal.

While the errors assigned are numerous, we shall discuss such only as we deem material. In submitting the case to the jury the court gave the following instruction, which was duly excepted to by the city; and the giving of it is now urged as error: "(10) You are instructed that the defendant is required to use ordinary care to keep its streets in a reasonably safe condition for travel in the ordinary modes by night as well as day, and whether they are so or not is a question of fact to be determined in each case by its particular circumstances." As a modification of the foregoing instruction, the city offered a request whereby it asked that the court instruct the jury in substance that the city was

not required to improve or make passable the whole width of the intersection, or the whole width of the two streets; that it was only required to improve and make passable such portion of said streets and intersection as was reasonably necessary for the needs of the public; and that it was the duty of the city to exercise ordinary care to keep in a reasonably safe condition for passage and travel such parts of the streets only as had been improved and opened for travel, if such portion was reasonably sufficient for the needs of the public using these streets. The court refused the request, and the duty of the city in respect to its streets is limited in the instructions to what is contained in the instruction copied above. The instruction given, and the refusal to instruct as requested, or to so instruct in substance, present the principal question discussed by counsel.

Counsel for respondent insist that appellant is not in a position to raise the question, because respondent in his complaint alleged that the city "was charged with the duty of maintaining the said streets in a safe and fit condition for public usage and travel," which allegation the city admitted in its answer. This contention is not tenable. The allegation at most is a mere conclusion of law, and could have been stricken from the complaint, and the city is not bound by the admission of such an allegation. 1 Bates Pl. & Pr. 233. While the instruction correctly states an abstract proposition of law applicable to a street, the whole width of which has been opened and worked for public use and travel, it is wholly inapplicable to the facts as developed in this case. The statement respecting the duty of the city with regard to maintaining its streets is so general that to a jury of laymen it practically afforded no information or guide whatever under the facts and circumstances developed at the trial. Such general statements, as was said in *City of Guthrie v. Swan*, 3 Okl. 116, 41 Pac. 84, are misleading in that the jurors will naturally assume that it was the duty of the city to make and keep all of its streets in a reasonably safe condition throughout their entire width at all times and places and under all circumstances. Instructions should in all cases apply the law to the existing facts and circumstances, and in cases of negligence, where the duty varies with the conditions, a mere general statement of the law with regard to the duty generally imposed is, if possible, worse than not to instruct at all. If it be the law that the duty of the city with respect to its streets is always and under all circumstances the same, then the instruction was proper enough. If, however, such is not the law, and the duty varies in accordance with conditions and circumstances, then it may be that the city had discharged its full duty with respect to a given street, or a particular place in such street, although it did not comply with what is said in the instruction above quoted.

The gist of the action in question was negligence, and there could be no actionable negligence unless the city did or omitted to do something which, in the exercise of ordinary care and prudence, it should have done or omitted to do. The authorities with regard to the duty imposed by law upon municipalities in opening, improving, and maintaining the streets in a reasonably safe condition for travel throughout their entire width are not in perfect harmony. In 15 A. & E. Ency. L. (2d Ed.) at page 452, after stating the law applicable to country roads to be that such roads need not be opened up nor maintained in a reasonably safe condition for travel throughout their entire width, the author proceeds as follows: "In regard to city streets it would seem that the rule might well be different from that prevailing in the case of country roads, and accordingly it is stated in some cases that there is an absolute duty to keep in repair the whole width of the street. These statements may, however, be viewed with reference to the particular circumstances under which they are made, and in the best-considered cases it is stated that even in the case of city streets the width which must be kept in repair is a matter dependent on particular circumstances, among which, apparently to be considered, are the amount of travel and the question whether the city has ever opened the whole street for travel by doing work thereon, so as to induce persons to use the whole width thereof." Upon an examination of the cases it will be found that what the author says with regard to the statements contained in the cases, and that such statements must be reconciled with the particular facts before the courts in making them, is not overdrawn. In fact it will be found that cases emanating from the same courts are not infrequently cited upon both sides of the proposition; namely, that it is the duty of the city to make its streets passable and to maintain them in a reasonably safe condition throughout their entire width, and also that no such duty is imposed. This apparent conflict is due to the fact that in those cases where the evidence was to the effect that the city had opened, worked, and prepared for travel and public use the whole width of the street the court simply stated that it was the duty of the city to maintain such streets reasonably safe for travel throughout their entire width, and that a failure to do this constituted negligence. In those cases, therefore, the question involved here, as a general rule, is not discussed; but the duty upon the part of the city to maintain the whole street safe is assumed.

There are also numerous cases where defects of sidewalks only were in question, and in most of those cases, in speaking of sidewalks as parts of the streets, it is also asserted that the whole width of the sidewalk—sometimes the expression "streets" is used—must be maintained in a reasonably

safe condition for travel whether in daytime or in nighttime. Judge Dillon, in his excellent work on Municipal Corporations, in speaking upon this question, says: "Nor, as already incidentally stated, is a municipal corporation bound to keep all of its streets and all parts of the street in good repair. When it opens a street and invites public travel, it must be made reasonably safe for such use; but this does not necessarily imply as a matter of law that the whole width of the street must be in good condition. Whether the street was wide enough to be safe, whether it was in a reasonably safe condition for public use by travelers who use ordinary care to avoid injury, are almost always questions for the jury." 2 Dill. Mun. Corps. (4th Ed.) § 1016. In *McArthur v. Saginaw*, 58 Mich. 357, 25 N. W. 313, 55 Am. Rep. 687, the Supreme Court of Michigan, in passing upon an instruction somewhat similar in its terms to the one above set forth, use the following language: "The jury undoubtedly understood from the rulings of the court and the questions laid before them that it was for them to decide how much of the streets should be kept in condition for general travel, and they found that the entire street ought to be clear of obstructions, and it must be presumed they based their verdict for plaintiff on that idea. This was a palpable error, for there can be no doubt of the right of every city to determine what part of the nominal highway shall be devoted to the various purposes of passage, and upon such a subject the municipal discretion must prevail." In the foregoing case it appeared that the actual width of the street as platted and surveyed was 66 feet, while the part that was worked and made passable was but 31 feet. The injury resulted by coming in contact with an obstruction which was outside of the 31 feet, but within the exterior boundaries of the street, and which was placed there by an abutting owner, apparently with the consent of the city. In *Perkins v. Fayette*, 68 Me. 152, 28 Am. Rep. 84, it is said: "The judge instructed the jury that towns were not required to render the road passable for the entire width of the whole located limits, and that the duty of the town was accomplished by making a sufficient width of the road in a smooth condition so that it would be safe and convenient for travelers." This the Supreme Court of Maine held to be a correct statement of the law, and it was commented on and followed in *Morse v. Belfast*, 77 Me. 44, and in subsequent cases by that court. In *City of Wellington v. Gregson*, 31 Kan. 102, 1 Pac. 255, 47 Am. Rep. 482, Mr. Justice Brewer, in speaking of the duty imposed by law upon cities in respect to the maintenance of their streets, says: "In the discharge of this duty, in places it must keep the whole width of the street in a safe condition for travel. * * * In other places it is sufficient if it keep a traveled track in good repair." In

Bassett v. City of St. Joseph, 53 Mo., at page 303, 14 Am. Rep. 446, the Supreme Court of Missouri, in speaking of the duties imposed on cities in this regard, say that the city "is only bound to keep such streets and such parts of streets in repair as are necessary for the convenience and use of the traveling public. It may be, and doubtless is, the case that there are streets or parts of streets in many cities which are not at present necessary for the convenience of the public that will be brought into use by the growth of the city, or there may be streets that have more width than is necessary for the present use or the requirements of travel." A much more recent case from the Supreme Court of Missouri we think, not only states a practical, but, as we conceive, the true, rule to be, that, if the city opens and undertakes to put the whole width of the street in condition for travel and invites the public to use the whole width, then it is the duty of the city to exercise ordinary care so as to maintain the whole width of such a street in a condition reasonably safe. If, however, the city works only a part of the street and puts it into condition for travel, then it is required to maintain only that part in a reasonably safe condition, and whether the part that is opened and worked is reasonably sufficient for public convenience may be a question of fact. *Kossman v. St. Louis*, 153 Mo. 299, 54 S. W. 513. In *Kelley v. Fond du Lac*, 31 Wis. 179, it is said: "Towns are not bound to keep highways in a suitable condition for travel in their whole width; and their liability is limited primarily to damages caused by defects in the traveled track." This case is approved and followed in the later Wisconsin cases, and especially in the case of *Rhyner v. City of Menasha*, 97 Wis. 523, 73 N. W. 41. In *Fullam v. City of Muscatine*, 70 Iowa, 438, 30 N. W. 862, the Supreme Court of Iowa, in sustaining the trial court in its refusal to give an instruction wherein the jury were told that it was the duty of the city to maintain the entire width of a street in a reasonably safe condition, say: "We are not prepared to say that it is the duty of a city to keep every street safe for travel throughout its entire width, regardless of its location, amount of travel, and all other circumstances." We refer to this case for the special reason that the Iowa court is sometimes cited as holding to the contrary doctrine; namely, that the entire width of the street must be maintained in a reasonably safe condition. Where such expressions are found in the cases from the Iowa court the facts were such as required the whole width of the street to be kept in safe condition. The following cases make this clear, namely: *Crystal v. Des Moines*, 65 Iowa, 502, 22 N. W. 646; *Stafford v. City of Oskaloosa*, 64 Iowa, 251, 20 N. W. 174. In a very recent case (1907) decided by the Appellate Court of Indiana, in speaking upon this subject it is said: "A municipal cor-

poration is bound to keep its streets and sidewalks reasonably safe and convenient for public travel either by day or by night; but when the municipality has prepared and maintained a way of sufficient width, smooth and convenient for travel, its duty in this respect has been accomplished." It is not necessary to quote further from the decided cases, and from among the numerous cases that might be cited we shall refer only to the following: *City of Austin v. Ritz*, 72 Tex. 401, 9 S. W. 884; *Goeltz v. Town of Ashland*, 75 Wis. 642, 44 N. W. 770; *Marshall v. Ipswich*, 110 Mass. 522; *City of Hannibal v. Campbell*, 86 Fed. 298, 30 C. C. A. 63; *Tasker v. Farmingdale*, 85 Me. 525, 27 Atl. 464; *Craig v. City of Sedalia*, 63 Mo. 417; *City of Guthrie v. Swan*, 3 Okl. 116, 41 Pac. 84.

The general doctrine that may be deduced from the cases that have considered and passed upon facts such as those in the case at bar may be stated as follows: That in opening a street for travel, whatever may be its nominal or platted width, it is primarily a matter within the discretion of the city to say whether it will prepare the whole or only a portion of the width of the street for travel; that in the business portions of the city, or where travel and the convenience of the public require it, the whole width of the street must generally be made and maintained passable and in a reasonably safe condition; that where the whole width of the street has been prepared and opened for travel, whether primarily necessary or not, the city must thereafter maintain the whole street in a reasonably safe condition throughout its entire width; that in some places, and especially in the outlying portions of the city, it may ordinarily determine what portions of the streets it will prepare for travel, and in such places it need only maintain that portion which is opened and set apart for travel in a reasonably safe condition; that whether the city has prepared a sufficient width for passage to respond to the needs of the public may be a question of fact for the jury, and as to whether the streets are maintained in a reasonably safe condition for travel (whether throughout their entire width where the whole width is opened, or over that portion which is opened and prepared for travel), is always a question of fact to be determined by the jury from all the facts and circumstances in the particular case. If it is made to appear, therefore, that the street is not one that has been prepared for travel throughout its entire width, or the particular place in question is one where this has not been done, the court should instruct the jury specially with regard to the duty of the city in this regard; and, if the question arises as to whether the city has prepared a sufficient width for travel where less than the whole width has been prepared, the jury should be required to find from all the facts and circumstances whether or not the space prepared by the city was reasonably sufficient, and in case the claim is

made that the space prepared is insufficient, it seems to us this should be alleged in the complaint as one of the grounds of negligence, so that the city may be prepared to meet it at the trial. It seems to us no other rule is either practical or reasonable. The streets in this city, as disclosed by this record, are 132 feet from lot line to lot line, a portion of which is usually set apart for sidewalks. At the place where the accident in question occurred there were no sidewalks. If the theory of respondent is to prevail, and as it might have been assumed by the jury from the instruction, then the city would be compelled to maintain all of its wide streets throughout their entire width in a reasonably safe condition at all times and under all circumstances. Any person might then at will go or drive anywhere between the lot lines either by day or night, and if he encounters an obstacle, whether natural or artificial, and is injured thereby, the city must respond in damages if the jury find that the street was not reasonably safe with the obstruction in it. If, therefore, a person may drive anywhere and may presume the whole width of the street to be safe, how can a jury escape the conclusion that any obstruction anywhere makes the street unsafe? In this case we think the court, in substance at least, should have instructed the jury as requested by the city in its twelfth request. The refusal to do this, and especially in connection with instruction 10 given by the court, was prejudicial error. We think further that the facts in this case are such that the court should have instructed the jury that it was the duty of respondent to pursue the traveled portion of the street, or that part which was worked and prepared by the city for travel, and that if he departed therefrom intentionally or heedlessly or for his own convenience, or for other reasons dependent upon his own volition, he assumed the risk in doing so. It is not the law that a person driving on the streets in all parts of the city may at will depart from the traveled track either by day or night, and if he encounters a natural or artificial obstruction and suffers injury that he may recover damages from the city. *Tasker v. Farmingdale*, 85 Me. 523, 27 Atl. 464; *Goeltz v. Town of Ashland*, 75 Wis. 642, 44 N. W. 770; *Marshall v. Ipswich*, 110 Mass. 522; *Barnes v. Chicopee*, 138 Mass. 66, 52 Am. Rep. 259.

The contention that this court has held to the contrary on any one or more of the foregoing propositions cannot be sustained. These questions were not involved nor discussed in the cases cited by counsel, namely: *Tucker v. Salt Lake City*, 10 Utah, 173, 37 Pac. 261; *Scott v. Provo City*, 14 Utah, 31, 45 Pac. 1005; and *Naylor v. Salt Lake City*, 9 Utah, 491, 35 Pac. 509. The first two cases were cases of defective sidewalks, and the court, in speaking of the width to be maintained, of course referred to the sidewalks which had been opened for travel throughout the whole width thereof, and for that reason ought to

have been maintained for that width. The last case was one where an artificial obstruction was placed in the traveled portion of the street without any guards or signals to warn persons thereof. So far as we know this court has never passed upon the direct questions presented in this case. As we have pointed out, the question of the lack of lights and barriers was raised in the complaint. In submitting the case to the jury the court did not say anything about these matters, but from what was said in the general charge which we have copied the jury may well have inferred that the city was negligent in not putting up a barrier along the bank referred to, or in not placing a signal light as a warning to travelers, and that for that reason if for no other they may have found the street was not in a reasonably safe condition. In this regard the charge was again too general. In view that the case will have to be sent back for a new trial, it is perhaps not improper for us to indicate our views with regard to these issues for the guidance of the court on the second trial. As a general rule the city is not required to put up barriers to prevent travelers from driving off the traveled portions of the streets. Barriers are not required for this purpose. They are generally required only where an obstruction or excavation is placed or made in the traveled part of the street, or where the excavation or dangerous declivity is so near the traveled part of the street that it makes it a dangerous place to pass over. In other words, barriers are intended to make the passageway safe, and not to mark or define its limits so as to warn travelers not to drive outside of them. This is well illustrated by the following cases: *Barnes v. Chilcopee*, 138 Mass. 67, 52 Am. Rep. 259; *City of Hannibal v. Campbell*, 86 Fed. 298, 30 C. C. A. 63; *McHugh v. St. Paul*, 67 Minn. 441, 70 N. W. 5; *Tasker v. Farmingdale*, 85 Me. 523, 27 Atl. 464; *Marshall v. Ipswich*, 110 Mass. 522; *Goeltz v. Town of Ashland*, 75 Wis. 642, 44 N. W. 770. If the city, therefore, opens and prepares only a part of the street for use, and the remaining portion is rough or has obstructions upon it, it is not, as a general rule, the duty of the city to mark the limits of the traveled portion, or to place signals at or near such obstructions to warn travelers. It is the duty of the traveler to remain within the wrought and traveled portion of the street, and if that portion is not reasonably sufficient for public use he may complain upon that ground as we have pointed out above. In this regard it may be said that, where a city maintains a street upon two levels, one considerably higher than the other, and the two are divided by an abrupt declivity, and both levels are opened for travel, then it may be incumbent upon the city to place a barrier along the upper level to prevent accidents in driving over the edge. But this, again, is simply for the purpose of making the driveway reasonably safe, and is well illustrated in the case of *Prideaux*

v. City of Mineral Point, 43 Wis. 513, 23 Am. Rep. 558. In cases, therefore, where a city prepares only a portion of the street, it may be a question of fact as to whether the portion opened for travel is reasonably sufficient. As to whether it is reasonably safe in view of all the surrounding circumstances is always a question of fact. The jury, therefore, should be instructed with regard to the duty of the city in opening and preparing its streets, and when and for what purposes barriers are required, and if, in view of all the circumstances, the street was not reasonably safe without barriers, and the jury so find, then the city would be liable. The jury should be distinctly told that it is not ordinarily the duty of the city to place lights or warning signals, or to put up barriers along the margins of its streets, or to mark or define the wrought or traveled portions of them, and that these are required only to point out obstructions or excavations in the traveled part of the street, or, where the whole street is opened, to point out where they are so that they may be avoided, and further, that if there be an excavation in the margin of the street or so near it that it may be dangerous to any one using the street, then that in all such cases barriers or signals reasonably sufficient to point out the danger or to keep one from driving over the one or falling into the other are usually required. In view of the whole record we are not clear as to whether respondent contends that the city was negligent in not lighting the street properly, or only in not having a light as a signal of warning at the embankment. As to the duty of the city to light its streets generally it may be said that no such duty exists at common law. Unless the duty is imposed by statute or by the city's charter, the failure to put up and maintain lights in the streets generally is not negligence. *Mitchell v. Tell City* (Ind. App.) 81 N. E. 594; *McHugh v. St. Paul*, 67 Minn. 441, 70 N. W. 5, and cases there cited. The absence of lights may, however, be important upon the question of contributory negligence. To what extent a city may be required to maintain lights in its streets generally in case it voluntarily assumes the duty to light them is a question not now involved, and we express no opinion upon it. As to when and under what circumstances a city must put up and maintain signal lights we have already discussed.

Upon the other assignments respecting the refusal of the court to give the other requests offered by the city we are of the opinion that those were sufficiently covered by the court's general instructions. We remark, however, for the benefit of counsel, that about all the requests offered uniformly ended with the request to find for the city. It does not necessarily follow that because an instruction states the law fully and correctly upon one issue the jury should therefore find generally for the plaintiff or the defendant as the case may be. The jury should be told what

their findings should be upon that issue only unless the particular issue is decisive of the whole case. Trial courts very often must refuse, and this court is compelled to sustain the refusal, to give correct statements of the law simply because they end by directing the jury to determine the whole case upon the one request. Nearly all of appellant's requests, 10 or 12 in number, end in this way, and the court did not err in refusing them for that reason if for no other.

The contention that the court erred in not permitting witnesses for the city to testify directly that the driveway at the place of the accident was sufficient for public travel is not tenable. All these questions called for the witnesses' conclusions merely. The reasonable sufficiency of the street is the ultimate fact to be found by the jury, and it must be found from the evidence with respect to the location of the street, the number of persons who have occasion to use it, the surrounding circumstances, and all the conditions bearing upon this question. Moreover, if a street were in fact insufficient for the public needs, but if no one else were attempting to use it at the time of the accident, and there was ample room for the wagon or carriage to pass, it may well be that the person who complains may not have any cause for complaint upon that ground. The question is, was the street sufficient for the purposes of the plaintiff at the time of the accident? If it was, then it was not material whether the street was opened and worked sufficiently wide to meet all public requirements or not. If it was of sufficient width and reasonably safe within that width to permit the plaintiff to pass over it at the time, and he departed from the traveled part without cause for doing so, he cannot complain that the street was not worked to a wider extent upon the sole ground that others at other times may have required or might require more space in passing over it. The defect, if any there be in this regard, under all such circumstances, would not cause nor directly contribute to the injury, and therefore the person injured may not complain, although others might have cause to complain under different circumstances.

From what has been said, it follows that the judgment should be, and it accordingly is, reversed, with directions to the district court to grant a new trial. Costs to appellant.

MCCARTY, C. J., and STRAUP, J., concur.

PEOPLE v. ALBITRE. (Cr. 1,411.)
(Supreme Court of California. April 20, 1908.)
CRIMINAL LAW—APPEAL—FAILURE TO FILE
BRIEF—EFFECT—AFFIRMANCE.

In a criminal prosecution, the failure of appellant on appeal to file a brief or appear on oral argument constitutes sufficient reason for affirming a judgment and order denying a new trial, under Pen. Code, § 1233.

In Bank. Appeal from Superior Court. Los Angeles County; B. N. Smith, Judge.

Delfine Albitre was convicted of murder, and appeals. Affirmed.

R. C. Coleman, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of murder in the first degree, and adjudged to suffer death. He appeals from the judgment and from an order denying his motion for a new trial. No brief having been filed in support of the appeal, the matter was submitted by the Attorney General upon the transcript, without oral argument, there being no appearance for defendant. The failure of defendant to file a brief or to appear on oral argument constitutes under our law sufficient reason for affirming the judgment and order. Pen. Code, § 1253. We have, however, carefully examined the record. The evidence contained therein amply warranted the verdict, and there is nothing to indicate that any substantial error was committed in the proceedings in the trial court.

The judgment and order are affirmed.

In re MOFFITT'S ESTATE. (S. F. 4,896.)
(Supreme Court of California. April 20, 1908.
Rehearing Denied May 20, 1908.)

1. TAXATION—INHERITANCE TAXES—PROPERTY
LIABLE—WIFE'S SHARE OF COMMUNITY
PROPERTY.

The surviving wife's share of the community property is subject to the inheritance tax imposed by Act March 20, 1905 (St. 1905, p. 341, c. 314), declaring that all property which shall pass by will or by the intestate laws shall be subject to the tax therein prescribed, since the wife takes as heir and not as survivor.

2. STATUTES—CONSTRUCTION—PRESUMPTION
OF KNOWLEDGE OF JUDICIAL DECISIONS.

A statute is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing on it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 204.]

In Bank. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

In the matter of the estate of James Moffitt, deceased. From an order and decree of the superior court in probate directing the executors to pay a certain amount as inheritance tax on the widow's interests in the community property, the widow and executors appeal. Affirmed.

Warren Olney, Olney & Olney, for appellants. Snook & Church, for respondent.

HENSHAW, J. This is an appeal by the widow and the executors of the will of the deceased from an order and decree made by the superior court of Alameda county in probate, directing the executors to pay to the county treasurer of Alameda county the sum of \$26,684.50 as the inheritance tax upon the interest of the widow in the community property of herself and her deceased husband.

The inheritance tax law of this state, approved March 20, 1905 (St. 1905, p. 341, c. 314), prescribes that "all property which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same * * * shall be and is subject to a tax hereinafter provided for." The single question presented by this appeal is whether the surviving wife's share of the community property is subject to this inheritance tax.

It is conceded that the determination of the trial court that such property is liable for the payment of this tax finds support in the cases of *In re Burdick*, 112 Cal. 387, 44 Pac. 734, *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, and *Sharp v. Loupe*, 120 Cal. 89, 52 Pac. 134, 586. But it is earnestly contended that this court should overrule these cases to the extent of holding that as to the community property the widow has such an ownership or estate or title as enables her to take upon the death of the husband, not as his heir, and not by succession, but by a certain right of survivorship; that, in effect, the wife during the existence of the marriage status has always enjoyed an ownership in one-half of the community property; and that by the death of the husband her ownership of this moiety is simply released from the power of disposition over it with which the law during his lifetime and during the existence of the marriage status has clothed him. Reference is made to the language of the Civil Code (section 682), which declares that ownership of property by several persons is either (1) of joint interest; (2) of partnership interest; (3) of interests in common; (4) community interest of husband and wife. We are referred also to expressions in some of the earlier decisions of this court, such as the language of *Beard v. Knox*, 5 Cal. 256, 63 Am. Dec. 125, where it is said: "The husband and wife during coverture are jointly seised of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite, and certain interest, which becomes absolute at his death." All of these Code sections, all of these cases, and all of these arguments were most ably urged upon the attention of the court in the first two cases above cited, and the conclusion then reached was there expressed in the following language: "Courts and counsel have occasionally endeavored to find some property right in the wife, or some respect in which the husband's interest falls short of full property. I think it will be universally admitted that so far there has been a complete failure in this respect. The first attempt shown by our reports of that kind is in *De Godey v. De Godey*, 39 Cal. 157. In that case it is said that, while no other technical term so well defines the wife's interest as the phrase 'a mere expectancy,' * * * it is at the same time * * * so vested in her that the hus-

band cannot deprive her of it by his will, nor voluntarily alienate it for the mere purpose of divesting her of her claim to it." After painstaking investigation and review, and after the fullest deliberation, this court in *Re Burdick* determined and held, as it declared in *Spreckels v. Spreckels*, that upon the death of the husband the wife takes one-half of the community property as heir. Every argument here advanced against that conclusion was urged by learned counsel in the other cases, and was fully met in the opinions above referred to. No useful purpose can be subserved by a repetition of these arguments or of the answers to them. A reading of the opinions of this court in those cases will establish how thoroughly the questions were entered into, and what a complete disposition was made of them.

It is finally urged that as laws imposing inheritance taxes are subject to strict construction, and that as it could not have been in the legislative mind that by this act they were imposing a tax upon the widow's share of the community property, therefore a construction should be sought which will avoid this harsh result. But a familiar and fundamental rule for the interpretation of a legislative statute is that it is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it. Thus the Legislature is presumed to have enacted it with full knowledge that this court in bank, not once, but repeatedly, had declared that the wife did take her share of the community property upon the death of her husband by succession as his heir. The next and necessary presumption that follows is that the Legislature enacted the inheritance tax law in the light of these decisions and to the end that the widow's share of the community property should bear this tax quite as much as would the portion of the husband's separate estate which might come to her by will or by the laws of succession. In other words, since the Legislature knew that the latest expression from this court upon the subject was an unequivocal declaration that the widow did take her share of the community property as heir of the husband, if it had designed that the widow's share should not be subject to this tax, it would have made provision that it should be excepted from the operation of the law. If, however, the truth be as counsel urge, that it never entered the minds of the men constituting the legislative body that they were imposing this tax upon the community interest of the wife, it can only be said that for their ignorance they, and not the courts, are responsible, and for their omission they, and not the courts, must find the remedy.

The order and decree appealed from are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

153 Cal. 365

In re SIMS' ESTATE. (S. F. 4,883.)

(Supreme Court of California. April 20, 1908.)

In Bank. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

In the matter of the estate of John Fletcher Sims, deceased. From an order and decree of the superior court in probate directing the executors to pay a certain amount as inheritance tax on the widow's interest in the community property, the widow and executors appeal. Affirmed.

H. M. Wright and Titus, Wright & Creed, for appellants. Snook & Church and U. S. Webb, Atty. Gen., for respondent.

PER CURIAM. This case presents the same question as that in *Estate of James Moffitt* (this day decided), 95 Pac. 653; namely, whether a surviving wife's share of the community property is subject to the inheritance tax. The decision of the trial court was to the same effect in both cases.

For the reasons given in *Estate of Moffitt*, the order and decree appealed from are affirmed.

153 Cal. 368

JOHNSON et al. v. WILLIAMS, County Auditor. (Sac. 1,617.)

(Supreme Court of California. April 24, 1908.)

1. COUNTIES—APPLICATION OF GENERAL FUND—HIGHWAYS.

The Legislature has power to authorize recourse by a county to its general fund, consisting almost entirely of taxes collected from all property of the county, for work on its public roads lying outside of the limits of municipalities within the county, and there is no double taxation of the owners of property within a municipality caused by such an expenditure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 219.]

2. SAME—POWER TO ISSUE BONDS—CONSTRUCTION OF BRIDGES AND HIGHWAYS.

Political Code, § 4088, provides that any county may incur a bonded indebtedness for any purpose for which the board of supervisors are authorized to expend the county funds, or for building or constructing roads, bridges, or highways. *Held*, that a county may issue bonds payable out of taxes to be levied on all property in the county including that in incorporated cities to construct bridges and highways in the county outside the municipalities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 265.]

3. SAME.

Political Code, § 4088, provides that any county may incur a bonded indebtedness for any purpose for which the board of supervisors are herein authorized to expend the county funds, etc. Section 2712 provides that, whenever it appears to the supervisors that any road district is unreasonably burdened by the expense of constructing or by the maintenance and repair of any bridge, they may cause a portion of the cost to be paid out of the general road fund of the county, or by a two-thirds vote of the board of supervisors they may order a portion of the cost to be paid out of the county general fund. *Held* that, where proceedings for the issuance of county bonds for the purpose, among others, of repairing bridges, were ordered and instituted by the unanimous vote of the board, the bonds

could be issued under section 4088, payable by general taxation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 265.]

4. SAME—CONSTITUTIONAL REQUIREMENT OF SINKING FUND—SUBSTANTIAL COMPLIANCE.

Const. art. 11, § 18, provides that no county indebtedness exceeding the income provided for the year shall be incurred unless provision shall be first made for the collection of an annual tax to pay the interest, and also provision for a sinking fund for the payment of the principal. Political Code, § 4088, contains a like provision, and provides that the supervisors before or at the time of issuing bonds shall provide for the levy of an annual tax sufficient to effect the objects of the provision. A board of supervisors, when making the order prescribing the form of county bonds on October 7, 1907, provided by ordinance for the levying of an annual tax commencing with the general tax levy to be made in September, 1908. The ordinance, which was adopted subsequent to the general tax levy for the year 1907, which by law is required to be made in September of each year, fully complied with the constitutional and statutory requirements as to the principal and all interest falling due after the first half of the year 1908; but the proposed bonds were to bear date December 10, 1907, with interest payable semi-annually, and the first interest coupon on each bond would by its terms be due on June 10, 1908, if the bond had been sold and delivered prior to that date. Consequently the tax to be levied to pay interest would not be available when the first installment of interest became due. *Held*, that the object of the provision was simply to insure provision annually at the time of the general tax levy for the necessary funds to pay interest and principal falling due before the time of the next general levy, and it did not contemplate a levy at any other time, and the procedure of the board was in substantial compliance with the Constitution, though the first payment of interest might be deferred for a short time pending proceedings for the collection of the tax.

McFarland, J., dissenting.

In Bank. Mandamus by Howard K. Johnson and others to compel L. P. Williams, as county auditor of Sacramento county, to attest and sign county bonds. Writ granted.

E. S. Wachhorst, Dist. Atty., W. H. Devlin, and J. B. Devine, for petitioners. H. C. Ross, for respondent.

ANGELLOTTI, J. This is a proceeding instituted in this court to obtain a peremptory writ of mandate requiring the defendant to attest and sign, as auditor of Sacramento county, certain proposed bonds of said county which have been ordered issued by the board of supervisors, after such issuance had been authorized by the electors of the county at a special election held in the manner provided by the Constitution and statutes. The auditor's refusal to perform this official action is based on his claims that the bonds cannot be legally issued, and the matter was submitted for decision upon a demurrer to the petition.

The proposed bonds are of three different kinds: First, bonds to the extent of \$660,000 for the purpose of erecting and constructing a new county courthouse, and in connection therewith a new county jail in the said county of Sacramento; second, bonds to the ex-

tent of \$600,000 for the purpose of building certain specified roads and highways in said county; third, bonds to the extent of \$225,000 for the purpose of building and constructing certain specified bridges in said county, the itemized statement in this behalf describing the work as to some of the bridges to be "repairs."

The city of Sacramento is a municipal corporation existing under a freeholders' charter, and having its corporate boundaries within the boundaries of the county of Sacramento. Under the existing laws applicable to all municipalities it is required to construct and maintain its own streets and bridges without aid from any county fund, and is exempt from certain road taxes by reason of the following provision of section 2 of the highway act of February 28, 1883, viz.: "Provided further, that nothing herein contained shall be deemed to authorize the levy or collection of a road poll tax, or property road tax, within municipalities existing under the laws of this state, wherein work and improvements upon the streets is done by virtue of any law relating to street work and improvements within such municipality. Nor shall any such incorporated city or town be by the supervisors of the county included or embraced in any road district by them established under this act." St. 1883, p. 20, c. 10. The roads and bridges to be constructed and repaired are all outside of the corporate limits of the city of Sacramento. The proposed bonds of the county and the interest thereon are necessarily to be paid from taxes levied by the county on all the property in the county, including that within the corporate limits of said city.

The principal contention of defendant is that the law does not authorize the issuance of county bonds payable from taxes to be levied on all the property of the county, including that situated in incorporated cities and towns, for the purpose of constructing roads, bridges, and highways, or repairing bridges. It is apparent that no constitutional question is presented by this contention. It is undoubtedly within the power of the legislative department to authorize recourse by a county to its general fund, consisting almost entirely of taxes collected from all parts of the county, for work on its public roads and highways lying outside of the limits of municipalities within the county, and our statutes show several instances of the exercise of this power, the validity of which has never been challenged. Section 2712, Pol. Code, authorizes a portion of the cost of constructing or maintaining or repairing any bridge or the cost of purchasing a toll road, to be paid under certain circumstances by the supervisors from the county general fund. Subdivision 10 of section 2643 authorizes the cost of waterworks, oil tanks, etc., for the sprinkling of roads and the cost of sprinkling to be charged to such fund. The same subdivision authorizes the expense of a road three miles in

length, the cost of which is too great to be paid out of the road fund to be paid from the general county fund. Section 2647, Pol. Code, contains a similar provision as to one-half of the cost of fences constructed on certain public highways. There is no double taxation caused by such an expenditure to the owners of property within a municipality. What they are thereby caused to pay for the expense of public highways lying outside of the municipality is nothing more than their proportion of such expense as the legislative power deems should be borne by the whole county. The whole matter is purely one of statutory legislation.

Has the Legislature authorized the issuance of county bonds for the purposes under discussion? The proceedings for the issuance of the bonds in question were had under the provisions of section 4068, Pol. Code, enacted March 18, 1907, St. 1907, p. 382, c. 282. That section provides that "any county may incur * * * a bonded indebtedness for any purpose for which the board of supervisors are herein authorized to expend the funds of said county, or for the purpose of building or constructing roads, bridges, or highways." The portion of this provision which we have italicized is new to our law; the corresponding section of the former county government act (section 13, County Government Act 1897; St. 1897, p. 460, c. 277) providing simply that such a bonded indebtedness might be incurred "for any purpose for which the board of supervisors are herein authorized to expend the funds of said county." Under the law last referred to the cases of *Devine v. Board of Supervisors*, 121 Cal. 670, 54 Pac. 262, and *Wright v. Sacramento County* (not officially reported) 54 Pac. 1130, were decided, and it was held therein that the statute did not authorize the issuance of county bonds for the construction of a county highway; the reason given being that the board of supervisors of Sacramento county were not authorized to expend the general fund of the county collected from all parts of the county including municipalities for such purposes. After these decisions the Legislature amended the law on the question by adding the words we have italicized above. It is manifest to us that these words were added for the express purpose of changing the statutes as they had been construed in the *Devine* and *Wright* Cases to the end that county bonds payable by means of a tax levied on all the property of the county, including that within municipalities, might be issued by any county for the purpose of "building or constructing roads, bridges, or highways." This is the plain meaning of the words used without regard to prior decisions on the subject; but, when the legislative action is viewed in the light of those decisions, there is no possible escape from the conclusion that we have stated. It is unimportant that there has been no modification or repeal of section 2 of the act of February 28, 1883, hereinbefore quoted.

That section simply prohibits the inclusion of a municipality within a road district of the county, or the collection therein of the county road poll tax or the property tax for county highway purposes levied annually by the board of supervisors (Pol. Code, §§ 2651-2655), and its provisions are in no way affected by the later enactment. We are satisfied that section 4088 of the Political Code authorizes the issuance of the bonds of Sacramento county for the purpose of building or constructing roads, bridges, and highways therein.

The amendment of 1907 does not in terms authorize the issuance of county bonds for the purpose of "repairing" bridges already constructed. As we have seen, a portion of the \$225,000 issue for bridge purposes was for such repairs, and it is claimed that the rule of the Devine and Wright Cases is applicable thereto. We may assume, without deciding, that the issuance of bonds for "repairs" of bridges is not authorized by the provision for such issuance for the purpose of "building or constructing" bridges. But the section also authorizes such issuance "for any purposes for which the board of supervisors are herein authorized to expend the funds of said county." Section 2712, Pol. Code, provides: "Whenever it appears to the board of supervisors that any road district is or would be unreasonably burdened by the expense of constructing, or by the maintenance and repair of any bridge, * * * they may, in their discretion, cause a portion of the aggregate cost or expense to be paid out of the general road fund of the county, or by vote of two-thirds of the board of supervisors, said board may, in their discretion, order a portion of the cost of construction and repairs of bridges * * * to be paid out of the county general fund as well as the general road fund." By this section the board of supervisors of Sacramento county are authorized to expend money in the general fund of the county, collected from all parts of the county, including municipalities, for repairing bridges, under the circumstances and in the manner provided by the section. The proceedings for the issuance of these bonds were ordered and instituted by the unanimous vote of such board, and this must be taken as a determination by the whole board of the facts authorizing resort to such general fund for the purpose indicated. Under these circumstances the issuance of bonds for repairing bridges was permitted by that part of section 4088 which authorizes the issuance of bonds for any purpose for which the board are authorized to expend the funds of the county.

The only remaining objection is one made to all the bonds, based on the provisions of section 18, art. 11, of the Constitution. This section provides that no indebtedness or liability exceeding the income or revenue provided for the year shall be incurred, "unless before or at the time of incurring such indebtedness provision shall be made for the collec-

tion of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal," etc. The section of the Political Code under which these proceedings were had (section 4088) provides, following the constitutional provision, for the levy of a tax by the board of supervisors "at the time of making the next general tax levy after incurring the indebtedness," and annually thereafter, for the purposes of paying the bonds and interest, "which must not be less than sufficient to pay the interest on said bonds, and such portion of the principal, if any, as is to become due before the time for making the next general tax levy." It further provides: "And the board of supervisors, before or at the time of issuing said bonds by ordinance, shall provide for the levy of an annual tax sufficient to effect the objects of this provision." The petition in this proceeding shows that the board of supervisors did, at the time of making the order prescribing the form of bonds and coupons, etc., October 7, 1907, adopt an ordinance providing for the levying of an annual tax commencing with the general tax levy to be made in September, 1908, sufficient for the purposes stated, as well as for the purpose of paying all interest accruing on such bonds. This ordinance was adopted subsequent to the general tax levy for the year, 1907, which by law is required to be made in the month of September of each year, and the provisions therein for an annual tax fully complied with the requirements of the Constitution and the statute as to the principal, and as to all interest falling due after the first half of the year 1908. But the proposed bonds were to bear date December 10, 1907, with interest payable semiannually, and the first interest coupon on each bond would, by its terms, be due and payable on June 10, 1908, if such bond had been sold and delivered prior to that date. The result would be that the tax to be levied for the purpose of paying interest would not be available at the time the first installment of interest became due. It is upon this fact alone, as we understand it, that the claim of the defendant that the constitutional requirement has not been complied with rests. We are of the opinion, however, that there was a substantial compliance with the requirement of the constitutional provision. The provision was adopted in the light of the rule which has always existed in this state for an annual general tax levy. No levy at any other time than that of the general tax levy was contemplated. The object was simply to insure provision annually, at the time of such general tax levy, for such money as would be necessary to pay interest and principal falling due before the time of the next general tax levy, and to place in the sinking fund for the payment of the principal the amount required by law. That the payment of interest might be deferred for a short time pending proceedings for the collection of

a tax for that purpose already levied, or that the payment of the first installment of the interest on the bonds might be deferred until a general tax levy and collection thereunder, because it fell due prior to the first general tax levy after the incurring of the indebtedness, were not matters being guarded against by the framers of the Constitution. The important thing was that a tax sufficient to pay the interest and principal falling due, and to make up the necessary sinking fund, should be levied and collected annually, and this we are satisfied was all that was intended by the provision under discussion. Under this construction of such provision, the proceedings for the incurring of the indebtedness were in compliance with the constitutional requirement.

This disposes of all the objections made by the defendant to the proposed bonds. It follows that the plaintiff is entitled to the relief sought.

Let the peremptory writ of mandate issue in accord with the prayer of the petition, requiring the defendant forthwith to attest and sign, as auditor of Sacramento county, the bonds and interest coupons therein described, and to do and perform such other acts in the premises as are required of him as such auditor.

We concur: BEATTY, C. J.; SLOSS, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.

I dissent: McFARLAND, J.

153 Cal. 265

QUIST v. MICHAEL et al. (S. F. 4,821.)
(Supreme Court of California. April 20, 1908.)

1. APPEAL—PRACTICE—DISMISSAL.

Where the determination of the question whether a party not served with notice of appeal is an adverse party who should have been served, and whether or not as between the parties actually served a judgment could be rendered without affecting the rights of the party not served, necessitates an examination of the record, such examination will not be made in advance of the hearing on the merits, and a motion to dismiss the appeal for failure to serve the notice will be continued to such hearing.

2. SAME.

Though a case was tried on an agreed statement of facts, with a stipulation waiving findings, the trial court had jurisdiction to entertain a motion for a new trial, and on appeal from its order denying the motion the appellate court acquired jurisdiction to review the trial court's action, and a motion to dismiss the appeal would not lie.

3. SAME—FRIVOLOUS APPEAL.

Where an appeal is properly taken, and the appellate court has acquired jurisdiction, it will not, on a motion to dismiss the appeal, examine the record to determine whether or not the appeal was frivolous and taken merely for vexation and delay, though, if such proves to be the case, respondent's rights will be protected by the imposition of a penalty.

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Charles Quist against David B. Michael and others wherein certain of de-

fendants filed cross-complaints. From the judgment and from an order denying their motion for new trial, defendants H. H. Hill and another appeal. Respondents' motion to dismiss the appeal from the judgment ordered to stand over, to be renewed, heard, and decided when the case is presented on its merits, and their motion to dismiss the appeal from the order denied.

McNab & Hirsch, for appellants. Thomas, Pemberton & Thomas, for respondents. Robert Duncan, for cross-complainants.

HENSHAW, J. The appeals in the above entitled case are from the judgment and from the order denying appellants' motion for a new trial. Respondents move to dismiss the appeals, the first upon the ground that Sandman, a defaulting defendant, was not served with notice of the appeal, and is an adverse party, whose rights will be injuriously affected by a reversal or modification of the judgment; the second upon the ground that the case was tried upon an agreed statement of facts, with a stipulation waiving findings, and that, as a motion for a new trial is a request to the court to re-examine an issue of fact, since here the facts are stipulated, an appeal from the court's order refusing to do so is a vain and useless thing.

As to the appeal from the judgment, it is sufficient to say that the determination of the question whether or not defendant Sandman is an adverse party who should have been served, and whether or not, as between the appellants and the respondents actually served, a judgment could be rendered without affecting the rights of Sandman, necessitates an examination of the record. In accordance with the practice of this court in such cases that examination will not be made in advance of the hearing upon the merits, but may be urged at the time of such hearing. *Hibernia S. and L. Soc. v. Behnke*, 118 Cal. 498, 50 Pac. 666; *Kenney v. Parks*, 120 Cal. 24, 52 Pac. 40. It is ordered, therefore, that the motion to dismiss the appeal from the judgment stand over, to be renewed, heard, and decided when the case is presented upon its merits.

As to the motion to dismiss the appeal from the order of the court refusing to grant a new trial, it is manifest that the trial court had jurisdiction to entertain the motion for a new trial, and by appeal from its order this court has acquired jurisdiction to review the action of the trial court. Under these circumstances a motion to dismiss does not lie. If it shall prove, as respondents argue, that the appeal is a vain and useless thing, the result will be an affirmance of the order of the trial court. The appeal having been properly taken, and jurisdiction by this court having been acquired, we will not look into the record to determine the merits of respondents' contention. If it shall appear that the appeal was frivolous and taken merely

for vexation and delay, a respondent's right in such a case will always be adequately protected by the imposition of a penalty.

The motion to dismiss the appeal from the order refusing to grant a new trial is therefore denied.

We concur: SLOSS, J.; SHAW, J.; ANGELLOTTI, J.

7 Cal. App. 634

CHAMBERLAIN v. CHAMBERLAIN et al.
(Civ. 439.)

(Court of Appeal, Third District, California.
March 4, 1908.)

1. TRUSTS—CONSTRUCTIVE TRUSTS—CONVEYANCE OF LAND—"ACTUAL FRAUD."

A person prevailed upon plaintiff to deed his land to her without consideration, falsely pretending that suits were about to be brought which would result in plaintiff's liability for certain indebtedness as a stockholder in a company, and that his land might be taken for the debt, and that she would upon demand reconvey the land which she subsequently refused to do. *Held*, that she was guilty of actual fraud within Civ. Code, § 1572, subds. 1, 4, 5, providing that actual fraud within the meaning of the chapter relating to contracts consists of the suggestion as a fact of that which is not true by a party to a contract with intent to deceive another party thereto, or to induce him to enter into the contract or a promise made by such a person without any intention to perform it, or any other act fitted to deceive, and under section 2224, providing that one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it, she became an involuntary trustee for plaintiff, in the absence of an affirmative showing that his purpose in conveying the land was unlawful or immoral.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 144–147.]

For other definitions, see Words and Phrases, vol. 1, pp. 157, 158.]

2. FRAUDULENT CONVEYANCES—VALIDITY OF TRANSACTION BETWEEN PARTIES.

Even if plaintiff in making the conveyance was induced by a desire to preserve his property from sequestration by the creditors of his corporation, the grantee could not take refuge behind the pretense that in yielding to her solicitations he committed a wrong against others, and thereby deprive him of any redress.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 524–529.]

3. TRUSTS—EVIDENCE TO ESTABLISH.

In a proceeding to have land which had been conveyed without consideration on an agreement to reconvey on demand adjudged to be held in trust, evidence *held* sufficient to sustain a finding that plaintiff had requested the reconveyance of the premises.

4. SAME.

In a proceeding to have land which had been conveyed without consideration on an agreement to reconvey on demand adjudged to be held in trust, evidence *held* sufficient to sustain a finding that the husband of the transferee had knowledge that she took and held the title in trust.

5. SAME—NOTICE OF TERMS OF TRUST.

Where a wife is a transferee of property held in trust without consideration under an agreement to reconvey on demand, it is not of decisive significance as affecting the right to a

reconveyance that her husband did not have full knowledge of her agreement to reconvey, where he was not a purchaser for value, and the principle of estoppel has no application as in the case of a purchaser or incumbrancer for value in good faith without notice.

6. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a proceeding to have land which had been conveyed without consideration on an agreement to reconvey on demand adjudged to be held in trust, the admission of evidence of defendant's declaration in reference to a former conveyance of the property to him to the effect that if he had the place over again he would not deed it back was of little importance, and not prejudicial.

7. TRUSTS—ACTION TO ESTABLISH—LACHES.

Where defendant was in possession of land which had been conveyed to his wife by plaintiff without consideration, and upon an agreement to reconvey upon demand which had been refused, and defendant had lost nothing by the delay, but had on the contrary benefited by plaintiff's forbearance, the doctrine of laches had no application to the bringing of a suit to enforce a reconveyance.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Joel Chamberlain against William M. Chamberlain and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

E. S. Van Meter, H. K. Harris, and D. E. Perkins, for appellant. F. H. Short and A. M. Drew, for respondent.

BURNETT, J. The action was brought to have certain land in Fresno county consisting of 80 acres adjudged to be held in trust for the use and benefit of plaintiff, and to have it conveyed to him in accordance with the terms of the said trust. In 1895 plaintiff conveyed this land to E. J. Chamberlain, the wife of the defendant, William M. Chamberlain, by deed of grant, bargain, and sale, naming \$3,000 as the consideration, though it is admitted that there was in fact no consideration; appellant, however, claiming in his answer that there was a gift of the property to the said E. J. Chamberlain. The parties named, at the time mentioned, for some time prior thereto, and for several years thereafter, resided together on the land in question. Their relations were of a friendly and confidential character. At the same time plaintiff was the owner of certain shares of stock in a corporation known as the Mill Race Ditch Company. This company had become involved in controversies with certain landowners, and suits were pending against the company. Under these circumstances, according to the allegation of the complaint, "on or about the 13th day of April, 1895, the said E. J. Chamberlain, with intent to deceive and defraud this plaintiff, and for the purpose of procuring the legal title to the said premises, did represent, assert, and say to the said plaintiff that certain parties whose true names are to plaintiff unknown were about to commence a suit against the Mill Race Ditch Company for certain indebt-

edness due from the said corporation to the said parties; that the said E. J. Chamberlain did then and there advise the said plaintiff to convey the said premises to her, and did agree then and there that if the said plaintiff would so convey the said premises that she would upon demand reconvey the said premises to the said plaintiff; * * * that each and all of said statements and representations made by the said E. J. Chamberlain to the plaintiff were false and fraudulent, and made with the intent to deceive and defraud the plaintiff."

This averment of the complaint really presents the vital point in the case. It is contended by appellant that plaintiff relied upon such representations at his peril, and that a conveyance in accordance with the said agreement with E. J. Chamberlain would not create a trust enforceable in a court of equity. It is said that: "Unless there was such fraud practiced by E. J. Chamberlain, or such undue influence exercised by her upon the plaintiff in inducing him to convey the land to her as would make her an involuntary trustee, the relation of trustee could not and would not exist. Her verbal promise to hold it in trust would not make her a trustee"—citing section 852 of the Civil Code; *Russ v. Mebius*, 16 Cal. 357; *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Hasshagen v. Hasshagen*, 80 Cal. 514, 22 Pac. 294.

We understand that respondent agrees with appellant that the case must fail unless the allegations of the complaint and the evidence disclose such fraud or undue influence as to create a constructive trust or one by operation of law, and no fault is found with the authorities cited by appellant, but only with the application of them attempted to be made to the particular facts of this case. The claim is made by respondent in other words that we have here the trust contemplated by subdivision 3 of said section 852 and recognized in said cases cited by appellant. For instance, in the *Russ* Case, *supra*, it is held that, "where a son conveys real estate to his father, the only consideration being a verbal agreement by the father to make a will and devise to the son certain property and the father dies without having complied with the agreement, the agreement is void, the conveyance is executed without consideration, express or implied, and a trust results in favor of plaintiff by implication of law, and he may set aside the conveyance and recover the property"; and the doctrine is asserted which must be accepted as well settled that, "unless there be evidence of fraud or mistake, the recitals in a deed are conclusive upon the grantee, and no resulting trust can be raised in his favor in opposition to the express terms of the conveyance." The decision in the *Feeney* Case is based upon the ground that there was no actual or constructive fraud. The court says: "For all that appears to the contrary,

Michael Feeney's deed may have been given and received in entire good faith." In the *Hasshagen* Case it is held that, "in order to entitle respondent to recover, it was necessary for her to prove that the trust attempted to be established was created or declared in writing or by operation of law," and that nothing was shown to take the case out of the statute; and, besides, that the original intent and purpose of the grantor conveying the property was to hinder and defraud his creditors, and hence there was the strongest reason for the application of the statute of frauds.

But here the allegation is that certain representations were made by the grantee, that they were false, and made with intent to deceive plaintiff, and that he relied upon the representations and promises and therefore executed the conveyance. The case is thus brought within the terms of section 1572 of the Civil Code providing that: "Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance with intent to deceive another party thereto, or to induce him to enter into the contract. (1) The suggestion, as a fact, of that which is not true by one who does not believe it to be true; * * * (4) a promise made without any intention of performing it; or (5) any other act fitted to deceive." And as to the relation thereafter sustained to the property by the one obtaining such an advantage section 2224 of the Civil Code provides that "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." The only possible objection, then, to the scheme of the complaint lies in the suggestion that it gives rise to the inference that plaintiff's purpose in conveying the property was unlawful or immoral, and hence that he does not come into court with clean hands, and cannot justly invoke the interposition of equity. We think it is sufficient to say that it does not affirmatively appear from the complaint that plaintiff's purpose was to defraud any creditor. The indebtedness of the corporation, it is true, in which he was a stockholder, is alleged as one of the inducements for the conveyance; but we must indulge the presumption that his intention was consistent with a prudential regard for his own interest as well as with the utmost good faith toward his creditors. Especially should this position be taken in view of the importunities of the grantee and the fact that there is no evidence that any creditor was actually defrauded.

Turning to the proceedings of the trial, we find in the testimony of the plaintiff sufficient support for said allegation and the corresponding finding of the court. The plaintiff testified: "She said: 'You better make the ranch over in my name, for the ditch com-

pany was in debt, and they would be liable to come on to it and take the whole ranch, and if I didn't look out I would lose my ranch, and she would make the deed back to me after the indebtedness was settled.' I deeded it to her so that I could have, if the company ever come on to me, that I could have longer time to pay up the indebtedness, but then I never deeded it to put the company out anything." The subsequent conduct of the grantee justifies the inference that she made the statement and promise to the plaintiff with the intent to deceive and mislead him. Hence a case of actual fraud was made out. Again, the age of the plaintiff and the confidence he reposed in the grantee are sufficient in connection with other evidence to justify the charge of constructive fraud. The fact that she was his daughter-in-law is not of itself sufficient to prove the fiduciary relation, but this is an important circumstance, and there is substantial support in the record for the conclusion that she became the involuntary trustee of plaintiff, as she certainly assumed "a relation of personal confidence" with him.

Even conceding that in making the conveyance plaintiff was influenced somewhat by a desire to preserve his property from sequestration by the creditors of the corporation, still giving full credit, as we must, to the evidence favorable to the judgment of the court below, we cannot find in that circumstance alone sufficient reason to disturb the findings. We are bound to accept as true that E. J. Chamberlain importuned plaintiff to convey the property to her upon the assurance that she would reconvey it on demand, that she made the promise with the intent to deceive him, and that he had confidence in her representations and therefore executed the deed. It follows, we think, upon the clearest principles of equity, that she could not take refuge behind the pretense that in yielding to her solicitations he committed a wrong against others, thereby depriving him of any redress for her gross misconduct. The law is more indulgent to human infirmity, and less tolerant of deliberate and obtrusive depravity. A. cannot lay a trap for B., secure his confidence, induce him to make a conveyance of his property in the expectation that it will be returned, and thereafter retain the fruits of his perfidy on the ground that B. too readily yielded to temptation to save himself at the possible expense of creditors. The greater offense of the tempter overshadows and renders innocuous the weakness of the one of whom advantage is taken. For further illustration of the principles herein involved we refer to the following cases: *Brown v. Burbank*, 64 Cal. 99, 27 Pac. 940; *Brison v. Brison*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; *Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513; *Adams v. Lambard*, 80 Cal. 426, 22 Pac. 180; *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; *Alaniz v. Casenave*, 91 Cal. 41, 27 Pac. 521; *Hayne v. Hermann*, 97

Cal. 259, 32 Pac. 171; *Crosby v. Clark*, 132 Cal. 1, 63 Pac. 1022; *More v. More*, 133 Cal. 489, 65 Pac. 1044; *Faylor v. Faylor*, 136 Cal. 92, 63 Pac. 482; *Nobles v. Hutton* (Cal. App.) 93 Pac. 289. The views we have thus expressed render it unnecessary to discuss at length the other points made by appellant.

It is claimed that the evidence fails to support that part of finding No. 3 to the effect that plaintiff requested E. J. Chamberlain to reconvey said premises. He so testified substantially when he said: "I wanted my daughter-in-law to make the ranch back to me, and she wouldn't. She turned it off and went away. I think some two or three times I had a talk with her about making it back to me, and she rather put me off, and she wouldn't do it—put me off." The foregoing is obviously sufficient, although the finding itself is immaterial. It would not aid appellant if plaintiff made no demand upon E. J. Chamberlain for a reconveyance.

Again, it is contended that there is insufficient support for the finding that "William Chamberlain had full knowledge of all the facts of the verbal agreement between plaintiff and the said E. J. Chamberlain, and that he knew she took and held the title in trust." William Chamberlain, however, did testify that he knew the circumstances why the deed was made, though denying that he heard anything said about the place being deeded back. But the court was not bound to accept the latter statement. Giving full credit to the testimony of the plaintiff as to the circumstances surrounding the transaction, it would be justified in concluding that the defendant knew that his wife agreed to reconvey. But, again, assuming that the issue is raised by the denial in the answer "that said defendant and William M. Chamberlain on or about the 13th day of April, 1895, or at any other time, had full knowledge of said alleged verbal agreement between plaintiff and said E. J. Chamberlain," it would seem to be without decisive significance in view of the fact that appellant was not a purchaser for value. There is no apparent reason why a voluntary transferee, whether with or without knowledge of the circumstances under which his grantor was clothed with the legal title, should not receive the property charged with the original trust. The principle of estoppel has no application as in case of a purchaser or incumbrancer for value in good faith without notice.

Complaint is made also of the finding that "all the allegations of defendant's answer are untrue." Appellant is right in his contention that the evidence shows an indebtedness of the corporation at the time plaintiff deeded the property to E. J. Chamberlain, but there is testimony that the corporation was perfectly solvent, and there is no showing that any creditor was defrauded. Under the circumstances, if the finding had been that this allegation of the answer is true, the result would not be changed. Even conced-

ing that plaintiff desired to protect his property against seizure by creditors of the corporation, appellant should not be permitted to set this up as a defense, as we have seen, in view of the evidence and finding as to the actual fraud of said E. J. Chamberlain.

Again, it is contended that the court committed error in overruling an objection to the testimony of a witness as to a declaration of appellant in reference to a former conveyance of the property to the effect that if he had the place over again he wouldn't deed it back. This might be some evidence of animus towards the plaintiff, and was probably admissible for that purpose as affecting the credibility of appellant; but if erroneously received it could hardly have been prejudicial, as it is a circumstance of little importance.

Again, it is contended that plaintiff should not have prevailed on account of his long delay in bringing suit, as equity abhors a stale claim, and it is incumbent upon the plaintiff to show facts excusing his delay in asserting the fraud. *Truett v. Onderdonk*, 120 Cal. 581, 53 Pac. 26; *Harrington v. Paterson*, 124 Cal. 542, 57 Pac. 476; 2 *Pomeroy's Eq. Jur.*, § 817. In the *Truett* case it is doubtful whether there were any fraudulent acts shown. There was an unexplained delay of 14 years, and it was held that the court below properly exercised its discretion in denying the relief claimed. *Harrington v. Paterson* presents the case of rescission of a contract of purchase, and in accordance with the provisions of the statute it is held that the party who claims to have been defrauded must act promptly after the discovery of the fraud. *Pomeroy* states the conditions under which acquiescence may prevent the right of equitable relief as follows: "The acquiescence must be with knowledge of the wrongful acts themselves and of their injurious consequences. It must be voluntary, not the result of accident, nor of causes rendering it a physical, legal, or moral necessity, and it must last for an unreasonable length of time, so that it will be inequitable even to the wrongdoer to enforce the peculiar remedies of equity against him after he has been suffered to go on unmolested and his conduct apparently acquiesced in," and he adds that "it follows that what will amount to a sufficient acquiescence in any particular case must largely depend upon its own special circumstances." But there is no reason here for the application of the doctrine of laches. The appellant has lost nothing by plaintiff's delay in bringing the action. It is not a case of rescission, but of forbearance to press a right to demand performance of an agreement, which indulgence has inured to the benefit of appellant, who, longer than he had a right to expect, has enjoyed the bounty of plaintiff.

Upon an examination of the whole record, we find no prejudicial error, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 667

RAISCH v. M. K. & T. OIL CO. et al.
(Civ. 413.)

(Court of Appeal, First District, California.
March 11, 1908.)

1. CORPORATIONS—ASSESSMENTS ON CAPITAL STOCK.

An assessment upon the capital stock of a corporation can be levied by the board of directors only at a regular meeting or at a special meeting regularly called, and the right to levy such an assessment can be legally exercised only in the manner provided by law or by the charter of the corporation.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 12, Corporations, §§ 654-656.]

2. SAME—FORFEITURE OF SHARES.

The proceedings by which the stock of a shareholder of a corporation is declared forfeited must be strictly pursued.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 12, Corporations, §§ 390-402.]

3. SAME—DIRECTORS—NOTICE OF MEETINGS.

The law contemplates that the directors of a corporation shall all have notice of each and every meeting. If a meeting is a regular one, the by-laws fix the time and place. If it is an adjourned meeting, they are each in law presumed to know what they have done at a regular meeting, and, if it is a special meeting, notice of the time and place of holding it must be given.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 12, Corporations, §§ 1292-1300.]

4. SAME—QUORUM—ADJOURNMENT.

Civ. Code, § 308, provides that the corporate powers, business, and property of all corporations must be exercised, conducted, and controlled by a board of directors, that a majority of the directors is a sufficient number to form a board for the transaction of business, and that every decision of a majority of the directors made when duly assembled is valid as a corporate act. Section 305 provides that, unless a quorum is present and acting, no business performed or "act done" is valid as against the corporation. *Held*, that a minority of the board of directors have no power to adjourn the time of holding a regular meeting, and an assessment levied on the capital stock at the adjourned meeting without previous notice to all the directors is void.

5. SAME—ACTIONS BY STOCKHOLDER AGAINST CORPORATION—PLEADING.

In an action by a stockholder and director against the corporation to have an illegal sale of his stock set aside and the stock reissued to him, and to be restored to his rights as a stockholder, it is not necessary for him to allege the value of the stock, or that he has been injured, since it will be assumed that the stock has some value, especially as it entitled the holder to the office of director.

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Harry J. Ralsch against the M. K. & T. Oil Company and others. Judgment for defendants on demurrer to complaint, and plaintiff appeals. Reversed.

Wal. J. Tuska, for appellant. Wm. R. Davis, for respondents.

COOPER, P. J. The court sustained a demurrer to the plaintiff's second amended complaint, and, upon the plaintiff declining further to amend, judgment was entered for defendant. This appeal is prosecuted from the judgment, and the plaintiff claims that the complaint states facts sufficient to constitute

a cause of action, and that the court erred in sustaining the demurrer thereto.

The facts necessary to an understanding of the question to be decided may be briefly stated as follows: The defendant is a corporation duly organized and having a board of five directors, which, during the times the acts complained of were committed, was composed of this plaintiff, David M. De Long, George D. Metcalf, George Schmidt, and R. A. Jackson. Plaintiff was the owner of 46,900 shares of stock. The by-laws of the corporation provided that the regular meetings of the board of directors should be held on the last Saturday of each month, and that each director should receive a notice, personal or otherwise, of all meetings called for any other time than the regular meeting. On Saturday, April 30, 1904, which was the day of the regular meeting of the directors pursuant to the by-laws, only Metcalf and Jackson were present, and an entry was caused to be made in the minutes as follows: "No quorum. Adjourned to May 7, 1904, at 2 p. m. Attest, R. A. Jackson, Secretary." On said May 7th, at the hour named, Metcalf, Jackson, and Schmidt met in the office of defendant without previous notice, personal or otherwise, of such meeting to plaintiff, or to any other director than the three who were present, and without plaintiff's knowledge or assent levied the assessment of five cents per share on each and every share of the capital stock of the corporation; this being the assessment claimed to be void in this case. Under the said assessment as so made, and not otherwise, the defendant sold the said 46,900 shares of stock belonging to plaintiff, becoming the purchaser itself, and after such sale it refused, and ever since has refused, to recognize the plaintiff as a stockholder or director of the corporation.

The question in the case is as to whether or not the assessment was valid; and this depends upon whether or not the meeting at which the levy was made was a regular meeting. It is not claimed that any special meeting had been called, or that any notice had been given of a special meeting in any manner. An assessment upon the capital stock of a corporation can be levied by a board of directors only at a regular meeting, or at a special meeting regularly called. *Thompson v. Williams*, 76 Cal. 155, 18 Pac. 153, 9 Am. St. Rep. 187; *Harding v. Vandewater*, 40 Cal. 78. The proceedings by which the stock of a stockholder of a corporation is declared forfeited must be strictly pursued. The right to levy an assessment can only be legally exercised in the manner provided by law or by the charter of the corporation. *Ruck v. Caledonia Silver Mining Co.* (Cal. App. filed Sept. 4, 1907) 92 Pac. 194; *H. Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143. If a minority of a board of directors can adjourn a regular meeting where no quorum is present to a time and place named, and thus make such adjourned meeting a regular

meeting, then the assessment in question was valid; otherwise not. If Metcalf and Jackson could adjourn the regular meeting of April 30, 1904, to May 7th, and procure Schmidt to be present at that time, thus making a quorum, without notice to the other directors, and then pass a valid order of assessment, every other director could have done the same thing; that is, either one of them could have adjourned the meeting. Of course, if a quorum had been present on April 30, 1904, the regular meeting could have been adjourned to any day and hour, and such adjourned meeting would have been a regular meeting, and not a special one; but no quorum was present, and hence the regular meeting could not be adjourned because there was no regular meeting. The time had arrived for the regular meeting, but only a minority of the directors were present. Such minority could not adjourn the meeting for the simple reason that they had nothing before them but the by-laws fixing the time and place for the regular meeting, and the fact that at such time and place there was no meeting and only two directors being present. The law contemplates that the directors shall all have notice of each and every meeting. If it is the regular meeting the by-laws fix the time and place; if it is an adjourned meeting the directors are each in law presumed to know what they have done at a regular meeting; and, if it is a special meeting, the notice of time and place of holding such meeting must be given. If such were not the rule, and if the meeting could be adjourned (as in this case) without notice, serious injury might result. Some unforeseen reason might prevent a quorum of directors from attending. Two of the directors, with improper motives, might adjourn the meeting for one day, and procure one other director, who might be either not well informed or easily influenced, and with the aid of such third director, and with no notice to the other directors, pass upon matters of grave importance to each and every stockholder.

The Code provides that the corporate powers, business, and property of all corporations must be exercised, conducted, and controlled by a board of directors; that a majority of the directors is a sufficient number to form a board for the transaction of business; and that every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act. Civ. Code, § 308. It is provided that, "unless a quorum is present and acting, no business performed or act done is valid as against the corporation." Civ. Code, § 305. The adjournment was an act done, and hence, under the express provisions of the Code, it was not a valid act. It is significant in this connection that there is no provision of the Code to which our attention has been called authorizing a meeting of the directors of a corporation to be adjourned by a minority. In the very chapter in which it is provided

that unless a quorum is present and acting no act done is valid as against the corporation we find a provision that, if at a stockholders' meeting there is not present a majority of the subscribed stock or of the members, the meeting may be adjourned from day to day or from time to time, such adjournment and the reasons therefor being recorded in the journal of proceedings of the board of directors. Civ. Code, § 312. Counsel have been unable to cite us to any authority, either in this state or elsewhere, directly in point. We have examined the cases cited, but find nothing to aid us in the solution of the question involved here. We therefore conclude there was no power in the minority of the board of directors to adjourn the time of holding the regular meeting, and that the assessment was levied without authority, and is therefore void.

It was not necessary in this case for the complaint to allege the value of the stock, or that the plaintiff had been injured. We will presume that 46,900 shares of the capital stock of the defendant had some value; at least, it entitled the plaintiff to hold the office of director of the corporation to which he had been elected, and to participate in the meetings of the stockholders. Defendant corporation will not be allowed to acquire the title to plaintiff's entire corporate stock through an illegal sale under a void assessment, and then hold it for the alleged reason that it does not appear to have any value. It is not analogous to a case in which a stockholder is suing for damages for an illegal conversion of his stock. Here the plaintiff is asking to have the illegal sale set aside, 46,900 shares reissued to him; and that he be restored to his rights as a stockholder.

The judgment is reversed.

We concur: KERRIGAN, J.; HALL, J.

7 Cal. App. 661

HUBBELL v. HUBBELL. (Civ. 402.)

(Court of Appeal, First District, California.
March 11, 1908. Rehearing Denied by
Supreme Court, May 10, 1908.)

1. DIVORCE.—GROUNDS—COMPLAINT—"ESPIONAGE."

Under Code Civ. Proc. § 426, providing that a complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language, a complaint in a suit for divorce on the ground of extreme cruelty, which alleges that defendant, since the marriage, has inflicted on plaintiff grievous bodily injury and mental suffering, that continuously during five years preceding the commencement of the suit defendant has maintained over plaintiff an unreasonable espionage, and has manifested unnecessary jealousy of plaintiff, and has repeatedly made to plaintiff false accusations of infidelity, and has taken possession of letters addressed to him by patients, opened the same, and has refused to surrender them, and that defendant instigated a third person to make a violent personal assault on plaintiff, as a result of which plaintiff sustained serious personal injuries, is good as against a general demurrer,

though the objection that the complaint does not show how plaintiff sustained any serious injury from the assault is well taken; "espionage" being defined as the practice of spying or secretly watching for the purpose of detecting wrongdoing, excessive or offensive surveillance.

2. SAME—APPEAL—REVIEW—FINDINGS OF TRIAL COURT.

Whether the evidence in a suit for divorce on the ground of extreme cruelty was sufficient to prove the ultimate facts alleged in the complaint, and whether or not the various acts of defendant caused plaintiff grievous mental suffering, were matters for the trial court.

3. SAME—PLEADING—COMPLAINT.

In a suit for divorce, either on the ground of habitual intemperance or on the ground of extreme cruelty, both being defined by the Code, the complaint must allege the ultimate facts, but need not allege the evidence thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 293.]

4. PLEADING—CONCLUSIONS.

In a suit for divorce on the ground of extreme cruelty, the acts and conduct relied on must be stated, and not conclusions of law.

5. APPEAL—HARMLESS ERROR—ERRONEOUS ADMISSIONS OF EVIDENCE.

Where, in a suit for divorce tried by the court, the uncontradicted evidence showed that a third person had assaulted plaintiff, who sought to show that the assault had been instigated by defendant, error in permitting a physician to testify to a statement made to him by plaintiff, to the effect that plaintiff had been attacked by the third person, and that plaintiff had received injuries, was not prejudicial to defendant.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action for divorce by G. R. Hubbell against Harriet H. Hubbell. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Frank McGowan, for appellant. Martin Stevens, for respondent.

COOPER, P. J. This action was brought to procure a divorce on the ground of extreme cruelty. After a trial lasting three days, the court filed its findings and conclusions of law, upon which judgment was entered for plaintiff as prayed. This appeal is from the judgment and the order denying defendant's motion for a new trial. No question is raised as to the sufficiency of the evidence to justify the findings, nor is there any question to the property rights or the custody of children.

The principal point relied upon by appellant is the contention that the complaint does not state facts sufficient to constitute a cause of action. It is claimed that the complaint does not state with sufficient particularity and certainty the facts relied upon as constituting extreme cruelty. The complaint alleges as follows: "That since their intermarriage defendant has inflicted upon plaintiff grievous bodily injury and grievous mental suffering, and more particularly as follows: That continuously during the five years last past, and immediately next preceding the commencement of this action, defendant has exercised and maintained over plaintiff and his affairs

an unreasonable espionage, and has manifested an improper, unreasonable, and unnecessary jealousy of and concerning plaintiff, and has repeatedly made to plaintiff false accusations of infidelity, well knowing her charges to be false, and has spied upon him in an offensive manner, and pried into his private affairs, and has taken possession of letters addressed to him by patients, opened the same, read them, and refused to surrender them to plaintiff, who was during all of said times and now is a physician and surgeon engaged in the practice of his profession in the city and county of San Francisco. That on the 14th day of July, 1904, at the residence of plaintiff and defendant in the city and county of San Francisco, defendant instigated one Hinckley, her son-in-law, to make a violent personal assault upon plaintiff, as a result of which plaintiff sustained serious personal injury." The defendant demurred to the complaint upon the general ground that it does not state facts sufficient to constitute a cause of action, and upon the special ground that it is uncertain, in this: "That it does not appear therefrom how the plaintiff sustained any serious personal injury from an assault." The demurrer also alleged that the complaint is ambiguous for the reason last stated, and, further, that it is unintelligible for the same reason.

It will thus be seen that the demurrer is general except as to that part of the complaint relating to the assault. As to such part, the objection is that it is not made clear how the plaintiff could have sustained "serious personal injury from an assault." It may be admitted that the complaint does not show how the violent assault could have resulted in serious personal injury, but, if the personal injury portion be eliminated, we still have the clear statement that at the time and place named the defendant instigated Hinckley to make a violent person assault upon the plaintiff. If such an assault did not or could not have caused serious personal injury, still it could have been one of the factors in causing the plaintiff grievous mental suffering, and the complaint states that the defendant has inflicted upon plaintiff grievous mental suffering by all the means stated in the complaint. As to the portion of the complaint to which the general demurrer was pointed, while it is not a model of pleading, we conclude that it is sufficient, at least when tested by general demurrer. It is alleged that defendant has for the five years last past exercised over plaintiff and his affairs an unreasonable espionage. Espionage is defined as "the practice of spying or secretly watching for the purpose of detecting wrongdoing; excessive or offensive surveillance." Standard Dictionary. It may be reasonably inferred that, if a wife has continuously and unreasonably for five years spied upon and secretly watched her husband, it would probably cause him grievous mental suffering, and it is alleged in the com-

plaint that it did cause him such mental suffering. It is further alleged that during all such times defendant has manifested an improper, unnecessary, and unreasonable jealousy of and concerning plaintiff. This language is such that a person of ordinary understanding would know what is intended, and the same may be said as to the "false accusations of infidelity." These accusations are alleged to have been made to plaintiff, and we will not presume that for a wife to falsely accuse her husband of infidelity, and this repeatedly and without cause, would not cause him grievous mental suffering. It is further alleged "that defendant has taken possession of letters addressed to him by patients, opened the same, and refused to surrender them to plaintiff." We do not think it was necessary to state the date of the letters, whom they were written by, or their contents; and, while a pleading should state facts, it is not required that it should state evidence. The ultimate facts must be stated in such manner as to apprise the opposite party of what is relied upon. As to whether the evidence was sufficient to prove the ultimate facts, and as to whether or not the various acts and conduct of defendant caused plaintiff grievous mental suffering, were matters for the trial court. Under our system the complaint is only required to state the facts constituting the cause of action in ordinary and concise language. Code Civ. Proc. § 426. In *Smith v. Smith*, 124 Cal. 651, 57 Pac. 573, it is said: "Grievous bodily injury, or grievous mental suffering, is the ultimate fact, and should be alleged. There is no attempt whatever to allege bodily injury, and the probative facts alleged in no degree establish grievous mental suffering." In *Forney v. Forney*, 80 Cal. 528, 22 Pac. 294, the action was brought on the ground of habitual intemperance. The complaint alleged "that for four years and eight months last past said defendant has been and still is guilty of habitual intemperance from the use of intoxicating drinks, to that degree that the intemperance of defendant reasonably inflicts a course of great mental anguish upon said plaintiff." It was claimed that the complaint was insufficient, in that it did not state facts, but conclusions of law. The court, however, held the complaint sufficient, and that it was not necessary to state how often the defendant was intoxicated, to what extent, and upon what occasions, or what he said or did when so intoxicated to cause mental anguish. In *Reading v. Reading*, 96 Cal. 4, 30 Pac. 803, it was held that it was not necessary to set out the particular acts of intemperance in an action for divorce upon such ground. As the Code makes habitual intemperance a ground for divorce, so it makes "extreme cruelty." It defines habitual intemperance, and so it defines extreme cruelty. In neither case is it necessary to set forth all the evidence, but the ultimate facts must be alleged. Of course, in an action for divorce on the ground

of extreme cruelty, the acts or conduct relied upon must be stated, and not conclusions of law. Appellant calls our attention to *Franklin v. Franklin*, 140 Cal. 607, 74 Pac. 155. That case was reversed on account of the insufficiency of the findings. The allegations of cruelty were "that shortly after their marriage, and for a period of nearly 10 years, defendant was abusive to plaintiff, neglected her, failed to provide for her, and compelled her to perform hard and unaccustomed labor to support herself and her minor children, while he spent his time in idleness and dissipation." The question as to the sufficiency of the facts stated in the pleading was not discussed.

It is claimed that it was error to allow the witness Dr. Hirschfelder to testify as to a statement made to him by plaintiff, to the effect that he had been attacked by Hinckley, the son-in-law of defendant, and in a personal encounter with said Hinckley that he had received an injury upon his knee. The statement made by plaintiff was purely hearsay, and should not have been admitted, but we do not think the ruling of sufficient importance to justify a reversal of the case. The fight with Hinckley was given in detail by the plaintiff as a witness in his own behalf, and by Hinckley, a witness for defendant, and also by defendant as a witness in her own behalf. There was no conflict as to the fact that an encounter of a violent nature had occurred between plaintiff and Hinckley, and that plaintiff was injured in the fight. The case was tried before the court, and we are of the opinion that the ruling did not injure the defendant. The same may be said as to the refusal of the court to strike out the statement of the plaintiff, as a witness in his own behalf, as to Mrs. Baum denying to him that she had made a remark that defendant had told plaintiff had been made. Whether or not Mrs. Baum made the remark was immaterial.

We have examined the many exceptions to rulings on the admission of evidence grouped under one heading in appellant's brief, but find nothing that would in our opinion justify a reversal of the case. The evidence admitted related to some transactions not set forth in the complaint; but, as we have before stated, the plaintiff was not required to plead minutely each and every detail of the evidence. The evidence was conflicting, but in our opinion amply sufficient to sustain the findings of the court. In fact, the defendant, by her own testimony, shows many little acts tending to establish jealousy on her part, and other acts of improper interference with the plaintiff and his business. She admitted that she opened plaintiff's letters, and she exhibited some of them in evidence. She admits that she upbraided plaintiff at times, and that at least upon one occasion she called him a coward, and that upon another occasion she threw down and broke a stein that belonged to plaintiff and had been paint-

ed for him by some one, but that he did not tell her who had given it to him. It is evident that the trial court, after hearing the evidence, and seeing the witnesses, concluded that defendant was at fault, and that the parties could not longer safely live together as husband and wife.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

7 Cal. App. 656

PEOPLE v. CAULFIELD. (Cr. 112.)

(Court of Appeal, First District, California.
March 11, 1908. Rehearing Denied by
Supreme Court May 10, 1908.)

1. RAPE—EVIDENCE—SUFFICIENCY.

Evidence examined, and held to support a conviction of rape.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 71-77.]

2. CRIMINAL LAW—APPEAL—REVIEW—QUESTIONS OF FACT.

Where there is evidence to support a conviction, a question of law cannot arise as to the propriety of the conviction on the evidence within the jurisdiction of an appellate court, as declared by Const. art. 6, § 4, providing that jurisdiction in criminal cases shall extend to questions of law alone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

John F. Caulfield was convicted of rape, and from the judgment and an order denying a new trial he appeals. Affirmed.

Frank McGowan and Elmer Westlake, for appellant. Webb, Atty. Gen., for the People.

KERRIGAN, J. Defendant was convicted of the crime of rape, and sentenced to the penitentiary for 10 years. He appeals from the judgment and from an order denying his motion for a new trial.

The chief point relied upon by appellant, and the only one that merits serious consideration, is the claim that the evidence is insufficient to justify or sustain the verdict. In this behalf our attention is directed to a line of cases in this state which hold that in cases of this character the testimony of the complainant alone, if inherently improbable and uncorroborated, will not support a conviction. *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Hamilton*, 46 Cal. 540; *People v. Brown*, 47 Cal. 447; *People v. Ardaga*, 51 Cal. 371. In those cases the evidence was so improbable as to warrant the conclusion that the verdicts were the result of passion or prejudice. In our judgment, however, the facts of this case do not bring it within the rule laid down in those cases. Here the testimony of the prosecutrix is neither improbable nor uncorroborated. Much of the evidence is of such a character that we cannot with propriety repeat it in this opinion, but that part of it tending to

support the verdict of the jury is as follows: The prosecutrix testified that on September 20, 1906, between 5 and 6 o'clock in the evening, the defendant, accompanied by four other men, entered her room in a lodging house at 3377 Mission street, San Francisco; that on entering the room defendant grabbed her by her arms and threw her upon the bed; that she screamed, whereupon defendant choked her, saying, "If you holler again I'll choke your wind off, you damn bitch;" that the men took all her clothes off with the exception of a small undershirt, and that while she was being held each of the five men, including the defendant, had sexual intercourse with her. Her testimony further shows that while Scobie, one of the men who accompanied defendant to the room, was engaged in an act of sexual intercourse with her, she again screamed and called for help, that some one slipped his hand over her mouth, and that she could not cry out again. She further testified that as the result of her resistance her throat was bruised and showed finger marks; that the same was true of her wrist; that her left eye was discolored; that her legs were scratched and bruised.

Her testimony was corroborated by two police officers as to her physical appearance and condition, and as to the fact that defendant and others were there. The latter fact defendant admitted, but claimed that he had been there but a short time when the officers arrived. When the officers entered her room, which was at about half past 1 o'clock in the morning, she exclaimed, "Thank God, you have come to my aid," and complained, "These men have ravished me, outraged me brutally." The defendant and his associates made no reply to this charge. When the officers entered the room the defendant was on the bed, clad only in his pants and shirt, and others of the men present had on even less.

The testimony of the prosecuting witness was thus not uncorroborated; and while, when read as a whole, it has its contradictions, inconsistencies, and statements hard to credit, it cannot be said to be inherently improbable. As it was corroborated and not incredible, it follows that the case does not fall within the rule laid down in the cases cited by appellant and to which reference has already been made. In short, there is evidence to support the verdict of the jury, and we cannot therefore say, as a matter of law, that the verdict should be set aside. By the Constitution appellate jurisdiction is conferred upon this court in criminal cases in questions of law alone. Consequently, when there is evidence to sustain the verdict a question of law cannot arise. *People v. Kuches*, 120 Cal. 569, 52 Pac. 1002; *People v. Logan*, 123 Cal. 414, 56 Pac. 56; *People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1014; *People v. Heart*, 1 Cal. App. 166, 81 Pac. 1018; *People v. White* (Cal. App.) 90 Pac. 471.

In the case of *People v. Kuches*, supra, the court said: "This court has appellate juris-

dition on questions of law alone (Const. art. 6, § 4), and the propriety of a conviction on the evidence before the jury becomes a question of law within the competence of this court only when there is a clear failure of proof. *People v. Smallman*, 55 Cal. 185."

On the same subject it is said in *People v. Logan*, supra: "It is claimed that the evidence is too weak to support the verdict of the jury. If the evidence of the prosecuting witness be true, the verdict has full support therein, and its truth or falsity was a matter essentially for the jury's consideration. In criminal cases this court's appellate jurisdiction is limited to matters of law alone, and the truth or falsity of a witness' statement is essentially a matter of fact. It is possible that evidence might come before this court so incredible, so inherently improbable, so stamped with falsehood upon its face, that the court would deal with it as presenting a matter of law; but such a case would be a most exceptional one, and it is not presented by the record, although it may be said that the circumstances and conditions enveloping and forming the *res gestæ* of this particular offense are unusual and not entirely convincing."

We perceive no other matter requiring consideration, and for the reasons stated above the judgment and order are affirmed.

We concur: COOPER, P. J., HALL, J.

7 Cal. App. 659

PEOPLE v. SCOBIE. (Cr. 113.)

(Court of Appeal, First District, California. March 11, 1908. Rehearing Denied April 8, 1908; Denied by Supreme Court May 10, 1908.)

CRIMINAL LAW—APPEAL—REVIEW—CONSIDERATION OF MATTERS OUTSIDE OF RECORD.

On a claim that the evidence is insufficient to support a conviction, evidence taken on the hearing of a motion to place defendant on probation, and not a part of the evidence in the case, cannot be considered by the Court of Appeal.

Appeal from Superior Court, of City and County of San Francisco; Carroll Cook, Judge.

Gustave Henry Scobie was convicted of rape, and from the judgment and an order denying a new trial, he appeals. Affirmed.

H. C. and Oliver Dibble, for appellant. Webb, Atty. Gen., for the People.

KERRIGAN, J. The defendant was convicted of the crime of rape, and was sentenced to a term of five years at San Quentin. He appeals from the judgment and from the order denying his motion for a new trial. The sole question presented is the sufficiency of the evidence to support the verdict.

This is a companion case to that of *People v. Caulfield* (Cr. 112, this day decided) 95 Pac. 666. The charges in both cases sprang out of the same transaction, and in the two

cases the evidence is substantially the same, except that here there was direct proof that the prosecutrix was a woman of loose character, and also stronger evidence that she was addicted to drink. For a statement of this case reference is made to *People v. Caulfield*, supra. The evidence in this case makes a little stronger defense than was presented by the evidence in the *Caulfield* Case, but after all the record in both cases presented a question of fact for the jury.

Counsel for the appellant, in their brief and in the oral argument, referred to testimony which shows that the prosecutrix died of alcoholism, and that before she died she made statements contradictory of her testimony as to the time appellant with his companions came to her room, and as to the rape itself. Appellant and one Mary McCarthy and one Nettie Richardson all state that she said that Scoble did not rape her. This evidence, however, was taken on the hearing of a motion to place appellant on probation, and is not part of the evidence in the case, and therefore cannot be considered by this court. It may not be out of place, however, to state that the trial court acted upon this showing, and placed appellant on probation; but a few days thereafter, on appellant being brought before the court for a violation of the terms of such probation, he was sentenced to a term of five years in the penitentiary.

For the reasons stated in the case of *People v. Caulfield*, supra, and upon the authorities there cited, the judgment and order in this case are affirmed.

We concur: COOPER, P. J.; HALL, J.

(7 Cal. App. 649)

BLACKBURN v. BUCKSPORT & E. R. R. CO. et al. (Civ. 434.)

(Court of Appeal, Third District, California. March 5, 1908.)

1. APPEARANCE—EFFECT.

Under Code Civ. Proc. § 416, providing that the voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him, where, in an action against certain named defendants and unknown claimants to quiet title, a claimant voluntarily appears and moves to set aside a default against him as an unknown defendant, which motion was by consent of counsel sustained, and a cross-complaint was filed, the voluntary appearance obviated the necessity of serving the summons, and the jurisdiction of the court on that ground cannot afterwards be questioned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, §§ 103–153.]

2. QUIETING TITLE—NOTICE OF LIS PENDENS—STATUTORY PROVISIONS—NECESSITY TO JURISDICTION.

The filing of a notice of the pendency of an action to quiet title with the county recorder is not necessary to invest the court with jurisdiction of the subject-matter of the suit, notwithstanding Code Civ. Proc. § 749, requiring the plaintiff in such action to file in the office of the county recorder of the county where the property is situated, the complaint, within 10 days after filing a notice of the pendency of the ac-

tion, containing the names of the parties, with the object of the action, and the description of the property, etc., and where a claimant appears as defendant, and has the default against him as an unknown claimant set aside, and files a cross-complaint, he is not prejudiced by failure to file a *lis pendens*, the only effect of which omission could be to release innocent third parties from the operation of a judgment affecting the title or right of possession of the land in dispute.

3. SAME—PARTIES—COMPLAINT—SUFFICIENCY—STATUTORY PROVISIONS.

Code Civ. Proc. § 749, providing that, in actions to quiet title, the complaint may include as defendants, in addition to such persons as appear of record, all other persons who are known to plaintiff to have some adverse claim or cloud on the land described, or other persons unknown, claiming any right, etc., does not require a plaintiff to examine the public records and name as defendants all persons having an interest in the land in controversy, in derogation of plaintiff's title, and failure to include such persons as defendants does not render the complaint insufficient to state a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 64–66.]

4. PARTIES—UNKNOWN PARTIES—PLEADING—FICTITIOUS DESIGNATION OF DEFENDANT—STATUTORY PROVISIONS—NECESSITY FOR AMENDMENT—EFFECT OF CROSS-COMPLAINT.

Code Civ. Proc. § 474, provides that, when plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and, when his true name is discovered, the pleading or proceeding must be amended accordingly. *Held* that, where a defendant sued by a fictitious name in an action to quiet title appears, answers the complaint, and files a cross-complaint seeking affirmative relief, failure to substitute the true name of the defendant will not authorize reversal; for, even if substitution is necessary at all under such circumstances, the court on appeal may direct the amendment of the complaint by the substitution of the name of the real parties as of a date prior to the judgment; the object of the requirement as to substitution of the true name of the party to bind him by the judgment.

5. ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY.

In an action to quiet title, evidence held sufficient to sustain a finding of adverse possession.

Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Mary Blackburn, also known as Mary T. Blackburn, against the Bucksport & Elk River Railroad Company, a corporation, and others, in which C. W. Hill appears as the defendant, and files a cross-complaint. From a judgment for plaintiff, C. W. Hill appeals. Affirmed, with directions as to amendment of complaint.

H. L. Ford and J. S. Burnell, for appellant. Coonan & Kehoe and G. D. Murry, for respondent.

HART, J. This is a suit to quiet title to certain real property situated in Humboldt county, and was brought against the Bucksport & Elk River Railroad Company and certain fictitiously designated defendants, and "all other persons unknown, claiming any right, title, estate, lien or interest in

the" said real property adverse to plaintiff's title thereto. The suit was instituted under the provisions of sections 749, 750, and 751 of the Code of Civil Procedure. Summons was duly served upon the corporation, and as to the other defendants the summons was published, under an order of the court, in a newspaper printed and published daily in the city of Eureka, in said Humboldt county. The railroad company appeared and answered the complaint, and, there being no appearance by or on behalf of the fictitious defendants or of any "unknown persons" claiming any interest in the property adversely to plaintiff, a default was entered against them. Subsequently the appellant appeared and moved the court to set aside the default as to him, so that he might be permitted to answer the complaint. By consent of counsel the default against the appellant was set aside, and he thereupon answered the complaint and also filed a cross-complaint, to which answers were interposed by the plaintiff and the railroad company, respectively. Upon the issues of fact thus made up the cause was tried and the plaintiff obtained judgment, from which, upon a bill of exceptions, this appeal is taken.

The only point presented and discussed in the briefs of counsel and upon which the appellant insists upon a reversal of the judgment involves the question of whether the court acquired jurisdiction of the action and of the person of the appellant. The claim is that the summons does not contain all the matters required by the Code provisions to be set forth therein; that the affidavit upon which the court ordered the publication of the summons is insufficient; that the affidavit of the publication of the summons, being made by one Smith, who designated himself as the "Manager" of the newspaper in which the summons was published, is not made by the person required by the law to make such affidavit; that there is nothing in the record showing that a *lis pendens* was filed in the office of the county recorder, as required by sections 409 and 749 of the Code of Civil Procedure. There is, in fact, no objection which could be urged against the sufficiency of the steps essential, under the statute, to give the court jurisdiction of the action which has been overlooked by counsel for the appellant. But we think appellant has no conceivable reason to complain here that the court was without jurisdiction to try the action and determine the issues involved therein as to him, even if we assume that his contention as to the alleged defectiveness of the summons and the service thereof be well founded. The record, as we have seen, shows that the appellant, after default had been entered against him as one of the "unknown defendants" and the same had been, on his motion and by consent of counsel for respondent, vacated, answered the complaint and filed a cross-complaint. The trial was proceeded with without objection upon his

part that the court was without jurisdiction either of the action or of his person. It is immaterial so far as he is concerned whether the summons was regularly issued or defective, in that there were omitted therefrom certain matters required by the statute to be embraced therein, or was not, for any reason, properly served and returned. And it is equally as immaterial, so far as he may be affected thereby, whether or not a *lis pendens* was recorded. He voluntarily made an appearance in the action, and under the law of this state "the voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him." Code Civ. Proc. § 416; *Hibernia Sav. & Loan Soc. v. Cochran*, 141 Cal. 654, 75 Pac. 315; *Hibernia S. & L. Soc. v. Lewis*, 117 Cal. 581, 47 Pac. 602, 49 Pac. 714. In the last-named case the court says: "When defendant William F. Lewis appeared, demurred to the complaint, and filed an answer thereto, the court acquired jurisdiction of his person itself, and whether there was or was not a valid summons in the case was of no moment." The fact that the appellant here appeared and moved to set aside the default, so far as it affected him, against the "unknown defendants," of whom he was one, and the further fact that, the default having been set aside, he not only answered the complaint, but also sought affirmative relief through a cross-complaint, indubitably bear witness to the fact that in some way or by some means he received notice of the institution of the suit, and that he has had "his day in court," and most assuredly it is immaterial now how he obtained such notice. If he were the only defendant, and had, before summons was issued or served upon him, having received actual notice of the filing of the action, appeared by way of answer or otherwise, he certainly could not complain, after judgment against him, because the summons had not been issued and served upon him, or, if issued, because it did not contain all the matters that the statute requires shall be set out therein to make it a valid summons. His voluntary appearance manifestly obviated the necessity of serving the summons, the sole purpose of which is to notify the defendant of the institution of the action, and in general terms, of the nature thereof.

And the question of whether or not a *lis pendens* was filed for recordation with the county recorder is, as to the appellant, of no significance. The record does not show that such notice was so filed, although the respondent's brief declares that a *lis pendens* was recorded. But, as we have suggested, even if there was a failure to file a *lis pendens*, the appellant could not be prejudiced thereby, for the only effect of an omission to so record such notice would be to relieve innocent third parties (purchasers or incumbrancers) from the operation of a judgment affecting the "title or right of possession" of the land in dispute. We know of nothing

which would have prevented the appellant himself, after filing his cross-complaint asking for affirmative relief, from filing a lis pendens, or notice of the pendency of the action. Section 409, Code Civ. Proc. But, as we have before stated, it is unimportant whether a lis pendens was or was not recorded, so far as this appellant is concerned. He voluntarily submitted himself to the jurisdiction of the court in the case, and we do not think, as we have already indicated, that the mere omission to file for record the notice of the pendency of the action affects the question of the court's jurisdiction of the subject-matter of the litigation. In other words, we do not think, as counsel's argument upon this point necessarily assumes, that the filing of the notice of the pendency of the action with the county recorder is an essential prerequisite to investing the court with jurisdiction of the subject-matter of a suit in which the recordation of such a notice is required. A lis pendens, or the filing for record with the recorder a notice of the pendency of a suit involving the title to or right of possession of real property, is the mode substituted by the Legislature for the constructive notice to all the world of the pendency of such an action which formerly arose ipso facto upon the institution of the suit. Thus "a purchaser or incumbrancer of property, instead of being required to examine all the suits pending in the courts to ascertain whether any of them relate to or affect the real estate he is negotiating about, has now only to examine the notices of lis pendens filed in the recorder's office of the county where the real estate is situated." *Sampson v. Ohleyer*, 22 Cal. 211. The purpose of the Legislature was thus to furnish the most certain means of notifying all persons of the pendency of the action and thereby warning them against attempting to acquire a legal or equitable interest in the property concerning which the suit was brought and to bind such persons as might acquire any interest in the property in controversy after the recording of the notice by any judgment which might be secured affecting said property. This is all that the Legislature intended by the present mode of giving constructive notice of the pendency of such actions, and the legislation does not, as we before observed, nor was it intended that it should, affect in the slightest degree the question of the court's jurisdiction of the subject-matter of the suit or of the persons of the parties thereto.

The appellant makes the further point that the complaint does not state a cause of action because it omits to include as defendants "all persons as appear of record to have * * * some claim or cloud on the lands described in the complaint adverse to plaintiff's ownership." Section 749 of the Code of Civil Procedure provides that the complaint may include as defendants such persons, and the appellant seems to think that it was

therefore the duty of the plaintiff to have examined the public records and named as defendants all persons having an interest in the land in controversy in derogation of plaintiff's title. We think the claim is destitute of merit. *Irving v. Carpentier*, 70 Cal. 23, 11 Pac. 391. Under our law, it is true, when the defendant is ignorant of the name of a defendant, he must state that fact in the complaint (the complaint here contains such allegation), and such defendant may be designated in any pleading or proceeding by any name, and, when his true name is discovered the pleading or proceeding must be amended accordingly. Section 474, Code Civ. Proc. But it has been held that in a case where parties are so sued by fictitious names, and appear and answer by their true names, and there is an omission to amend the complaint by substituting the true for the fictitious names, the cause will not be reversed, but the judgment on appeal will direct the lower court to amend the complaint as of date prior to the judgment, in order to support the judgment. *Alameda County v. Crocker*, 125 Cal. 101, 57 Pac. 766; *Baldwin v. Bornheimer*, 48 Cal. 434; *McKinlay v. Tuttle*, 42 Cal. 572. We are not prepared to say that in a case like this, where one of the parties sued by a fictitious name appears, and not only answers the complaint, but also files a cross-complaint in which he seeks affirmative relief, it is absolutely necessary to substitute the true name of the party in the complaint in support of the judgment. The object of the requirement of the statute that the complaint must be amended by inserting therein the true name of a party who has been fictitiously designated as one of the defendants, when such true name has been discovered, is to bind such person by the judgment. In other words, "it is requisite that the record should show that the court had jurisdiction of the person against whom the judgment was rendered, and that the judgment was warranted by the allegations of the pleading of the party in whose favor it was rendered." *McKinlay v. Tuttle*, supra. The cross-complaint contains the name of the plaintiff as an adversary party, and alleges that "the above-named plaintiff and defendants claim to have some right, title, estate," etc., in the real property described in the cross-complaint (and likewise in the complaint) adverse to the title and ownership of the cross-complainant. The answer of plaintiff to the cross-complaint denies that the cross-complainant is the owner of the property in question, and prays that "she be dismissed therefrom with her costs and such other and further relief as to this court may seem meet and equitable in the premises." Thus it seems reasonable, even if the complaint be disregarded, that the cross-complaint and answer of respondent thereto present a direct issue between the parties to this appeal as to the ownership of the land affected by the judgment, and that such judg-

ment is "warranted by the allegations of the pleading (answer to cross-complaint) of the party in whose favor it was rendered." However, we see no harm in directing, and perhaps it may be the better practice under the circumstances to so order, the court below to cause the complaint to be amended in the respect here referred to.

Among the assignments of error in the record is the claim that the court's findings upon the material points in the case are not sufficiently supported by the evidence. No special reference is, however, made to this point in the briefs of counsel. But there is no substantial ground upon which to found the claim. The plaintiff sets up title by adverse possession. There is evidence showing that she had been in possession of the land in dispute for over 30 consecutive years prior to the commencement of the action; that during nearly, if not quite all of said period, she had the property inclosed by a fence, had paid all the taxes assessed thereon for all those years, and had otherwise exercised acts of ownership thereof. The defendant established a record title; but the court's finding of title by adverse possession in the plaintiff is well supported by the proofs, and cannot be disturbed by this court.

The judgment is affirmed, with directions to the court below to amend the complaint or cause the same to be amended, as of date prior to the judgment entered the 19th day of August, 1905, in said court, by the insertion of the name of C. W. Hill as a party defendant.

We concur: CHIPMAN, P. J.; BURNETT, J.

7 Cal. App. 679

BERRYMAN v. GIBSON. (Civ. 426.)

(Court of Appeal, First District, California.
March 12, 1908. Rehearing Denied by
Supreme Court May 11, 1908.)

1. APPEAL—SCOPE OF REVIEW—APPEAL ON JUDGMENT ROLL ALONE.

Where an appeal is prosecuted from a judgment on the judgment roll alone, neither the sufficiency of evidence to support the findings, nor the rulings of the court in the admission or exclusion of evidence, can be considered.

2. LANDLORD AND TENANT — NOTICE OF CHANGE OF RENT—SUFFICIENCY.

A notice of increase in the amount of rent on a monthly tenancy is not insufficient merely because it announces that the rent after a certain date will be \$150 per month, instead of the sum of \$40, "as heretofore paid," even if the rent under a prior oral lease was \$35 per month; for, as the tenant knew the amount of rent theretofore paid, an error in the statement did not tend to mislead or injure him, and he was informed that the terms of his lease were to be changed so that the rent would be \$150 per month, which was the object of the notice.

3. APPEAL—REVIEW—PRESUMPTIONS — REGULARITY OF JUDGMENT.

Where there was nothing in the record to show that the rent of premises alleged to have been unlawfully detained by the tenant had not been \$40 per month prior to an increase thereof, instead of \$35, as stated in the complaint, it will

be presumed in favor of the regularity of the judgment that the complaint erroneously stated the amount, and that it was shown or stipulated on the trial that it was \$40 per month.

4. LANDLORD AND TENANT—UNLAWFUL DETAINER—NOTICE TO QUIT—SUFFICIENCY.

Under Code Civ. Proc. § 1161, providing that a tenant is guilty of unlawful detainer when he continues in possession after default in the payment of rent pursuant to the lease or agreement under which the property is held, and three days' notice in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him, it is not necessary to notify the tenant that he has three days' time in which to pay the rent, for the statute fixes the period, and must be read in connection with the notice; and, while an action of unlawful detainer cannot be maintained until three days after the notice is given, the notice need not be in any particular form, and if it states the thing required by the section in plain language, so that a person of ordinary understanding would know what is intended, it is sufficient.

5. SAME—COMPLAINT—SUFFICIENCY—RIGHT OF PLAINTIFF—LEASE FROM OWNER.

In an action of unlawful detainer brought by one holding a lease from the owner of the premises, it is not necessary to set forth the contents of such lease in the complaint, and, while it is incumbent upon plaintiff to show that he is the successor in interest of the owner, it is sufficient if he states that the owner has executed and delivered to him a written lease of the premises for a term covering the period in question.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by F. M. Berryman against A. Gibson. From a judgment for plaintiff, defendant appeals. Affirmed.

Andrew Thorne, for appellant. H. Jones, for appellee.

COOPER, P. J. This is an action of unlawful detainer. The case was tried before the court, and findings were filed, in which judgment was directed to be entered for plaintiff. The defendant prosecutes this appeal from the judgment on the judgment roll alone.

In such case we cannot examine the sufficiency of the evidence to support the findings, nor the rulings of the court in the admission or exclusion of evidence. It is contended, however, that the complaint does not state facts sufficient to constitute a cause of action, and that the defendant's demurrer to the complaint should have been sustained. In appellant's brief the reasons are pointed out why the complaint is claimed to be insufficient.

It is first claimed that the notice served August 10, 1906, changing the terms of the lease so as to make the rent on and after September 1, 1906, \$150 per month instead of the sum of \$40, "as heretofore paid by you," was not sufficiently certain, because the complaint alleges that the rent under the prior verbal lease was \$35 per month. There is no merit in the contention. If the verbal lease was at \$35 per month, the defendant

knew it, and the error in the statement did not tend to mislead or injure him in any way or in any manner. He was informed by the notice that the terms of his lease were to be changed so that his rent from the time named in the notice would be \$150 per month. The object of the notice was to change the amount of monthly rental which defendant had been paying, and the defendant was informed by the notice of such change. Not only this, but there is nothing in this record to show that the prior rent was not \$40 per month. The complaint may have erroneously stated that it was \$35 per month, and the evidence may have shown, or the parties may have stipulated, on the trial, that it was \$40 per month. We must presume that such was the case in favor of the judgment, as all presumptions are in favor of the regularity of the judgment. On September 4, 1906, the plaintiff served a demand in writing upon defendant, demanding payment of the rent for the month of September, stating the amount due, and demanding that defendant pay the same or deliver up possession of the premises; and in October, 1906, a like demand was made for both the September and October rent. It is argued that the above notices were defective for the reason that they did not notify the defendant that he had three days' time in which to pay the rent. The Code provides (Code Civ. Proc. § 1161) that a tenant is guilty of unlawful detainer when he continues in possession "after default in the payment of rent pursuant to the lease or agreement under which the property is held and three days' notice in writing requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him." This action was not commenced until October 15, 1906; and it is alleged that the defendant neglected and refused for the space of three days after each of said demands to either surrender possession of the said premises, or to pay the rent due. It is not necessary that the notice or demand specify the three days. Demand in writing must be made, the amount of rent due must be stated, and the payment thereof required. Then after such demand, if the tenant, without the permission of his landlord, remains in possession without paying his rent for three days, he has had three days' notice in writing. The statute fixes the period of three days, and it must be read in connection with the notice; and when the period of three days has expired the tenant has had notice for three days, which is in substance three days' notice in writing. While the statutory requirements must be observed, and no one thing required dispensed with, yet the law regards the substance and not the shadow. The notice required by the statute need not be in any particular form. It may be deficient in spelling or in grammatical construction; but, if it states the thing required by the section in plain language so that a

person of ordinary understanding would know what is intended, it is sufficient. The case cited by counsel (*Martin v. Splivalo*, 56 Cal. 123) does not hold that the notice shall state anything about the three days, and we are aware of no case that does so hold.

It was not necessary for the contents of the lease of the premises from the owner to the plaintiff to be set forth in the complaint. The complaint sufficiently states that the owner had made, executed, and delivered to plaintiff a written lease of the premises for the term of two years from the 1st day of August, 1906. This was a conveyance for the purposes set forth in the instrument for the term of two years. It was incumbent upon plaintiff to show that he was the successor in interest of the owner. This he did by alleging that he procured a written lease from the owner for the period of two years. He had the right to change the terms of defendant's monthly tenancy, or to terminate it. He served notice upon defendant 20 days before the expiration of the month. Defendant of his own volition remained in possession, and he must suffer the penalty.

The judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

1 Cal. App. 683

DENT et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 494.)

(Court of Appeal, Second District, California. March 12, 1908.)

1. PLEADING—AMENDMENT—JURISDICTION.

Though, after judgment on an order sustaining a demurrer and the denial of a new trial, the court has no jurisdiction to permit amendments to a demurrer, such jurisdiction continues after an order sustaining a demurrer, so long as no judgment is entered thereon.

2. SAME—"ORDERS"—REVOCATION.

A decision overruling a demurrer to an amended complaint, with leave to defendants to answer, was not a judgment of itself, but an order which was subject to vacation for cause under Code Civ. Proc. § 473, providing that the court may relieve a party from a mistake in an order made during the progress of the proceedings during the term in the furtherance of justice.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5020, 5023.]

3. SAME—"MISTAKES" OF LAW.

Mistakes of law are mistakes within Code Civ. Proc. § 473, authorizing the court, in the furtherance of justice, to allow an amendment correcting mistakes in proceedings had during the progress of a trial in the furtherance of justice.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4539, 4542; vol. 8, p. 7722.]

4. PLEADING — DEMURRER — AMENDMENT — ABUSE OF DISCRETION.

Where a complaint was demurred to both generally and for misjoinder of causes of action, and an order was entered overruling the demurrer with leave to answer, and before answer defendants moved to compel plaintiff to separately state and number the several causes of action alleged in the complaint, which relief could only be obtained by demurrer, it was with-

in the jurisdiction of the court, and was not an abuse of discretion, to permit defendants to file an amended demurrer setting up as an additional ground that plaintiff's different causes of action were not separately stated and numbered, the effect of which was to revoke the former order overruling the demurrer.

5. APPEAL—REVIEW—FINAL JUDGMENT.

Any irregularity or error connected with an order permitting an amendment of a demurrer after the same had been overruled was proper matter for determination on an appeal after final judgment.

6. CERTIORARI — PROCEEDINGS REVIEWABLE — FINALITY OF DETERMINATION.

Parties may not through writs of review or other proceedings of like character correct errors pending the proceedings, even where errors are made to appear.

Petition for writ of review by Henry G. Dent and others against the superior court of Los Angeles county. Application denied.

A. K. Hancock and T. B. Archer, for petitioners.

ALLEN, P. J. On August 12, 1907, petitioners, as plaintiffs, commenced an action in the superior court of Los Angeles county against certain defendants, who, in due time, filed a demurrer to an amended complaint filed in said action, which demurrer was general as well as upon the ground of a misjoinder of causes of action. This demurrer was overruled in December, 1907, with leave given defendants to answer. Thereafter, and before answer filed, a motion was interposed by defendants asking for an order requiring petitioners, as plaintiffs in said action, to separately state the several causes of action set out in the amended complaint. Plaintiffs objected to the hearing of this motion, for the reason that the matters contained in the motion were grounds of demurrer, and could not be taken advantage of by motion. This objection was sustained by the court, but upon the hearing the court granted defendants leave to file an amended demurrer, which was filed in due time, and which demurrer was identical with the original demurrer, except that it contained the additional ground that the several different causes of action claimed by plaintiffs in their amended complaint were and are not separately stated. This demurrer, upon hearing, was sustained, but no judgment thereon has been rendered.

Petitioners in this application contend that the court was without jurisdiction to grant the defendants leave to file the amended demurrer. We think this position not maintainable. While it is true that, after a judgment has been entered upon an order sustaining a demurrer and a new trial denied, the suit is ended and the court has no jurisdiction to permit amendments, but a different rule obtains where no judgment has been entered upon the order. The decision of the court upon the original demurrer was not a judgment of itself, but an order, as defined in *McGuire v. Drew*, 83 Cal. 232, 23 Pac. 312. Orders made and entered during the progress of proceedings have always been held sub-

ject to revocation by the court for good cause during term time, and in our practice, under section 473 of the Code of Civil Procedure, the court may allow any mistake corrected which is in the furtherance of justice. Mistakes of law are mistakes within this section. *Ward v. Clay*, 82 Cal. 502, 23 Pac. 50, 227. The application for leave to amend the demurrer was made before any issue of fact was tendered. Nothing is shown suggesting an abuse of discretion in granting leave to amend, and, when so granted, the effect could only be a revocation of the former order overruling the original demurrer. In our opinion the court had jurisdiction to allow the filing of the amended pleading, the effect of which was to revoke the former order, and, even were there any irregularity or error connected therewith, it would be proper matter for determination upon an appeal after final judgment. Our practice does not permit parties through writs of review, or other proceedings of like character, to correct errors pending the proceedings, even where errors are made to appear. The fact that the additional grounds stated in the amended demurrer have only recently been recognized as grounds of demurrer explains the mistake upon the part of defendants' counsel in seeking relief through a motion, which practice prior to 1907 was the correct practice.

We think the court did not exceed its jurisdiction, and the application for a writ of review is denied.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 708

McCUE v. JACKMAN. (Civ. 446.)

(Court of Appeal, First District, California.)

March 16, 1908.)

1. MECHANICS' LIENS—MATERIALMEN'S LIENS—ENFORCEMENT—STATUTES.

Under Code Civ. Proc. § 1200, providing that where a contractor abandons the work the portion of the contract price applicable to the liens of others than the contractor shall be fixed so that the balance remaining after deducting from payments due and paid the value of the work and materials done and furnished including materials actually delivered shall be the portion of the contract price applicable to such liens, a materialman, seeking to enforce a mechanic's lien for materials furnished to a contractor who abandoned the work, must allege and prove that the value of the work and materials done and furnished, including the materials delivered at the time of the abandonment, exceeded the amount due and paid to the contractor, for, unless there is such excess, there is no sum applicable to the claim.

2. SAME.

A materialman who has furnished materials to a contractor to be used by him in the construction of a building is only entitled to be paid by the owner when there is something owing and unpaid from the owner to the contractor.

Appeal from Superior Court, Marin County; Thomas J. Lennon, Judge.

Action by J. S. McCue against W. Jackman. From a judgment for defendant, plaintiff appeals. Affirmed.

J. S. McCue, in pro. per. (W. B. Crocker, of counsel), for appellant. Edgar C. Chapman, for respondent.

KERRIGAN, J. Appellant sought by his action to foreclose a mechanic's lien. The cause was tried, and judgment went for respondent, from which judgment appellant prosecutes this appeal.

The appellant, pursuant to a contract between him and F. J. Owens, the original contractor, furnished and delivered to said Owens, to be used in the construction of six certain houses of respondent, concrete amounting to the sum of \$124.40, to be paid for by said Owens on or before the completion of said buildings. In part the court found that the respondent and said Owens entered into the agreement alleged, and in accordance therewith concrete amounting to \$124.40 was delivered, for which material no payment has been made, and that the lands described in the complaint are the property of the respondent; but the court also found as follows: "That it is not a fact that the said buildings or any of them were completed under said contract between said F. J. Owens and said defendant Wm. Jackman, but in this behalf the court finds that during the month of July, 1904, said F. J. Owens abandoned the work of construction of said buildings, whereupon on the 10th day of August, 1904, the defendant, William Jackman, at the instance of Dodge & Oliver, who were the architects employed by him to superintend the work of drawing plans and specifications and to superintend the erection of said buildings, filed in the office of the county recorder of Marin county, state of California, a notice, wherein it was stated that for the period of more than 30 days next preceding the 8th day of August no work had been performed upon said buildings or any of them by said F. J. Owens, and that said F. J. Owens had abandoned the work of the construction of said buildings."

By this last finding it appears that the buildings were not finished by Owens, but that the contract was abandoned by him. This finding brings the case within the rule of section 1200 of the Code of Civil Procedure, which is as follows: "In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor shall be fixed as follows: From the value of the work and materials already done and furnished at the time of such failure and abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections one thousand one hundred and eighty-three and one thousand one hun-

dred and eighty-four, and the remainder shall be deemed the portion of the contract price applicable to such liens."

Appellant, in order to recover, should have alleged and proved that the value of the work and materials done and furnished, including the materials delivered or on the ground, at the time of the abandonment, exceeded the amount due and paid to the original contractor. This he neglected to do. If there was no such balance, there was no sum applicable to plaintiff's claim. In no aspect of the case, however, does the complaint or the findings state a cause of action; for it is not shown in either of them that there was anything owing from the respondent to Owens, the original contractor, when appellant's claim of lien was filed. A materialman who has furnished materials to the original contractor of a building, to be used by him in its construction, is only entitled to be paid by the owner of the building when there is something owing and unpaid from the owner to the original contractor. *Turner v. Strenzel*, 70 Cal. 28, 11 Pac. 389.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

Cal. App. 672

MUGFORD v. ATLANTIC, G. & P. CO.
(Civ. 407.)

(Court of Appeal, First District, California.
March 12, 1908. Rehearing Denied by
Supreme Court, May 11, 1908.)

**1. MASTER AND SERVANT—DUTY TO WARN
SERVANT OF DANGER.**

In the case of a man 32 years old, an experienced carpenter, who, after working about a pile driver 3½ days, was sent aloft for the first time to point the pile and put a ring thereon, and who, after announcing that the ring was on, and after the signal was given by the foreman to the engineer to let the hammer fall shouted, "Hold on," and while the hammer was descending grabbed for the ring to prevent its falling off, the pile having moved slightly, there was no duty of the master to warn him, though when he went aloft the foreman said, "I will take care of you"; the danger to which he was exposed being obvious and apparent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 310.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

A man of mature years, an experienced ship carpenter, who, after working about a pile driver for 3½ days, was sent aloft for the first time to point a pile and put a ring on it, the foreman saying, "I will take care of you," was guilty of contributory negligence, where, after announcing that the ring was on, and after the signal was given by the foreman to the engineer to let the hammer fall, and while it was falling he shouted, "Hold on," and grabbed for the ring to prevent its falling off.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by William Mugford against the Atlantic, Gulf & Pacific Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Fitzgerald & Abbott and Campbell, Fitzgerald, Abbott & Fowler, for appellant. S. G. Hinds, for respondent.

KERRIGAN, J. This action was brought by an employé of the defendant corporation to recover damages for personal injuries received while working on a pile driver of defendant. At the trial below, at the close of plaintiff's case, the court granted a nonsuit. Plaintiff appeals from the judgment following the nonsuit and from an order denying a new trial.

The contention of the appellant is that the court erred in deciding that as a matter of law plaintiff was guilty of contributory negligence, and in taking the case away from the jury. From plaintiff's case, as presented by his bill of exceptions, the following undisputed and uncontradicted facts appear: William Mugford, at the time of the accident, was a thoroughly competent ship carpenter. He had worked at his trade seven or eight years in different places in the United States and elsewhere. He had worked on the pile driver 3½ days, during which time he pulled ropes and poles around the pile driver. Sometimes he was on the deck of the scow on which the pile driver stood, and sometimes in a boat running lines by which to handle the scow. On the morning of the accident, May 22, 1903, plaintiff was sent aloft to act as loftsmen by the foreman. The duties of loftsmen are to point a pile in the mud, and put it in position upright between the "gins" of the pile driver, which are the straight edges or guides at each side of the hammer, and then to place a ring on the top of the pile. Before directing the plaintiff to act as loftsmen the foreman asked him how he was as a loftsmen, and plaintiff answered that he did not know what the duties were, but that he would act as such. The foreman replied: "Go ahead, and I'll tell you what to do and take care of you." The plaintiff went aloft, a pile was put in place, and the plaintiff was told to measure the head of the pile to ascertain what size ring would be required. He did so, and replied that a 14-inch ring was necessary. The ring was tied on a rope kept for that purpose. The plaintiff pulled it up and put it on the head of the pile. Then he holloed to the foreman below: "Ring's on." That is the general signal given by loftsmen. Plaintiff testified that he did not know that the expression "Ring's on" was the signal to let go the hammer; that after he holloed "Ring's on" he listened for a response, but did not "hear the foreman say anything." The foreman, whose duty it was to give the signal "to let go," told the engineer to "hit the pile." In the meantime the pile moved slightly, and the ring fell off, whereupon the plaintiff holloed, "Hold on," and grabbed for the ring to keep it from falling. Just then the hammer came down and caught plaintiff's hand between the hammer and the head of the pile, and cut off all the fingers of that hand. The evidence showed further that plaintiff was ignorant of the duties of loftsmen, and was given no instruction beyond being told to measure the head of the pile, and he was not told that he was going to work in

a dangerous place. The evidence also showed that plaintiff did not do his work that morning in the approved fashion.

As the negligence alleged is for the failure to warn and instruct plaintiff as to the dangers incident to his employment, it is proper to set forth the substance of the testimony showing the character of the apparatus on which plaintiff was working. Plaintiff, according to his own testimony, knew how the pile driver was operated. Charles Osberg, the engineer at the time of the accident, who was an experienced pile driver, and who had worked in every capacity in the business, testified that there was nothing about the pile driver as to the lowering or dropping of the hammer and the apparatus for that purpose that an ordinary man could not see. Ernest Downing, the foreman, testified: "There is nothing about the pile driver concealed that I know of. It is open and visible to everybody."

The trial court held that the evidence showed that the plaintiff was guilty of contributory negligence, and on that ground granted respondent's motion for nonsuit. In so ruling appellant claims that the court committed error, and in support of this claim cites the well-known rule that negligence is a question for the jury, even when there is no conflict in the evidence, if different conclusions on the subject can rationally be drawn from the evidence; or, as stated in other words, when the question of negligence is fairly debatable. *Fernandes v. Sacramento, etc., R. R. Co.*, 52 Cal. 45; *McKeever v. Market St. R. R. Co.*, 59 Cal. 294; *Chidester v. Consolidated, etc., Co.*, 59 Cal. 197; *House v. Meyer*, 100 Cal. 592, 35 Pac. 308; *McKune v. Santa Clara, etc., Co.*, 110 Cal. 480, 42 Pac. 980; *Herbert v. Southern Pac. Co.*, 121 Cal. 227, 53 Pac. 651; *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 656, 62 Pac. 308, 64 Pac. 903; *Liverpool, etc., Co. v. So. Pac. Co.*, 125 Cal. 434, 58 Pac. 55; *Olsen v. Gray*, 147 Cal. 112, 81 Pac. 414.

Respondent, on the other hand, claims that the nonsuit was properly granted for the following reasons: (1) There was no evidence from which a reasonable man could find negligence causing the injury on the part of any person except the plaintiff. (2) If negligence other than that of plaintiff caused or contributed to the cause of plaintiff's injury, it was negligence of the foreman, a fellow servant of plaintiff, and such conclusively appears from plaintiff's evidence in the matter. (3) Granting negligence on the part of defendant, the plaintiff was guilty of contributory negligence, and his negligence was so established by his own evidence that reasonable minds could not differ as to its existence.

These reasons, except the second, are the grounds on which the motion for nonsuit was based in the trial court. The second reason just stated was not specified in the trial court as one of the grounds of the motion, and appellant, therefore, objects to the point being raised in this court. While we think, under

the circumstances of this case, that the objection has little if any merit, nevertheless, in view of the conclusion we have reached on the first and third reasons urged by respondent, no discussion of the one objected to will be necessary.

Appellant contends that respondent was guilty of negligence in not warning and instructing him of the dangers incident to his employment as loftsmen. Under the well-settled law in this state and elsewhere it is the duty of an employer to instruct his employees only when the dangers of their employment are concealed. No such duty is imposed on him where the dangers are obvious and apparent. 20 Am. & Eng. Ency. of Law, 94, and cases cited; 1 Labatt on Master and Servant, p. 522, and cases cited. The rule is stated by Labatt in the following words: "The failure to give instructions, therefore, is not culpable, when the servant might, by the exercise of ordinary care and attention, have known of the danger; or, as the rule is also expressed, where he had all the means necessary for ascertaining the actual conditions, and there was no concealed danger which could not be discovered." The appellant was a man 32 years old, and an experienced ship carpenter. He had worked around this pile driver 3½ days. The work exacted of him as loftsmen required no great amount of skill. The danger to which he was exposed and which resulted in his injury was obvious and apparent; hence, under the circumstances of this case, no duty of warning devolved upon respondent. The statement of the foreman to appellant, "I will take care of you," did not impose on the respondent the duty of cautioning the appellant. The following cases hold that no assurance can take from an employee the duty of guarding against obvious danger: Section 452, Labatt, and cases cited; District of Columbia v. McElligott, 117 U. S. 621, 6 Sup. Ct. 884, 29 L. Ed. 946; Phillips v. Michaels, 11 Ind. App. 672, 39 N. E. 609.

This brings us to the subject of appellant's contributory negligence. We think appellant was negligent in allowing his hand to be hit by the hammer, and that his negligence in this respect was so apparent that reasonable minds could not differ about it. The appellant of course was bound to use such care as an ordinarily prudent man would use under similar circumstances, or men of such intelligence and knowledge as he (the appellant) may be presumed to have had. As we have seen, he was a man of mature years, a thoroughly competent mechanic in his line—that of ship carpenter. He went to work on a pile driver, the operation of which was simple and open, and had worked on and about it for 3½ days when he was sent aloft to point or set a pile in the mud and to place a ring on the top of the pile in order to keep the pile from spreading or splitting. He placed the ring on the pile, knowing why it was placed there, and holloed, "Ring's on," and the foreman then gave the signal to the engineer.

In the meantime the ring fell off, and he holloed, "Hold on," and grabbed for the ring, and in doing so he put his hand on top of the pile, the hammer came down, struck his hand, and he was seriously injured. This certainly was not the act of a reasonably prudent man. Reasonable minds could not differ as to the character of such an act. The trial court, in granting the motion for nonsuit, in apt language expressed itself in part as follows: " * * * The evidence shows that before placing the ring on top of the pile he knew, or must have known, that it was put there in order that the pile might be hit with the hammer without splitting. He informed the foreman below by calling out, 'The ring is on,' and the foreman then gave the signal to the engineer, and the hammer came down. In the meantime, after saying, 'The ring is on,' he called out, 'Hold on,' which showed that he knew that the initiatory signal, as it may be called, had been given to let the hammer fall. He may not have known—he says he did not know—that that was the customary signal. But he knew it had some purpose. He announced that the ring was on for some purpose. Evidently to let the people below know, so far as he was concerned, the thing was ready, and when he had holloed out, 'Hold on,' it shows conclusively that he had given a signal before which would start the sequence of events which would result finally in the dropping of the hammer; yet he put his hand on the top of that pile, an act which a person of any intelligence whatever would have known was fraught with danger to himself."

The rule applicable to this case is stated by Labatt in the following words: "A servant is not in the exercise of ordinary care unless, at each stage of his work, he makes an effective use of his bodily and mental faculties, and observes as attentively as is reasonably possible under the circumstances the condition of the instrumentalities by which his safety may be affected, and the results of their operation by himself or others, in so far as that operation may tend to subject him to danger." Volume 1, § 332.

And, again, in the American and English Encyclopedia of Law the rule is given thus: "One who is working in a place where, or with machinery or appliances by which, he is exposed to danger, must exercise his faculties of sight and hearing for his own protection so far as proper attention to his duties will permit; and, if he fails to do so, and is injured in consequence thereof, he is guilty of such negligence as will preclude a recovery for such injury." See, also, volume 20, p. 144 (2d Ed), citing, among other cases, Kenna's Adm'r v. C. P. R. R. Co., 101 Cal. 26, 35 Pac. 332.

For the reasons stated, the judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

7 Cal. App. 705

GOLDSTEIN v. WEBSTER. (Civ. 432.)
(Court of Appeal, First District, California.
March 16, 1908.)

1. FRAUDS, STATUTE OF—MEMORANDUM—SIGNATURE—LEASE MADE BY AGENTS—NECESSITY OF WRITTEN AUTHORITY.

A lease for a term to commence in the future, made by agents having no written authority, is void.

2. LICENSES—LICENSES REVOCABLE.

A license by a landlord to a tenant to enter the leased building for the purpose of removing a partition therein prior to beginning the term is a revocable one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, §§ 117-120.]

3. FORCIBLE ENTRY AND DETAINER—NATURE AND ELEMENTS OF FORCIBLE OR OTHER UNLAWFUL DETAINER.

Where agents, having authority only to lease premises subject to the approval of the owner, made an unauthorized lease, giving the tenant the keys to the building and permission to remove a partition therein, the owner, who had other keys to the building, by peaceably taking possession of the premises during the absence of the tenant, and renting them to other parties, was not guilty of forcible entry or forcible detainer.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by J. A. Goldstein against James S. Webster. Judgment for defendant, and plaintiff appeals. Affirmed.

Samuel M. Samter, for appellant. Lindley & Eickhoff, for respondent.

HALL, J. This is an appeal from a judgment on nonsuit granted upon motion of defendant at the close of the evidence for plaintiff. The action is for forcible entry and detainer, and the complaint is so drawn as to state a cause of action under both sections 1159 and 1160 of the Code of Civil Procedure.

The only ruling presented for review, aside from the order granting the nonsuit, is the action of the court sustaining an objection of defendant to the offer of a receipt dated April 20, 1906, and shown to have been signed and delivered that day by "Baldwin & Howell, Agents." The instrument purported to be a receipt for \$25 as a deposit on account of rent of the premises sued for at \$60 per month, for the term of one year commencing on the 1st day of May, 1906. The objection was upon the ground, among others, that it was void as against defendant; no written authority to the agents being shown, and the lease being for a term to commence in the future. At the time of the offer no written authority had been shown. Subsequently plaintiff proved that no written authority had ever been given by the defendant to Baldwin & Howell. Treated as a lease, the instrument was void as against defendant. *Wickson v. Monarch Cycle Mfg. Co.*, 128 Cal. 153, 60 Pac. 764, 79 Am. St. Rep. 36. Furthermore, the entry complained of is alleged and claimed to have

occurred prior to April 24th, while the receipt did not purport to confer any right upon plaintiff until May 1st. It therefore did not tend to show either a right of possession by plaintiff, or any actual possession by plaintiff, at the time of the entry complained of. The court did not err in sustaining the objection.

Plaintiff in his testimony showed that his only claim of right to the possession of the premises, and his only possession, if any he ever had, of the premises, was as a tenant of defendant. The evidence in the case shows that on April 20, 1906, plaintiff applied to Baldwin & Howell to rent the premises in suit, being two stores, numbered 1109 and 1111 Fillmore street. It was shown that Baldwin & Howell had no written authority from the owner, the defendant, and was only orally authorized to lease the stores subject to the approval of defendant. Baldwin & Howell, as agents, did, however, on the 20th day of April, 1906, through Mr. Baldwin, rent to plaintiff the two stores at a rental of \$60 a month for the term of one year, commencing May 1, 1906, and accepted as a deposit on the rental \$25. Baldwin then went with plaintiff to the stores, and told plaintiff to get the keys from a billiard parlor, which he did. They went into the stores, and plaintiff tore down the "To Let" signs of Baldwin & Howell. Plaintiff picked up a piece of plaster that was lying on the floor, and wrote on it, "This store will be opened as a first-class clothing and furnishing goods store," and placed it in the window, where it could be seen by the public. He then said to Mr. Baldwin that the plaster would need fixing, and Baldwin replied that that would be done. Plaintiff then said that he would like to take out the partition between the two stores at his own expense, and Baldwin said the landlord will not object to that. They then left the premises. Plaintiff locked the doors and retained the keys, although there was a tag attached to each with the direction, "Lock the doors and return this key to billiard parlor." This was in the morning, and plaintiff again in the afternoon visited and entered each store. The keys remained in his possession, and, we think it may be fairly inferred from the evidence, with the knowledge and consent of Mr. Baldwin. The foregoing is all the evidence tending to show any possession or occupation of the premises by plaintiff. Plaintiff went to the country, where he had been living, and on his return several days later found the stores in the possession of others. He made a demand on defendant for the premises, and tendered to him the rent, but defendant refused to accept the rent and refused to give him possession of the premises. There is no evidence of how defendant entered the stores, or got the doors opened, except what may be inferred from the fact that he gave to the person, to whom he rented the premises on April 24th, keys to

the doors, and keys to padlocks which had been placed thereon.

The trial court granted the nonsuit upon the ground that the plaintiff was not in the possession of the premises when the entry complained of occurred. We think the court was correct in thus holding. The lease was by its terms to commence in the future (May 1, 1906), and, having been made by an agent without written authority, was void. *Wickson v. Monarch Cycle Co.*, 128 Cal. 158, 60 Pac. 764, 79 Am. St. Rep. 36. Furthermore, the evidence shows that the only authority of Baldwin & Howell from defendant was to lease the premises subject to the approval of defendant. Defendant never approved the lease, but, on the contrary, leased the premises to one Mr. Wolfe, and put him in possession on April 24, 1906. Plaintiff never in fact occupied the stores, either by himself or by any employé or agent. He never put any of his goods or possessions therein. He simply had possession of keys to the stores, and this was unauthorized by the owner of the stores. The owner of the premises (defendant) seems also to have had possession of keys to the stores, for he delivered to Mr. Wolfe keys to the doors of the stores on April 24th. Under the circumstances above set forth, the mere possession of keys to the stores did not give to plaintiff possession of the stores as against the owner thereof. The permission to remove the partition between the stores, even if it had been authorized, added nothing to the strength of plaintiff's possession. The most that can be claimed for it is that it gave a license to enter for the purpose of removing the partition prior to the beginning of the term, which was never acted upon. Such a license is revocable, even if it had been authorized by the owner. *Potter v. Mercer*, 53 Cal. 667.

Furthermore, even if it be conceded that plaintiff had a possession of the premises sufficient to warrant an action for forcible entry and detainer, the evidence wholly fails to show that the entry by the defendant was either forcible or unlawful. As before stated, the evidence shows that the lease under which plaintiff claims was void. The evidence also shows that the possession, if he had any, was without authority from the owner (defendant). Defendant therefore had a right of entry, and the possession of plaintiff, if any he had, was unlawful as against defendant. The owner, with a right of entry, of lands unlawfully in the possession of another, may, during the absence of such occupant, peaceably and without force or violence, take possession thereof, and his subsequent refusal to deliver possession to such occupant does not make him guilty of either a forcible entry or forcible detainer. *Potter v. Mercer*, 53 Cal. 667; *Powell v. Lane*, 45 Cal. 677. In *Powell v. Lane*, supra, the action was brought under the forcible entry and detainer act of 1866 (St. 1865-66, p.

768, c. 550), which was substantially identical with sections 1159 and 1160 of the Code of Civil Procedure. Like the case at bar, the complaint was so framed as to state a cause of action under each section of the act. Defendant was the owner of the premises in suit (a dwelling house), but plaintiff had been in possession thereof with her family for over a year. During the absence of plaintiff, defendant went into the house and took possession, removing plaintiff's furniture, without violence, to the other side of the road. On plaintiff's return, she was refused admission, and the next day she made a written demand for possession, so as to bring herself within section 3 of the act (corresponding to subdivision 2 of section 1160 of the Code of Civil Procedure), and, being refused, brought her action. It was held that plaintiff could not recover. To the same effect is *Potter v. Mercer*, supra, which was brought under sections 1159 and 1160 of the Code of Civil Procedure, and in its essential features is much like the case at bar. The plaintiff, pending negotiations with the owners of a certain store for a lease thereof, obtained permission to fit up the store with shelves, etc., and thereupon obtained the key to the store, and immediately employed a carpenter, who, on the same day, took lumber into the building and commenced work. The negotiations for the lease were not consummated, and the license to enter was revoked on the same day. It was held that the owners, after revoking the license to enter, had a right to re-enter if they could do so peaceably and without violence, and, having entered and obtained possession peaceably, they were not guilty of forcible entry or detainer for refusing to permit the plaintiff to enter.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 724

COOPER-POWER v. HANLON. (Civ. 457.)

(Court of Appeal, First District, California.

March 17, 1908. Rehearing Denied by

Supreme Court, May 14, 1908.)

JUDGMENT—VACATING JUDGMENT—EXCUSABLE NEGLIGENCE—AFFIDAVIT OF MERITS—SUFFICIENCY.

On a motion to set aside a default on the ground of excusable neglect, where the affidavit of merits merely stated that affiant had fully and fairly stated the facts constituting her defense to the action to her counsel, etc., and does not state that affiant had stated all the facts of the case to her counsel, it was insufficient as an affidavit of merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 314-316.]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Rose L. Cooper-Power against Elizabeth R. Hanlon, executrix of John D. Hanlon. From an order granting a motion to

set aside a default by defendant, plaintiff appeals. Order reversed.

Arthur H. Barendt, for appellant. Coffey & Coffey (Edward C. Harrison, of counsel), for respondent.

HALL, J. This is an appeal by plaintiff from an order granting the motion of defendant to vacate and set aside a default that had been duly entered against her for failure to appear and answer to plaintiff's complaint. The notice of motion was given a few days before the expiration of six months from the entry of the default, and stated that the motion would be made upon the grounds that said default had been taken against defendant through her inadvertence, mistake, and excusable neglect. No answer or proposed answer was served with the notice, but an affidavit of merits sworn to by defendant was served.

This affidavit of merits fails to state that defendant has or had stated all the facts of the case to her counsel, but in that regard simply states "that affiant has fully and fairly stated the facts constituting her defense to the cause of action set out in the complaint in said action, to her counsel," etc. Such an affidavit has repeatedly been held insufficient as an affidavit of merits. *Palmer & Rey v. Barclay*, 92 Cal. 190, 28 Pac. 226; *Morgan v. McDonald*, 70 Cal. 32, 11 Pac. 350; *People v. Larue*, 66 Cal. 235, 5 Pac. 157; *Nickerson v. California Raisin Co.*, 61 Cal. 268.

The order must be reversed, and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

Ex parte GALE.

(Supreme Court of Idaho. May 12, 1908.)

1. CONSTITUTIONAL LAW—LICENSE TAX—BILLIARD TABLES—DOING BUSINESS.

Section 1645 of the Revised Statutes of 1887, as amended by the act of March 12, 1903 (Sess. Laws 1903, p. 104), providing that a license tax shall be paid by the "proprietor or keeper of a billiard table," must be read and construed in the light of, and in connection with, section 2 of article 7 of the Constitution, and the statute will be held to apply only to proprietors or keepers of billiard tables who are using the same in "doing business" as that term is employed in the Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 46.]

2. SAME.

Where a statute may constitutionally operate upon certain persons or in certain cases, and was evidently not intended to conflict with the Constitution, although its general language might extend to persons upon whom the Constitution prohibits such legislation operating, the statute will not be held unconstitutional merely because there are persons or isolated cases comprehended by the general language of the statute on which it cannot constitutionally operate, or to whom it cannot constitutionally apply. In such case the statute will be deemed constitu-

tional, and will be construed not to apply to the excepted persons or cases on the ground and upon the principle that courts are bound to presume that the Legislature did not intend to violate the Constitution or pass an unconstitutional act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 46.]

3. SAME.

Where a statute can be reasonably and fairly construed in connection with the Constitution so as to render the statute valid and effective, without doing violence to the evident legislative intent, it will be so construed, and the legislative act will be upheld and enforced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 46.]

4. LICENSES—OCCUPATIONS—MAINTENANCE OF BILLIARD TABLE—CONSTITUTIONAL LAW—"DOING BUSINESS."

Where the proprietor or keeper of a saloon keeps and maintains a billiard table in connection therewith, it will be held that such table is kept and used in "doing business" within the meaning of section 2 of article 7 of the Constitution, although no separate or specific hire is exacted or charge made for the playing of games on such table. The incidental advantage and adjunct which the table affords to the business in connection with which it is used will be held sufficient to bring it within the purview of "doing business."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2155, 2160; vol. 8, pp. 7640, 7641.]

(Syllabus by the Court.)

Application by G. W. Gale for writ of habeas corpus. Writ denied.

G. G. Pickett, for petitioner. W. E. Stillinger, Pros. Atty. for Latah county, for the State.

AILSHIE, C. J. The petitioner is the proprietor of the Hotel Moscow in the city of Moscow, Latah county. In connection with the hotel business, the petitioner runs a saloon which is kept in the same building, and adjoining the office room of the hotel. In the front room of the saloon petitioner keeps a billiard table, on which, according to the stipulated facts, any and all persons are permitted to play without charge. There is a partition with swinging doors between the front room where the billiard table is kept and the adjoining room in which the bar is kept, and over which liquors and cigars are dispensed for pay. Petitioner has paid his state and county tax on this billiard table and his other property, and has paid the necessary license for running and maintaining his saloon or bar. He has neglected and refused, however, to pay any license tax on this billiard table as provided for by section 1645, Rev. St. 1887, as amended by the act of March 12, 1903 (Sess. Laws 1903, p. 104). That part of section 1645, Rev. St. 1887 which is involved in this case, and which is necessary to be considered, is as follows: "License must be obtained for the purposes hereinafter named, for which the tax collector must require the payment as follows: * * * (3) From each proprietor or keeper of a billiard, pool or bagatelle table, or any other kind of

table, on which games are played with ball and cue, for each table five dollars per quarter; and for a bowling alley, five dollars per quarter for each alley; but no license must be granted for a term less than three months." The petitioner, G. W. Gale, was arrested and convicted for violation of the law and sentenced to pay a fine, or, on failure to do so, to be imprisoned in the county jail. He applied to this court for a writ of habeas corpus, and, on stipulation between petitioner and the county attorney of Latah county, the issuance of the writ was waived and demurrer to the petition was filed, and the questions therefore involved are presented on demurrer to the petition.

The first proposition presented is that the act of March 12, 1903, is unconstitutional and void for the reason that it is in conflict with section 2 of article 7 of the state Constitution. That section reads as follows: "The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her or its property, except as in this article hereinafter otherwise provided. The Legislature may also impose a license tax (both upon natural persons and upon corporations, other than municipal, doing business in this state); also a per capita tax; Provided, the Legislature may exempt a limited amount of improvements upon land from taxation." It will be observed that the Constitution authorizes the Legislature to impose a license tax both upon natural persons and corporations, other than municipal, doing business in this state. This provision of the Constitution therefore limits the power of the Legislature to impose a license tax to those persons and corporations that are "doing business." It is conceded by counsel for the state here that the Legislature would have no power or authority to impose a license tax upon the mere right or privilege of owning or holding property, nor would it have the right to impose a license on one owning and keeping a billiard table in his home for amusement or recreation. The power to impose such a tax extends only to the business as contradistinguished from the ownership or possession or right of ownership of the property. The objection that is made to this statute is that it imposes such license tax on "each proprietor or keeper of a billiard * * * table." The petitioner claims that the Legislature went beyond its constitutional power and authority in attempting to impose such a license tax upon all keepers or proprietors of such property, instead of imposing it upon those only who may use the tables in doing business, and that, therefore, the act must be held invalid. If the general language used in this statute is to be read and understood independent of and separate from the Constitution itself, then it is undoubtedly too comprehensive, and covers a class of persons that cannot be subjected to such tax. Counsel for

the state insists, however, with very much reason and logic, that this statute must be read in the light of and in connection with the Constitution, and that it will be presumed that the Legislature in passing the act intended to enact a constitutional statute and to keep within its constitutional power and authority, and that consequently the statute was written with section 2 of article 7 of the Constitution in mind, and was made and intended to apply only to "proprietors or keepers of billiard tables" who were using them in "doing business."

In examining the authorities on this proposition we find considerable conflict; but that conflict does not exist so much among the decisions of the state courts as it does between the decisions of the courts of the several states and a line of federal decisions. In *Re Opinion of the Justices*, 41 N. H. 553, the Supreme Court of New Hampshire was considering a statute which in terms was broader than that permissible under the Constitution and an act of Congress, and covered a class of persons that it was not competent for the Legislature to deal with. In discussing the purpose and intent of the legislation and the rule of construction and interpretation in such case, the court said: "If the intention of any part of the act, determined upon settled principles of legal interpretation, were to obstruct or impede the exercise or enjoyment of any right secured by the Constitution of the United States, or by any constitutional law of the United States, that part would be unconstitutional. But if the intention thus determined were merely to establish, regulate, or guaranty rights or privileges consistent with the Constitution and laws of the United States in a mode not in conflict with either, and if the act would constitutionally apply to a large class of cases that do and will exist, it would not be rendered unconstitutional by the fact that, literally construed, its language might be broad enough to extend to a few exceptional cases where it could not constitutionally apply, since, upon settled principles of construction, the latter are as fully and effectually excepted by necessary implication as if the statute had contained an express proviso that it should not extend or apply to such cases. The rule of construction universally adopted is that when a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the Constitution, it is not to be held unconstitutional merely because there may be persons to whom or cases in which it cannot constitutionally apply; but it is to be deemed constitutional, and to be construed not to apply to the latter persons or cases on the ground that courts are bound to presume that the Legislature did not intend to violate the Constitution." In *State v. Smiley*, 65 Kan. 240, 69 Pac. 199, 67 L. R. A. 903, the Supreme Court of Kansas had under consideration an anti-trust statute which was more sweeping

and comprehensive than was permissible by the Constitution. The Supreme Court in passing on the question said: "In immediate connection with the subject just discussed the question arises whether, assuming the general phraseology of the statute to be comprehensive of classes of persons who cannot be rightfully included therein, the whole enactment becomes nullified thereby. The general doctrine is that only the invalid parts of a statute are without legal efficacy. This is qualified by the further rule that, if the void and valid parts of the statute are so connected with each other in the general scheme of the act that they cannot be separated without violence to the evident intent of the Legislature, the whole must fail. These rules are of every day enforcement in the courts." The Kansas court in considering the diversity of opinion between the state and federal courts pointed out the fact that the federal courts have to do principally with acts of Congress, and that in determining whether such acts are constitutional they have to deal with them in the light of the powers of Congress; in other words, that Congress has absolutely no power of legislation other than that specifically granted by the Constitution of the United States, while, on the other hand, a state Legislature has absolute and plenary power of legislation except as restricted by the Constitution. After considering these two propositions at some length, the court said: "A power which is specifically limited cannot be allowed to express itself in general terms, and a limitation of the general language to the specific power will not be implied. On the other hand, however, a power which is unlimited, except as specifically prohibited, may express itself in general terms, and the specific instances of limitation will be implied as provisos. This furnishes a rational basis of discrimination between rules of interpretation applicable in the respect under consideration to federal and state legislation. Congress cannot legislate on all subjects, as can a state Legislature. Therefore its enactments must show on their face their application to that which, as matters of constitutional limitation, they should be confined."

In passing to the final conclusion that court reached as to the rule it would follow, it is said: "We construe the general words of our statute to be comprehensive only of those cases which are the rightful subjects of legislation of the kind in question. However, we disavow doing so merely in order to shelter the statute under the rule mentioned, but because the ancient established and wise canon of interpretation requires it to be done. Sporadic and anomalous cases indicating to the contrary may be found, as they may be found to the contrary of every settled accepted doctrine of the law; but the rule that the general words of statutes will be restricted in application to cases presumptively within the legislative in-

tent has been so long accepted as a cardinal principle that its occasional denial, even by the most learned of courts, fails utterly of adverse impression."

Counsel for petitioner in this case cites *Williamson v. United States*, 28 Sup. Ct. 163, 52 L. Ed. —, in which the Supreme Court of the United States, in considering the scope of a statute, held that an act of Congress authorizing the Commissioner of the General Land Office to establish rules and regulations for the enforcement of the statute cannot be held to have authorized him to adopt rules and regulations purely destructive of the rights granted by the act of Congress, nor which would amount to additional legislation on the subject. This decision was evidently intended as a wholesome rebuke to departmental and bureaucratic legislation, and was most likely meant by the highest court of the land as a notice to those departments that they must act within the law, instead of attempting themselves to make laws. No such question arises here. In fact, there is no similarity whatever between the principle of law presented in that case and the construction of the statute under consideration here. We are fully satisfied that the act of the Legislature authorizing the imposing of a license tax on the keepers and proprietors of billiard tables is constitutional and valid, and that it should properly be construed in connection with the Constitution as covering only those cases contemplated by the Constitution and excluding those on which the legislative authority could not act. This statute was under consideration by this court in *State v. Jones*, 9 Idaho, 693, 75 Pac. 819. In that case the table was kept in very much the same manner as the table petitioner is maintaining. No charge was made for its use, and it was kept as a kind of an adjunct or leader to the saloon business. The contention was there made that its use was free, and it was therefore not kept in doing a business within the meaning of the Constitution. While this question was not squarely passed upon in so many words in that decision, yet it was necessary for the court to hold that the maintenance of the table was a business within the meaning of the Constitution in order for the court to arrive at the conclusion it reached in the case. We do not think it is essential to the collection of a license tax on such a table, used under the circumstances existing in this case, that the proprietor of the table charge any separate and specific compensation for the use of the table. A billiard table may be used independently of any other business—may be used for hire or free. It may also be used in connection with other business, such as the saloon business. The fact that it is used in connection with the saloon business clearly brings it within the provisions of the Constitution in the sense of "doing business." The saloon business might run without the billiard table, and so might the

table be run without the saloon. The fact, however, that either one may run and do business without the other and may pay a license therefor does not prevent both being carried on together, and the fact that the billiard table is used as a bait for custom for the saloon, and no charge is made for the use of the table, does not take it out of the category of doing business. If the proprietor of this table had it in his residence, and there used it for amusement and recreation and invited his friends or guests to use it, it would be on quite a different footing. There it would be kept and used purely as a pastime and for amusement and recreation at a place where no business is carried on—at a place other than a business house—and would clearly not be subject to a license tax. The proprietor cannot, however, escape taxation under the guise or pretext that, while he has it in his saloon and place of business, it is kept for the amusement and recreation of his customers, and not for the purpose of hire or doing business.

Counsel for petitioner has cited a number of cases where it was attempted to impose license tax wherein the courts have held that the object or thing on which the tax was imposed could not be termed or classed "business," and among these cases is the case of *Hewlin v. City of Atlanta*, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795. In that case the city of Atlanta attempted to impose a special license tax upon merchants who kept trading stamps and gave them out to their customers in the retail mercantile business. The court there held that such a tax could not be imposed on the trading stamps or one keeping them, for the reason that such a business could not exist alone and separate from some mercantile or trading business or concern; that the trading stamps were of no value or use except as they could be used by the merchant in connection with the business of selling goods; and that, therefore, the stamp business was only a part of the mercantile business which the merchant might use and employ in his business or not as the case might be. The court held that the mercantile business could exist without the use of the trading stamps, but that the trading stamp business could not exist independently, and could not constitute a business of itself separate and apart from the mercantile business. The distinction between that case and the one at bar appears at once.

The other cases cited by counsel are readily capable of similar distinction from the case at bar. We conclude that the statute in question is constitutional, and that the petitioner was maintaining a billiard table in his business as contemplated by section 2 of article 7 of the Constitution, and that he was properly convicted. The demurrer to the petition is sustained, and the writ will be denied and the petition dismissed.

SULLIVAN and STEWART, JJ., concur.

BARROW v. B. R. LEWIS LUMBER CO. et al.

(Supreme Court of Idaho. April 30, 1908.)

1. APPEAL—DISMISSAL—DEFECTIVE TRANSCRIPT.

Where the certificate to a transcript is defective, and a motion to dismiss the appeal is made for that reason, and a corrected certificate is offered at the hearing of the motion, the motion will be denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3166.]

2. MASTER AND SERVANT—INJURY TO SERVANT—EVIDENCE—NONSUIT.

Held, that the court did not err in overruling defendants' motion for a nonsuit at the close of plaintiff's evidence.

3. TRIAL—NONSUIT—DENIAL—WAIVER OF MOTION.

When a motion for a nonsuit is made at the close of plaintiff's evidence, and is denied, and the defendant thereafter submits evidence in support of his defense, he waives his motion for a nonsuit unless he renews it at the close of all the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 982.]

4. MASTER AND SERVANT—RELATIONSHIP—EVIDENCE.

Held, under the facts of this case, that the plaintiff when acting as brakeman was acting in the capacity of a servant for the railroad company as well as for the lumber company.

5. SAME—CARE REQUIRED OF MASTER.

A corporation that maintains a railway as a part of its lumber manufacturing plant is bound to exercise ordinary care to the end that such road shall be so constructed and maintained as to be reasonably safe as a place of work for its employees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 218-223.]

6. SAME—ASSUMPTION OF RISK.

Where the injured servant has had no experience, or virtually none, in dealing with conditions similar to those which he was required to encounter in his employment, he does not assume the risk connected therewith, which risk he would have been conclusively presumed to appreciate and assume if he had been engaged for a sufficient length of time in discharging similar duties under similar circumstances to understand the risk and appreciate the defects in the machinery with which he is working.

7. TRIAL—INSTRUCTIONS—CONSTRUCTION.

Instructions must be considered together and as a whole, to the end that they may be properly understood, and when so construed, if they fairly and fully state the law applicable to the evidence, the giving of them is not error, although detached sentences or separate charges considered alone might be erroneous or misleading.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; William W. Woods, Judge.

Action by Peter Barrow against the B. R. Lewis Lumber Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Chas. L. Heitman and Frank T. Post, for appellants. R. E. McFarland, for respondent.

SULLIVAN, J. This action was brought to recover for personal injuries alleged to have been sustained by reason of the negligent

and careless operation of a logging train on the Idaho & Northwestern Railway Company line of road. A motion was made to strike the transcript from the files and dismiss the appeal, for the reason that the transcript was not certified as required by law. At the hearing a corrected certificate was offered, and the motion was denied. Where the certificate to a transcript is defective, and a motion to dismiss the appeal is made for that reason, and a correct certificate is presented and offered at the hearing of the motion, the amended certificate will be admitted and allowed, and the motion to dismiss denied.

It appears from the record that the B. R. Lewis Lumber Company and the Idaho & Northwestern Railway Company, who are appellants here, are corporations, the former organized and existing under the laws of the state of Washington, and doing business in the state of Idaho, and the latter organized and existing under the laws of the state of Idaho, and doing business in this state. We shall hereafter refer to the first-named corporation as the lumber company, and the latter corporation as the railroad company. It appears from the record that the capital stock of the railway corporation is divided into 600 shares, and that the lumber company is the owner of 595 of said shares. It appears also that the respondent was employed by the lumber company to drive teams and to cut and skid logs, and worked at that labor for a period of 3 days, when the company directed and required him to suspend such work, and to perform services as a brakeman upon the logging train of said railroad company. It appears that the grade of said railroad was about 5 per cent., and that it was the custom of said company to load the cars with logs and then bump them off, and send them down the track without a locomotive; that the respondent had assisted in taking one or two trains of logs down said grade prior to the time of the accident; that the train to which the accident occurred consisted of 10 loaded cars; that there were 4 brakemen on said train, including the respondent; that after said train was loaded with logs it was bumped off and started down the grade, and at a curve in the track it, for some reason, jumped the track, piled up and broke several of the cars, killed one of the brakemen, and cut the respondent's leg off and otherwise injured him.

It is alleged, among other things, in the complaint that it was the duty of the appellants to furnish and provide the respondent a safe place to work in and at, and to keep and maintain their line of railroad and railway track in proper, suitable, and safe condition for said logging trains and cars to run over and upon, and to equip and provide their said logging trains and cars with proper, suitable, and safe brakes and other operating appliances, and to run, operate, pull, and propel said logging trains and cars with prop-

er, suitable, and safe railway locomotives, and to start, move, and control said logging trains and cars, when loaded with saw logs and timbers, with and by means of such railway locomotives; but that, disregarding their said duty in the premises, and in this respect, they knowingly, carelessly, and negligently constructed said railroad and railway track in such manner that the railroad cross-ties were loosely and insecurely laid and placed upon the ground without any filling or ballast between the same to hold the same in place, and the rails thereon and across and over which said logging trains and cars ran and were operated were insecurely fastened to said cross-ties and were insufficiently nailed and spiked thereto; and at all of the times mentioned they knowingly, carelessly, and negligently kept and maintained said railroad and railway track in said unsafe condition, and knowingly, negligently, and carelessly neglected to equip and provide said logging trains and cars with suitable and safe brakes and operating appliances, and locomotives with which to start, propel, and pull the same, whereby and by reason thereof said railroad and railway track and said logging trains and cars were rendered and remained dangerous and unsafe to work in, upon, and about; that there is, and at all of said times was, a steep grade between camp No. 3 and Mica Bay. It is also alleged that the plaintiff was inexperienced as a brakeman, and had never worked upon a train or railway cars in the capacity of brakeman prior to the time that he commenced to work for the lumber company, that all of which was well known to the appellants; that the dangerous and unsafe condition of said railroad and railway track were at all times known to the appellants and unknown to the respondent; and that the handbrakes on said logging trains and cars were imperfect, insufficient, and defective, and were inadequate to hold or manage said logging trains and cars in the absence of a railway locomotive, all of which was well known to the appellants and wholly unknown to the respondent and could not have been discovered or detected by him prior to the time of the accident; that on the 19th of April, 1906, while respondent was in the performance of his duties as a brakeman, the appellants knowingly, carelessly, and negligently undertook to take and run a logging train down the grade on said railway to Mica Bay without the aid of a railway locomotive, and carelessly and negligently started said logging train down said grade by bumping the engine which was used for loading said cars against the rear end of said train, and that while said logging train was going down said grade the said rails on and along said railroad and railway track, by reason of the defective and imperfect manner and condition in which they were fastened to said cross-ties and maintained as aforesaid, and by reason of the careless and negligent manner and condition in which

said cross-ties were laid and maintained upon and across the ground without any filling or ballast as aforesaid, spread and separated, and tore loose from said rails, whereby, and by reason whereof, the said logging train was thrown off said railroad and railway track and wrecked, and plaintiff was thereby violently and with great force thrown from said logging train upon the ground, and was run over by said logging train, and his right leg cut off, and was thereby otherwise greatly injured in his back, hip and ribs; that in going down said grade and before being thrown from said railroad and railway track, the said logging train was running at a high rate of speed which could not be checked or controlled by or with said hand brakes, although said hand brakes were set to their fullest capacity, but were insufficient and inadequate to check, manage, or control said logging train; that said accident was wholly caused by the carelessness and negligence of defendants in maintaining their said railroad and railway track in an unsafe and dangerous condition, and in carelessly and negligently failing to provide and equip their said logging train and cars with suitable, adequate, and safe brakes and railway locomotives, and that all during the performance of his said duties as brakeman, and at the time of said accident and injuries complained of, plaintiff was exercising due care and caution, and was injured as aforesaid without any fault or negligence on his part.

The respondent prayed for \$25,000 damages. The appellants each separately answered, denying many of the material allegations of the complaint, and set up as an affirmative defense that the respondent, with other of his fellow servants, contrary to the express orders and directions of his employer and over and against its protest, got upon a loaded log train detached from the locomotive used to move the same, and for the purpose of carrying out his own designs and purposes, and entirely independent of his employment, and acting entirely outside thereof, he caused the brakes and blockage holding said train to be released and removed, to the end that said logging train would move down the grade, commencing at the point where said train was stationed; and that by so doing he caused said train to start and run with great velocity down said grade, and, because of said great velocity, said cars left the track on a curve therein; that said plaintiff climbed upon and was riding upon said cars when they left the track as aforesaid, and either sprang from or was thrown therefrom at or about the time said cars left the track as aforesaid; that at the time of getting on said cars, and at the time of starting the same, and thereafter until said accident, the said plaintiff should have known, and did know, that to start said train, or to ride thereon when started without a locomotive attached, was dangerous, and should have known, and did know, at all times, that he and his fellow

workmen were forbidden to start or be upon said train without an engine attached thereto; that any and all injuries sustained by the plaintiff at the time alleged in the complaint were occasioned solely and entirely by the negligence and carelessness of said plaintiff and of his fellow servants, and were occasioned while acting entirely without his duties as an employé, and acting independently and not for his employer or in connection with the work or enterprise of said employer; that, in doing the things hereinbefore alleged in this affirmative defense, the said plaintiff assumed any and all risks and hazards which were, or might be, occasioned by his said acts, directly or indirectly, and that part of the agreement under which he was employed was, and part of the consideration of his employer was, that he, the plaintiff, should assume any and all risks and hazards incident to doing any of the things in the complaint, or in this affirmative defense hereinbefore alleged.

Upon the issues thus made, the cause was tried by the court with a jury, and a verdict was returned, and judgment entered in favor of the plaintiff for \$6,000 damages and costs. The appeal is from the judgment and the order denying a new trial. At the close of the plaintiff's testimony, each of the appellants interposed a motion for a nonsuit based on the grounds that there was no evidence establishing negligence against the defendants; that, if any negligence was shown, it was not the proximate cause of the accident or injury; that the evidence established that the plaintiff himself was familiar with and appreciated all the risks and hazards incident to the work he was engaged in at the time and prior to the accident, and that he assumed such risk and hazard; that the plaintiff was guilty of negligence himself, which caused or contributed to the accident and injury; that the evidence established, if there was any person or party guilty of negligence other than the plaintiff, such person was a fellow servant of the plaintiff.

The overruling of said motions is assigned as the first error. We have made a careful examination of the evidence introduced by the plaintiff in support of the allegations of his complaint, prior to the time said motions were made. We are fully satisfied that the plaintiff made a prima facie case before the motion for a nonsuit was made, and that the court did not err in overruling that motion. After said motions were denied, appellants proceeded to introduce their evidence. It was held by this court in *Shields v. Johnson*, 12 Idaho, 329, 85 Pac. 972, that after a motion for a nonsuit had been denied, and the defendant submitted evidence in support of his defense, he waived his motion for a nonsuit, and must accept the verdict of the jury, unless he renews such motion at the close of all the evidence. The court did not err in denying said motions for a nonsuit.

It is next contended that, irrespective of

all questions of law and fact to be considered in the case with reference to the lumber company, no case has been made against the railroad company. This suggestion proceeds upon the theory that the railroad company was not operating its line of road, or that respondent was not in the employ of the railroad company. It, however, appears from the record that the lumber company was the owner of 595 shares, out of a total of 600 shares of the capital stock of said railway company; that 5 shares thereof were held by parties to qualify them as directors, and we think it sufficiently appears from the record that both corporations are liable for the damages sustained by the respondent. It is true, the same authority that employed the plaintiff to drive teams, cut and skid logs, directed him to act as brakeman on the logging train, and he did so act, apparently with the full knowledge and consent of the railway company, and we think from the facts, as they appear from the record, that the railroad company owed plaintiff the duty a master owes his servant, as the plaintiff was acting in the capacity of a servant for the railroad company.

It is contended by counsel for appellant that the plaintiff knew the condition of the roadbed, as he had walked over it the day before, and he had ridden over it on a logging train two days before, and on the jammer or loader the same day; that he was of mature years, experienced, and intelligent, and that he knew as much about the condition of the road as the railroad company itself, and for that reason they were on an equality; and that if there were any risks because of the failure to ballast said road he assumed them; and that it appears that the brakes and other operating appliances were those usually used on logging roads; that if taking said train of logs down said grade without a locomotive was a dangerous performance, plaintiff was one of the actors, and cannot recover because he assumed the risks and was guilty of contributory negligence. We have gone carefully over the evidence, and are unable to concur in said contentions of counsel. The evidence on the part of the appellants shows that after the wreck the brakes on said cars were found to be properly set, and it nowhere appears that the brakeman on said train had been negligent in any manner, but it does appear that it was negligence on the part of the appellants to undertake to send a train of 10 cars, loaded with logs, down said grade with four brakemen and without a locomotive. It further appears from the evidence that the respondent knew nothing about the railroad business; that he had reason to and did believe that the railroad company considered that method of taking trains over said track safe. It sufficiently appears from the evidence that it was dangerous to take such a train loaded as it was down said grade without a locomotive, with only four men at the

brakes, and on account of the inexperience and want of knowledge on the part of respondent, it was unknown to him, and that he was unable to detect and discover that such a method of sending the train down said grade was dangerous. But it appears that that fact was known and understood by the appellants. In their answers, they allege that the respondent and his fellow employees were forbidden to take said train down said track without a locomotive, and did so in violation of such order. They, however, failed to introduce any evidence whatever in support of that allegation, and the evidence shows that the usual method of taking such trains over said track was without a locomotive. It is incumbent upon any one maintaining a sawmill and railway plant in connection therewith to put and maintain the same in a reasonably safe condition, as employees generally, on account of inexperience, are not able to judge of the safety of the appliances or machinery used by them in their employment, especially a railroad. The rule applicable in this case is clearly stated in section 67, 1 Master & Servant, Labatt, as follows: "The general rule is that any person who maintains a railway as a part of his plant is bound to exercise ordinary care, to the end that it shall be so constructed and maintained as to be reasonably safe as a place of work. For the purposes of this rule, it is immaterial whether the employer is, as is usually the case, a company engaged in transportation as a common carrier, or a company or individual operating a railway as an accessory to some other business—as, a coal company, or a lumber manufacturer who owns and conducts a railroad running from his mill to the timber. It is also clear that the employer is equally liable whether he constructed the track through his own agents or acquired it after its completion by another party." See, also, 4 Thompson on Negligence, § 4021; *Stephens v. Elliott* (Mont.) 92 Pac. 45. While it is contended by counsel that respondent was a "timber jack" of long experience, it does not appear that he had had experience with logging railways, and the evidence shows he was not competent to judge whether such railroad track and the method of handling the logging trains thereon were safe for the purposes intended. A railroad track with the trains and appliances thereon may not be safe, and an employee by reason of his inexperience could not appreciate such danger, although he may have observed their conditions. Such a one is not necessarily chargeable with notice of the defective conditions of such property and appliances. In section 395, 1 Master & Servant, Labatt, the author says: "In many instances where the injured servant had had no experience, or virtually none, in dealing with conditions similar to those which he was required to encounter, it is deemed unwarrantable to take the case from the jury, or override a verdict in his favor, although it may

be certain that the risk to which the injury was traceable was one which he would have been conclusively presumed to appreciate, if he had been engaged for a longer time in discharging similar duties under similar circumstances. * * * To that section is attached an exhaustive note citing many authorities on the question of risks not deemed to be, as a matter of law, comprehended without special experience. The evidence in this case clearly shows that the respondent was inexperienced so far as railroad construction and the running of trains were concerned, and for that reason was not capable of judging whether it was safe or not to take cars down said track and grade without an engine, or taking 10 loaded cars down the same with only 4 brakemen.

The next contention is that the court erred in its instructions to the jury and failure to give instructions requested by appellant. It is contended that the third instruction given is erroneous in two vital particulars. Said instruction is as follows: "The jury are further instructed that if from the evidence you believe that at the time alleged in the complaint in this action, and while the plaintiff was in the employ of the defendants, as alleged in said complaint, he was injured through the negligence of defendant in failing to provide him with a safe place in and at which to work, as is alleged in said complaint, your verdict should be for the plaintiff, provided that if from the evidence you believe that such injury was not brought about through the negligence or fault of the plaintiff." It is contended that the thought expressed in said instruction is that the master is negligent in failing to provide the servant with a safe place in which to work, and that the settled rule of law in regard thereto may be stated in two different ways that have merely a shade of difference, and, in illustrating said shade of difference, counsel states: "One is that it is the duty of the master to use reasonable care to provide the servant with a reasonably safe place to work, considering the character of the work being undertaken; and the other is that it is the duty of the master to furnish the servant with a reasonably safe place to work, considering the character of the work being undertaken." Counsel also contends that it has never been held that it is the duty of the master to provide the servant with a safe place to work, and that failure so to do is negligence on the part of the master, and under said instruction the jury was bound to find a verdict for the plaintiff. There might be something in counsel's contention if the instruction above quoted stood alone, but, as it does not, it must be considered with the other instructions given embodying the law of the case upon the evidence as presented upon the trial. It will not do to select an instruction here and there from a mass of instructions, and affirm or reverse a case upon a consideration of such selected instructions; but the instructions

must all be taken and considered together and if they, as a whole, state the law applicable to the facts in the case, that is sufficient, and the case should not be reversed. It is not required that the entire law of the case shall be stated in a single instruction, and it is therefore not improper to state the law as applicable to particular questions or particular parts of the case in separate instructions, and if there is no conflict in the law as stated in different instructions and all the instructions considered as a series present the law applicable to the case fully and fairly, it is sufficient. 1 *Blashfield*, Instructions to Juries, § 61. The court gave instructions 2, 3, 4, 5, 9, 11, and 13 requested by the defendants, and we think, taking all of the instructions together, as given by the court on its own motion and on the request of counsel for respective parties, the law applicable to the evidence of the case and the issues made by the pleadings is fairly and fully stated.

Instructions must be considered all together, to the end that they may be properly understood, and if when so construed, and, as a whole, they fairly and fully state the law applicable to the evidence, there is no error in giving them, although detached sentences or separate charges considered alone might be erroneous or misleading. 1 *Blashfield*, Instructions to Juries, § 385. In *Tarr v. O. S. L. Ry. Co.*, 93 Pac. 957, this court said: "Again, we have repeatedly held that all the instructions given in a case must be read and considered together as a whole, and that, where they are not inconsistent but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole instruction, rather than to an isolated portion thereof. *Lufkins v. Collins*, 2 Idaho. 236, 10 Pac. 300; *State v. Corcoran*, 7 Idaho. 220, 61 Pac. 1034; *Hansen v. Haley*, 11 Idaho. 293, 81 Pac. 935; *State v. Bond*, 12 Idaho. 424, 86 Pac. 43; *State v. Neil* (Idaho) 90 Pac. 860."

The court did not err in giving such instructions, and it did not err in rejecting or refusing to give certain other instructions requested by counsel for the appellants. After considering all of the errors assigned, we are fully satisfied that the judgment ought to be affirmed, and it is so ordered, with costs in favor of the respondent.

AILSHIE, C. J., and STEWART, J., concur.

VILLAGE OF HAILEY v. RILEY.

(Supreme Court of Idaho. March 12, 1908.
On Rehearing, May 11, 1908.)

1. WATERS—DESERT ENTRY—CONVEYANCE.

Water applied to a desert entry for the purpose of reclaiming the same does not become inseparable therefrom, and may be conveyed separate and apart from a conveyance of the land.

2. DEDICATION—TOWN SITE—WATER RIGHTS.

The making and filing of a plat laying out a town site upon a desert entry will not dedicate to the public the water used upon the streets and alleys of said town site, under a water right subsequently located and acquired.

3. SAME—EVIDENCE.

A finding that a desert entryman and his successors in interest intended that the occupants of a town site should have the free use of water on the streets of such town site is not sufficient to show a perpetual dedication of said water to a public use.

4. SAME.

A finding: "That the use of water on the streets of a town site is necessary for a reasonable enjoyment of the streets and private rights, and public convenience and accommodation, would be materially affected by an interruption of the use of the water on the streets of said town site"—is not sufficient to show an intention to dedicate or the fact of dedication of such water perpetually to a public use.

5. SAME—PERMISSIVE USE.

Where the findings of fact show a long continued use, with the knowledge of the owner, of water upon streets and alleys of a municipality, such findings are not inconsistent with a permissive use and a license to use the same, and do not show an intention to perpetually dedicate the same to a public use.

6. SAME—USER.

To constitute dedication by user, it is necessary to find the probative facts which of themselves constitute dedication, or the ultimate fact of dedication. It is not enough to find facts which merely have a tendency to prove dedication, as the use found to exist must be inconsistent with a permissive use or a mere license.

7. TRIAL—FINDINGS—ISSUES.

In an action to quiet title to an easement in a ditch and the right to use water flowing therein, where the answer interposes, as a defense, the statute of limitations under sections 4036 and 4037 of Rev. St. 1887, it is incumbent upon the trial court to make a finding upon such defense, unless a finding thereon would not affect or control the judgment or call for a different judgment than authorized by the findings made.

8. APPEAL—REVIEW—INSUFFICIENT FINDINGS.

Where the findings and conclusions of law do not support the judgment, the judgment will be reversed.

On Rehearing.**9. DEDICATION—WATER RIGHTS—CONSTRUCTION.**

Under the facts shown in this case, there has been such a dedication of water to the streets, alleys, and lots of the village of Hailey, within the purview and meaning of section 4, art. 15, of the Constitution and the statutes of this state, that the water cannot hereafter be withheld from such streets, alleys, and lots to which it has been applied, so long as the consumer pays the reasonable rental therefor, as the same may be established by authority of law, and to that extent the public and individual use of such water cannot be disputed or interrupted.

10. ESTOPPEL—IN PAIS—APPLICATION.

The doctrine of estoppel in pais cannot be applied in favor of the public against the property owner, unless it can be shown that he has stood by, and by his action or silence concurred in allowing the public and individuals to so use and enjoy his property and the right thus initiated, that thereafter to deprive them of it would work an injustice or fraud upon them and invade the right founded on the presumption he has thus allowed to be raised.

11. TRIAL—FINDINGS—CONCLUSIONS OF LAW.

A finding to the effect that, unless a certain use be held to amount to a dedication, private rights and public accommodation would be ma-

terially affected, and that an interruption or cessation thereof would materially affect both public and private interests, is a conclusion of law, rather than a finding of fact, and it is the duty of the trial court to find the facts upon which such conclusion must necessarily rest.

(Syllabus by the Court.)

Appeal from District Court, Blaine County; Lyttleton Price, Judge.

Action by the village of Hailey against W. T. Riley. Judgment for plaintiff, and defendant appeals. Reversed.

See 92 Pac. 756.

R. M. Angel and Richards & Haga, for appellant. W. A. Brodhead, Village Atty., McFadden & Brodhead, and Sullivan & Sullivan, for respondent.

STEWART, J. This is an appeal from the judgment. The record presented to this court consists of the judgment roll and a statement of the case settled and allowed by the trial court.

The plaintiff alleges, in the complaint: That it is the owner and in possession of a public easement of an undivided one-ninth interest in a certain ditch, and has the right to convey in said ditch, known as the "Big Ditch," taking water from Wood river, in Blaine county, Idaho, 700 inches of water through said ditch and laterals; that it is the owner and in the possession of all ditches and laterals for the purpose of conveying water along, over and upon the lots, blocks, streets, and alleys of Hailey; and that it is the owner of a public easement, and in the possession and entitled to the right to use 700 inches, under four-inch pressure, of the waters of Big Wood river, through said ditch and laterals, for irrigation and domestic purposes. It is then alleged that the defendant claims some interest in said property which is without any right whatever. Plaintiff demands judgment that the defendant set forth his claim to said property, and that a decree be entered adjudging that he has no interest in said property, and that the plaintiff's title is good and valid, and that the defendant be enjoined from asserting any claim to said property.

The defendant puts in issue the allegations of the complaint by denials, and alleges: That in April, 1883, the Oregon Land & Improvement Company located and appropriated a water right to the extent of 6,000 inches of water out of the waters of Wood river, and constructed the canal mentioned in plaintiff's complaint, known as the "Big Ditch," for the purpose of carrying and conveying said water to the place of intended use, and prosecuted said work diligently until the same was completed to the full carrying capacity appropriated; that this defendant and his predecessors in interest have for more than 20 years been in the sole, exclusive, complete, absolute, and undisputed control, possession, and management of said ditch, and of the laterals connected with or used in connection therewith, and of the water flowing in, or carried or conducted through, said ditch and laterals,

to the full capacity of said ditch, to wit, 6,000 inches; that for more than 20 years before the commencement of this action the defendant and his predecessors in interest have been the sole, exclusive, absolute, and undisputed owners of said ditch and laterals, and said water right and water appropriation, to the full capacity of said ditch and laterals, and during all this time have exercised and enjoyed all the power and rights of ownership in fee, and during all of said time have received and collected for their sole and exclusive use and benefit the rents, profits, and income from the use of said property; that, through mesne conveyances, said property has been transferred and conveyed by the original owner and locators to this defendant, who is now the sole, exclusive, and absolute owner thereof, and for several years before the commencement of this action has had the sole, exclusive, complete, and absolute control and management of said ditch and laterals and said water right and water appropriation, to the full capacity of said ditch; and that this defendant and his predecessors in interest have for more than 20 years paid all the taxes levied and assessed against said property.

As a further defense, the defendant pleads the statute of limitations, under sections 4036 and 4037 and 4060 of the Revised Statutes of 1887. Upon the issues thus presented, the court made his findings of fact and conclusions of law, and entered a decree as follows: "Wherefore, by reason of the law and findings aforesaid, it is ordered, adjudged, and decreed: That the village of Halley is entitled to the right to the use and possession of 271.45 inches of the waters of Big Wood river, through what is known as the Idaho & Oregon Land Improvement Company Ditch, or 'Big Ditch,' and laterals, which is taken from said Big Wood river about $4\frac{1}{2}$ miles north of the village of Halley, Blaine county, Idaho, measured under a four-inch pressure, at the point where the main lateral is diverted from said ditch, near the northeast corner of the town of Halley, for any and all legitimate street purposes on the streets and alleys of the said village of Halley. That the defendant has no right, title, or interest whatever in the plaintiff's right to the use of said water or any part thereof, except and provided, however, that if, at any time or times, the said full quantity of 271.45 inches of water shall not be necessary to be used as aforesaid, the said village shall, at such times, take of said quantity only so much as shall be so necessary, and permit the remainder to flow uninterrupted in said ditch. That the village of Halley has an easement in said Idaho & Oregon Land Improvement Company Ditch, or 'Big Ditch,' and in the laterals extending from the same to, along, and upon the streets and alleys of said village, to the extent of conveying through said ditch and laterals 271.45 inches of water; and the defendant has no right, title, or interest whatever in said easement. That plaintiff have

judgment for its costs expended herein, amounting to the sum of \$103. Dated February 2, 1906."

By the pleadings, the issues presented to the court for decision are: (1) Is the plaintiff the owner of a public easement and in the possession of an undivided one-ninth interest in what is known as the "Big Ditch," taken from Wood river in Blaine county, Idaho, and an equal interest in the laterals extending from said ditch to said village; and has the plaintiff the right to convey 700 inches of water through said ditch and laterals for use on the streets of said city or village? (2) Is the plaintiff the owner and in the possession of any and all ditches taken from said ditch and laterals for the purpose of conveying water along, over, and upon the lots, blocks, streets and alleys of said village of Halley? (3) Is the plaintiff the owner of a public easement in the possession and right to the use of 700 inches of water, measured under a four-inch pressure, of the waters of said Big Wood river through said ditch and laterals for irrigation and domestic purposes? (4) Has the defendant been the sole and exclusive owner of the whole of the property described in the complaint and seised and possessed of the same, and in the sole and exclusive control thereof, and paid taxes thereon, for a period of time exceeding five years?

An examination of the findings shows: That the court found that the village of Halley is a municipal corporation organized on April 21, 1903. That on the 6th day of December, 1880, John Halley made a desert entry containing 484.70 acres, and in the spring of 1881, laid out the town of Halley into streets and alleys, blocks and lots, etc., and made a plat of the same, and filed said plat in the county recorder's office in said county on the 10th day of May, 1881. That on the 24th day of August, 1882, said Halley filed a revised plat of said town of Halley, embracing the same land included in the original plat, and covering substantially all of said desert entry. In 1881, John Halley constructed a ditch from Indian creek to the town of Halley as then platted, and during the years 1881 and 1882 conveyed water through said ditch from Indian creek to the town of Halley, and used the same on the streets by the inhabitants of said town for irrigation and other street purposes. That on the 7th day of June, 1882, said Halley entered into an agreement of sale with the Idaho & Oregon Land Improvement Company, agreeing to sell to said company the land embraced in said desert entry, excepting such lots as had previously been disposed of; said Halley to make proof and then convey according to said agreement. That on the 24th day of March, 1883, the Oregon Land & Improvement Company located a water right for 12,000 inches, to be taken from Wood river about $4\frac{1}{2}$ miles above the town of Halley, said water to be used for irrigation purposes upon said desert entry and upon other claims, and in the summer of 1883

constructed what is known as the "Big Ditch," from Wood river, and in the fall of 1883, and every summer since, water has been conveyed through said ditch to the town of Hailey and used by the inhabitants of said town for irrigating the trees along the streets and for other street purposes. That on the 6th day of December, 1883, said company deeded to John Halley an undivided one-ninth interest in said Big Ditch, and also the right to the use of 700 inches of water from said water right through said ditch for the purpose of irrigating said desert entry. That, after the summer of 1883, the Indian creek water was not used on said desert entry, and on the 11th day of February, 1884, prior to said Halley's making proof on said desert entry, he conveyed all his interest in the water of said Indian creek. That said Halley's original filing on the unsurveyed land for said desert entry comprised an area of 484.70 acres, but after survey the lines were adjusted and patent issued for 440 acres. That final proof was made on said desert entry on the 1st day of March, 1884, showing that said Halley had the right to the use of 700 inches of water of Wood river, through said Big Ditch, and had used the same upon said desert entry. That patent was issued to said Halley on the 5th day of April, 1884.

Then follows what is denominated a "history" of the use of said water in said town, in which it is recited by the trial court: That, as soon as the plat of the original town of Hailey was filed, the people began purchasing lots and erecting buildings, and water was conveyed to said town from Indian creek and used in the years of 1881, 1882, and 1883. That the Big Ditch was dug in the summer of 1883, taking water from Big Wood river, which, during the latter part of the year 1883, was used on the streets in the town of Hailey, and, as the town grew, ditches were extended, trees planted, and water used, and from the year 1881, up to the present time, the lot owners and inhabitants have planted trees yearly, and said Halley and his successors in interest have planted trees and encouraged the planting of trees. That such trees required irrigation, and had been irrigated every year by the water and ditches in question. That the use by the public of said water for legitimate purposes has been continuous and uninterrupted since the first occupation of the tract, until the present time, a period of over 20 years. That from the time water was put on said desert entry, and this defendant acquired the same, the water was turned by said Halley and his successors, and by this defendant, into the ditches on the streets of Hailey and used by whomsoever desired, and without any objection on their part. That it was the intent of Halley and his successors and this defendant that the occupants of the town tract should have the full use of said water on the streets for legitimate purposes. That the purchasers of said lots, down to the

time this defendant acquired said property, were induced to believe, and did believe, that the public should have the right to the full use of the water on the streets of said town for all legitimate purposes, and did so use the water, and did not understand that they were to be charged for such use, although some of them paid. That since 1881, there has always been sufficient water from such source to irrigate the trees on the streets and other street purposes, in the main lateral leading from said Big Ditch to the town. That previous to the organization of Hailey as a village, there was no municipal government for the town, and when the village was organized, it found a large community occupying the town laid out, owning lots sold to them by Halley and his successors, according to the plats. That many years since 1881, the ditches on the streets were not cleaned out or repaired by any one engaged to do this work, and no person in particular attended to the same. That the inhabitants of the town of Hailey have been in possession of the water so used on the streets of Hailey, since it was first brought on said desert claim. That since the settlement of said town in 1881, except the years 1884 and 1885, the defendant, Riley, has been associated in the management of said ditch and water right connected therewith, and never claimed to the inhabitants that the owners of said Big Ditch were the owners of the water flowing through the ditches of said town, but permitted its free use. That the use of the water on said streets is necessary for a reasonable enjoyment of the streets, private rights, and public convenience. That of the part of the Halley entry included in the town plat, 181.09 acres are covered and included within the streets and alleys platted.

The court, as conclusions of law, found: That, by the incorporation of the village, the municipality took exclusive control and authority of the streets of Hailey and all right and authority to use water on the streets, that the land covered by the streets and alleys was set apart and dedicated by John Halley for public use for highways, for public traffic, and for all uses and purposes, and the setting apart of the streets was more than a common-law dedication. That it was a dedication enlarged by statute to the extent that the lot owners purchased with their lots the right to plant trees in the streets of Hailey, and by statute were granted the right to use the soil for tree growing, and that this statutory enlargement is something more than a mere right of passage, and gives a right to the use of the soil for the growth of vegetation, and that this right to the use of the soil cannot be separated from the right to the use of the necessary water to induce growth. There being a grant to the use of the land, the right to the use of the water follows. That the water in question is appurtenant to the land in the streets and alleys, and the use of the

same for legitimate street purposes is inseparable therefrom, and is incident to and necessary for a reasonable enjoyment thereof. That the beneficial uses to which water can be put on the streets and alleys of Halley include all sanitary considerations, extinguishing fires, betterment and preservation of roadways, etc. That the village of Halley is entitled to the right to the use of 271.45 inches of said waters of Big river, through said Big Ditch mentioned, under a four-inch pressure, at the point where the main lateral is diverted from said ditch, to be used for legitimate street purposes when necessary. That the village has an easement in said ditch and laterals to the extent of conveying through said ditch and laterals 271.45 inches of water, and is entitled to a decree of such water and easement in said ditch. And that the defendant has no interest or estate whatever in the plaintiff's right to use said water or its easement.

The respondent contends that the findings show: First, a common-law dedication of the water itself, separate and distinct from the dedication of the streets and alleys; second, that water for street purposes passed with the dedication of the streets and alleys, or as incident and necessary to the enjoyment thereof; and third, that the water used on the desert entry and the water right supporting the same became a part of the freehold and inseparable therefrom.

In considering these three questions, we will take up the latter first. It will be seen from the findings that the trial court proceeded upon the theory that by the use of the water through the Big Ditch from Big Wood river upon the desert entry of said Halley, under which said desert entry was reclaimed, and upon which final proof was made, said water became an appurtenant to said land and inseparable therefrom. If this be the theory upon which said case was tried, and the view of the law upon which the findings are founded, then said findings are unwarranted by law. There is no statute of the United States, or of this state, which prohibits a desert entryman from disposing of the water used for final proof, separate from the land, after proof has been made. When the water had been used for reclaiming said land, and final proof of the same had been submitted to the government and patent issued therefor, the entryman had complied with the legal requirements prescribed by the government, and took title to his land without any conditions or restrictions. The land became his property to dispose of as he might see fit, either the water and the land together or separately. In the case of *Hard v. Boise City Irrigation & Land Co.*, 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407, this court held that the owner of a water right, by purchase, or original appropriation, had a right to dispose of the same and sell the water separate and apart from the land. To the same effect is *Johnston v. Little Horse Irrigation Company*, 13 Wyo. 208, 79 Pac. 22, 70 L. R. A.

341, 110 Am. St. Rep. 986. If this be a correct statement of the law, then the trial court erred in its conclusion of law, to the effect that the water applied to the desert entry became appurtenant to the land and inseparable therefrom.

The next question is: Do the findings show that, when the desert entryman filed a plat, laying out the town site of Halley in the spring of 1881 and in August, 1882, he thereby made a dedication of the streets and alleys of said platted ground, and that such dedication carried with it, as an incident and necessary to the enjoyment thereof, the water which had been applied to said land? The findings show that the appropriation of water from Big Wood river was not made until the 24th day of March, 1883, and the ditch was constructed during the summer of 1883, and in the latter part of the summer or fall of 1883 water was conveyed through said ditch from Big Wood river to the town of Halley, and used upon the streets of said village; therefore, the water appropriated from Big Wood river and conducted through said Big Ditch had not been applied to the desert entry of Mr. Halley at the time said plats were made and recorded; consequently, the dedication made by the making and recording of said plats, if any, would not cover the water from Big Wood river, which was not appropriated until seven months after the filing of the amended plat. The water used on said desert entry at the time said plats of the village of Halley were filed for record was water taken from Indian creek, and not from Big Wood river through said Big Ditch, so whatever passed by the dedication in the making and recording of said plat would only apply to the condition of the land, marked as streets and alleys, at the times when said plats were filed, if at all, and would not pass to the public use any of the waters of Big Wood river carried through said Big Ditch.

It is further contended by respondent that the findings of the court show a dedication of the waters of Big Wood river, carried through said Big Ditch, by user, and that the same will arise out of either one of the following conditions: (1) For a prescriptive period; (2) for the period prescribed by statute as a bar for real actions; (3) for said period as an interruption in the use would affect private rights and the public convenience. It is admitted, however, that to support the first two classes the limit of adverse user must exist, and the use must not be permissive only, and that the findings do not show a dedication upon such grounds. But it is contended that the user of said water has been for such a period of time that to deny the respondent's right thereto at this time would affect private rights and public convenience. This is the real and important question in this case: Has the municipality of Halley and the people within said village used the waters in controversy a sufficient length of time and under such conditions that the same amounts to a dedication by user?

Before the findings of the court can establish a dedication by user, it must appear therefrom that the owner intended to dedicate the water to the public use. As said by the Supreme Court of California in the case of *Hartley v. Vermillion*, 70 Pac. 273: "The intention of the owner to dedicate is a vital element in every case, and that intention also is a pure question of fact. A mere permissive user, by the owner, of the land for a highway, never can amount to a dedication. That is a user by license, and nothing more, and of itself never would ripen into a dedication, no matter how long continued." In the case of *Cooper v. Monterey County*, 104 Cal. 437, 38 Pac. 106, the Supreme Court of that state had under consideration the sufficiency of a finding to show a dedication of a public highway. The finding in that case, after describing the highway, continues: "Has been continuously and uninterruptedly traveled and used by the general public as and for a public road or highway ever since 1872; and that 'the same is a public highway'; and 'that such use of said portion of said land as a road or highway by the general public has been with the knowledge of plaintiff and without objection on his part.'" The court, commenting on that finding, says: "The finding that the strip of land in question was traveled and used by the public ever since 1872, with the knowledge of the plaintiff and without objection on his part, is only the finding of probative facts, tending to prove a dedication; but the fact of dedication, which, by the way, is neither alleged nor found, does not necessarily follow from these probative facts, since they are not necessarily inconsistent with a total absence of intention to dedicate, and may indicate merely a license." In the case of *City and County of San Francisco v. Grote*, 120 Cal. 62, 52 Pac. 128, 41 L. R. A. 335, 65 Am. St. Rep. 155, the court says: "It is no trivial thing to take another's land without compensation, and for this reason the courts will not lightly declare a dedication to public use. It is elementary law that an intention to dedicate upon the part of the owner must be plainly manifest." And in the case of *Hartley v. Vermillion*, supra, the court further says: "And while long continued user, without objection, and with the knowledge and consent of the owner, is some evidence of a right in the public, still there must be joined to that user an intention upon the part of the owner to dedicate, or no dedication will be consummated, for the long continued user by the public, without objection by the owner, is entirely consistent with a license to the public to use the land, and therefore evidence of long continued user alone will not support a finding of fact that a dedication was created. Neither will a finding of fact of mere long continued user support a conclusion of law that a public highway was created. As previously stated, in order to constitute a dedication of a highway by evidence in pais, there must be convincing evidence that the

owner intended to appropriate the land to the public use."

The findings "that it was the intent of Halley and his successors down to Riley, that the occupants of the town tract should have the free use of this water on the streets of the town for all legitimate purposes," and "that the use of this water on the streets of Hailey is necessary for a reasonable enjoyment of the streets, and private rights and public convenience and accommodation would be materially affected by an interruption of the use of this water on the streets of Hailey," are findings of probative facts. Such probative facts only tend to prove a dedication, but there is no finding of probative facts, or of the ultimate fact of dedication. The dedication, in fact, would not necessarily follow from the probative facts found, inasmuch as such probative facts are not necessarily inconsistent with the total absence of intention to dedicate, and may indicate merely a license. The fact that the predecessors in interest of the defendant permitted the free use of said water in said village is not conclusive proof that such owners intended such use to be perpetual. At most, the use found to exist by the findings above might be permissive only and amount to a mere license. To constitute dedication by user, it is necessary to find the probative facts which of themselves constitute dedication, or the ultimate fact of dedication. It is not enough to find facts which merely have a tendency to prove dedication. We are therefore clearly of the opinion that the findings in this case are not sufficient of themselves to show a dedication by user. An examination of the findings clearly shows that the court proceeded upon the theory that the use of the water by Mr. Halley on his desert entry in the reclamation thereof, and for the purpose of making final proof, affixed said water to the land and made the same inseparable therefrom, for it is found by the trial court that said desert entry consisted of 440 acres, and that the original plat and the revised plat included substantially all the lands embraced in said Halley's desert entry, and that the streets and alleys set apart upon said plat include 181.09 acres of said entry, thereby showing that the court considered the acreage of the streets and alleys to be the basis for figuring the water dedicated to the same. It will be observed, however, that the court did not find the amount of water which had actually been used or necessary to be used upon said streets and alleys. This, it was necessary for the court to do, as the extent of the dedication, if there be a dedication of said water, was one of the issues in said case.

Again, the defendant's answer presented an issue under section 4036 of the Revised Statutes of 1887, which is as follows: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in

question within five years before the commencement of the action; and this section includes possessory rights to lands and mining claims." Also under section 4037 of the Revised Statutes of 1887, which is as follows: "No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appears that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor, of such person was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made." Upon the issue thus presented, the court made no finding. In the case of *Later Bros. v. Haywood*, 93 Pac. 374, this court held that, where the trial court fails to find on all the material issues, the judgment will be reversed, unless a finding thereon, whether for or against the successful party, would not affect the judgment entered. And where the court fails to find on an issue presented, and a finding thereon might call for a different judgment, it is reversible error. It is apparent therefore, in this case, that had the court made a finding upon the issue interposed, of the statute of limitations, it would affect and control the judgment, and, if in favor of the defendant, the judgment must follow such finding, and be for defendant. The failure to find upon this issue is reversible error.

Again examining the findings, we are unable to discover any facts found which would justify a judgment that the plaintiff or the public had any interest in said water appropriation, or any interest in the Big Ditch through which the waters of said appropriation were carried. At most, the facts found disclose that the water used by the public upon the streets of said village of Halley was taken from a lateral leading from the Big Ditch. If this be correct, the findings would not warrant a judgment giving the village of Halley the right to the use and possession of 271.45 inches of the water of Big Wood river through the Big Ditch. Had the judgment followed the findings and decree that the village of Halley was entitled to 271.45 inches of water at the point where the main lateral is diverted from said ditch, then the findings in that particular would have supported a judgment therefor; but such is not the judgment.

Again, there is no finding to warrant the judgment that the village of Halley has an easement in said Big Ditch to the extent of conveying through said ditch and laterals 271.45 inches of water. There is no finding to support that part of the judgment to the effect that the said village of Halley is entitled to the right to the use and possession of 271.45 inches of water from said Big Wood river through said Big Ditch and laterals, when necessary, as there is no finding to show the amount of water necessary for said use, or the extent of the use of said water

by said village through said ditch. The evidence is not before the court, and we cannot inquire whether or not it supports the findings. But it does appear clearly to this court: First, that the case was tried and decided upon the theory that the water used upon said desert entry became appurtenant and inseparably fixed thereto, which the law does not warrant; second, that the findings do not show a dedication of the waters used on said land to a public use; third, that the findings do not show any title or interest in said water or ditch by adverse user; fourth, that there is no finding upon the issues tendered by the defendant in his answer; fifth, that there is no finding of the extent of the dedication, even if there be a dedication in fact; sixth, that the findings do not support the judgment.

The judgment in this case is therefore reversed, and the cause remanded for a retrial. Clerk's costs on appeal, and the costs of printing 25 pages of the transcript, and the reply brief, are awarded to appellant.

AILSHIE, C. J., concurs.

On Petition for Rehearing.

AILSHIE, C. J. In this case the respondent has filed a petition for rehearing, in which it is contended that we have misapprehended the law as applicable to the question of dedication to a public use, where a denial of or interference with its continued use would impair or interrupt the public convenience and private rights. Various questions have been presented by counsel in their petition for rehearing, but we do not deem it necessary to consider or discuss any of the propositions relied on, except the one touching the question of the public convenience and accommodation and private rights, as the same might be affected or interrupted by a refusal to recognize the principle of dedication as contended for by counsel.

In the first place, and before passing to a consideration of the main proposition here presented, it is well enough to observe that there can be no question in this case but that there has been a dedication of the water to the streets and alleys of the village of Halley, and to all of the lands to which the water has been applied within the purview and meaning of section 4 of article 15 of the Constitution and the statutes of this state, as well as under the repeated decisions of this court. That dedication is such that the water cannot hereafter be withheld from the streets and alleys and lots to which it has been applied within the village of Halley, so long as the consumer pays the reasonable rental therefor, as the same may be established under and by authority of law. In that sense, there is an unquestioned dedication, and to that extent the use and convenience of the public, as well as of the individual property owners, cannot be disputed or interrupted. On the other hand, we are still convinced that the findings of the court

are not sufficient on which to base a decree to the effect that there has been such a dedication of these waters as to entitle the municipality and property owners to a free perpetual use of the same. That will be one of the questions to be determined on a retrial. In determining that question, both the use and nature and extent thereof and the intention of the owner of the ditch and water right must be taken into account, as well as any representations made by the owner or owners of the town site who were at the same time the owners of the ditch and water right.

We pass now to a consideration of the proposition for which respondent contends: "A presumption of dedication arises from permissive user where private rights and public accommodation would be materially affected by an interruption of the use." The principal case on which respondent relies is that of *City of Cincinnati v. The Lessee of White*, 6 Pet. 431, 8 L. Ed. 452. In that case the Supreme Court of the United States had under consideration the question of dedication of a public common, and in considering the question of use by the public and private property owners and the acquiescence in the use by the owner of the common, the court said: "This was for the public use and the convenience and the accommodation of the inhabitants of Cincinnati, and doubtless greatly enhanced the value of the private property adjoining this common, and thereby compensated the owners for the land thus thrown out as public ground. And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel in pais, which precludes the original owner from revoking such dedication. It is a violation of good faith to the public and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted." In the case of *Schettler v. Lynch*, 23 Utah, 305, 64 Pac. 955, the Supreme Court of Utah was considering an implied dedication and a dedication by user. In speaking of the principle of implied dedication, the court said: "An implied dedication is founded on the doctrine of equitable estoppel, and when land has been thus set apart as a highway for the use, convenience, and accommodation of the public, and enjoyed as such, the law considers it in the nature of an estoppel in pais, which precludes the original owner from revoking such dedication." The Utah court, in discussing the point as to when and under what circumstances the evidence will justify the application of the rule, said: "Where the evidence shows such a course of conduct and such acts respecting the land in controversy as clearly manifest an intention on the part of the owner to appropriate it to the public use as a highway, and such as were calculated to induce people to believe that the land was devoted to such purpose, and lull them into security as to any rights they might ac-

quire with reference thereto, the law will imply dedication."

From these authorities, as well as the numerous others that have been cited by respondent, it will be seen at once that as to the principle applied by the courts, to the effect that a dedication will be presumed where to disturb the right would impair private rights and disturb the public convenience, the courts have, in substance, rested the doctrine upon the principle of estoppel in pais. In other words, the courts have held that where an individual has stood by and allowed the public to use his property as though it had been dedicated to the public use, and has allowed private rights to grow up under that assumption, and in view of such belief and opinion, and a disturbance of those rights would amount to an injustice, an inequity, or a fraud, the owner will thereafter be estopped to set up the true state of facts or assert his own title to the prejudice of the public or the private rights thus accrued. An examination of all these authorities will at once disclose that they rest upon the basic principle of estoppel in pais. It would therefore be unjust to apply the principle of estoppel against the property owner, unless it can be shown that he has stood by and by his action or silence concurred and assented in allowing the public and individuals to use and enjoy the property, and the right thus acquired in such a manner that to thereafter deprive them of it would work an injustice or fraud upon them and the right founded on the supposition he has thus allowed or invited them to acquire. In *De Martini v. San Francisco*, 107 Cal. 402, 40 Pac. 496, cited by respondent, the Supreme Court of California, in considering the question of dedication by user, said that it would only be considered as a dedication in cases where it clearly appeared that such user was with the knowledge and consent of the owner or without his objection, and under such circumstances as to fairly give rise to the presumption that the owner intended to dedicate to such use.

Again, in reference to the findings to the effect that, unless this use be held to amount to a dedication, private rights and public accommodation would be materially affected, and that an interruption or cessation thereof would materially affect both the public and private interests, we are satisfied that this proposition is a conclusion of law, rather than a finding of fact. It is the duty of the court to hear the evidence from which such a conclusion is to be reached, and to find the facts upon which that conclusion must necessarily rest as a proposition of law. We have no inclination to deny the soundness of such a legal proposition. It is clearly entitled to application in this state where the facts of the case will justify invoking that principle. The trouble with this case, as we have viewed it from the time we arrived at our conclusion on the original hearing, is that the findings of the court were not sufficient upon which to rest the conclusions of

law and the judgment that the court has announced in the case. We are not familiar with the facts in this case upon which the findings and conclusions rest, as the evidence is not before us. Those are questions to be presented and considered on a retrial of the case, and it is for that reason that we have remanded the case for further hearing.

We do not find anything contained in the petition that we had not previously examined and considered, although we may not have discussed some of the particular questions argued by counsel at such length as we might have done. We did not do so, thinking it best to leave those questions to be determined in connection with the evidence. We think, however, the foregoing observations sufficient to make clear the position of this court with reference to the legal propositions involved. The petition is denied.

STEWART, J., concurs.

PERKINS et al. v. LOUX, Mayor, et al.
(Supreme Court of Idaho. March 24, 1908.
On Rehearing, May 12, 1908.)

1. APPEAL—RECORD—TIME TO MAKE OBJECTIONS.

Under the provisions of rule 17 of the rules of this court (32 Pac. ix), when it is desired to raise objections to transcript, statement, the bond or undertaking on appeal, or notice of appeal or its service, or any objection to the record affecting the rights of the appellant, to be heard on the points of error assigned, such objections must be taken at the first term after the transcript is filed in order to have them considered.

2. PLEADING—COMPLAINT—STATUTORY ACTIONS.

Where a plaintiff desires to avail himself of a statutory privilege or right to be granted on the facts set forth in the statute or ordinance, such facts must be alleged in the complaint.

3. INTOXICATING LIQUORS—LICENSES—RIGHT OF CITY TO REFUSE.

Under the law and the provisions of the ordinance of the city of Pocatello, the city council has some discretion in granting liquor licenses, and it may refuse to grant a license to disreputable characters whose conduct of the liquor business would be dangerous to the public peace and quiet of the city.

Stewart, J., dissenting in part.

On Petition for Rehearing.

4. APPEAL—REVIEW—NATURE OF DECISION APPEALED FROM—APPEAL FROM FINAL JUDGMENT.

Section 4456, Rev. St. 1887, requires that a copy of any order made on demurrer shall become a part of the judgment roll. An order made on demurrer may be announced from the bench and entered in the minutes of the court, and thereby become as fully the order and decision of the court on the demurrer as if it had been drawn up and signed as a separate instrument and filed with the clerk. In either event a copy of any such order, whether entered on the court minutes or made and filed with the clerk, becomes a part of the judgment roll, and is reviewable on an appeal from a final judgment.

5. SAME—RECORD—MINUTES OF COURT.

The minutes of the court, as such, are not properly a part of the judgment roll, except in so far as they may contain any order or judgment, a copy of which is by statute made a part of the judgment roll.

6. SAME—NECESSITY OF BILL OF EXCEPTIONS.

An order made and entered in the minutes of the court, striking any allegations from a pleading, cannot be reviewed on an appeal from the judgment, unless the same is incorporated in a bill of exceptions.

7. SAME—PRESENTATION AND RESERVATION OF ERROR IN LOWER COURT—NEW TRIAL—NECESSITY.

Under the provisions of section 4427, Rev. St. 1887, it is unnecessary to take an exception to an order striking out a pleading, or a portion thereof, and it is likewise unnecessary to incorporate such order or ruling in a bill of exceptions, and the same appearing in the record or files may be reviewed on appeal as though settled in a bill of exceptions. In order, however, to have such exception reviewed by the appellate court without incorporating the same in a bill of exceptions, it is necessary to move for a new trial and use such record and files as provided for by section 4443, Rev. St. 1887, in which case the same may be used on appeal from the order granting or refusing the motion for a new trial.

(Syllabus by the Court.)

Appeal from the District Court, Bannock County; Alfred Budge, Judge.

Mandamus to compel C. E. M. Loux, as mayor, and the city council of the city of Pocatello, to grant a retail liquor license to J. B. Perkins and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

R. M. Terrell, City Atty., and Standrod & Terrell, for appellants. Gray & Boyd, for respondents.

SULLIVAN, J. This is an action commenced in the district court for a writ of mandate to compel the city council of the city of Pocatello to issue a license to the respondents to sell liquors at retail in said city. The complaint alleges the partnership of the plaintiffs, the corporate capacity of the city, and that the defendants are its officers; the application for license, ordinances under which the same was asked, and the refusal to grant the license. A general demurrer was interposed, which was overruled, and defendants answered. On motion a large part of the answer was stricken out. Thereafter evidence was submitted by both parties, and findings of fact and conclusions of law made, and judgment entered in favor of the respondents. This appeal is from the judgment on the judgment roll alone.

A motion to strike out portions of the transcript has been interposed, but it is contended by counsel for respondents that said motion comes too late, as the transcript was filed on the 9th of November, 1907, and the case was for hearing at the November term of this court, and, as this motion was not made until the February term of the court, it came too late under the provisions of rule 17 of the rules of this court (32 Pac. ix), which rule provides that objections to the transcript, statement, the bond, undertaking on appeal, etc., or any objection to the record affecting the rights of the appellants to be heard on the points of error assigned, must be taken at the first term after the transcript is filed.

We think the contention of counsel for appellants is correct and must be sustained, as motions of this kind must be made under said rule at the first term after the transcript is filed. The overruling of the demurrer to the complaint is assigned as error.

The demurrer goes to the seventh paragraph of the complaint, which is as follows: "That on the 7th day of May, 1907, said Perkins & McCarty duly petitioned said council, as required by said ordinances, to issue to them a license for three months as retail dealers in spirituous, vinous, and malt liquors. Said retail liquor business to be conducted upon lot 18, in block 372, in the city of Pocatello, Bannock county, Idaho, at what is known as the Tupper House on South First avenue. And said petition being then and there signed by not less than a majority of the property owners and tenants of property owners of the said block in which it was so intended to conduct said business, and said petition also being accompanied by \$126." It is contended that the allegations in said paragraph are not sufficient, for the reason that the petition required to be presented is not alleged to have been signed by a majority of the property owners and tenants of property owners of the block in which it was intended to conduct said business; the alley being the dividing line of the block. It is contended that the allegation in the complaint alleges that the petition presented was signed by not less than a majority of the property owners and tenants of property owners in the block in which it was intended to conduct said business, but does not allege that the signers of said petition are property owners and tenants of property owners residing in the block where such business is to be conducted; the alley being the dividing line. A part of section 115 of the ordinances of the city of Pocatello is as follows: "All applications for such license shall be made by petition to the city council, said petition to be signed by not less than the majority of property owners, and tenants of property owners, residing in that block in which it is intended to conduct the business for which the license is sought. The alley being the dividing line of the block." That section provides that no license shall be issued except on the conditions named therein, the presentation of a petition signed by a majority of the property owners and tenants thereof, residing in the half block where such business is to be carried on. The clear intent of the language used in said ordinance is that the petition required to be presented to the city council must be signed by a majority of the property owners or tenants of property owners residing in the half block where said business is to be conducted. That being true, the demurrer should have been sustained, for the reason that the complaint fails to state a cause of action, for, when one claims a right under the statute, he must allege all the facts required by the statute in order to bring himself within its provisions. This court held, in *Sherwood v.*

Stevens, 13 Idaho, 399, 90 Pac. 345. that, where a pleader wishes to avail himself of a statutory privilege or right to be granted on particular facts, such facts must be alleged in the complaint. The court therefore erred in overruling the demurrer. The demurrer should have been sustained.

It is next contended that the court erred in striking out certain portions of the affirmative matter set forth in the answer. The court evidently struck out said part of the answer on the theory that, if the proper petition was presented to the city council, it was compulsory upon the council to grant the license. Under the amendatory act of section 73 (Laws 1901, p. 90), of an act concerning the organization, government, and powers of cities and villages, approved March 15, 1907 (Laws 1907, p. 500), it is provided that, in addition to the powers theretofore granted to cities and villages under the provisions of law, any city or village may, by ordinance or by-law (subdivision 8, § 1, p. 518), "license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor." Under those provisions, the council of Pocatello, by section 114 of its ordinances, provided that it shall be unlawful to sell, barter, deal, or otherwise dispose of spirituous, vinous, malt, or other intoxicating liquors without first having obtained a license therefor. A part of the provisions of ordinance (section 115) is above quoted, and requires the application for license to retail liquor to be made by petition, etc. Section 116 of said ordinances provides that, upon the granting of the license petitioned for, the applicant shall pay to the treasurer the license fee, and thereafter the clerk shall issue the license. The question is then presented whether, under the law and the provisions of said ordinances, the city council had no authority whatever to refuse a license in case a proper petition was presented. The language of the ordinance we do not think is mandatory, and section 116 provides that "upon the granting of the license petitioned for," etc., but does not provide that it must be granted to disreputable characters whose conduct of the business would menace the peace of the city. It does not provide that the license must be granted upon presenting the petition. If the city council had no discretion in the matter, but must grant the license, the ordinance in question would have provided that upon filing a proper petition a license must issue.

That part of the answer stricken out on motion was to the effect that the application for such license by the plaintiffs was made for the sole use and benefit of one Joseph Murphy, who had theretofore been refused a license; that during the years 1904 and 1905 said Murphy was engaged in the retail business in the city of Pocatello; that he operated and conducted a dance hall therein, in which congregated a large number of lewd women and immoral men, and thugs, highwaymen, holdups, and thieves were suffered and allowed to congregate for the purpose

of plying their vocation and fleeing such victims as might venture therein; that the place of business of said Murphy became a menace to the morals of the young men and boys of the city of Pocatello and notorious throughout the southern part of the state, to the great shame and disgrace of said city; that said place of business was commonly known and referred to as "Honky-Tonk," and under such name became notorious as an immoral and disreputable place, and one highly dangerous to the morals of the city. The part of the answer stricken out contained other allegations in regard to the disreputable character of said Murphy. We are satisfied that, under the law and the provisions of said ordinances, the city council had some discretion in granting licenses, and it was their bounden duty to refuse to grant a license to any one of such character as that of said Murphy was alleged to be, and the court erred in striking that part of the answer. They were not obliged to grant a license to any one who would conduct a resort that would be dangerous to the public peace and quiet of their city. In *Perry v. City Council of Salt Lake City*, 7 Utah, 143, 25 Pac. 739, 908, 11 L. R. A. 446, it was held that the city council of Salt Lake City, under a power given them by law to license, regulate, and tax the sale of intoxicating liquors, had discretion to refuse a license, notwithstanding the applicant has complied with the ordinance with respect to the petition, bond, etc., where no previous ordinance has specified the persons to whom nor the places where licenses may be granted. In this class of legislation for the regulation of the sale of liquor, it was to protect society from the evils attending it. The benefit of the dealer is not the chief end of such laws and regulations, and to intrust the privilege of selling intoxicating liquors to such persons as the allegations of the answer showed the person for whom such license was intended would be a menace to the peace and good order of the city. There is no inherent right in a citizen to sell intoxicating liquors at retail. It is a business attended with danger to the community, and it is recognized everywhere as a subject of regulation. *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620. We therefore conclude that the city council has a reasonable discretion in granting such licenses.

The judgment is reversed, and the cause remanded. Costs are awarded to the appellant.

AILSHIE, C. J., concurs.

STEWART, J. (dissenting in part). I dissent from that part of the opinion of the majority of the court in which it is held that, under the ordinances of Pocatello, the city council had a discretion in granting or refusing a license. Section 73 of an act approved March 15, 1907 (Laws 1907, p. 509), provides, "In addition to the power hereinbefore granted to cities and villages under the provisions of this chapter, any city or

village may by ordinance or by-law," and then follows subdivision 8 of section 15, in part as follows, "license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor." This statute empowers cities and villages by ordinance to license, regulate, and prohibit the liquor traffic, but it does not grant to cities or villages the power to regulate or prohibit the sale of liquor independent of an ordinance. In this case, the city council having passed an ordinance regulating the sale of intoxicating liquors, the petitioners were entitled to a license upon complying with said ordinance. The city council had no authority to reject the application upon grounds and conditions not covered by the ordinance. Had the city desired to prohibit a certain class or certain individuals from selling liquors, the council should have provided for the same in the ordinance. In other words, I hold that the power with reference to the liquor traffic must be exercised by ordinance, and not independent of ordinance.

On Petition for Rehearing.

AILSHIE, C. J. Respondents have filed a petition for a rehearing, and make their principal complaint against the action of the court in considering the ruling of the trial court in passing upon defendants' demurrer, and also in striking from defendants' answer certain parts thereof. The questions argued and presented by this petition were argued on the original hearing of this case. This court, however, in its opinion only dealt with that part of the contention involving respondents' motion to strike certain matter from the transcript. We held that the motion, not having been made within the time prescribed by rule 17 of this court (32 Pac. ix), was too late and could not be considered by the court. We did not, however, go into a consideration of the further proposition that certain orders and rulings of the trial court were not properly before this court, on account of not having been saved and settled in a bill of exceptions. Taking these questions up in their order, we will briefly consider them on this petition.

Section 4818, Rev. St. 1887, enumerates the papers, files, and documents that shall be brought to this court on an appeal from a final judgment. Among other things there enumerated is that of the judgment roll. Section 4456, Rev. St. 1887, defines and prescribes what shall constitute the judgment roll, and among other orders, papers, and files enumerated is included "a copy of any order made on demurrer." The transcript in this case contains what purports to be the minutes of the district court of the 31st day of May, 1907, in which there is an entry of the title of this case, followed by a recital and order that, "on this day the court announces its decision on the demurrer of the defendants to the complaint herein, heretofore argued, submitted and taken under ad-

visement, and orders that said demurrer be and hereby is overruled," etc. This order and entry is contained in the judgment roll and is certified as a part of the judgment roll. The statute does not prescribe the manner or method of making or entering an order sustaining or overruling a demurrer. We accept it, however, as a fundamental proposition that the trial judge may announce an order ruling on a demurrer from the bench and have it entered on the court minutes, and that the same will be as much an order of the court and have the same force and effect as if the judge had written a formal order on a separate sheet of paper and signed the same and caused it to be filed by the clerk. In either event, it is the order of the court in ruling on the demurrer.

The foregoing statute (section 4456) requires the clerk to make a copy of such order and attach it with the other papers which go to constitute the judgment roll. The clerk can as easily make a copy of the order made and entered on the court minutes as he can of an order made and filed in his office. In either event, it is a copy of the order of the court ruling on the demurrer, and we conclude that the order in the present case is properly in the judgment roll and contained in the transcript, and was properly before the court for its consideration. It is true that the minutes of the court, as such, are not properly a part of the judgment roll, and can only be brought to this court on an appeal from the judgment by being incorporated in a bill of exceptions. In *Williams v. Boise Basin Min. & Dev. Co.*, 11 Idaho, 233, 81 Pac. 646, and in *re Paige's Estate*, 12 Idaho, 410, 86 Pac. 273, this court specifically held that "the minutes of the court," as such, are not properly a part of the judgment roll, and cannot be examined or considered by this court on an appeal from the judgment, unless the same is incorporated and settled in a bill of exceptions.

The next contention made by the petitioner is that the order of the trial court, in striking from the answer certain parts of the defendants' alleged separate defense, is not properly before this court, and was therefore improperly considered by the court. That order appears only from the minutes of the court, and is not incorporated or settled in any statement or bill of exceptions. Under the rule announced by this court in the *Boise Basin Mining Case* and in *re Paige*, supra, the order of the court on the motion to strike certain matter from the answer is not properly before this court, and, in that view of the case, what was said by the court concerning that order and the matter purported to have been stricken from the answer was merely dictum and purely gratuitous. And in that view of the case, there would be nothing before this court to show that the matter stricken from the answer is not still a part of the answer. It all appears in the answer contained in the transcript, and, without this minute entry, there is nothing in the tran-

script to show that the objectionable matter was ever ordered stricken out, and, of course, would remain in this transcript as a part of the answer. Anything said with reference to that motion, however, would not affect our judgment in this case, for the reason that we held that the demurrer was improperly overruled and should have been sustained. That alone would work a reversal of the judgment, irrespective of any view we might entertain of the action of the court on the motion to strike from the answer.

In this connection, it becomes necessary for the court to consider a contention made by the appellants, both by brief and on the oral argument of this case. It was urged that, under the provisions of section 4427 of the Revised Statutes of 1887, it is unnecessary to take exception to an order "striking out a pleading or a portion thereof," and that it is likewise unnecessary to embody such order or ruling in a bill of exceptions, but that "the same, appearing in the record or files may be reviewed upon appeal as though settled in such bill of exceptions." In support of this contention, appellants cite *Palmer v. Pettingill*, 6 Idaho, 348, 55 Pac. 653, in which this court said: "Under the provisions of section 4427 of the Revised Statutes of 1887, an order overruling or sustaining a demurrer need not be embodied in a bill of exceptions to be reviewed on appeal. If the same appears in the records or files, it may be reviewed on appeal, as though settled in a bill of exceptions." It will be observed, however, that that case involved an order made by the trial court ruling on a demurrer. Section 4427 is as follows: "The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the rights of the parties, or some of them; an order or decision made upon a contested motion; an order or decision from which an appeal may be taken; an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance; an order made upon ex parte application, and an order or decision made in the absence of a party, are deemed to have been excepted to; and such exception to the verdict of a jury; to the final decision of an action or proceeding; to an order or decision finally determining the rights of the parties or any of them; to an order sustaining or overruling a demurrer; or to any other order or decision included within the terms of this section, where such order or decision and the papers upon which it is made are a part of the records and files in the action, need not, unless desired by the party objecting thereto, be embodied in a bill of exceptions, but the same, appearing in the record or files, may be reviewed upon appeal as though settled in such bill of exceptions." We have compared the foregoing section with the corresponding section of the California Code of Civil Procedure (section 617), and we

find that the California statute does not contain that provision which makes it unnecessary to embody the order made on any of the matters enumerated in a bill of exceptions, and which further provides that the same appearing in the "records and files" may be reviewed on appeal as though settled in a bill of exceptions; nor does the California statute contain the clause allowing a party an exception to "an order or decision made upon a contested motion." It follows therefore that decisions of the California court, construing section 647 of their Code, can throw but little light on this section of our statute.

An examination of the latter portion of section 4427 makes it clear that the statute itself gives a litigant an exception to an order made on a contested motion or striking out a pleading, or portion thereof, and it is also clear that the statute does not require such an order to be embodied in a bill of exceptions, and that "the same appearing in the record or files, may be reviewed upon appeal as though settled in a bill of exceptions." Now, the only difficult question that arises in this connection is that as to the method of presenting such "record or files" to the Supreme Court. An order made on a contested motion or striking a pleading, or portion thereof, is not made a part of the judgment roll under section 4456; nor is it made a part of the record on appeal under section 4818. We therefore turn to the provisions defining the record on appeal from an order granting or refusing a new trial. Section 4820, Rev. St. 1887, defines and prescribes what shall constitute a record on an appeal from an order granting or refusing a new trial, and is as follows: "On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in section 4443 of this Code." Section 4443, to which the foregoing section refers, provides, among other things, that "the judgment roll and the affidavits, or the records and files in the action," etc., may be used on the hearing of a motion for a new trial. It is therefore provided by section 4443 "that the records and files in the action," mentioned in section 4427, may be used and considered on a motion for a new trial, and, of course, this may be done without incorporating the same in a bill of exceptions. Section 4443 is a verbatim copy of section 661 of the Code of Civil Procedure of California, with the exception of the words, "or the records and files in the action," contained in our statute, which do not appear in the California statute. In California, while an exception is allowed as a matter of law, to an order or ruling on a motion striking a pleading or portion thereof, in order to have the same preserved and reviewed, it is necessary to incorporate it in a bill of exceptions. But the Idaho Legislature, after adopting section 4427 and specifically providing that orders and rulings made on the mat-

ters therein enumerated need not be embodied in a bill of exceptions, evidently thought it necessary to provide a method for having such orders and rulings reviewed. They therefore included in section 4443 the additional matter, namely, "or the records and files in the action," that might be considered on a motion for a new trial, and by section 4820 authorized the same to be made a part of the record on an appeal from an order granting or refusing a new trial.

From the foregoing examination and analysis of the different provisions of the statutes of this state, and a comparison of the same with corresponding provisions of the California Code, we conclude that the Legislature of this state intended that the orders and rulings of the court to which exceptions are allowed by statute, as enumerated in section 4427, and which are not made a part of the judgment roll, must be reviewed on an appeal from an order granting or refusing a new trial. They clearly cannot be reviewed on an appeal from the judgment where they are not made a part of the judgment roll or incorporated in a bill of exceptions.

No sufficient ground appearing in the petition why a rehearing should be granted, the same is denied.

SULLIVAN and STEWART, JJ., concur.

STATE ex rel. SULLIVAN et al. v. SCHNITGER, Secretary of State.

(Supreme Court of Wyoming. May 12, 1908.)

1. STIPULATIONS—CONSTITUTIONAL QUESTIONS—STIPULATION OF PARTIES.

The question of the constitutionality of a statute is a judicial one, and it is not within the power of parties litigant to admit or stipulate as to the invalidity thereof.

2. CONSTITUTIONAL LAW—TIME OF TAKING EFFECT OF CONSTITUTION.

The Constitution of Wyoming went into effect on July 10, 1890, the date of the approval of the act of admission of Wyoming into the Union.

3. EVIDENCE—JUDICIAL NOTICE—ORGANIZATION OF COUNTIES.

Judicial notice will be taken of the organization of counties of the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 31.]

4. STATUTES—TITLE—SUFFICIENCY.

The title of each of the legislative apportionment acts of 1893 (Laws 1893, p. 55, c. 26), 1901 (Laws 1901, p. 98, c. 91), and 1907 (Laws 1907, p. 81, c. 69), entitled "An act fixing the state senatorial and representative districts and determining the legislative representation thereof," relates to cognate subjects and germane to the subject of apportionment, and the provision in each act containing a legislative recognition of the organization of new counties and a declaration of the right of the new counties to representation in the Legislature is within the title, since under Const. art. 3, § 3, providing that each county shall constitute a senatorial and representative district, a new county, created by a separate act, unaccompanied by any general apportionment, is entitled to representation in the Legislature.

5. SAME—PARTIAL INVALIDITY—EFFECT.

Const. art. 3, subtit. "Apportionment," § 4, contains an apportionment of senators and

representatives. The legislative apportionment Acts of 1893 (Laws 1893, p. 55, c. 26), 1901 (Laws 1901, p. 98, c. 91), and 1907 (Laws 1907, p. 81, c. 69), establish senatorial and representative districts, and contain a legislative recognition of the organization of new counties and a declaration of the right of the new counties to representation in the Legislature. *Held*, that the provisions of the act establishing senatorial and representative districts and giving the right of new counties to representation are severable, and the invalidity of the apportionment of senators and representatives does not affect the validity of the other provisions, and the right of the new counties to representation must be taken into consideration in any apportionment of senators and representatives.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 58-66.]

6. PLEADING—CONCLUSIVENESS.

A party is bound by his theory of the cause and its logical sequence.

7. STATES—LEGISLATURE—LEGISLATIVE APPOINTMENT—VALIDITY.

The legislative apportionment Act of 1907 (Laws 1907, p. 81, c. 69), fixing the number of senators at 27 and the number of representatives at 56, is within Const. art. 3, § 3, providing that the number of representatives shall not be less than twice nor greater than three times the number of senators.

8. SAME.

The legislative apportionment act of 1901 (Laws 1901, p. 98, c. 91) fixes ratios for the apportionment of senators and representatives. The legislative apportionment act of 1907 (Laws 1907, p. 81, c. 69), based on a later census is silent on the subject of ratios, fixes the number and the apportionment of senators and representatives, and repeals all acts or parts of acts inconsistent therewith. *Held*, that the provision fixing ratios in the act of 1901 is repealed by the act of 1907, and the apportionment thereunder need not follow such ratios, but must follow ratios based on the number of inhabitants and the number of senators and representatives.

9. SAME—"RATIO."

In the absence of express ratios in a legislative apportionment act, the ratios are the number of the inhabitants of the state divided by the number of senators fixed by the act, and the same number of inhabitants divided by the number of representatives fixed by the act.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 5932.]

10. EVIDENCE—JUDICIAL NOTICE—MEMBERS OF THE LEGISLATURE—TERMS OF OFFICE.

The court will take judicial notice of the membership of the Legislature and the terms of the senators as the Senate is constituted and the journal of either branch of the Legislature in so far as it is germane to and bears on the question of the validity of a legislative apportionment act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 66.]

11. STATES—LEGISLATIVE APPOINTMENT—DISTRICTS.

Each senatorial and representative district is a territorial unit, and it cannot be a senatorial district and not a representative district.

12. SAME.

The legislative apportionment in the Constitution is temporary in its application, and is applicable to the conditions existing at the time of its adoption, and it cannot be applied so as to disturb conditions which are the legitimate outgrowth of other provisions of the Constitution, and which are permanent in their nature, and it does not follow that a valid legislative enactment is necessary to render the constitutional apportionment inapplicable.

13. SAME.

Const. art. 3, subtit. "Apportionment," § 4, provides for a legislative apportionment of 16

senators and 33 representatives, and the apportionment acts of 1893 (Laws 1893, p. 55, c. 26), and 1901 (Laws 1901, p. 98, c. 91), establish senatorial and representative districts, and give three new counties representation in the Legislature. Senators and representatives were elected under the acts, and the senators were classified pursuant to the Constitution, so that 13 senators, including a senator from one of the new counties, held over until January, 1911. Some of the hold-over senators were elected in counties mentioned in the constitutional apportionment after the creation of new counties from the territory included in such counties. The holding of an election in 1908 under the apportionment act in the Constitution would result in a Legislature of 19 senators and 36 representatives, while the Constitution provides that the number of representatives shall not be less than twice the number of senators, and the voters in two of the new counties would have to submit to representation by nonresidents and in whose election they had no voice. *Held* that, though it be conceded that the apportionment acts of 1893 (Laws 1893, p. 55, c. 26), 1901 (Laws 1901, p. 98, c. 91), and 1907 (Laws 1907, p. 81, c. 69), are invalid, the court cannot compel an election under the apportionment found in the Constitution.

14. SAME.

The courts will not declare a legislative apportionment act unconstitutional when there is no prior valid apportionment act to fall back on.

15. SAME.

A Legislature elected under an inequitable apportionment act is not illegal, and the court cannot inquire into the qualification of or right of any one to his seat therein, since the final arbiter of such question is the Legislature itself, and each house is the sole and exclusive judge of the election and qualification of its own members.

16. MANDAMUS—NATURE OF WRIT—ISSUANCE.

Though mandamus is a writ of right, it will only issue in the sound discretion of the court after a judicial examination of the facts alleged or proved, when such facts show at least a clear legal right in the relator, and that mandamus is the proper remedy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 5.]

17. SAME.

Mandamus will not issue where it is not the proper remedy, or where it will be ineffectual to secure the right sought, or where it is sought to coerce the performance of an illegal act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 48.]

18. SAME.

The question whether it is sought by mandamus to compel the performance of an illegal act must be determined on facts and conditions existing at the time of the application for the writ, and in determining the question the courts may take judicial notice of those conditions which are germane and exist as to a co-ordinate branch of the government, and which are the legitimate outgrowth of the constitutional provisions.

19. STATES—APPOINTMENT—JUDICIAL POWER.

The court has no power to apportion the number of senators and representatives, and it cannot force on the people of the state an illegal apportionment act.

20. SAME.

The rule that to entitle one to relief by mandamus from an illegal apportionment act it is necessary to show a prior valid apportionment is applicable to an apportionment made by the Constitution intended to be temporary in its nature, and which has not been directly superseded by legislative enactments alone, but which is inapplicable to conditions which are the outgrowth of the establishment and organization of

the Legislature along rules prescribed by other constitutional provisions.

21. CONSTITUTIONAL LAW—VALIDITY OF STATUTES—RIGHT TO RAISE QUESTION.

One who is not entitled to mandamus to compel the Secretary of State to give notice of the election of senators and representatives as specified in the constitutional legislative apportionment on the ground that an apportionment act is invalid is not entitled to ask the court to decide the question of the validity of the act.

22. MANDAMUS—EVIDENCE.

One seeking by mandamus to compel the Secretary of State to give notice of the election of senators and representatives in accordance with the legislative apportionment found in the Constitution in disregard of apportionment acts enacted by the Legislature must show that a legal right to which he is entitled is withheld from him, and must show a prior apportionment under which the election of a constitutional Legislature can be had, and that it is within the power and the legal duty of the Secretary of State to perform the act demanded.

Mandamus by the state, on the relation of Patrick Sullivan and another, against William R. Schnitger, Secretary of State, to compel defendant to disregard apportionment acts enacted by the Legislature in giving notices of election. Heard on demurrer to the petition and alternative writ. Demurrer sustained.

W. R. Stoll, for plaintiffs. W. E. Mullen, Atty. Gen., for defendant.

SCOTT, J. The relators have filed a petition in this court in which they pray that a writ of mandamus issue out of this court directed to the defendant, commanding him, as Secretary of State, in notifying the boards of county commissioners of the various counties of the state what public officers are to be elected at the next general election to be held in the present year, to insert in such notice the number of senators and representatives for each county as specified in the legislative apportionment found in the Constitution of the state, and to disregard the number of senators and representatives specified in the apportionment acts respectively of 1907, 1901, and 1893, unless in the meantime a session of the Legislature shall be called for the purpose of enacting a valid and constitutional apportionment act. An alternative writ of mandamus has been issued, and the matter has been heard upon a demurrer to the petition and alternative writ, which was filed by the Attorney General representing the respondent. The petition for the writ is presented in the name of the state, on the relation of Patrick Sullivan and John T. Williams, who are citizens of the United States, the former being a resident, elector, and citizen of the county of Natrona, and the latter a resident, elector, and citizen of the county of Converse, and they allege that they present the petition on behalf of themselves and all the citizens of their respective counties and of the state.

The petition assails the apportionment act approved February 19, 1907 (Laws 1907, p. 81, c. 69), apportioning among the different counties of the state senators and representa-

tives, as unconstitutional and void, for the alleged reason that the apportionment was not made upon the enumeration of the number of inhabitants of the state made in 1905, and according to ratios fixed by law as required by the Constitution, and that the two preceding apportionment acts made in 1901 and 1893 are each unconstitutional for the latter reason, leaving the only valid apportionment of senators and representatives in force in the state that made by the Constitution at the time of its adoption, and which was to remain in force and effect until otherwise provided by law. It is charged by the petition that the apportionment made by each act does not conform to a ratio fixed by law, and that the senators and representatives were not by said acts divided among the counties according to the number of inhabitants, and that the apportionment made by each act is unequal, and gives undue representation to certain counties, leaving others insufficiently represented.

Before proceeding with the other allegations of the petition and the statement of the claims of the respective parties, the constitutional provisions with reference to election and apportionment of senators and representatives in so far as applicable to the question here involved will be stated. They appear in article 3, and are respectively as follows:

"Sec. 2. Senators shall be elected for the term of four (4) years and representatives for the term of two (2) years. The senators elected at the first election shall be divided by lot into two classes as nearly equal as may be. The seats of senators of the first class shall be vacated at the expiration of the first two years, and of the second class at the expiration of four years. No person shall be a senator who has not attained the age of twenty-five years, or a representative who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state and who has not, for at least twelve months next preceding his election resided within the county or district in which he was elected.

"Sec. 3. Each county shall constitute a senatorial and representative district; the senate and house of representatives shall be composed of members elected by the legal voters of the counties respectively, every two (2) years. They shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants. Each county shall have at least one senator and one representative; but at no time shall the number of members of the house of representatives be less than twice nor greater than three times the number of members of the senate. The senate and house of representatives first elected in pursuance of this Constitution shall consist of sixteen and thirty-three members respectively."

Under the subtitle of "Apportionment" are the following sections, viz.:

"Sec. 2. The Legislature shall provide by

law for an enumeration of the inhabitants of the state in the year 1895, and every tenth year thereafter, and at the session next following such enumeration, and also at the session next following an enumeration made by the authority of the United States, shall revise and adjust the apportionment for senators and representatives, on a basis of such enumeration according to ratios to be fixed by law."

"Sec. 4. Until an apportionment of senators and representatives as otherwise provided by law, they shall be divided among the several counties of the state in the following manner: Albany county, two senators and five representatives. Carbon county, two senators and five representatives. Converse county, one senator and three representatives. Cook county, one senator and two representatives. Fremont county, one senator and two representatives. Laramie county, three senators and six representatives. Johnson county, one senator and two representatives. Sheridan county, one senator and two representatives. Sweetwater county, two senators and three representatives. Uinta county, two senators and three representatives."

The relators' complaint is directed mainly to the apportionment of the representatives. No ratio having been expressly fixed in the act of 1907, it is alleged that so much of the act of 1901 as fixed a ratio was continued in force, and that the Legislature was bound to follow it in the matter of the apportionment in the act of 1907. The act of 1901 provided that each organized county should be represented in the Legislature by one senator and one representative regardless of the population of such county, and in addition thereto should have one senator for every 6,000 inhabitants and one senator for every fraction over 3,500 inhabitants, and also one representative for every 2,250 inhabitants and one representative for every fraction over 2,000 inhabitants, in addition to the minimum allowance of one senator and one representative. Upon the assumption that the ratios so fixed in the act of 1901 should be applied to the apportionment under the act of 1907, it is alleged that Weston county with a population of 3,605 was given three representatives, or one to which it was entitled, and two on a major fraction; that Crook county was given three representatives, or two to which it was entitled, and one on a minor fraction; that Uinta county was given four senators when it was only entitled to three; and that Laramie county was given ten representatives when it was only entitled to nine. But little light is thrown upon the question here presented by the decisions of the courts of other states in cases where the constitutionality of apportionment acts have been questioned. In each case the decision rests upon the construction of constitutional provisions which obtain in the jurisdiction where the question arose, and which as a whole differ materially from

those in our Constitution. It, therefore, becomes necessary in reaching a conclusion to follow the specific provisions of our Constitution giving to them that construction which was plainly intended, and preserving to the relators such rights if any to which they are entitled under the allegations of their petition.

It will be observed that the counties of Big Horn, Natrona, and Weston are not named in the apportionment fixed in the Constitution as separate senatorial and representative districts, although for legislative purposes they were by the various acts under which they were created attached to and remained a part of the counties from which they were respectively taken, and were so included and formed a part of the districts established in that apportionment. They are, however, mentioned as separate districts in the different apportionment acts assailed. It, therefore, becomes a necessary and a material inquiry to determine their status and the effect which an election held under the apportionment fixed in the Constitution would have upon these counties and the people residing within their limits. It is admitted by the respondent in argument that the apportionment acts of 1893 and 1901 are each unconstitutional, but it is urged that the same infirmity does not exist as to the act of 1907. Such admission is one of law, and this court is not bound by it. It requires a judicial determination of a court of competent jurisdiction to affect the validity of a statute on such ground. The question of the constitutionality of a statute is a judicial question, and it is not within the power of parties litigant to admit or stipulate as to their invalidity. In the two former acts a ratio was fixed and expressed in each, but in either act it appears upon the face of the petition that the Legislature disregarded such ratio in making the apportionment. It further appears that in both acts the number of senators and representatives to which each organized county was entitled under the Constitution was not taken into consideration upon the ratio, but that the latter applied only to those which were allowed in addition thereto. In other words a part only of the apportionment was based upon a ratio. In each act, however, and including the act of 1907, it is provided that each organized county in the state of Wyoming shall constitute a separate senatorial and representative district for the election of senators and representatives. Natrona and Weston counties were so recognized in the act of 1893, and it was further provided in that act that Big Horn when organized should be entitled to one senator and one representative. Without, therefore, discussing further the question as to the unconstitutionality of the apportionment acts of 1893 and 1901 as a whole, we take it that if conceded as being unconstitutional in the matter of apportionment of senators and representa-

tives they and the act of 1907 as well constitute a legislative recognition of the organization and a declaration of the right to representation in the Legislature of the counties of Natrona and Weston, and of Big Horn when organized, as separate senatorial and representative districts, although they were not established as such in the apportionment made in the Constitution. Section 4, subtit. "Apportionment," supra. Section 1 of the act of 1893 (Laws 1893, p. 55, c. 26) is as follows: "Each organized county shall constitute a separate senatorial and representative district for the election of senators and representatives." Section 1 of the act of 1901 (Laws 1901, p. 98, c. 91) is identical in language, as is also the first part of section 1 of the act of 1907; and in each act the counties of Natrona and Weston are named, and in the last two the county of Big Horn is also named, as constituting such districts.

The Constitution was adopted and ratified by the people at an election held for that purpose on the first Tuesday in November, A. D. 1889. Section 7, art. 21, of the Constitution, and the act of Congress admitting Wyoming as a state of the Union. On July 10, 1890, the act of admission was approved and the Constitution went into effect. Commissioners of the county of Fremont v. Perkins, 5 Wyo. 166, 170, 38 Pac. 915. Between the time of the adoption of the Constitution and the admission of the state the county of Weston was created and organized pursuant to chapter 47, p. 79, Sess. Laws 1890, approved March 12, 1890, its officers having qualified on May 16, 1890. By section 61, c. 90, p. 217, Sess. Laws 1888, Natrona county was created as an unorganized county, with authority to organize upon the petition of 300 electors resident therein, in pursuance of the sections of that act, and did so become fully organized on April 12, 1890, when its officers qualified. The county of Big Horn was created and the manner of its organization prescribed by chapter 48, p. 80, Sess. Laws 1890, which was approved March 12, 1890, but its right to so organize was postponed by section 2 of the act until after February 1, 1892. Neither of these counties was represented in the first Legislature, which convened on November 12, 1890, as separate senatorial and representative districts, nor as such in the second state Legislature, which convened on January 10, 1893. At the time the Constitution went into effect, viz., July 10, 1890, Natrona and Weston were organized and Big Horn was unorganized; but for legislative purposes each continued to be a part of the county or counties from which they were taken, as provided by the act or acts under which they were created, and as such they were merged in, and though not separately named constituted a part of, the senatorial and representative districts as established by the Constitution until the third state Legislature, which convened on Janu-

ary 8, 1895, when each of them was represented as separate senatorial and representative districts, the county of Big Horn having been organized in the meantime, and all having been declared to be and constituted under the apportionment act of 1893 such districts and entitled to representation. Section 18, art. 21 of the Constitution, being the schedule, is as follows: "Senators and members of the house of representatives shall be chosen by the qualified electors of the several senatorial and representative districts as established in this Constitution, until such districts shall be changed by law, and thereafter by the qualified electors of the several districts as the same shall be established by law." It is apparent that the members of the Legislature were so chosen until after the act of 1893, which had reference to the election of members for the Legislature which convened on January 8, 1895.

Aside from the fact that judicial notice will be taken of the organization of these political subdivisions of the state, the Legislature has recognized them as such, and has by the various acts of apportionment which are here assailed constituted them senatorial and representative districts. The title of each act is as follows: "An act fixing the state senatorial and representative districts and determining the legislative representation thereof." These are cognate subjects and germane to the subject of apportionment, and, being followed in the act by a declaration as to what shall constitute such senatorial and representative districts, clearly show the legislative intent to establish the districts thus defined. It cannot be said to be a mere redeclaration of the constitutional provision, and limited to the districts existing at the time that instrument went into effect; for it was within the contemplation of the Constitution that the Legislature should create and establish new districts as occasion required, and further it was contemplated that each organized county should constitute such district. Such counties could be declared as such by a separate act unaccompanied by any general apportionment, and when so constituted they would each be a territorial unit, and entitled under any general apportionment act thereafter enacted to at least the minimum representation fixed under section 3, art. 3, of the Constitution, as above quoted. We think, therefore, under the well-established rule of construction, that so much of the various apportionment acts as fixes and establishes the senatorial and representative districts is severable from the balance of the acts and might stand, whatever constitutional infirmity may exist as to the remaining portions of the acts. Cooley, Constitutional Limitations, p. 209; section 297, Sutherland, Stat. Constr. The last author says at section 130, Id.: "It is germane to the subject of an act to repeal previous acts relating to it or inconsistent with it. Such repeal is an-

cillary to the purpose of the new legislation." See cases cited in the footnotes. The Legislature was expressly authorized by section 7, art. 21, to establish new legislative districts, and in pursuance of that power the Legislature did so. It necessarily follows that, even though the counties of Big Horn, Natrona, and Weston were not separate senatorial and representative districts at the time the Constitution went into effect, and were not recognized as such in the Constitution, yet they are such at the present time, and are and were entitled to have their representation fixed and taken into consideration in any apportionment of senators and representatives. This is conceded by relators in their petition in so far as Natrona and Weston are concerned. It is not alleged that they were entitled to no representation, but, on the contrary, it is alleged that each was entitled to two representatives, notwithstanding which it is sought to have this court issue its writ which would in effect deprive them of any and all right of representation to which they are now entitled as separate senatorial and representative districts. If entitled to representation as alleged, they constitute legislative territorial units under the provisions of the Constitution. The conceding of the right to two representatives from each of those counties by the allegations of the petition is inconsistent with and negatives the right of relators to have them deprived of separate representation as such districts.

The issue as to the existence of Big Horn county as a separate senatorial and representative district is not tendered, nor is its right to representation in the Legislature questioned except in the manner in which it would be effected by compelling an election to be held under the apportionment fixed in the Constitution. We think upon the theory of relators' case as disclosed by their petition and the argument and brief thereon that they must be held to concede that these counties are now separate senatorial and representative districts, and as such are entitled to representation in the Legislature, and that such right must be recognized under any apportionment act. The petition attacks the apportionment act as a whole upon grounds which do not involve the question of their existence or right as such districts to separate legislative representation. In all the computations made by relators in their petition and brief in attempting to show the injustice and inequality of the apportionment acts complained of these counties are recognized and taken into consideration with all the other counties of the state as constituting separate districts for legislative purposes. Aside, however, from the rule that relators should be held bound by their theory and its logical sequence, we are nevertheless compelled to the conclusion that these counties were constituted, and have continued to be such districts by reason and in pursuance of

legislative enactments ever since the apportionment act of 1893 and the organization of Big Horn and the admission of their senators and representatives elected under such act to seats in the third state Legislature, which convened on January 8, 1895.

By the act of 1907 the number of senators was fixed at 27, and the number of representatives was fixed at 56. It is thus seen that the relative number in membership of the senate and the house of representatives is within the constitutional provision, and that the act is not objectionable on that ground. It is urged that as no ratio was expressed in the act of 1907 that the ratio fixed in the act of 1901 was continued in force, and should have been applied and followed in the former act. The act of 1907 after fixing the apportionment provides that all acts or parts of acts inconsistent therewith are repealed. It is contended that the apportionment must have been based upon such ratio in order to be valid, but that, as the Legislature failed to follow it in the last act, it is for that reason invalid. It is contended by the respondent that that ratio was not the basis of the apportionment. The population of the state as determined by authority of law is a matter of legislative as well as judicial knowledge. The petition sets out the enumeration of the inhabitants of each county and the total population of the state as shown by the state census of 1905. The number of members of the lower house and the number of members of the upper house of the Legislature is fixed by the act. While the ratio is not in express words, and it would probably be better to have so expressed it, we should hesitate to hold such a bill unconstitutional upon that ground alone, if it is apparent on its face that the Legislature was guided by a ratio and what such ratio was. In the absence of any expressed ratios, the ratios are of course the number of inhabitants of the state divided by the number of senators, and such number divided by the number of representatives. It is a matter of easy calculation, and when departed from is easily detected. Applying this rule, we find that under the apportionment act of 1907, as each organized county constituted a separate senatorial and representative district, each of such districts was, inclusive of such minimum representation so fixed by the Constitution, entitled to one senator for each unit of 3,771 inhabitants, and one representative for each unit of 1,818 inhabitants, and these ratios should have been so applied that each of such districts, even though its population were less than these units, should have such minimum representation. The apportionment made by the act of 1901 is, as alleged, inconsistent with these ratios, and as the act of 1907 is of a later date, and based upon a later census enumeration, it necessarily follows from such inconsistency that such ratios were repealed by the last act.

It is contended by the respondent that the inequalities and defects alleged with reference to the apportionment in the act of 1907 were made within the legislative discretion, while it is argued by the relators that they constitute a clear and palpable violation of the Constitution. These questions have been ably discussed by the attorneys who appear in this case. We are not required to go into the question of how far the Constitution has lodged discretion in the Legislature when it provides that the apportionment must be made as near as may be upon a basis of the number of inhabitants of the county, nor in fixing a ratio, nor as to how far their discretion extends in fixing the number of members of the house and senate so long as the proportionate membership fixed by the Constitution is carried out, for we are met by an obstacle which confronts us upon the threshold of this case which renders it unnecessary to do so. Section 2, art. 3, *supra*, fixes the term of the senators at four years, and that of representatives at two years, and provides that the senators elected at the first election shall be divided by lot into two classes as nearly equal as may be, those of the first class to serve two years, and those of the second class to serve four years. This court takes judicial notice of the membership of the Legislature and the terms of the senators as the senate is now constituted and the journal of either branch of the Legislature in so far as it is germane to and bears upon the question here involved. At the first state election the senators as provided in section 4, subtit. "Apportionment," *supra*, numbered 16 in all, and the membership of the House of Representatives was fixed at 33, and were to be elected from the districts as therein provided. The term of the senators was fixed by lot as provided in section 2, art. 3, *supra*. Neither Big Horn, Natrona, nor Weston counties were mentioned in that apportionment, but constituted parts of the counties therein named for legislative purposes. They have, since the framing and adoption of the Constitution, been organized, and, as already stated, now constitute separate senatorial and representative districts, and as such are now entitled to representation, and have respectively been represented in both branches of the Legislature since 1895. The classification of the senators, and fixing of the long and short term by the first state Legislature in accordance with the constitutional provision, and following the rule therein prescribed, together with the increase of membership of both houses as provided from time to time, whether such senators were elected under a constitutional or unconstitutional apportionment, has brought about the condition that there are now 13 senators whose term of office does not expire until the first Monday in January, A. D. 1911. One of these senators is from Weston county, which is not entitled to any representation as a separate

senatorial and representative district under the apportionment fixed in the Constitution, and under which the relators seek to have this court direct the election to be held. Under the constitutional apportionment the number of senators as already stated was fixed at 16, and were divided among the several counties of the state as provided in section 4, subtit. "Apportionment," *supra*, and to be elected from the several senatorial and representative districts as there established. Section 18, art. 21, schedule. If, by any possibility, this court had the power to interfere with and exclude the senator from Weston county from his seat in the senate, then under the contention of relators there would be 4 senators to elect at the ensuing election and 33 representatives.

It was clearly the intention as gathered from the Constitution that one-half of the senators should hold over, and that the hold-over senators should be taken into consideration in whatever apportionment act that should thereafter be passed by the Legislature. Section 2, *supra*. It is equally apparent that this provision of the Constitution would be distorted and practically disregarded if the relief here sought were granted, for it would result in a senate consisting of 12 hold-over senators and 4 to be elected for a full term. As to when or under what conditions this matter would right itself may perhaps be a question of minor importance, and it may be that it is a condition that was not foreseen by the framers of the Constitution; yet it is purely a matter of speculation as to when, if ever, the constitutional proportion would or could be re-established. If the senator from Weston county be included, then the election of four senators under the apportionment found in the Constitution would make the number of senators 17, whereas the election of representatives from certain districts named is limited to 33. We would thus have an unconstitutional Legislature, for it is expressly provided that in no case shall the number of representatives be less than twice nor more than three times the number of senators. Section 3, art. 3, *supra*.

It will be observed that each senatorial and representative district is a territorial unit. It cannot be a senatorial, and at the same time not a representative district. If the Constitution were susceptible to the construction that the county of Big Horn upon its organization, and the counties of Natrona and Weston upon the admission of the state, became legislative districts, and as such, without further legislative enactment, entitled to the representation of one senator and one representative, and that such senators and representatives should be considered as supplementary to the apportionment as made in that instrument, then, as it necessarily follows that no greater representation could be allowed in the absence of legislative enactment, it would be necessary to add the total of the

minimum representation from these counties, or 3 senators and 3 representatives, to the numbers respectively allowed in such apportionment, which would make 19 senators and 36 representatives. Upon the facts alleged Natrona and Weston counties were each entitled to one senator and one representative, and, adding two senators and two representatives to the numbers respectively as fixed in that apportionment, there would be 18 senators and 35 representatives. It is only necessary to state the propositions and the resulting proportions as to membership of the Senate and House to show the incorrectness of such reasoning, for a Legislature so constituted would also violate the constitutional requirement that the number of representatives shall not be less than twice nor more than three times the number of senators.

The apportionment found in the Constitution was based upon the number of votes cast at the election preceding the framing of that instrument. It was intended by the convention to apply only to the first state election. It was so stated in the debates and proceedings of the convention, and it was further expected that the first state Legislature would pass an apportionment act based on the provisions and requirements of the Constitution. It was intended to be temporary in its application, and was applicable to the conditions existing at that time. It does not partake of that fixed and enduring character of other constitutional provisions which never yield to legislative enactment; nor can it at any time be applied so as to disturb conditions which are the legitimate outgrowth of such other provisions, and which are permanent in their nature. Such inapplicability does not arise from the infirmity of the apportionment acts complained of, but from fixed conditions with reference to legislative representation which exists at the present time, and which are the outgrowth of other constitutional provisions. It does not follow that a valid legislative enactment is necessary to render this apportionment inapplicable. It may be so rendered by the operation of other constitutional provisions under which the legislative department of the government has been organized and established, and out of which conditions have arisen which render it inapplicable, without violating the spirit and express provisions of the Constitution. This question was not involved in any of the numerous cases cited in relators' brief. To review those cases and quote the constitutional provisions under which they arose, and attempt to differentiate between those cases and the one before us, would only result in a prolixity of words, and obscure the meaning and ground upon which we have reached our conclusions. It may however be said that in all of those cases the courts have uniformly declined to interfere and declare an apportionment act unconstitutional when there was no prior or antecedent valid ap-

portionment act to fall back to. This rule is well understood by the attorney for relators, for he has based his case and argument upon the theory, as contended by him, that there has been no valid apportionment act passed by the Legislature since the state was admitted, and that being so he claims that the apportionment fixed in the Constitution is in force, and that the ensuing election must be held thereunder.

It may be conceded for the purposes of this discussion that the present Legislature was elected under an inequitable apportionment act, and it may be further conceded that there has not been a fair apportionment act passed since the Constitution went into effect, but that does not render the Legislature so elected under such apportionment act illegal, nor authorize or empower this court to inquire into the qualification or right of any one to his seat therein. Such right cannot be questioned in the courts. People ex rel. Sherwood v. State Board of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646; 10 Cent. Dig. 127, tit. "Const. Law." The last and final arbiter of such question is the Legislature itself, and each house is the sole and exclusive judge of the election and qualification of its own members. Such determination is so far judicial in its nature as to make one so admitted a member, not only de facto, but de jure also. In speaking upon a similar question where an apportionment act was assailed as being unconstitutional, the Court of Appeals of New York say: "As already said, the Senate and Assembly elected under the apportionment act and actually assembled, constitute in any aspect a de facto Legislature. As a de facto body each house has, under the Constitution, not only the exclusive power, but the exclusive right, to judge the title of any of its members to a seat therein. Whoever either house receives as its legally elected member and entitled to a seat becomes thereby a de jure member of that house, even though the courts, were such a question triable before them, might be of a different opinion. It follows, therefore, that not only is the present Legislature a valid Legislature, but that each member thereof, so long as the particular house to which he belongs does not oust him, is to all the world not only a de facto, but a de jure, member, and he is entitled to all the privileges of a member. * * *" In re Sherill, 188 N. Y. 185, 81 N. E. 124, 133, 134, 117 Am. St. Rep. 841. The same principle was recognized by this court in State ex rel. Bennett v. Barber et al., 4 Wyo. 56, 32 Pac. 14. That was a proceeding in mandamus to require the state board of canvassers to canvass certain returns of the votes cast for the relators for members of the House of Representatives from Carbon county at the election held on Tuesday, November 8, 1892. It was there urged upon demurrer to the petition and alternative writ that the court was without jurisdiction

to grant the writ because of the constitutional and statutory provision to the effect that each house shall judge of the election, returns, and qualification of its own members. The late Justice Conaway, speaking for the court, at page 71 of 4 Wyo., at page 19 of 32 Pac., said: "In such cases the courts are not the last or the principal bulwark of the rights of the people in choosing their representatives. The final and plenary jurisdiction upon which the people must rely in the last resort in such cases is that of the House of Representatives itself. And courts will not entertain the idea that other tribunals in which the Constitution and the laws have vested some small portion of judicial power will not exercise such power with as much wisdom and justice as could the courts."

We think from the foregoing statement of the law that there is an entire absence of power in this court to question the right of any member of the Legislature as now constituted to his seat therein or of any hold-over senator to his seat in the Legislature to be convened on the second Tuesday in January, 1909, nor have we the power by any ruling in this case to oust such senator from his right thereto. The senator from Weston county must therefore be treated as such *de jure* for the full term for which he was elected and qualified, and any apportionment made or election held must be with the view that he and the other hold-over senators will be members of and entitled to a seat in the senate to be organized on the second Tuesday in January, 1909, and that their right to seats therein is and will be independent of any intervening election. What is here said with reference to the senator from Weston county is equally applicable to the senator from Crook county.

It will be observed that the senatorial and representative district of Crook county as established in the Constitution included the territory embraced within the boundaries of Weston county as provided in the act creating the latter, and as such district it was entitled to a representation of one senator and two representatives. The senator from Crook county is also a hold-over senator, he having qualified as such on January 8, 1907, and his term does not expire until the first Tuesday in January, 1911. To fall back to the constitutional apportionment means also to fall back to the legislative districts as therein established, and those counties would be entitled to but one senator, whereas they now have two hold-over senators, whose right to hold their seat is a question which has been passed upon by the Legislature itself, and, as already stated, its judgment and action thereon is conclusive upon this court. It is difficult to understand how, in view of the present unyielding conditions, the apportionment made in the Constitution can be applied, and its integrity and that of the constitutional provision with

reference to the relative membership of the Senate and House of Representatives be preserved. With two senators from a district which was only entitled to one under that apportionment, then to keep down the number of senators to 16 as therein prescribed some other district as established therein must be deprived of a senator to which it was entitled, a proceeding that would not be any more within the power of this court than to deprive either Crook or Weston of its senator. Giving the other districts under that apportionment the right of representation as there fixed, and to which they would be entitled, then it necessarily follows that, one of those districts having a double senatorial representation, the number of senators who would be entitled to seats in the next Legislature would be 17, or one more than the apportionment provided for, and the number of representatives would at the same time be less than twice that number.

The senatorial and representative district of the county of Carbon as established by the Constitution in connection with the act creating and prescribing the method of the organization of Natrona county included for the purposes of representation in the Legislature the territory embraced within the boundaries of the latter. Under the apportionment (section 4, subtit. "Apportionment," *supra*) this district was given two senators. Carbon county alone and ever since the creation of Natrona into a separate legislative district has itself elected its senators and representatives. At the general election held in 1906 it elected two senators for a term of four years each commencing on the 8th day of January, 1907, and ending on the second Tuesday in January, 1911, and each duly qualified for such term, and they will be entitled to their seats in the next Legislature, which convenes on the second Tuesday in January, 1909. They were not elected by the people of Natrona county, for that county and its people had no voice in their election. To apply the apportionment as fixed in the Constitution would not only deny Natrona the right to elect a senator, but compel it to submit to representation in the senate by nonresidents of that county, and who were elected solely by the inhabitants of another county, and in whose election the inhabitants of Natrona county had no voice whatever. Such senators were not elected from the districts as established in the Constitution, but by the inhabitants of a part only of such district, and yet this court would be without power to dispossess said senators of their office.

The legislative districts of Fremont, Johnson, and Sheridan as established in the Constitution were each entitled to one senator and two representatives. As such they each included a part of the territory now embraced within the limits of Big Horn. Since the organization of Big Horn county the territory included therein has been detached from the counties from which it was taken. The

senatorial districts of Sheridan and Johnson each have a senator who was elected at the general election in 1906, and who has duly qualified, and whose term as such does not expire until the second Tuesday in January, 1911, and each is entitled to his seat in the senate which is to assemble and organize on the second Tuesday in January, 1909. It is apparent that the same condition exists as to the people of this county that exists as to the people of Natrona. They, by an election held under the apportionment and from the districts as made and established in the Constitution, would be denied the right to elect a senator as a separate senatorial and representative district, and would be compelled to submit to representation by nonresidents of the county, and in whose election they had no voice, and who also were not elected from the districts as established in the Constitution, but by the inhabitants of a part only of such districts.

The writ of mandamus is referred to in the text-books and the decisions as a writ of right. The nature of the writ should not be confounded with the right to have it issue. It will only issue in the sound discretion of the court. *People v. Olson*, 215 Ill. 620, 622, 74 N. E. 785; 33 Cent. Dig. col. 2053, § 5. Such discretion means only that the question as to whether the writ ought to issue depends upon the result of a judicial examination of the facts either as alleged or in proof. Such facts or proof must show at least a clear legal right in the relators and that mandamus is the proper remedy. The relators must show a clear legal right to which they are entitled, and which is withheld or threatened to be withheld from them, and that it is the legal obligation or duty of the respondent to perform the act sought to be coerced, and that the performance of such act can only be secured through and by means of the writ. It is said by some of the authorities that if a legal right is withheld from the relators the consequences of securing such right through the issuance of the writ ought not to be considered. The courts are not in harmony on this question, but seem to have been governed by the facts in each particular case so that each case stands practically upon its own footing. The determination of the question in each case necessarily involves the question of the right sought to be secured and the effectiveness of the remedy for that purpose. There is an underlying principle in all the cases that, if mandamus be not the proper remedy, or would be ineffectual to secure the right sought, then it should not issue, for in such case it would be of no benefit. It is also fundamental that the legal right to the issuance of the writ never exists to coerce the performance of an illegal act, and that question must be determined upon the facts and conditions existing at the time the application for the writ is made, and in determining that question the courts may and should take judicial notice of those conditions which are

germane and exist as to a co-ordinate branch of the government, and which are the legitimate outgrowth of constitutional provisions. In *Spelling, Injunctions and Extraordinary Remedies* (2d Ed.) at section 1378, it is said: "It would be idle to discuss the question whether any court has power by any manner of process to compel the performance of an act violative of existing statutes." In *People v. State Board of Canvassers*, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 645, it is held that the writ will never issue to accomplish the violation of a constitutional provision. In 26 Cyc., at page 150, it is said: "When it appears that the act sought to be coerced would be unauthorized by law, * * * the writ will be denied." The text is supported by an abundance of authorities cited in the footnotes. Nor will mandamus issue to command an officer to do that which he could not lawfully do without such mandate. 26 Cyc. 166; *Rosenthal v. State Board of Canvassers*, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157; *Clark v. Buchanan et al.*, 2 Minn. 346 (Gil. 298). In *State ex rel. v. County Commissioners*, 55 Neb. 210, 75 N. W. 579, the Supreme Court of Nebraska say that "the remedy by mandamus must rest upon the legal rights of the relator upon one hand, and upon the legal obligations and duties of the respondent upon the other hand. It cannot be predicated solely upon the equities existing between the parties." To the same effect is *Davis v. Miller Signal Co.*, 105 Ill. App. 657, 661.

The counties of Big Horn, Natrona, and Weston, not being organized at the time the Constitution was framed and adopted, constituted a part of, and were embraced in, the districts established by the apportionment fixed in the Constitution. They have since been organized, the former after the state was admitted, and the two latter prior thereto, and, as already stated, have been by legislative enactment constituted and are now separate senatorial and representative districts, and as such each is entitled to representation in both branches of the Legislature. They have become such districts in pursuance of law, and having been so created they cannot as such be here questioned. The section of the Constitution fixing the apportionment says that until otherwise provided by law the senators and representatives shall be divided among the several counties of the state as therein provided. These counties were not established as separate senatorial and representative districts in that section, but their rights have matured under other constitutional provisions. To issue a call for an election under that section of the Constitution would necessarily exclude them from the call as separate districts, and deprive them of their present constitutional right to elect their senators and representatives. The provisions of the Constitution with reference to the apportionment then made are mandatory. They are exclusive as well as inclusive. They include counties therein named and established

as separate senatorial and representative districts, and by all rules of construction exclude districts not so established. Although the counties of Big Horn, Natrona, and Weston formed a part of such districts, they now constitute separate districts in themselves. The writ here sought could only apply to the districts there named and as then constituted, and must as measured by the relief sought be limited to those districts. It is not pointed out how or by what authority the respondent under that apportionment could notify the commissioners of Big Horn, Natrona, or Weston counties of the number of senators and representatives either was entitled to elect as a separate legislative district. Under and by all rules of construction they must be held to be excluded from and disregarded in the apportionment fixed in the Constitution as separate senatorial and representative districts, and if the writ issue as here prayed the respondent must notify the commissioners of every organized county in the state embraced in the districts then established and no other of the number of senators and representatives to be elected or voted for in the respective counties so notified. He would be required and limited by the writ to notify those counties alone, and thus ignore and withhold any notice to the counties of Big Horn, Natrona, and Weston as separate senatorial and representative districts. Further, as already stated, an election in pursuance of that apportionment could not affect the title of either the senator from Weston county or the senator from Crook county to his seat in the Legislature, and we would then have 17 senators and 33 representatives, which would be an unconstitutional Legislature.

This court has no power to apportion the number of senators and representatives. It could not force upon the people of the state an illegal apportionment act. It can only pass upon the questions presented. It has no power to compel the respondent to do an act which is unlawful, and it is clear that he has no authority to issue notices of an election, which, if held as prayed by the relators, would confer no right upon the persons elected in pursuance thereof to organize as a valid and constitutional Legislature; nor is this court authorized to compel him by its writ to do so. It would be lending the power of the court to the violation of constitutional and vested rights to partially disfranchise three of the counties of the state, to in effect declare by its allowance a vacancy in the office of either the senator from Weston county or the senator from Crook county, or to require the respondent to issue notices of an election for senators and representatives so that the latter are less in number than twice the number of those who are entitled to a seat in the senate, and which would be a Legislature which is unauthorized by the Constitution.

In order to entitle the relators to the writ it is incumbent upon them to show a prior

valid apportionment to fall back to. This proposition is substantiated by the following cases cited in their brief: *Giddings, Relator, v. Blacker, Secy. of State*, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402; *Board of Supervisors v. Blacker*, 92 Mich. 638, 52 N. W. 951, 16 L. R. A. 432; *People ex rel. Carter v. Rice*, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836; *People ex rel. Pond v. Supervisors, Id.*; *Horn v. Board of Supervisors, Id.*; *Parker v. State ex rel. Powell*, 132 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; *Morris v. Wrightson, County Clerk*, 56 N. J. Law, 126, 28 Atl. 56, 22 L. R. A. 548; *Denny, Clerk, v. State ex rel. Basler*, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; *People ex rel. Woodyatt v. Thompson, County Clerk*, 155 Ill. 451, 40 N. E. 307; *State ex rel. Attorney General v. Cunningham, Secy. of State*, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 568; *State ex rel. Lamb v. Cunningham, Secy. of State*, 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145, 35 Am. St. Rep. 27. This rule we think is equally applicable to an apportionment made by the Constitution which was intended to be temporary in its nature, and which has not been directly superseded or displaced by legislative enactments alone, but which has been rendered inapplicable to conditions which now exist and which are the outgrowth of the establishment and organization of the legislative department of the government along lines and rules prescribed by other constitutional provisions. Upon the facts alleged the apportionment acts of 1901 and 1893 possess the same infirmity as the act of 1907, and, as we have seen, the apportionment fixed in the Constitution has been rendered inapplicable to the legislative department as now constituted under other provisions of that instrument.

Upon principle and authority as to that branch of the case it is clear that the relators are not, upon the allegations of their petition, entitled to the writ, and that being so, this court is not called upon nor is it necessary to decide the constitutionality of the apportionment act of 1907. The relators have no standing to ask this court to decide that question as a mere abstract question of law. *North v. Trustees, etc.*, 137 Ill. 296, 27 N. E. 54; *People v. Olson*, 215 Ill. 620, 74 N. E. 785; *Kennedy v. City of Chicago*, 220 Ill. 485, 505, 77 N. E. 155. They must show that a legal right to which they are entitled is withheld from them, that is to say, they must show a prior apportionment under which the election of a valid and constitutional Legislature can be held; that they are entitled to but are denied the right to elect their proportionate membership of a Legislature under such prior apportionment; that it is within the power, and that it is the legal duty, of the party against whom the remedy is sought to perform the act which will secure them that right; and that they are entitled to the writ to compel the performance of such act. As already stated, they are not in a

position to invoke the extraordinary powers of this court when the effect of the issuance of the writ would be violative of either the statutory or fundamental law of the state, no matter how much they may deem themselves injured, or how inequitable or unjust the apportionment act of which they complain may be. The wrongs alleged cannot be corrected by mandamus upon their case as made in the petition without disregarding express constitutional provisions and rights which have matured thereunder, the disregarding of which by this court would in any event be as violative of constitutional provisions as the legislative enactments of which they complain.

The demurrer will be sustained; and should there be no further pleadings filed, the writ will be denied.

BEARD, J., concurs.

POTTER, C. J. (concurring). I concur in the conclusion and the grounds thereof stated in the opinion delivered by Justice Scott as the opinion of the court, and I would ordinarily be content with the simple announcement of my concurrence. But owing to the unusual importance of the case itself, the questions involved, and the grave duty cast upon the court in their determination, as well as the peculiar situation disclosed by existing conditions, if the claims of the relators be correct as to the validity of the legislative enactments called in question, I desire in a separate opinion to set forth the reasons which in my opinion irresistibly lead to the conclusion and disposition of the case announced in the principal opinion. This I do, not alone of my own inclination, but following also the desire of my associates. I do not expect or hope to add materially to the main opinion, and much that I shall say will be but a repetition of that already said, though perhaps differently expressed.

The relators have brought this case, seeking a certain remedy for the enforcement of alleged rights of themselves and others in a like situation as citizens and electors of the state, which rights are alleged to have been interfered with through the enactment of an invalid law by the legislative department of the state government. The only power and jurisdiction that this court would have to pass upon the questions involved in the inquiry whether there has been an infringement of the rights of relators or other citizens and electors by the acts aforesaid must depend upon the power of the court to afford the remedy sought, or at least some fairly adequate remedy, if the allegations of the petition as to the violation of such rights be true in fact and law. The court does not sit, nor is it empowered, to determine purely abstract questions of law in any case unconnected with the enforcement of legal or equitable rights, and, if there is any distinction depending upon the character of the case, the

court should be peculiarly careful to ascertain that the question is actually presented, and that a decision thereon is necessary before considering the constitutionality of a statute, or at least before adjudging its invalidity, and especially is that true when the statute assailed affects the composition of the Legislature itself. I do not doubt as a general rule the power and duty of the court in a proper case to pass upon the constitutionality of a legislative act, and to adjudge it to be invalid if found to conflict with constitutional provisions, nor, when that question is necessarily involved in the disposition of a pending case properly instituted, to determine whether an act apportioning legislative representation is violative of constitutional requirements, and to declare the same void if found to conflict with such requirements. But the decision should be necessary to a just determination of the case. Judge Cooley, in his work on Constitutional Limitations, stated the principle as follows: "Neither will a court as a general rule pass upon a constitutional question and decide a statute to be invalid, unless a decision upon that point becomes necessary to the determination of the cause. * * * In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet, if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable." Cooley's Const. Lim. (3d Ed.) 163. Another rule of controlling importance in considering the validity of a statute is that all reasonable doubts must be solved in favor of the legislative act. Such a question is to be approached by the judiciary with great caution and examined in every possible aspect, and a statute should not be declared void unless its invalidity is beyond reasonable doubt. Id. 182. With these principles in mind, I propose briefly to examine the allegations and contentions of the parties to ascertain where they lead.

First, it is alleged and contended that the apportionment act of 1901 prescribed a ratio for the apportionment of senators and representatives respectively, and that the act of 1907 is void for the reason that the apportionment therein made was not based upon the ratio so established. In other words, the position of the relators is that, as ratios were not expressly prescribed in the act of 1907, the ratios of 1901 continue in force and are controlling upon the question of apportionment until new ratios are prescribed. While it is contended generally that the act of 1907 is void on the ground that the senators and representatives are not thereby apportioned

among the counties as nearly as may be according to the number of inhabitants, the particular theory of the petition is that the ratios of 1901 controlled and were not followed. It is true that the act of 1907 does not expressly prescribe or fix ratios, but it does apportion the senators and representatives among the counties, and in a separate section it declares that "all laws or parts of laws inconsistent with the provisions of this act are hereby repealed." Now, conceding that the apportionment made by the act of 1907 does not follow the ratios of 1901, the act of 1901 in prescribing ratios is then inconsistent with the provisions of the act of 1907. It was clearly within the power of the Legislature to repeal the former act, and when it made an apportionment and repealed all inconsistent provisions of other acts it necessarily repealed the inconsistent ratio provisions of the act of 1901. It is clearly more reasonable and logical to so hold than to say that the later act is invalid because inconsistent with the former one. Of course the repeal would not result if the apportionment in the act of 1907 is void upon other grounds, because, if the apportionment part of the act should be declared void, the ratios prescribed by the act of 1901 would not be inconsistent with any of its provisions.

But there is still another and sufficient answer to the claim that the ratios of the act of 1901 controls until other ratios are fixed. The constitutional provision for ratios is found in the section requiring the Legislature in 1895, and every tenth year thereafter, to provide by law for an enumeration of the inhabitants of the state, and it is directed therein that at the session next following such enumeration, and also at the session next following an enumeration made by authority of the United States, the Legislature shall "revise and adjust the apportionment for senators and representatives on a basis of such enumeration according to ratios to be fixed by law." The words "such enumeration" in the latter part of the section clearly refers to the last preceding enumeration. It is a publicly known fact and conceded in the petition that the Legislature did provide for an enumeration in 1905, and that such enumeration was made. Upon that enumeration, therefore, it became the duty of the Legislature in 1907 to revise and adjust the apportionment, as well as according to ratios to be fixed by law. Now the act of 1901 does not prescribe ratios according to the number of inhabitants generally, but the provisions of that act in that particular are that the ratios fixed for senators and representatives, respectively, shall be based upon the enumeration of inhabitants made in 1900 by authority of the United States. Sections 3 and 4 of the act are similar in this respect, the one providing a ratio for senators, and the other for representatives. It will be sufficient, therefore, to quote from section 3. It reads: "Each organized county shall have one sena-

tor for every six thousand inhabitants and one senator for every fraction over 3,500 inhabitants, in such county as shown by the enumeration of such inhabitants made by the authority of the United States, in the year one thousand and nine hundred." Laws 1901, p. 98, c. 91. What can be clearer than that this ratio so fixed and qualified would not control, and indeed could not control, in an apportionment made subsequent to the state enumeration of 1905, without violating the constitutional requirement that after the later enumeration it should constitute the basis for a revision and adjustment of the apportionment?

Again, the act of 1901 did not fix ratios for all the senators and representatives, but only for those in addition to the one senator and representative respectively allotted to each county. It is true that under the Constitution each county is entitled to at least one representative in each legislative body. That, however, does not mean that the ratios shall not be fixed for all, but only that whatever the ratio each county shall have at least one senator and one representative. Nor does it mean that the ratio is necessarily the number of inhabitants in the county having the smallest population, for that would arbitrarily determine the number in each body, and would prevent keeping up the relative size of the two bodies as required by the Constitution; and, moreover, the Legislature is authorized to determine the number to compose the senate and house, respectively, restricted only by the constitutional provisions as to the right of each county to be represented as above stated, that the apportionment shall be based upon the enumeration of the inhabitants as aforesaid according to ratios fixed by law, and that the senators and representatives shall be divided among the counties as nearly as may be according to the number of their inhabitants. As I understand these provisions, they require that an apportionment shall be made by dividing the senators and representatives among the counties according to the number of their inhabitants, as nearly as may be on a basis of the last preceding enumeration made as provided by law, according to ratios to be fixed by law, provided that each county shall have at least one senator and one representative, even though the number of its inhabitants may be less than the prescribed ratios. It will be observed that contrary to the rule prescribed in many states the senatorial and representative districts are fixed by our Constitution, each county constituting such a district. It would seem, therefore, that to prescribe a ratio for the excess only over the minimum allowed to each county might be held to depart from the letter as well as the spirit of the Constitution.

There is a further answer that might be made to the claim that the ratios fixed by the act of 1901 are controlling until other ratios shall be expressly prescribed. In the

section of that act fixing a ratio for apportioning members of the House of Representatives it is provided that no county shall have a less representation, either in the senate or house, than is allowed to such county in the Legislature of 1901 which passed the act. The ratio as to representatives was therefore again qualified, and, if controlling at all, it carries the proviso with it, which might result, as it apparently did in that act, according to the averments of the petition, in awarding to a county a greater number of representatives than it would be otherwise entitled to upon the ratio without such qualification. And it might result, in case of a decrease in population either through a division of counties or otherwise, in a direct violation of the constitutional provisions relied on here to invalidate the act of 1907. At any rate it seems to make a special ratio as to certain counties, or to exempt them from the ratio altogether.

For either of the reasons above mentioned I think it may well be doubted whether the basis of the particular objections set out in the petition against the act of 1907 has any support upon a proper construction of the Constitution and statutes.

However it is contended that the Constitution not only requires that an apportionment shall be actually made according to ratios, but that such ratios shall be fixed by law. With that view I am inclined to agree. The Constitution seems to contemplate that the basis of the apportionment shall not be left to conjecture, nor for ascertainment upon independent computation. But it must be remembered that the purpose of the provision in connection with others upon the same subject is to secure a fair and equitable apportionment according to the number of inhabitants of the respective counties. Upon a mere technical objection that ratios were not expressed by law, without it appearing that in fact an apportionment was not based upon ratios that were fair and reasonable, and that such apportionment was unfair or inequitable, or not made according to the number of inhabitants as nearly as may be, there would, in my opinion, be strong reason for hesitation on the part of the court to declare an act void.

It is here claimed by the Attorney General, in defense of the act, that ratios were employed, and that they are to be discovered as to both bodies by dividing the number of inhabitants of the state by the number of members provided for each body respectively. Such a division produces a quotient or ratio for the senate of 3,771, and 1,818 for the house. Upon the basis of the quotient so found there would appear to be only slight inequalities, and such as might perhaps be expected in any apportionment act, except in the following instances: After allowing Crook county two representatives, it would have a fraction over of only 201, but it was given three. After allowing Weston county

two representatives, there would be no fraction remaining, but it would lack 32 of having the full number for two. It was given three. Uinta was given 7 representatives. It had, in addition to enough to entitle it to that number, a major fraction of 1,766, or within 52 of the number so found as a ratio for apportioning representatives. No other county had a major fraction, that is to say, more than one-half the number required for a representative, after receiving the number of representatives allotted to it. But though Crook county was given a third representative, having a fraction of only 201 in addition to the number required for two, Natrona county, with a fraction over of 624, was given but one representative, Sheridan, with 875 more than enough to entitle it to 5 representatives, was given only 5, Albany county, with 902 in excess of the number entitling it to 5, was given only 5, and Converse was given only 2, although it had 532 more than the number required for 2. None of the counties except Uinta, however, had a large enough fraction over the number required for the representation given it which would seem to afford reasonable ground of complaint that it had not received its full quota; that is, none except Uinta was left with a major fraction unrepresented, if we may assume that the ratios aforesaid were in fact adopted or employed. But, on the other hand, the particular counties above mentioned might perhaps find cause to complain that Weston county was given a third representative in the absence of any number of inhabitants in excess of that required for two, and that Crook was given a third representative upon a smaller fraction than several other counties had, and that therefore those counties are given greater representation in proportion than other counties. The complaint, therefore, would be not that any county, except Uinta, is discriminated against by not apportioning to it all that it was entitled to, but that the discrimination consists in allowing at least one county, and perhaps two, a larger representation than it or they would be entitled to under any ratio based upon population. Adopting the ratio above suggested, the Attorney General contends that the words "as nearly as may be" vest in the Legislature a reasonable discretion not subject to control by the courts; that in considering the legislative action some regard must be given to the difficulties necessarily encountered in the passage of an act, and especially one of this nature where sectional jealousies and differences are bound to be displayed; and that nothing but gross inequalities, or a plain departure from the constitutional principle, will justify the court in adjudging an apportionment act void.

The relators not only assail the act of 1907, but they allege and contend that the two previous acts—those of 1901 and 1893—are each void, upon the ground that the ratios established thereby respectively were not follow-

ed in making the apportionment. The Attorney General concedes the invalidity of said former acts, but upon different grounds. He maintains that each act establishes ratios in an unconstitutional manner, viz., by applying them to some of the members of each body only; and he also contends, as I understand, that the inequalities of the apportionment made by each of said acts are greater than those appearing in the act of 1907. By the admission of the relators, therefore, as well as that of counsel for respondent, if the act of 1907 is invalid, the acts of 1901 and 1893 are likewise invalid, and if the act of 1907 is to be held unconstitutional, both of the preceding acts must also fall. This would leave as the only apportionment the one made in the Constitution itself, under which the elections for senators and representatives were held prior to the session of 1893, and it is under that apportionment that the relators ask this court to direct the notices for the election this year of senators and representatives to be given. That is the only remedy sought by the relators in this proceeding, and the only one they would be entitled to, if their claims as to the various apportionment acts should be upheld. This case is brought in this court as an original proceeding under its jurisdiction in mandamus as to state officers. The duty sought to be controlled is the requirement of section 206, Rev. St. 1899, that in an election year, within the period therein stated, the Secretary of State shall make out and cause to be delivered to the board of county commissioners of each county a notice in writing stating what officers other than county and precinct officers are to be elected and voted for in the several counties.

I do not doubt that the question as to the constitutionality of the act of 1907 and possibly the two previous acts is presented in this case, and I suppose the court would have jurisdiction to determine that question in the first instance before going to any other question in the case. But there is another question that would demand consideration in the event that the apportionment acts should be decided to be unconstitutional, and upon its determination the right to the remedy sought would ultimately depend. Should we enter upon a full consideration of the constitutionality of the act of 1907 and adjudge it to be invalid, and then upon a consideration of the further question, viz., the right to have the notices for the election given under the apportionment in the Constitution, should decide, as we would be compelled to do, that the right does not exist on the ground that such apportionment is totally inapplicable under present conditions, at least so far as the power of the court to enforce it is concerned, the court would find itself in the position of having for no purpose whatever adjudged a legislative act void. While, therefore, the court might take upon itself the responsibility of deciding upon the validity of

the act without first considering the other question, I doubt very seriously the propriety of doing so, and hold to the opinion that it is incumbent upon the court in the first place to ascertain whether the remedy herein sought is one that can or ought to be granted in any event. That seems to me as well as the other members of the court the most logical course in view of the character of the questions involved. I am aware that there are cases holding to the contrary view. *Parker v. State ex rel.*, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; *People v. Thompson*, 155 Ill. 451, 40 N. E. 307. I think that those cases are distinguishable from the one at bar owing to difference in the circumstances. In those cases it would have been necessary to examine and pass upon the constitutionality of a former act as determined by practically the same objections urged against the later, and I do not understand that the enforcement of such former act would leave various sections of the state totally unrepresented in one or other of the two legislative bodies, or that its enforcement, if validly enacted, would interfere with constitutional provisions. In the *Indiana* case, however, there was a vigorous dissenting opinion by Judge Elliott upon the precedence of the questions, in which he gave several excellent reasons for first considering the right to the remedy in any event. Among other reasons he mentioned the following: "Courts will not send against a public officer the extraordinary writ of injunction or of mandamus, unless the complainant makes it appear that the writ will be effective in the particular case in which it is demanded"—and: "The inexorable rule is that constitutional questions will never be decided unless their decision is indispensably necessary to a final disposition of the case actually before the court." Upon appeal in a case of a similar nature the New York Court of Appeals decided the question of the validity of an apportionment act, and held it to be unconstitutional, although it made no order in the case, for the reason that the election had occurred under the act; but it was held by the court that the decision would not affect the official rights of the members elected, nor the acts of the Legislature, the members whereof had been elected under the void act. In *re Sherrill*, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841.

We conceive that the situation here is greatly different from that apparently presented in other cited cases involving the validity of apportionment acts. But, even if our conclusion in this respect would seem not to accord with the decisions by some other courts, we maintain upon principles well settled and universally recognized that under a situation such as is here presented it is eminently more logical and reasonable to inquire in the first place whether the remedy proposed through the intervention of the court is one within its power to grant with-

out compelling a deviation from constitutional mandates. It is therefore in order, before proceeding further with the discussion of the apportionment acts, to take up the apportionment embodied in the Constitution, together with other provisions therein contained, and review the situation now presented in connection therewith. It may be said here that it is not denied by counsel that as each house is the sole and exclusive judge of the qualifications of its own members, and as the terms of office of the members of the Legislature that convened in 1907 have not expired, and will in no case expire until January next, that Legislature was a *de facto* Legislature, and its members are *de facto* members thereof, and that its acts if otherwise valid cannot be assailed on the ground of the invalidity of any apportionment act under which the members were elected. It is indeed asserted by counsel for relators, and in that we agree with him, that the same Legislature, if called in special session for that purpose, would have the power to pass a valid apportionment act if the one now assailed should be held to be invalid. That is simply a concession to a well-settled principle applicable to the acts of public officers generally, as well as the lack of power of the court by any order in this or any other proceeding to debar a member elected to either branch of the Legislature from a seat in the body to which he may have been elected and admitted. It may be here stated that, had there been no subsequent legislation of any character upon the subject, the apportionment section of the Constitution would have remained the only apportionment law for this state. That was declared to be effective until otherwise provided by law. The general statement that it would constitute the apportionment until otherwise provided by law shows that it was intended to have only a temporary existence or effect. Indeed, in another section it is stated that the senate and house first elected under the Constitution shall consist of 16 and 33 members, respectively, the members that were actually apportioned. In the absence of any action by the Legislature pursuant to constitutional provisions affecting the question of apportionment, the various sections of the state would have remained represented in the Legislature as apportioned in the Constitution, and very little difficulty or cause of complaint would have arisen, except that new communities might be unfairly represented; but there would not then have existed any legal ground of complaint, nor the condition of affairs that now confronts us. But the Legislature did act, and did assume to enact apportionment laws, the first in 1893, under which the members of the Legislature of 1895, 1897, 1899, and 1901, respectively, were severally elected. In 1901 the second act was passed, under which the members of the Legislature, respectively, of 1903, 1905, and 1907 were elected. Except for the first state Legislature, and by the ap-

portionment therein made "until otherwise provided by law," the Constitution does not prescribe the number of members for either the Senate or House of Representatives. The Legislature is not restricted in that respect otherwise than as to the size of the two bodies in relation to each other. In each apportionment act the number of members in each body was increased, the constitutional proportion between them, however, being maintained.

It is to be remembered that the Constitution was framed by a convention held in September, 1889, while Wyoming was yet a territory, in anticipation of favorable action by Congress upon a bill or proposed bill for its admission as a state. When the bill would be considered or passed could not be known. This is not only evident from the nature of the question, but it was recognized by the convention, and provisions were inserted in the schedule to cover contingencies depending upon the date of statehood. See sections 21, 22, art. 21, entitled "Schedule." These provisions had reference to the assembling of the Legislature and the general election. The people of the territory voted upon and adopted the Constitution at an election held in November, 1889. The act of admission was approved July 10, 1890, and thereupon the Constitution became effective. The first state election was held in September of the same year, and the first Legislature of the new state convened in November, and remained in session until the latter part of January, 1891. Between the time of framing and adopting the Constitution as aforesaid and its taking effect (here using the term "adopted" as referring to the vote of the people thereon) two new counties were organized, Natrona, which had been created from the northern part of Carbon in 1888, and Weston, created from the southern part of Crook, by the Legislature of the territory that assembled in January, 1890. The Constitution provided (article 12, § 1) that "the several counties in the territory of Wyoming as they shall exist at the time of the admission of said territory as a state, are hereby declared to be the counties of the state of Wyoming." Under that provision it cannot be doubted that Natrona and Weston counties, having been created and organized prior to the state's admission, became upon such admission counties of the state. Big Horn county had been created in 1888, but was not organized until after statehood. But it was held by this court that when the state was admitted said county was a created but unorganized county of the state, and that its organization, though not its creation, was controlled by the restrictive provisions of section 2, art. 12. Board, etc., v. Perkins et al., 5 Wyo. 166, 38 Pac. 915. Neither of these new counties were mentioned in the apportionment of senators and representatives provided in the Constitution; and hence, had there been no subsequent enactment of an apportionment law by any Legislature of the

state, the territory in such counties would no doubt have remained attached to the counties from which they were respectively taken for the purpose of participation in the election of members of the Legislature, for, although each county is expressly constituted a separate senatorial and representative district by the Constitution itself, that provision would necessarily be read in connection with the section making a specific apportionment, which, for that purpose, mentioned the counties as they existed when the Constitution was framed. To prevent the nonrepresentation of the territory and people included in the newly organized counties, they would necessarily be regarded as part of the original counties respectively for the purposes of legislative elections and representation. And that course was in fact followed in the election of the first Legislature that convened in November, 1890, and the second that convened in January, 1893.

By the apportionment act of 1893 Natrona and Weston counties were each awarded one senator and one representative, and it was provided that Big Horn county, when organized, should have one senator and one representative. Omitting Big Horn county, the senate and house were by that apportionment to be composed of 18 and 37 members, respectively, and with said county the relative membership was to be 19 and 38; thus preserving the constitutional proportion with or without that county. In electing senators at the election preceding the session of 1893 it happened that a senator elected for four years from Carbon county resided in that part of its original territory which had become the county of Natrona. By a provision of the act of 1893 applicable generally to every case of that kind he was to represent, during the remainder of his term, the county wherein he resided, viz., Natrona. In the Legislature of 1895, and each succeeding Legislature, Natrona and Weston counties were each separately represented by a senator as well as representatives, and commencing with the session of 1897 Big Horn county has been separately represented in each body. Each senator from said counties was elected for the term of four years, the term of office fixed by the Constitution. There having been no apportionment act passed between 1893 and 1901, the number of members elected after the organization of Big Horn county, and until and including the session of 1901, continued at 19 and 33, respectively. At the session of 1895 the senate was composed of 18 members, of whom 9, or one-half the number, had been elected at the last preceding election for the term of four years, so that the two classes at that session were equally divided. At the session of 1897 there were 10 senators who were to hold office for four years from that time, having been elected at the fall election in 1896, as against 9 whose terms would expire in two years, the latter having been elected at the election held in

1894; and therefore at the next succeeding session there were 9 newly elected members to serve for four years as against 10 in the other class whose terms were to expire before the next following biennial session. This proportion was of course maintained at the session of 1901, the numbers being again reversed, the four-year class containing 10 members. The apportionment act of 1901 provided for a senate of 23 and a house of 50 members, giving each of the new counties separate representation. This increase in the senate resulted in the election of 13 new senators at the election in 1902, so that the two classes of senators were represented at the sessions of 1903, 1905, and 1907 by 13 and 10, respectively, which was as nearly equal as they could be made, considering the increase in the number of senators and the term of office of those to be newly elected as provided in the Constitution. The last act, and the one here particularly complained of, that enacted in 1907, provided for 27 senators and 56 representatives. At the session of 1907, 13 new senators were admitted who had been elected in November, 1906, for four years, making it necessary under the act aforesaid, if it shall stand, for the election of 14 senators at the election this year; and thus the relative number in the two classes will be maintained as contemplated by the Constitution. The present hold-over senators, that is, those who will be entitled to seats as senators at the regular session to be held in January, 1909, by virtue of their election in 1906 for four years from January, 1907, were elected in the numbers stated from the following named counties: Two from each of the counties of Albany, Carbon, Laramie, and Uinta; and one from each of the counties of Crook, Johnson, Sheridan, Sweetwater, and Weston. In order to give to the respective counties named in the apportionment found in the Constitution the number of senators awarded them thereby, without interfering with the hold-over senators above mentioned, it would require an election of a senator in each of the following counties, viz., Converse, Fremont, Laramie, and Sweetwater, or a total of four, which, when added to the number of hold-overs, makes 17, or one more than the number of senators provided for by the apportionment in the Constitution.

We are therefore confronted with this situation: That, should the Secretary of State be commanded to call an election under said apportionment, it would be necessary for him to determine the counties wherein an election for a senator or senators should be held, unless indeed this court would be authorized to make such a determination and embody the same in the writ. But whether that duty would devolve upon the Secretary or the court, it would be necessary to either disregard the senators already elected, and call for an election of an entirely new body of senators, or arbitrarily disregard the right of one or more of them to the office to which

they have been elected and admitted, or, in order to keep the number at 16, to arbitrarily ignore one of the four counties entitled to a senator to make up its representation as fixed in said apportionment. Should the senators already elected and seated not be disregarded, and we know of no authority on the part of the court or the Secretary to disregard them, then there would be 13 senators in one class, and not more than 4 in the other. And at any subsequent election new senators would necessarily be elected for the constitutional term of four years. It is therefore apparent, using former acts as an illustration, that, should the senate under a new apportionment be composed of 23 as heretofore, or 27 as provided by the act of 1907, the newly elected senators would number 19 or 23, while the remaining class would consist of 4 only, and this inequality would continue to exist, whatever the number of senators, unless reduced to a very small number, thus defeating the very obvious purpose of that provision of the Constitution dividing the senators into two classes. Again, a great reduction in the number of senators would require a corresponding though less reduction in the number of representatives, since the latter are in no case permitted to exceed three times the number of senators. Moreover, if 17 members are to compose the senate, that will be more than one-half the number of representatives, a condition forbidden by the Constitution in the most positive language; and, as neither the court nor the respondent could add to the number of representatives, it would be imperative that there be not more than 16 senators, so that it would be necessary to either deprive some county of its representation prescribed in the apportionment of the Constitution, or some elected senator of his office. If it should be said that the senator elected from Weston county might be disregarded, the fact would be pertinent that he was elected from a part of the territory embraced in the Crook county district under the apportionment sought to be applied, and it is a matter of public state history that the first senator from that district resided in the territory that is now Weston county. While the present senator from that county was elected by the votes of only a portion of the inhabitants of the original district known as Crook county, the same thing is true of the present senator from Crook county; and the territory covered by that district as established by the apportionment in the Constitution has now two elected senators, whereas it was given but one by that apportionment. The incompetency of the court to enter an order that would effectively deprive any hold-over senator of his office is recognized by all the authorities, and the principle is so well settled as to require no citation of cases. But I may refer to a late case in Pennsylvania where a relator in quo warrant, claiming to have been elected a senator, questioned the constitutionality of an apportionment act. The court refused to decide

the question on the ground that the relator had no such interest as gave him a standing to maintain the writ, and it was said: "Even a judgment of ouster against the respondent would not give the office to the relator, for his own qualifications and the regularity and validity of his election would still be subject to the investigation and judgment of the Senate, which is the ultimate and supreme tribunal on these matters." *Commonwealth v. Crow*, 218 Pa. 234, 67 Atl. 355.

The above statement of the present condition shows, not alone the confusion and difficulties that would attend any attempt at this time to go back to the apportionment of the Constitution, but to do so would deviate from mandatory constitutional provisions. It is evident that this court cannot in this case or any other either make an apportionment or unseat any senator already elected and admitted to that office, nor can we require the respondent, as Secretary of State, to do so, notwithstanding that the hold-over senators may have been elected under an unconstitutional act. I wish also to state that the acts of 1893 and 1901 have not heretofore been questioned, at least in any judicial proceeding, until the institution of this case; but they have been acquiesced in by the people as well as the Legislature. That fact does not of course render them valid, if in fact or law not so; but it does show that the people have elected their senators from time to time as therein respectively provided, and that the persons so elected have been admitted to the senate as members thereof by the only body authorized by the Constitution to ultimately determine their qualifications as senators. But it will be said that the court has no concern with the difficulties or confusion that might flow from the remedy sought in the case in determining the right to that remedy. Conceding that to be so as a general proposition, the court is concerned in this case with those matters, for they grow out of constitutional provisions equally as important and mandatory, if not more so, than those relied upon by the relators, and by which provisions the court as well as the Legislature and the parties are as much bound. In Kentucky it was said by the Court of Appeals in a recent case, with regard to an apportionment act that had been in effect more than 13 years: "The act of 1893 has gone into effect, and the government has been organized under it. To hold it void would be to throw the government into chaos; and this no court is required to do." *Adams v. Bosworth* (Ky.) 102 S. W. 861, 10 L. R. A. (N. S.) 1184.

It would be an anomaly to say that a provision of the Constitution is itself unconstitutional or invalid as conflicting with another provision of the same instrument. We are not here saying that the apportionment made in and by the Constitution "until otherwise provided by law" is unconstitutional or invalid for any reason. Such a position is far from our decision. But it is to be read and

construed in connection with other cognate provisions. When that is done, if it is found impossible of enforcement, and at the same time maintain inviolate the permanent and mandatory provisions which admit of no alteration by the court or Legislature, then it is our duty to refuse to enforce it. But, in any view of the matter, our position goes a step beyond that. Keeping in mind the evident purpose of the apportionment temporarily made by the Constitution, the acts adopted by the Legislature, and up to this period acquiesced in by the people, have resulted in a condition impossible of correction by the courts which must be regarded by the court, so far as this case is concerned, as equivalent to "otherwise provided by law," so as to render the apportionment in the Constitution superseded and inoperative. I do not mean to say that an invalid law would of itself destroy the operation or effect of the apportionment section of the Constitution; but an act appearing to have been duly enacted and promulgated is to be regarded as valid until otherwise declared by competent authority, and we are now considering the propriety of passing upon the validity of the apportionment acts, if not the power of the court to do so; and what I do maintain upon the facts above stated is that a condition beyond the control of the court has been produced, which, so far as the power of the court is concerned to award the remedy here sought, has caused in effect the apportionment of the Constitution to become inoperative. Where it was sought to have an election for the Legislature held under the apportionment act of 1879 in New York instead of the act of 1892 (Laws 1892, p. 806, c. 397), assailed as void, and the court could see that if the act of 1892 was invalid the act of 1879 (Laws 1879, p. 286, c. 208) was also void, and that to hold the later act void would relegate the people to the act of 1866 (Laws 1866, p. 1301, c. 607), a law more than a quarter of a century old, the court said that "this would be a travesty on the law and upon all ideas of equality, propriety, and justice." *People ex rel. v. Rice*, 185 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836. In the same case it appeared that the Constitution provided that the establishment of senate districts should be based upon an equal number of inhabitants, excluding "persons of color not taxed." The provision for the exclusion of persons of color not taxed in arriving at the number of inhabitants for the purpose stated had been inserted at a time when a man of color not taxed was not entitled to vote by express provision of the Constitution. After the War of the Rebellion and the adoption of the thirteenth, fourteenth, and fifteenth amendments to the federal Constitution, the state Constitution was amended by omitting the condition for the exercise of the elective franchise by a colored person, and other amendments were also adopted eliminating similar discriminations or provisions

based thereon; but the one for excluding colored persons not taxed in computing the number of inhabitants when establishing senate districts was in some way allowed to remain. The question was presented to the court upon an objection to the validity of the apportionment act on the ground that persons of color not taxed had not been excluded in the establishment of senate districts. In the opinion delivered by Mr. Justice Peckham it was held that the section was not to be construed as excluding such persons, notwithstanding its language, on the ground that the change in policy towards persons of color, clearly indicated by the constitutional amendments referred to, rendered it clear that the basis for the provision had been taken away; and it was held that under the conditions it should be regarded as impliedly repealed by the other amendments. That case does not of course precisely touch the question before us upon the facts, but it does show that subsequent conditions were considered as having an important bearing upon the construction of a particular section of the Constitution.

But there is an additional element in the case that I have not referred to, but which is mentioned in the principal opinion, viz., the declaration by the Legislature in each apportionment act that each organized county shall constitute a separate senatorial and a separate representative district, following a similar declaration in the Constitution. If that portion of each act is valid regardless of the validity of the remainder of the act, and I think there is strong ground for so holding, and indeed am inclined to the opinion that it must be so held, though perhaps it may not be necessary to do so in this case, then there is the condition that certain established districts are not apportioned any representation by the apportionment in the Constitution, and there would be a direct conflict between the apportionment section, which was intended to have only a temporary operation, and other provisions, such as that requiring each county to have at least one senator and one representative. Upon such a conflict the former and temporary provision must yield. Moreover the legislative act so establishing the districts would then furnish the contingency, "otherwise provided by law," upon which the section of the Constitution in question was to cease. Although it would amount to a partial provision only, it would render the section of the Constitution ineffectual in consideration of the other related sections. As counsel for relators has contended, and the petition herein asserts, that the ratio provisions of the act of 1901 would not fall if the section thereof making the apportionment should be adjudged void, I suppose it would be conceded on the part of relators that the section of said act declaring each organized county to constitute a separate senatorial and representative district would likewise remain unaffected by the invalidity of the provision

covering the apportionment of members. At least there would seem that every reason for maintaining that the ratio provisions are separable from the part alleged to be void would equally apply to the provision establishing the districts.

In the opinion handed down for the court Judge Scott has called attention to the fact that two senators from Carbon county, the entire quota awarded that county by the constitutional provision, are hold-overs, and were elected from that county as now constituted, so that by leaving them to represent that county would not only deprive Natrona county of any separate senatorial representation, but of any voice in the election of a senator. That would also be the case as to those portions of Big Horn county taken from Sheridan and Johnson counties, respectively. In the case of the Crook and Weston county senators it occurs to me that it might be a difficult matter upon any legal principle to determine which one, if either, should be deprived of the privilege of serving out the full term. Not only has the senator from Weston county been admitted as such by the senate, but at the last session he was elected vice president of that body, and is probably now holding that office. The cases cited in brief and argument involving the validity of apportionment acts severally present a far different state of facts as well as different constitutional provisions from those with which we are concerned. In many if not most of the cases the duty was imposed upon the Legislature by the Constitution of establishing districts according to the number of inhabitants and under certain other restrictions such as those of compactness and contiguity; but I do not recall a case where, if an election was held under a previous act, certain counties or sections would be deprived, not only of representation, but of any voice in the selection of a representative.

Upon any view of the case at bar, should the writ demanded by the relators be granted, not only would there be caused inextricable confusion, but there would occur an inevitable deviation from the permanent provisions of the Constitution concerning the formation of the Legislature and representation therein; and in my opinion, therefore, the only safe and reasonable course is to deny the writ on the ground that the relators have not shown themselves entitled to it, without deciding as to the validity of the apportionment acts.

HALL v. O'CONNELL.

(Supreme Court of Oregon. May 12, 1908.)

1. MORTGAGES—DEED ABSOLUTE—EVIDENCE.

Evidence held to show that a person advanced the purchase price of land as a loan to the purchaser, and took title in himself from the vendor as security for the repayment thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 108-111.]

2. MONEY PAID—TIME OF PAYMENT—INTEREST.

Where money paid is intended as a loan, the law supplies the elements of a loan such as time for payment, rate of interest, and agreement to repay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Paid, §§ 1-16.]

3. MORTGAGES—DEED ABSOLUTE AS MORTGAGE—EVIDENCE.

A deed absolute on its face given as security for the repayment of a loan may be shown by parol to be intended in fact as a mortgage, and the rule applies where the purchaser of land borrows the purchase money and causes the title to pass directly from the vendor to the creditor as security for the loan.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 98-101.]

4. SAME—INTENTION OF PARTIES.

Whether an absolute deed is a mortgage depends upon the intention of the parties, and not upon the form of words or of the instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 85.]

5. TRUSTS—EXPRESS TRUSTS—TAKING TITLE TO LAND PAID FOR WITH ANOTHER'S MONEY.

Where a purchaser of land in securing a loan has the title transferred by the vendor directly to the creditor, the conveyance not only operates as a mortgage as between debtor and creditor, but the grantee also becomes the trustee of the title for the purchaser, and the trust is enforceable as soon as the debt is paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 45.]

6. MORTGAGES—ABSOLUTE DEED AS MORTGAGE—SUFFICIENCY OF EVIDENCE.

To establish an absolute deed as a mortgage, the proof must be clear, consistent, and convincing that it was intended to operate as a mortgage by the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 108-111.]

Bean, C. J., dissenting.

Appeal from Circuit Court, Coos County; J. W. Hamilton, Judge.

Action by E. O. Hall against Eugene O'Connell to have a deed absolute on its face declared a mortgage and to redeem therefrom. Judgment for defendant, and plaintiff appeals. Reversed and reudered.

John S. Coke and E. B. Seabrook, for appellant. J. W. Bennett, for respondent.

EAKIN, J. This is a suit to have a deed absolute on its face declared to be a mortgage and to redeem therefrom. Prior to the 10th day of December, 1901, plaintiff had negotiated for the purchase of a portion of lot 3 of section 22, township 25 S., range 13 W., W. M., in Coos county, Or., from Mrs. Schetter, residing in San Francisco, for the price of \$750, and had by wire directed her to forward to him at Marshfield, Or., a deed therefor. Plaintiff at that time had the promise of the purchase money from his son, but failed to secure it from that source, and by plaintiff's contention, on or about that date, he secured the promise of a loan of that amount of money from the defendant with which to pay for the land. For the purpose of securing him therefor, plaintiff, by agreement with defendant, wired to Mrs. Schetter at San Francisco to name defend-

ant as the grantee in the deed; and on the 10th day of December, 1901, she did so execute the deed and forward it to Otto Schetter, to be delivered upon receipt of the money; and O'Connell paid the money and took the deed. Thereafter, on March 29, 1902, plaintiff paid to the defendant's clerk at his store \$100 to apply upon the said loan, but defendant, when advised of it, returned the money to plaintiff, stating, as plaintiff asserts, that he did not want the money in small payments; and thereafter, on June 7, 1902, plaintiff tendered to defendant \$800, the whole amount claimed by him to be due thereon, but the defendant refused to accept it, and asserted ownership of the property. Defendant, on the contrary, insists that Hall did not want the property and corresponded with Mrs. Schetter and negotiated the purchase for him; and that no talk of a purchase by Hall or a loan to him was had between them; and that he paid the money and took the title as a purchase for himself. The evidence clearly establishes that Hall had negotiated the purchase for himself, and had wired for a deed before he and the defendant had had any conversation about it. This is evidenced by Otto Schetter as well as by Hall himself, and this fact tends strongly to discredit O'Connell's explanation of Hall's connection with it and his own negotiations through Hall. Hall is also corroborated by Mr. Nicholson, the surveyor, who says: "Mr. Hall met me on the street, down near Walcott's, and asked me if I would make a survey for him, and stated that he was buying a piece of property there, but that Mr. O'Connell was going to pay for the surveying, and to drop into O'Connell's store and see if it was all right. I went into Mr. O'Connell's store, and he repeated the same thing and wanted me to make the survey, and stated Mr. Hall was buying a piece of property and that he was going to advance the money, and would pay me for the survey." Hall is corroborated by Puskaline, who claims to have been present when the arrangement was made between Hall and O'Connell for the loan of the money. We think the evidence satisfactorily establishes that O'Connell loaned to plaintiff the money to pay for the land and that Hall procured the deed, to be executed in O'Connell's favor as security for the repayment thereof, and that defendant holds the title to the land as security. It is urged by defendant that there was no set time for the payment, rate of interest fixed, or formal agreement to repay, but the law supplies each of these elements if there was in fact a loan. It is also suggested that plaintiff made no opposition to defendant's possession of portions of the land, or to his making improvements thereon; but, part of those improvements was agreed upon at the time of the agreement for the loan, for defendant's convenience. However, defendant was not misled by the conduct of plaintiff, as he was diligent in asserting his rights. He

tendered the first payment upon the loan within three and a half months, and the whole debt within six months, from the time the advance was made.

A deed absolute on its face given as security for the repayment of a loan may be shown by parol to be intended in fact as a mortgage. This has been frequently so decided by this court, beginning with *Hurford v. Harned*, 6 Or. 362. But it is urged by the defendant that this is a purchase by defendant with his own money and a conveyance to him from the vendor and not from the plaintiff, and therefore does not come within the above rule, and is within the statute of frauds. But as we understand, the rule that a deed absolute on its face, given as security, may be shown by parol to be a mortgage applies equally to the case of a purchaser borrowing the purchase money, and causing the title to pass directly from the vendor to the creditor as security for the loan. It is a question of the intention of the parties and not the form of words or of the instrument. If the equitable interest in the property is in the debtor, equity will protect him. In such a case, *Jones, Mort.*, says, at section 331: "The grantee in such case acquires title by his (the debtor's) act, and as security for his debt, and therefore holds the title as his mortgagee." Also 27 Cyc. 979, says: "If a person who has contracted for the purchase of land procures another to lend him the money necessary to make the payments, or to advance it for him, and has the deed made to the latter, with an agreement that he will convey the title to the former on repayment of the amount advanced, the transaction will amount to an equitable mortgage if it was the understanding and intention of the parties that the one should become debtor to the other for the money advanced, and that the land should be held merely as security for this debt. If this was their contract, the form in which they may have cast the agreement is immaterial. It is not necessary that the agreement to reconvey should be under seal, or even that it should be in writing; a verbal agreement will be sufficient in equity, if fully established. While it is necessary, as stated, that the transaction should be intended as a security for a debt or loan, no promise or personal covenant on the part of the borrower to repay the money is required to make it a mortgage in equity." *Nigeler v. Maurin*, 34 Minn. 118, 24 N. W. 369.

There is this additional element in the case, where a purchaser in securing a loan has the title transferred by the vendor directly to the creditor; namely, the conveyance operates not only as a mortgage as between debtor and creditor, but the grantee becomes the trustee of the title for the purchaser. As the title did not vest in the debtor, but the purchase being made with his money and the title taken in the name of the creditor, there arises a trust in favor of the debtor and enforceable as soon as the debt

secured is paid. So, when the fact is determined that the loan was made by defendant to the plaintiff and that the deed was so taken as security therefor, then it is established that the purchase was made in defendant's name with plaintiff's money, and when the debt is paid defendant holds but the naked title without any beneficial interest, and is deemed the trustee of the title for the plaintiff. It is so held in many cases on this subject. *Fleming v. Georgia R. Bank*, 120 Ga. 1023, 48 S. E. 420; *Campbell v. Freeman*, 99 Cal. 546, 34 Pac. 113. *Jones, Mort.*, at section 331, says: "In equity it is regarded as unnecessary that the conveyance should be made by the debtor. It is sufficient that he has an interest in the property, either legal or equitable. Having such an interest, if he procure a conveyance of the property to one who pays the price of it, or makes an advance upon it, under an arrangement that he shall be allowed to have the property upon repaying the money advanced, he has a right to redeem. The grantee in such case acquires title by his act, and as security for his debt, and therefore holds the title as his mortgagee." This is entirely consistent with the holding in *Sisemore v. Pelton*, 17 Or. 546, 21 Pac. 667; *Taylor v. Miles*, 19 Or. 551, 25 Pac. 143. When the loan and the fact that the conveyance was so made as security are established, we have a clear case of a purchase with plaintiff's money; and thus a resulting trust is established. The following additional cases are to this effect: *Hughes v. McKenzie*, 101 Ala. 415, 13 South. 609; *Stewart v. Fellows*, 128 Ill. 480, 20 N. E. 657; *Rogers v. Davis*, 91 Iowa, 730, 59 N. W. 265; *McPherson v. Hayward*, 81 Me. 329, 17 Atl. 164; *Malloy v. Malloy*, 35 Neb. 224, 52 N. W. 1097; *Leahigh v. White*, 8 Nev. 147.

In *Campbell v. Freeman*, 99 Cal. 546, 547, 34 Pac. 113, 114, where the agreement and defeasance were in parol, it is held: "The rule is familiar that when, upon a purchase of real property, the purchase money is paid by one person and the conveyance is made to another, a resulting trust immediately arises. * * * The same rule prevails if the money paid by the party taking the title is advanced by him as a loan to the other, and the conveyance is made to the lender for the purpose of securing the loan. But in the latter case the purchaser cannot demand the conveyance until he has paid the money advanced, and for which the land is held as security. In such a case the grantee holds a double relation to the real purchaser—he is his trustee of the legal title to the land and his mortgagee for the money advanced for its purchase—and, as in the case of any other mortgage which is evidenced by an absolute deed, is entitled to retain the title until the payment of the claim for which it is held as security."

In *Fleming v. Georgia R. Bank*, 120 Ga. 1023, 1026, 48 S. E. 420, 422, Carr purchased the lot in question from Dickey. Defendant advanced the price, and the conveyance was made by Dickey to the defendant as security; and it is said: "While his (Carr's) interest in the land was only the equity of redemption, upon payment of the debt secured by the deed Carr or his assignee could maintain a proceeding to compel a conveyance from the bank. Upon payment of the debt, a resulting trust would have arisen; and the bank, holding the naked legal title with no beneficial interest in the land, would be deemed the trustee of Carr."

So there remains only the question of fact whether the transaction between plaintiff and defendant was a loan, the repayment of which was secured by a deed from the vendor to defendant, absolute on its face and intended between plaintiff and defendant as a mortgage. To establish this, the proof must be clear, consistent, and convincing that such was the intention of the parties. As said in *Stephens v. Allen et al.*, 11 Or. 188, 196, 3 Pac. 168, 173, "As cases of this character must be determined upon their own special facts, it is admitted that these facts should be of clear and decisive import. They should lead the court to a satisfactory conclusion as to what the parties intended and meant by their contract, so that it may be enforced according to that intent." The testimony of plaintiff and defendant is in direct conflict upon almost every fact involved in these issues, but plaintiff is corroborated in his testimony by that of Nicholson and Puskaline, and also by the circumstance that he actually negotiated the purchase for himself, and acted promptly in tendering the repayment of the loan; and we think he has established by clear and convincing proof the facts necessary to a recovery. Therefore, the deed from Mrs. Schetter to the defendant is in fact a mortgage to secure the repayment of the said \$750, interest, and taxes, and the defendant also holds the legal title to the property as trustee for the defendant. Upon the repayment of the sums so secured defendant should be decreed to convey the said property to plaintiff. There is due to the defendant the sum of \$750, with interest thereon at the rate of 6 per cent. per annum from December 10, 1901, to June 7, 1902, the time of the tender, namely, \$22.25, together with the taxes paid by the plaintiff on said property for the years 1901, 1902, 1903, and 1904, amounting to \$55.85, making a total of \$928.10.

The decree of the lower court is reversed, and one entered here in accordance with this opinion, with costs to appellant.

BEAN, C. J., dissents from the conclusion here reached.

STATE v. NIELSEN.

(Supreme Court of Oregon. May 12, 1908.)

1. FISH—NATURE OF PROPERTY.

Fish being *ferae naturae* while in state of nature, may of common right be captured and taken from navigable waters by any one unless forbidden by law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fish, §§ 1-3.]

2. SAME—POWER TO REGULATE.

The sovereignty having jurisdiction over navigable waters may under its police power regulate or restrict the right of fishing therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fish, § 16.]

3. SAME — STATES — BOUNDARIES — RIVERS — "CONCURRENT JURISDICTION."

Under Act Cong. March 2, 1853, c. 90, 10 Stat. 172, providing that the territories of Oregon and Washington shall have "concurrent jurisdiction" over offenses committed on the Columbia river where it forms the common boundary, and Act Cong. Feb. 14, 1859, c. 33, 11 Stat. 383, admitting Oregon into the Union, providing that the state of Oregon shall have "concurrent jurisdiction" on the Columbia river so far as the same shall form a common boundary of the state, the law of Oregon prohibiting fishing with a purse net on the Columbia river extends over the entire river where it forms a boundary of the state, though the law of Washington permits fishing by such means by one obtaining a license so to do, since the rule is that where adjoining states have concurrent jurisdiction on the waters forming their boundaries the law of each state regulating the common right to take fish from such waters are valid when not in conflict, and where there is a conflict the law of the state which is most restrictive in its character must prevail.

4. SAME.

Since a license to fish in the Columbia river issued by the state of Washington does not confer on the licensee the right to fish, and since the issuance of the license is a mere regulation of an existing right, the enforcement of the law of Oregon prohibiting fishing in the Columbia river does not deprive the licensee of a right granted to him by the state of Washington but the law of Oregon is an additional restriction of a common right.

Appeal from Circuit Court, Clatsop County; Thomas A. McBride, Judge.

Christ Nielsen was convicted of illegal fishing, and he appeals. Affirmed.

G. C. Fulton, for appellant. A. M. Crawford, for respondent.

BEAN, C. J. The defendant, a resident of the state of Washington, was tried and convicted in the courts of this state, for fishing on the Washington side of the Columbia river, with a purse net—a floating device for taking fish—in violation of the laws of this state, and he appeals. By the law of the state of Washington, in force at the time of his arrest, fishing with a purse net was lawful by those having a license so to do from the fish commissioner of that state, and defendant had such license. The single question for determination, therefore, is whether the law of Oregon prohibiting the taking of

fish, in the manner indicated, extends over the entire waters of the river, or whether it is confined to the Oregon side. By section 1 of the Act of Congress of March 2, 1853, c. 90, 10 Stat. 172, all that part of the territory of Oregon lying north of the "main channel of the Columbia river" was organized into the territory of Washington, and by section 21 of the same act it is provided, "that the territory of Oregon, and the territory of Washington, shall have concurrent jurisdiction over all offenses committed on the Columbia river where said river forms the common boundary between said territories." Section 1 of the act of Congress admitting Oregon into the Union (Act Feb. 14, 1859, c. 33, 11 Stat. 383), after describing in detail the boundaries of the state, provides, "including jurisdiction in civil and criminal cases upon the Columbia river and Snake river, concurrently with the states and territories of which those rivers form a boundary in common with this state." And in section 2 it is said "the state of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said state of Oregon, so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same."

The meaning of the words "concurrent jurisdiction," as used in these several acts of Congress, is the point at issue in the present case. It has been a subject of dispute between the two states for many years, and is a question of great public importance to both commonwealths, and one which should be authoritatively settled by the Supreme Court of the United States, as the court of final resort. In 1895, one Mattson was tried and convicted in the circuit court of Clatsop county for fishing in the river on Sunday, in violation of the laws of this state. Mattson petitioned the Circuit Court of the United States for a writ of habeas corpus and, upon a hearing before Judges Bellinger and Hanford, was discharged, the court ruling that the law of Oregon, under which he was tried and convicted, was invalid, because it had not been acquiesced in or sanctioned by the state of Washington. In construing the word "concurrent," as used in the acts of Congress conferring jurisdiction on the river, it is said, "the word 'concurrent' in its legal and generally accepted definition, means acting in conjunction, and when applied to jurisdiction of Oregon to enact laws for the Columbia river, it can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington, or as are already in force within its jurisdiction." In *re Mattson* (C. C.) 69 Fed. 535. This ruling was subsequently followed by Judge Wolverton in *Ex parte Desjairo* (C. C.) 152 Fed. 1004. By this construction, concurrent jurisdiction is made to mean the same as joint jurisdiction, consequently neither state can make or

enforce any of its laws—civil or criminal—on the river, without the consent of the other, thus denying to each state a jurisdiction expressly conferred upon it by Congress. The question of concurrent jurisdiction over boundary waters has frequently been considered by the courts of this country, and, while no satisfactory definition of the term is to be found in the books, no court, except the one referred to, has, so far as we have been able to ascertain, ever held or intimated that where the waters of a river or stream form the boundary between two states, and each is given concurrent jurisdiction on the same, that neither can enforce its laws unless they have been acquiesced in or approved by the other.

The northern boundary of the states of West Virginia and Kentucky extends to low-water line on the north side of the Ohio river, and the southern boundary of Illinois, Indiana, and Ohio to that point. The middle channel of the Mississippi river is a boundary between the states of Missouri, Iowa and Minnesota, on one side, and Illinois and Wisconsin on the other; and the middle channel of the Missouri river is the boundary between Missouri and Kansas. Each of these states is given concurrent jurisdiction over the river forming the boundary thereof. The right of such states to execute power emanating from its courts and enforce its civil and criminal laws on the waters of the stream has been repeatedly declared, and is denied by no court of last resort, except in *Meyler v. Wedding*, 107 Ky. 310, 53 S. W. 809, 92 Am. St. Rep. 347, which was subsequently reversed by the Supreme Court of the United States, 192 U. S. 573, 24 Sup. Ct. 322, 48 L. Ed. 570, 66 L. R. A. 833, and *Roberts v. Fullerton*, 117 Wis. 222, 93 N. W. 1111, 65 L. R. A. 953, which will be referred to hereafter. Thus, in *State v. Plants*, 25 W. Va. 119, 52 Am. Rep. 211, a conviction in a West Virginia court for selling spirituous liquor on a boat which was afloat on the Ohio river above low-water mark on the Ohio side, in violation of the laws of West Virginia, was sustained. In *Welsh v. State*, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664, it was held that one who sold intoxicating liquors in a boat anchored in the Ohio river south of low-water mark could be charged, tried and convicted in an Indiana court for violating the laws of that state, the court saying, "that the criminal laws of the state extend to and are in force on the Ohio river where such river constitutes the south boundary of the state." In *Carlisle and another v. The State*, 32 Ind. 55, it was held that an Indiana court had jurisdiction over the crime of murder committed on the Ohio river, and in *State v. George*, 60 Minn. 503, 63 N. W. 100, that a court of that state had jurisdiction to punish the crime of larceny committed on the Wisconsin side of the Mississippi river. In *Loy v. Steamboat F. X. Aubury*, 28 Ill. 412, 81 Am. Dec. 292, the

court held that trespass would lie for assault committed on a passenger by the officer of a boat on the Ohio river. A conviction for keeping a house of ill fame on the Illinois side of the Mississippi river was sustained by the courts of Iowa (*State of Iowa v. Mullen*, 35 Iowa, 199), and so was a conviction for keeping a gaming house on the Missouri river by the court of that state, although the house or boat in which the gaming was conducted was on the Kansas side (*State v. Metcalf*, 65 Mo. App. 681). In *Sanders v. St. Louis & N. O. Anchor Line*, 97 Mo. 28, 10 S. W. 595, 3 L. R. A. 380, it was ruled that an act of the state of Missouri, giving damages for negligence resulting in death, controlled in a case arising from facts occurring on the Illinois side of the Mississippi river, and the same doctrine has been enforced in the courts of Indiana. *Sherlock v. Alling*, Adm'r, 44 Ind. 184; *The Memphis & Cincinnati Packet Co. v. Pikey*, Adm'r, 142 Ind. 304, 40 N. E. 527. The circuit court of the United States for the district of Oregon, in *Annie M. Smull*, 2 Sawyer, 226, held that it had jurisdiction over a boat anchored on the Washington side of the Columbia river. Judge Deady, in stating the terms and effect of the act of Congress conferring on this state concurrent jurisdiction on the Columbia river says, "It is not merely a special grant of judicial power to the courts of the state over persons and things upon the river, but within the boundary of the state. It is a legislative declaration or enactment that the jurisdiction of the state—that is, its whole sovereign power shall extend to the whole river, subject to the qualification that the jurisdiction of the state or territory on its northern shore, shall in like manner extend to its southern shore. In effect, this makes the northern shore of the river the northern boundary of the state, for its territorial limits and jurisdiction are necessarily the same. Practically, then, so far as the Columbia river forms a boundary common to Oregon and Washington, it is within the territorial limits and jurisdiction of each." The right to exercise concurrent jurisdiction over rivers forming state boundaries will be found discussed by Mr. Rorer in his work on Interstate Law, 336 et seq., and in notes to *Roberts v. Fullerton*, 117 Wis. 222, 93 N. W. 1111, 65 L. R. A. 953. And, as we have already remarked, in no instance has the suggestion been made that the validity of the law sought to be enforced was dependent upon the acquiescence or concurrence of the adjoining state, unless it was concerning some matter affecting or annexed to the soil, but on the contrary in *Keator Lumber Co. et al. v. The St. Croix Boom Corp.*, 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837, it is expressly declared that concurrent jurisdiction is not joint in the sense that only legislative acts adopted by both states can be effective on boundary waters.

The case of *Roberts v. Fullerton*, *supra*, is

much relied upon by defendant. That was an action to recover damages for the taking of plaintiff's fish net from where it was located, to catch fish on the Wisconsin side of the Mississippi river. Defendant pleaded in justification that he was an officer of the state of Minnesota duly authorized to enforce its law for preservation of fish, and, in doing the act complained of, was in the performance of his official duties. The court held that, although the states of Wisconsin and Minnesota had concurrent jurisdiction over the water in question, an attempt is made in the majority opinion to distinguish between laws regulating the right to fish and other acts of a criminal and civil nature. But, like Mr. Justice Dodge, who dissented in that case, we are "unable to distinguish between criminal and police legislation of the state addressed to the subject of catching or destroying fish, and police or criminal legislation relating to other subjects." Fish being *feræ naturæ*, while in state of nature, may of common right be captured and taken from navigable waters by any one, unless forbidden by the law giving power. 2 Farnham, *Water & Water Rights*, 1361. But because an indiscriminate exercise of this common right would speedily result in the destruction of the fish, the sovereignty having jurisdiction over the waters under its police powers may regulate or restrict the exercise of this right for the common good. *State v. Schuman*, 36 Or. 16, 58 Pac. 661, 47 L. R. A. 153, 78 Am. St. Rep. 754; *Haggerty v. Ice Mfg. & Storage Co.*, 143 Mo. 238, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647; *Smith v. State*, 155 Ind. 611, 58 N. E. 1044, 51 L. R. A. 404. And in our opinion, where adjoining states have concurrent jurisdiction on the waters forming their boundaries, the law of each state regulating the common right to take fish from such waters are valid and binding, when not in conflict, and, if there is a conflict, the law of that state, which is the most restrictive in its character, must prevail, and to that extent the state, which first assumes, has jurisdiction to the exclusion of the other. If this is not so, and the states of Oregon and Washington must join in regulations to protect the fish industry on the Columbia river, a thing they have heretofore been unable to do, the river will practically become a common fishing ground, without limitation or restriction, and one of the greatest industries on the coast be speedily destroyed.

It is argued that Washington, by issuing a license to defendant to fish with a purse net, has made that which the state of Oregon has declared to be an offense, and that a citizen of the former state who has complied with its laws ought not to be punished for violating a law of this state. But the license did not confer upon defendant the right to fish. It was a mere regulation of an existing right, and hence the enforcement of a law of this state prohibiting fishing with certain appliances does not deprive defendant of a right

granted to him by an adjoining state, but is an additional limitation and restriction on a common right, and one which, by reason of its jurisdiction over the river, we think it had the power to enact.

(52 Or. 602)

STATE v. PORTLAND GENERAL ELECTRIC CO.

(Supreme Court of Oregon. May 12, 1908.)

1. PLEADING—"DEMURRER"—ORDER SUSTAINING—EFFECT.

A demurrer is a part of the proceeding by which a cause is put at issue, and the order sustaining it eliminates from the pleading the matter demurred to.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 568.

For other definitions, see Words and Phrases, vol. 2, pp. 1982, 1985.]

2. APPEAL—RULINGS ON DEMURRER—REVIEW.

Under B. & C. Comp. § 557, providing that, on appeal, the appellate court may review any intermediate order involving the merits or affecting the judgment appealed from, a ruling sustaining a demurrer may be reviewed on appeal from the final judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3456-3461; vol. 2, Appeal and Error, § 420.]

3. PLEADING—COMPLAINT—SEPARATELY STATING CAUSES OF ACTION—WAIVER.

Under B. & C. Comp. § 106, providing that, when a pleading contains more than one cause of action and the same is not pleaded separately, the pleading may on motion be stricken out, etc., a defendant desiring to take advantage of the fact that a complaint states as one cause of action matters constituting several causes must do so by motion to strike, or the error is waived, and the complaint must be treated as setting forth one cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1103-1108, 1355-1374.]

4. SAME—DEMURRER—GROUNDS.

Under B. & C. Comp. § 69, providing that a demurrer may be taken to the whole complaint, or to any of the alleged causes of action stated therein, a demurrer is not available to question any part of a pleading less than a cause of action, and it cannot attack a part of the recovery sought by a complaint stating as one cause of action matters constituting several causes on the ground that the prayer demands too much.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 408-417.]

5. SAME.

Under B. & C. Comp. § 68, providing that defendant may demur to the complaint when it appears on the face thereof that the action has not been commenced within the time limited, a demurrer cannot attack a part of the recovery sought by a complaint stating a good cause of action for a part of the claim sued on, but the amount of the recovery must be determined at the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 408-417, 486.]

6. CANALS—PUBLIC AID—TRUST RELATION—CREATION.

Act Oct. 21, 1870 (Laws 1870, p. 14), appropriating funds to a company for the construction of a canal and locks on condition that the company shall pay to the state a specified per cent. of the net profits arising from the tolls collected from freight and passengers passing through the canal and locks, etc., does not make the company a trustee of the state for the speci-

fied per cent., but the same is the money of the company due as a debt to the state.

7. LIMITATION OF ACTIONS — CLAIMS DUE STATE.

Under B. & C. Comp. § 13, providing that limitations shall apply to actions in the name of the state for its benefit, all suits by the state, whether in its sovereign or proprietary capacity, may be barred by limitations and limitations run against a liability created by a statute requiring a company operating a canal to pay to the state a specified per cent. of the tolls received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 35-39.]

8. EMINENT DOMAIN—RIGHT TO EXERCISE.

The right granted to a corporation to exercise the power of eminent domain is available only when a public interest is to be served, and when the exercise of the power is necessary to enable the corporation to carry out the purpose of its organization, and it does not transfer to the corporation the title or use of any public property, rights, or easements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 147-160.]

9. CORPORATIONS — ORGANIZATION — POWERS — FRANCHISES—STATUTES.

A corporation organized under B. & C. Comp. §§ 5052-5075 (Deady's Gen. Laws, p. 658, c. 8), providing what the certificate of incorporation shall specify, defining what the powers of a corporation shall be without granting any franchise other than the right to incorporate, and declaring that any corporation "formed for the purpose of navigating any stream * * * may * * * construct any * * * canal * * * as if such corporation had been specifically formed for such purposes," and authorizing corporations to enter into possession of property, etc., possesses no franchise to construct and operate a canal and locks as part of a navigable river, and to take tolls thereon, which rights are franchises which cannot be exercised without permission from the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1511-1523.]

10. SAME.

A corporation may take advantage of the privileges and franchises granted by the general law of incorporation by including in its articles of incorporation any of the privileges and franchises it may desire to exercise, and to that extent the articles stand as the legislative charter thereof, but it cannot exercise powers or privileges not enumerated therein, and can exercise no power not authorized by statute, though enumerated therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1511-1523.]

11. FRANCHISES—CONSTRUCTION.

Grants of franchises are strictly construed against the grantee, and nothing passes by implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Franchises, § 2.]

12. CANALS—RIGHT TO OPERATE.

The right to construct and operate a canal and locks as a part of a navigable river and to take tolls thereon is an undertaking, the exercise of which belongs exclusively to the state or to those to whom it may delegate it, and it is not one of common right, and is subject in the hands of the delegated agent of the state to any restrictions that may be imposed by the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Canals, §§ 1-3.]

13. NAVIGABLE WATERS—TITLE OF UPLAND OWNERS.

An upland owner of land bordering on a navigable stream owns only to the high-water

line, and the stream and the river and its banks and bed belong to the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 180-200.]

14. EVIDENCE—JUDICIAL NOTICE.

The court will take judicial notice of the fact that a corporation could acquire rights in the bed, banks, and water of a navigable river only by an act of the Legislature, so that one constructing and operating a canal built on land owned in fee with the exception that the canal at both ends reach navigable water could only do so under a franchise from the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 30-48.]

15. CANALS—CONSTRUCTION — DEDICATION TO PUBLIC.

Where a corporation accepted the franchise granted to it to construct a canal and locks and constructed the same principally on land which it owned in fee, the land became a part of the highway to the same extent it would have done if originally owned by a stranger and the corporation had acquired it by the right of eminent domain; the act of the corporation being equivalent to a dedication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Canals, §§ 6, 9-12.]

16. SAME.

A corporation was organized to construct a canal and locks as a part of a navigable river. Act Oct. 21, 1870 (Laws 1870, p. 14), authorized the corporation to operate the canal and locks, limited the rate of toll, exacted a payment to the state of a specified per cent. of the profits from tolls, and reserved the right of the state, at the expiration of a specified period, to appropriate the canal and locks on paying therefor. *Held*, that the act conferred on the corporation a franchise to operate the canal and locks, including the right to appropriate the bed and banks of the river so far as needed, and to divert the water necessary for its purposes.

17. CORPORATIONS — POWERS — TRANSFER OF FRANCHISE.

A corporation to which a franchise has been granted with no power to transfer has no power to transfer it, and a transfer is void, and does not relieve the franchise of any of the burdens imposed by the act of its creation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1525-1529.]

18. CANALS—POWERS OF CORPORATION.

B. & C. Comp. § 5056, subs. 4, 7, authorizing corporations to purchase and dispose of real estate necessary and convenient to carry into effect the objects of the corporation, and providing that a corporation incorporated to construct and operate a railroad, may purchase a railroad constructed by any other company, etc., does not authorize a corporation organized to construct a canal and locks and possessing a franchise to operate the same and charge tolls therefor to transfer the franchise.

19. SAME.

A corporation possessing a franchise to construct and operate a canal and locks subject to Act Oct. 21, 1870 (Laws 1870, p. 14), requiring it to pay a part of its tolls to the state, transferred the franchise without legislative authority. Act Oct. 19, 1876 (Laws 1876, p. 14), subsequently enacted, made no change in the original liabilities and obligations of the corporation and referred to "any and every person, corporation, company, * * * either having authority to charge or control of or owning or claiming to own or having any interest in" the canal and locks. Subsequent acts contained provisions only lessening expense to the state and to aid in securing the fulfillment of the act of 1870. *Held* that, though the act of 1876 be construed as recognizing the transfer, it could not be construed as recognizing a transfer free from

the obligations imposed by the act of 1870 and the transferee was subject to such liabilities.

20. "FRANCHISE"—WHAT CONSTITUTES.

A franchise is an incorporeal hereditament, a privilege or authority vested in certain persons by grant of the state to exercise powers or to do and perform acts which without such grant they could not do or perform. It does not involve an interest in land, and is a privilege which may be owned without the acquisition of realty, and the use of a franchise may require the occupancy, or even the ownership of land without making the franchise itself an interest in land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Franchises, § 1.

For other definitions, see Words and Phrases, vol. 3, pp. 2929, 2941; vol. 8, p. 7066.]

21. CANALS—TOLLS—RIGHTS OF STATE.

Act Oct. 21, 1870 (Laws 1870, p. 14), appropriating money to a corporation organized to construct a canal and locks, authorized it to operate the same, and required it to pay a specified part of the tolls to the state. The corporation without legislative authority transferred the franchise. A subsequent act, though acquiescing in the transfer, did not waive the benefits arising to the state under the act. For many years the officers of the state made no effort to collect the tolls due to the state. *Held* that the laches of the officers did not operate as a waiver of the continuing liability for a share of the profits or a recognition of the transferee's ownership of the property and franchise free from the burdens imposed.

22. ESTOPPEL—ESTOPPEL IN PAIS.

Estoppel in pais against the state will not arise from the laches of its officers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 151-153.]

23. SAME—NATURE OF "ESTOPPEL BY CONDUCT."

To constitute estoppel by conduct, there must be a false representation made with knowledge of the facts, and with the intent that it should be acted on by the other party who was ignorant of the truth, and who was induced to act on the representation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 124-135.

For other definitions, see Words and Phrases, vol. 3, pp. 2494, 2495; vol. 8, p. 7654.]

24. CANALS—TOLLS—RIGHTS OF STATE.

Act Oct. 21, 1870 (Laws 1870, p. 14), required a corporation authorized to construct and operate a canal and locks as a part of a navigable stream to pay to the state a specified per cent. of the tolls collected. The corporation without legislative authority transferred the franchise to a transferee. Subsequent acts, though acquiescing in the transfer, did not waive the rights of the state under the act of 1870. For many years the officers of the state made no effort to collect any of the tolls. The corporation and the transferee did not question the right of the state to its share of the tolls. *Held*, that the state was not estopped from collecting its share of the tolls.

25. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

Where a corporation acquired property subject to a specified burden imposed by the state, the enforcement by the state of the burden did not take the property of the corporation without due process of law, in violation of the fourteenth amendment of the federal Constitution.

26. STATUTES—TITLE—SUFFICIENCY.

The title of Act Oct. 21, 1870 (Laws 1870, p. 14), entitled, "An act to appropriate funds for the construction of a steamboat canal at" a designated place, is sufficiently broad, within Const. art. 4, § 20, providing that every act shall embrace but one subject and matters properly

connected therewith, to embrace a provision for the payment to the state of a specified per cent. of the net profits of the tolls collected by the corporation authorized to construct and operate the canal as a condition on which the state appropriated funds for the construction of the canal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 124, 141-144.]

27. SAME.

Where the provisions of a statute relate directly or indirectly to the same subject, and are actually connected with the subject expressed in the title, the statute is not in conflict with Const. art. 4, § 20, providing that every act shall embrace but one subject and matters properly connected therewith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 135.]

28. CONSTITUTIONAL LAW—VALIDITY OF STATUTES—RIGHT TO CONTEST.

A corporation accepting the benefits of an act and acting on it for several years cannot question its validity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 41.]

29. SAME.

A corporation purchasing the property and franchises of another corporation not entitled to question the validity of an act the benefit of which it has accepted and under which it has acted for several years is estopped from questioning the validity of the act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 41.]

Appeal from Circuit Court, Multnomah County; Arthur L. Frazer, Judge.

Suit by the state against the Portland General Electric Company. From a decree of dismissal rendered after the overruling of a demurrer to the new matter of the answer, plaintiff appeals. Reversed and remanded.

As disclosed by the amended complaint, this is a suit brought by the state against the defendant, as successor in interest of the Willamette Falls Canal & Lock Company, which we shall hereafter refer to as the "first company," to recover the 10 per cent. of the net profits arising from tolls collected on the canal and locks at Oregon City, as provided by an act of the Legislature of the year 1870. On September 14, 1868, the first company incorporated for the purpose of constructing a canal and locks at, and on the west side of, the Willamette Falls, and on October 21, 1870, the legislative assembly of the state of Oregon passed an act entitled "An act to appropriate funds for the construction of a steamboat canal at the Willamette Falls," which we shall hereafter refer to as the act of 1870 (Laws 1870, p. 14), the preamble to which is as follows: "Whereas, the Willamette Falls Canal and Lock Co. was duly incorporated under the laws of Oregon, on the 14th day of September, 1868, for the purpose of constructing a canal, and locks at and on the west side of the Willamette Falls; and, whereas, it is of great importance to the people of Oregon that the obstructions to the free navigation of the Willamette river at that place should be removed, and freights carried on said river should be cheapened; therefore, be it enacted. * * * Section

1 of the act agrees to pay to the said company the sum of money in the act afterwards specified. Sections 2 and 3 provide the following:

"Sec. 2. In order to entitle the said corporation to receive the sum of money hereby agreed to be paid, it shall be the duty of said corporation to construct a canal and locks at and on the west side of the Willamette Falls; the said lock to be not less than one hundred and sixty feet in length, and forty feet in width, and to be constructed chiefly of stone, cement and iron, and otherwise built in a durable and permanent manner; the said canal and locks to be completed on or before the first day of January, 1873. And after the completion of the same, the said corporation shall pass without delay through the said canal and locks, all steamboats, flatboats, barges and other water craft, in the order in which they shall arrive at either terminus of the canal.

"Sec. 3. The state of Oregon agrees to pay the said sum of money upon the express condition that the said corporation, after the completion of the said canal and locks, as hereinafter set forth, shall not charge a greater rate of tolls than fifty cents per ton for freight, and ten cents for each passenger, going through said canal and locks in steamboats or other water craft. And at the expiration of 20 years from the time said canal and locks are completed, the state of Oregon shall have the right and privilege to take and appropriate to its own use forever, the said canal and locks, upon the payment to the said corporation the actual value thereof, at the time of taking and appropriating the same, which value shall be ascertained in such manner as the legislative assembly of Oregon may hereafter prescribe."

Section 4 provides that the company shall execute to the state by January 1, 1873, a bond in the sum of \$300,000, conditioned for the faithful construction of said canal and locks, and provides that the state shall issue its interest-bearing bonds for \$200,000 to the company, payable to it or its assigns on or before 10 years. Section 5 provides the following: "The faith of the state of Oregon is hereby pledged so to administer said funds as to make them available at the earliest period, for the payment of said bonds by this act authorized to be issued, upon the express condition that said corporation shall construct said canal and locks in the manner before provided in this Act, and not charge a greater rate of tolls than is herein set forth. And it is further provided that the issuance and payment of said bonds shall be made upon the express condition that said corporation shall pay to the state of Oregon ten per centum of the net profits arising from the tolls collected for passing freights and passengers through said canal and locks, which sum of ten per centum of net profits shall be paid into the common school fund of this state." The company did construct the canal and locks as pro-

vided for in said act, and the bonds for the said sum of \$200,000 were issued and afterward paid. Thereafter that company operated the canal and locks and collected tolls therefor until March 8, 1876, and during that time paid to the state as net profits for the year 1873 \$430, but made no other payments. On March 8, 1876, it assigned and transferred all of its interests in the canal and locks to the Willamette Transportation & Locks Company, which we shall hereafter refer to as the "second company." This second company thereafter operated the same until August 24, 1892, when it assigned and transferred its interests therein to this defendant, which has operated the same ever since. The Legislature on October 19, 1876 (Laws 1876, p. 14), passed an additional act, relating to the canal and locks, by section 5 of which it created a board of canal commissioners consisting of three members and authorized them to appoint a secretary, whose duty it was to keep a register of the names of all water craft and of the number of tons of freight and number of passengers passing through the locks, and also provided by other sections that no discriminations should be made by the company in passing boats or collecting tolls, requiring boatowners to furnish to the secretary of the board lists of the amount of freight and number of passengers carried through the locks, and requiring the board to certify to the Secretary of State the number of tons of freight and number of passengers passing through the locks, to the end that knowledge of the receipts of the said locks company may be authoritatively had, and that the first company, or the party claiming under it by virtue of assignment, shall certify to the Secretary of State a detailed and itemized statement of the disbursements and liabilities of the company, in order that the company's net receipts may be ascertained. On October 17, 1878, another act (Laws 1878, p. 27) was passed by the Legislature, amending section 5 of the act of 1876 (Laws 1876, p. 16). This act provides that one commissioner shall be elected by the Legislature, who, with the Governor and Secretary of State, shall constitute the board, and the elected commissioner shall be the secretary of said board. On October 26, 1882, another act (Laws 1882, p. 42) was passed, making the Governor, Secretary of State, and State Treasurer, the board of canal commissioners, and the private secretary of the Governor the secretary of the board, and requiring the first company, or the party acting under it, to certify quarterly to the board the number of tons of freight and the number of passengers, together with the names of craft, passing through the canal. This act repeals such sections of the acts of 1876 and 1878 as are thereby rendered inoperative. It is alleged in the amended complaint that the defendant has refused and neglected to furnish a detailed and itemized statement of the disbursements, or a full and complete statement of the freight and passengers passing

through the canal and locks, or of the tolls collected therefor, from which the net profits of the company may be ascertained, and refuses and neglects to pay the said 10 per cent. of such net profits to the state; and asks that the defendant be required to furnish an account of the expenses and of the freights and passengers passed through the locks, and the tolls collected therefor, that said net profits may be ascertained, and that the plaintiff have judgment for 10 per cent. of said net profits from and including the year 1874 to and including the year 1904.

The defendant demurred to all that part of the amended complaint which seeks to recover from the defendant the net profits earned prior to the 21st day of May, 1897, for the reason that this suit therefor has not been commenced within the time limited by law. The demurrer was sustained by the lower court and entry thereof made on January 2, 1906, and thereafter, on March 3, 1906, the court rendered judgment dismissing the complaint, so far as it seeks to recover any net profits arising prior to the 21st day of May, 1897. On April 3, 1906, the defendant filed his answer, wherein he denies that the first company accepted the terms of the act of 1870, but admits that it accepted the bonds; denies on information and belief the payment of \$430, that the first company or the second company made no other payments of the 10 per cent. of the profits, or that the first company or the second company operated the canal and locks under the Act of 1870 or the Act of 1876; also denies that any request was made upon this defendant for a statement or for the payment of said 10 per cent.; and denies the legal effect of the statutes, and acts set out in the complaint, and sets up three separate affirmative defenses. The effect of the first one is that by the articles of incorporation of itself and predecessors, and by mesne conveyances the defendant has acquired the title and ownership of the canal and locks in fee, and not through any of these special statutes. By the second defense, after reciting its title as set forth in the first defense, it is alleged that, by reason of the fact that the state has acquiesced in the defendant's exercise of these rights and by virtue of the act of 1876, it is now estopped to claim anything against the defendant. The third defense, after alleging title as set forth in the first defense, and ownership of the locks in fee, alleges that the suit seeks to deprive defendant of property without due process of law. The state demurred to the new matter of the answer, which was overruled by the court, and, the state refusing to plead further, decree was rendered dismissing the suit. From this decree the state appeals, assigning as error the order of the court sustaining defendant's demurrer to a portion of the amended complaint and the order overruling plaintiff's demurrer to the answer. This is a sufficient statement of the pleadings to disclose the issues presented here.

A. M. Crawford, Atty. Gen., and Wm. P. Lord, for appellant. Frederick V. Holman and Wirt Minor, for respondent.

EAKIN, J. (after stating the facts as above). Defendant insists that the plaintiff cannot now question the ruling on the demurrer to the amended complaint, for the reason that a judgment was rendered at that time dismissing so much of the pleading as related to the matter covered by the demurrer, and that more than six months had elapsed thereafter before the appeal was taken. A demurrer is a part of the proceeding by which a cause is put at issue, and the order sustaining it eliminates from the pleading the matter so demurred to. No further order or judgment is required or effective for that purpose; and the ruling thereon may be reviewed upon appeal from the final decree or judgment, regardless of the time that may have elapsed since the entry thereof. B. & C. Comp. §§ 557. This is clearly a proper interpretation of the statute relating thereto; and to hold otherwise would be to establish a very cumbersome and dilatory practice, as well as one burdensome to the courts. This demurrer is anomalous in the fact that it is not directed to the complaint or a cause of action therein, but to only a part of the relief sought. The order sustaining it did not eliminate a paragraph or even a sentence thereof, but only determined that plaintiff was not entitled to all the relief he asked. B. & C. Comp. § 69, provides that "It [the demurrer] may be taken to the whole complaint, or to any of the alleged causes of action stated therein." It may be that this complaint contains matters that constitute several causes of suit, but it is, in fact, stated as one cause. If defendant desired to take advantage of that fact, it should have done so by motion to strike out the complaint because it contains several causes of suit not separately stated under B. & C. Comp. § 106; but, not having done so, the error is waived, and the complaint must be treated as one cause of suit. The demurrer is not available to question any part of the pleading less than a cause of action or defense. Here it only attacks a part of the recovery sought, claiming that the prayer asks too much. This point is quite similar to the one decided in *Sunnyside L. Co. v. Bridge Ry. Co.*, 20 Or. 544, 546, 26 Pac. 835, 836, in which Mr. Justice Bean says: "If the allegations of the complaint, in which plaintiff seeks to lay down the rule by which the damages are to be estimated, are insufficient or irrelevant, the defect cannot be reached by demurrer, so long as the other parts of the complaint contain a sufficient statement." B. & C. Comp. § 68, provides that the defendant may demur to the complaint when it appears on the face thereof that the action has not been commenced within the time limited by this Code; but

the demurrer here does not come within that statute. It is admitted that there is a good cause stated for part of the claim, and the amount of the recovery is to be determined at the trial. However, both plaintiff and defendant, as well as the court below, have treated it as questioning the extent of plaintiff's right of recovery; and we shall so consider it.

The plaintiff insists that the statute of limitations does not apply to any part of the claim sought to be recovered, for the reason that by the act of 1870 (Laws 1870, p. 14) the state reserved a portion of the tolls to itself, to be collected by the company as the agent of the state, and that, when the company received the same, it did so in trust for the state, and that the statute in such a case does not commence to run until a demand is made or an accounting had; but we think the premise is wrong. The state did not reserve a portion of the tolls, but authorized the company to take the tolls and "pay to the state of Oregon 10 per cent. of the net profits arising therefrom"—a per cent. of what is left after the expenses are paid, which is not specific money, but an unknown quantity until the accounting is had and a balance ascertained. This is the holding in the case of *Railroad Company v. Maryland*, 21 Wall. (U. S.) 456, 22 L. Ed. 678. There the statute reserved to the state one-fifth of the gross receipts for fares on the railway, and the state claimed that, even if the act was in violation of the United States Constitution, yet the money was received as a trust fund, collected by the company for the state as its agent, and therefore it must account; but the court holds that "we cannot concur in the position that any part of the passenger money, when received by the company, became or was the money of the state. It was the money of the railroad company alone." Counsel for plaintiff in their argument seek to make a distinction in the application of the statute of limitations to suits brought by the state in its sovereign capacity and to those involving contractual relations. This question is discussed in *Schneider v. Hutchinson*, 35 Or. 253, 57 Pac. 324, 76 Am. St. Rep. 474, in which the court hold that all suits by the state, whether brought in its sovereign or its proprietary capacity, are alike within the statute. In this case the liability is for a debt—a charge upon the franchise against which the statute may run. Prior to May 21, 1903, the statute of limitations applied to actions brought in the name of the state, the same as to those brought by private parties. B. & C. Comp. § 13. Therefore we conclude that the state is barred from recovering herein for any amounts accrued prior to May 21, 1897.

Defendant claims that the first company acquired its rights and franchises, by which it owned and operated the canal and locks, by virtue of the General Statute of 1862, author-

izing the organization of corporations, which is found at page 658 in the Code of 1866, known as Dedy's Code (B. & C. Comp. §§ 5052-5075), and not by virtue of the act of 1870. This is the principal point of contention between plaintiff and defendant; and we shall first consider the effect of the statute of 1862. Section 4 thereof provides what the articles of incorporation shall specify, and section 5 defines what the powers and authority of a corporation shall be; but neither of these sections grant any franchise other than the right to incorporate. Sections 23 and 24 extend to the corporations therein mentioned, which include those organized for the construction of canals, the power to exercise the right of eminent domain. This right is available or necessary only when a public interest is to be served, and when the exercise of the right of eminent domain is necessary to enable the company to carry out the purpose of its organization. *Railroad Co. v. Maryland*, 21 Wall. (U. S.) 456, 22 L. Ed. 678. It does not transfer to such a corporation the title to, or the use of, any public property, rights, or easements. It is maintained by defendant that section 20 of this act is a grant of the state's right in the public highway and the right to construct and operate the canal, as well as the right of eminent domain; but the only purpose of the first portion of that section is to enlarge the powers of corporations organized for purposes of navigation so as to authorize the construction of railroads or canals necessary to such navigation, as though that had been originally included in their articles, and nothing more. Its language is: "Any corporation formed for the purpose of navigating any stream or other water, may, by virtue of such incorporation, construct any * * * canal * * * necessary * * * in like manner and with like effect as if such corporation had been specially formed for such purposes." Therefore no other right, power, or franchise is granted thereby to a corporation organized for such a purpose than is given by section 23, viz., it confers the right of eminent domain for canal purposes upon a corporation whose charter is otherwise not broad enough to include it, and nothing more. Besides, that section relates only to corporations organized for navigation, and does not apply to the Willamette Falls Canal & Lock Company, as that is a corporation for construction, and is fully provided for by section 23. But the construction and operation of a canal and locks as part of a navigable river, and the taking of tolls thereon are franchises that cannot be exercised without permission from the state. A corporation may take advantage of the privileges and franchises granted by the general law of incorporation by including in its articles any of these privileges and franchises it may desire to exercise, and to that extent the articles stand as the legislative charter of the

company, but it cannot exercise powers or privileges not enumerated therein, and can exercise no power not authorized by the statute, even though enumerated in its articles. "A corporation can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other act of the legislature which granted that charter." *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 21, 9 Sup. Ct. 409, 32 L. Ed. 837. In such a case as this tolls are nowhere authorized by the general statute. *Lansing v. Smith*, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89; 5 Am. & Eng. Ency. Law, 117; *Toll Road Co. v. People ex rel.*, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711; *Winchester & L. T. R. Co. v. Croxton*, 98 Ky. 739, 34 S. W. 518, 33 L. R. A. 177; *Perrine v. Chesapeake & D. C. Co.* 9 How. (U. S.) 171, 13 L. Ed. 92; *State v. Olcott et al.*, 6 N. H. 74; *Olcott v. Banfill et al.*, 4 N. H. 537. It is universally held that all grants of franchises are to be strictly construed against the grantee. Nothing passes by implication. Mr. Justice Gray, in *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, quotes with approval from Sir William Scott: "All grants of the crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant beyond what such grant by necessary and unavoidable construction shall take away." *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 9 L. Ed. 773, 938; *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; *Turnpike Co. v. Illinois*, 96 U. S. 63, 24 L. Ed. 651; *Dubuque & Pac. R. Co. v. Litchfield*, 23 How. (U. S.) 66, 16 L. Ed. 500.

It is maintained by defendant that the locks were constructed on land owned in fee by the first company, and that, by reason thereof, under its common-law right, it had the right to take tolls and also to transfer to whom it pleased; but such right does not apply in relation to franchises intended in a large measure to be exercised for the public service. Such an undertaking is one, the exercise of which belongs exclusively to the state, or to those to whom it may delegate it. It is not one of common right, and is subject in the hands of such delegated agent to any restrictions that may be imposed by the state. In *Sturgeon Bay H. Co. v. Leatham*, 164 Ill. 239, 244, 45 N. E. 422, 424, the court, in discussing the power of corporations to take toll, quote from *Perrine v. Canal Co.*, 9 How. (U. S.) 172, 13 L. Ed. 92, as follows: "A corporation created by statute is a mere creature of the law, and can exercise no powers except those which the law confers upon it, or which are incident to its existence. And as no power is given

to this corporation to demand toll from passengers, or from vessels on account of the passengers on board, it is very clear that no such power can be exercised, and no such toll lawfully taken"—and then says: "Appellant's counsel insist that the appellant company is the owner of the canal, and has the common-law right of any owner to exact a compensation for the use of what belongs to it. This doctrine is not applicable here. The appellant corporation has no rights of property except those conferred by its charter, and can only exercise such rights of property as are necessary to effectuate the objects for which the Legislature created it. 'Whether it may lawfully demand compensation from a person whom it permits to pass over its property must depend upon the language of its charter, and not upon the rules of the common law.' *Perrine v. Canal Co.*, supra." In the case of *Perrine v. Canal Co.*, cited in that opinion, in discussing this same question, it is said: "Now it is the well-settled doctrine of this court that a corporation created by statute is a mere creature of the law, and can exercise no powers except those which the law confers upon it, or which are incident to its existence. * * *

The principle above stated is also an answer to the argument which places the right of the company to demand toll upon the ground that it is the absolute owner of the works and of the land it occupies, and insists that it may therefore, like any other owner, demand compensation from any person passing over its property. The error of this argument consists in regarding the title of the company to the property in question as derived to them upon common-law principles, and measuring their rights by the rules of the common law. The corporation has no rights of property except those derived from the provisions of the charter, nor can it exercise any powers over the property it holds except those with which the charter has clothed it. It holds the property only for the purposes with which it was permitted to acquire it; that is, to effectuate the objects for which the Legislature created it. And whether it may lawfully demand compensation from a person whom it permits to pass over its property must depend upon the language of the charter, and not upon the rules of the common law." See, also, *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; 2 *Sutherland*, Stat. Const. § 549. Defendant's claim that the canal was built upon land which the first company owned in fee is not entirely correct. The upland owner bordering upon a navigable stream owns only to the high-water line. The river, and its banks and bed belong to the state. *Montgomery v. Shaver*, 40 Or. 244, 66 Pac. 923; *Wilson v. Welch*, 12 Or. 353, 7 Pac. 341; *Bowlby v. Shively*, 22 Or. 410, 30 Pac. 154; *Johnson v. Knott*, 13 Or. 308, 10 Pac. 418; 4 Am. & Eng. Ency. Law, 825; 21 Am. & Eng. Ency. Law, 436; *Railroad Co. v. Schur-*

meir, 7 Wall. (U. S.) 272, 19 L. Ed. 74; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331. Although the answer here alleges ownership of the canal and locks in fee, the court will take notice of the fact that the predecessors of defendant could acquire rights in the bed, banks, or water of the river only by an act of the Legislature; and, whether the locks are within the banks of the river or not, the canal at both ends must reach deep water. Thus it would seem to be very necessary for the defendant to claim its franchises through the act of 1870. When the first company accepted the franchise to construct the canal and locks, and constructed them principally upon land which it owned in fee, such land thereby became a part of the highway to the same extent as it would have done if originally owned by a stranger and the company had acquired it by the exercise of the right of eminent domain. It was equivalent to a dedication to that extent. *Olcott v. Banfill et al.*, 4 N. H. 537; *Toll Road Co. v. People ex rel.*, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711; *Elliott, Roads & Streets*, 54; 29 Am. & Eng. Ency. Law (2d Ed.) 5. And now looking at the special acts of 1870, 1876, 1878, and 1882, we find that by the preamble to the act of 1870 the first company was incorporated for the purpose of constructing a canal and locks, and that the state, by that act, appropriated to it the sum of \$200,000 upon certain conditions; and every requirement imposed upon the company by the act was a condition of the appropriation and other rights granted. The act must be considered as an entirety. The corporation was organized only for the purpose of construction. Therefore, by its charter, it could not operate the locks, but by the act of 1870 it was authorized and required to construct and operate them, which enlarged its charter, and, by implication, included the right to appropriate the bed and banks of the river, so far as needed, and to divert the water necessary for its purposes. In other words, it extended to the company the state's power and right to do these things. This act limited the rate of toll, and exacted a payment to the state of 10 per cent. of the profits therefrom, thus impliedly authorizing the collection of tolls. Also it reserved the right, or exacted the condition, that the state, at the expiration of 20 years, should have the right to appropriate the canal and locks upon paying therefor. The preamble to the act of 1870 refers to the act of 1870 as granting "privileges, rights, and pecuniary aid," thus construing it as a franchise granting more than pecuniary aid, so that the act of 1870 became a part of the company's charter. Again, as to the power of the first company to transfer its franchises, the grant was made to the first company with no power to transfer. Without such authority a transfer is void, and does not relieve the franchise of any of the burdens imposed by the act of its creation. These burdens are a charge

upon the franchise, not upon the land as such, and may be enforced against the person or corporation exercising it. *State v. N. P. Ry. Co.*, 36 Minn. 207, 30 N. W. 663; *Railroad Co. v. Maryland*, 21 Wall. (U. S.) 456, 22 L. Ed. 678. This is the effect of the decision in *Lakin v. Railroad Co.*, 13 Or. 436, 11 Pac. 68, 57 Am. Rep. 25, in which Mr. Justice Lord says: "A railroad corporation organized under it (the general law) has no authority, without the consent of the Legislature, to lease its road, and that, when it has done so, it is responsible to the public for the manner of operating the road. As to the public, those operating it must be regarded as agents of the corporation." Where a corporation "has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy." *Thomas v. Railroad Co.*, 101 U. S. 71, 83, 25 L. Ed. 950. In *Railroad Co. v. Winans*, 17 How. (U. S.) 30, 39, 15 L. Ed. 27, it is said: "This conclusion [argument] implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the Legislature." In *Black v. Canal Co.*, 22 N. J. Eq. 130, 399, the court say: "It may be considered as settled that a corporation cannot lose or alien any franchise or any property necessary to perform its obligations and duties to the state without legislative authority." See, also, *Toll Road Co. v. People ex rel.*, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711; *Penn. Co. v. St. Louis, etc., Railroad*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Chicago Gaslight Co. v. People's Gaslight Co.*, 121 Ill. 530, 13 N. E. 109; *Stewart's Appeal*, 56 Pa. 413. The right of a corporation to transfer its franchises was the only issue involved in *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837, under the general statute of 1862, the one involved here, and, after a thorough exam-

ination thereof, holds that it did not authorize a corporation to sell or lease its entire property, franchises, and powers to another company. Counsel for defendant seem to claim something from the amendments of the act construed in that case. Deady's Gen. Laws, p. 659, c. 8, § 5. Section 5 thereof (B. & C. Comp. § 5056) was amended in 1878 (Laws 1878, p. 90, § 1) by adding to subdivision 4 a clause giving a corporation power to receive and dispose of property donated to it for the purpose of aiding the objects of such corporation, but has no reference to the disposition of its franchises. This section was again amended in 1887 (Laws 1887, p. 14, § 1) by adding subdivision 7, which relates only to railroads, and evidently for the purpose of avoiding the effect of the ruling in *Oregon Ry. Co. v. Oregonian Ry. Co.*, supra, and also in recognition of the fact that at that time a corporation could not transfer its franchise, and neither of these amendments aid defendant here, and the act of 1905, authorizing corporations to transfer their property and franchise, can have no bearing upon this case.

As to the legislative act of 1876, the first company transferred its interests to the second company on March 8, 1876, without the consent of the Legislature, and on October 19, 1876, that body, evidently knowing of such transfer, and that the second company was a transportation company and would pass its own vessels through the locks, and that it was thus in a position both to discriminate against other boatowners and to defeat the state, provided by the act of that date against such discrimination, and created a board of canal commissioners to supervise these matters. It was provided that the secretary of this board should keep account of the freight and passengers passing through the locks, and that the boatowners, which would include the second company itself, should furnish to the secretary lists of the amount of freight and the number of passengers, and also that the company operating the canal should furnish a detailed statement of expenses that the net profits might be ascertained. The provisions of the act of 1870, although not re-enacted in this statute, are not repealed but remain intact, and it is very plain that the purpose of the act of 1876 was to put the state in a position to collect its 10 per cent. of the net profits in addition to the other purposes above mentioned. Section 18, p. 19, being the emergency clause, expressly states that, as there is a necessity for accurate records relating to the locks, the interests of the state therein should be represented, and that there is apprehension in the minds of the people as to the situation, making it important that the act take effect immediately. This emergency clause aids us in understanding what was in the mind of the legislators when considering the measure. It would seem from the whole act that language could hardly make it plain, that its purpose was to aid in the enforce-

ment of the legislative act of 1870, and for no other purpose. It creates no additional burdens, and makes no change in the original liabilities and obligations of the first company. The act studiously avoids recognizing the second company in terms, but refers to "any and every person, corporation, company, or agent for, or employé of, either having authoritative charge or control of, or owning or claiming to own, or having any interest in the Willamette Falls canal and locks," and "or any party claiming under said corporation by virtue of assignment." If this may be considered as authorizing or recognizing the transfer, or consenting thereto, it is on condition that the second company shall stand in the place of the first company and bear the burdens of the act of 1870. At any rate, it cannot be construed as recognizing a transfer free from those obligations. The acts of 1878 and 1882 contain provisions only to lessen expense to the state and to aid it in securing the fulfillment of the terms of the act of 1870, and do not ignore but emphasize them.

In *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950, a lease had been made, and thereafter the Legislature passed an act in which it referred to the company or its "lessees"; and this was held not to be a ratification of the lease. In *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837, the effect of a special act of the Legislature of Oregon granting certain privileges to a corporation and to its "successors and assigns" (Laws 1880, p. 56) was under consideration, which it was claimed authorized a transfer or lease by the defendant. But it was held that it could not be so construed. Even if this transfer be recognized as effective to pass the title, yet, when the second company purchased the canal and locks, it was the purchase of a franchise—a creation of the Legislature—and must be accepted as created with its privileges, but also subject to its burdens. 2 *Rorer, Railroads*, 882, says: "It is merely the purchase of a privilege of being subrogated to and recognized by the state as the corporate entity in lieu of the original corporators, and the terms of the old charter become those of the new by legal enactment without a repetition of the words." Such was held to be the effect of a transfer in *State v. N. P. Ry.*, 36 Minn. 207, 30 N. W. 603, where the assignee was required to pay the percentage of earnings provided in the charter of the original company. Also in *Mayor v. Twenty-Third St. R. Co.*, 113 N. Y. 311, 21 N. E. 60, a provision of a special act of the Legislature modified the liability of the company under the general statute. This provision was held to be an amendment of the charter, and, as in the case before us, required the company to pay to the city 1 per cent. of the gross receipts of the road. By authority of a special act of the Legislature, the original company leas-

ed the road to the defendant for 99 years. But neither by the lease nor by the terms of the statute was it expressly required to pay the 1 per cent. of earnings; and the court say it was a charter obligation. "The entity called a corporation consists of the sum total of all its charter powers and rights, and all its charter obligations and duties; and such powers and rights cannot be effectually divorced from such obligations and duties. The latter are correlatives to the former, and constitute the consideration for the corporate franchises, and their performance may be exacted as a condition of corporate existence. Hence, when the defendant took the property, rights, privileges and franchises of the Bleeker Street & Fulton Ferry Railroad Company, it took them burdened with its charter obligations." See, also, *Harmon v. Columbia & G. R. Co.*, 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686. A franchise does not involve an interest in land. It is not real estate, but a privilege which may be owned without the acquisition of real property at all. The use of a franchise may require the occupancy or even the ownership of land, but that circumstance does not make the franchise itself an interest in land. A franchise is (1) an incorporeal hereditament; and (2) a privilege or authority vested in certain persons by grant of the state to exercise powers or to do and perform acts which, without such grant, they could not do or perform. A franchise consists in the incorporeal right. The property acquired is not the franchise. *Consolidated Gas Co. v. Mayor, etc.*, 101 Md. 541, 61 Atl. 532, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584. The first company could not transfer its franchise free from its burdens, nor could the transferee company avoid liability, even though in its purchase it did not expressly assume the burdens. The cases cited make it plain that the burden is upon the franchise, and not dependent on any theory of a lien or covenant running with the land. *Chicago, R. I., etc., Ry. Co. v. Zerneck*, 183 U. S. 582, 22 Sup. Ct. 229, 46 L. Ed. 339; *Railroad Company v. Maryland*, 21 Wall. (U. S.) 456, 22 L. Ed. 678.

The second and third defenses of the answer are based largely upon the legislative acts of 1870 and 1876 as viewed from defendant's standpoint; but our interpretation thereof in this opinion practically disposes of these defenses. The second defense is to the effect that the state is estopped from asserting its claim by reason of the provisions of the act of 1876 in acquiescing in the transfer by the first company to the second company, and as equivalent to an abandonment by the state of the provisions of the act of 1870, and also by reason of its acquiescence in defendant's ownership, and laches in enforcing its claim. As we have seen, the Legislature did not by the act of 1876 approve or recognize the assignment by the first company to the second company, or to any extent waive the benefits arising under the act of 1870, but rather

made them more secure by that act; and, therefore it constitutes no foundation for estoppel. The only acquiescence by the state in plaintiff's purchase and improvements of the locks claimed by defendant is the inaction of its officers, principally in that they did not collect the 10 per cent. of the profits. But the laches of the officers of the state in collecting installments due cannot operate as a waiver of a continuing liability for a share of the profits or a recognition of defendant's ownership free from it. *United States v. Kirpatrick*, 9 Wheat. (U. S.) 720, 6 L. Ed. 199. Neither can it be construed as silence by the state when it ought to speak. Estoppels in pais against the state will not arise from the laches of its officers. 16 Cyc. 780; *State ex rel. Lott v. Brewer*, 64 Ala. 287. The cases of *City of Bradford v. Tel. & Tel. Co.*, 206 Pa. 582, 56 Atl. 41, *Commonwealth v. Turnpike Co.*, 153 Pa. 47, 25 Atl. 1105, *Penn. R. Co. v. Montgomery Co. Pass. Ry.*, 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659, and other cases cited by defendant upon this point relate to acquiescence by the state or municipality in appropriation by a corporation of streets for railway purposes, and are not in point upon the question here. The purchase by the second company or by this defendant was not inconsistent with, or adverse to, any interest of the state that required the state to act. There was no apparent attempt to transfer any interest of the state. It had a right to assume that the purchaser would fulfill the obligations of the first company. To constitute estoppel by conduct there must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; (5) the other party must have been induced to act upon it. *Bigelow, Est.* (5th Ed.) 569, 570. The conduct complained of here is that plaintiff stood by and saw its rights interfered with; that is, was silent when it was its duty to speak. 16 Cyc. 759, 770. There are several answers to this claim: First, the plaintiff's right as to the share of the profits was not being questioned, no mention was made of it in the transfer, nor was the transfer inconsistent therewith. The officers of the state had no power or authority to hold out to the defendant that the state would consent to the transfer or waive any right. The defendant knew the facts, and gave the state no intimation that it was intending to deny the state's right to a share of the profits; so that the answer does not allege facts sufficient to constitute an estoppel against the state.

The third defense of the answer is that plaintiff seeks to take the property of defendant without due process of law, in violation of article 14 of the Constitution of the United States, and also is based upon defendant's alleged fee-simple title to the canal and locks

independent of and free from any burdens imposed by the act of 1870; but, as we have already shown, the defendant acquired the property subject to these burdens, and therefore the enforcement of them is no violation of the constitutional provision relied on. It is urged by defendant that the title of the act of 1870 is not broad enough to authorize the provision of section 5 thereof, which provides for payment to the state of 10 per cent. of the net profits of the tolls as a condition upon which the grant is made, within the provisions of article 4, § 20, Const. Or., which provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." But this condition of section 5 is clearly a matter "properly connected" with the subject of the act. It is the condition upon which the grant is made, with a view to partial compensation to the state for the grant. It certainly is not foreign to the subject. It is said by Mr. Justice Bean in *State v. Shaw*, 22 Or. 287, 29 Pac. 1028, to be fatal; the departure from the title must be plain and manifest, and all doubts will be resolved in favor of the law. "If all the provisions of the law relate directly or indirectly to the same subject are naturally connected, and are not foreign to the subject expressed in the title, they will not be held unconstitutional as in violation of this clause of the Constitution. * * * This clause is not violated by any legislative act having various details properly pertinent and germane to one general object." To the same effect is the opinion of Mr. Chief Justice Lord, in *State v. Koshland*, 25 Or. 178, 35 Pac. 32, and he says: "If the matters embraced in the act are congruous, and have a proper relation to each other, and are not foreign to the subject expressed in the title, the requirements of the provision are not violated." See, also, *Ex parte Howe*, 26 Or. 181, 37 Pac. 536. The title to this act contemplates the construction of the canal and locks, and the act may properly embrace provisions for its operation, including compensation to the state, and is not obnoxious to this clause of the Constitution within the rules above quoted. However, the first company accepted the provisions and benefits of the act of 1870 and acted upon it for several years, and cannot be heard to question its validity. *Corey v. Eastman*, 166 Mass. 279, 44 N. E. 217, 55 Am. St. Rep. 401; *Ashley v. Ryan*, 153 U. S. 436, 14 Sup. Ct. 865, 38 L. Ed. 773; *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187; *Chicago, R. I., etc., Ry. Co. v. Zerneck*, 183 U. S. 582, 22 Sup. Ct. 229, 46 L. Ed. 339; *De Lamar's Nev. G. M. Co. v. Nesbitt*, 177 U. S. 523, 20 Sup. Ct. 715, 44 L. Ed. 872. Since the defendant has acquired from the first company what rights it now enjoys, and can occupy no better position as against the state than it did, defendant is also estopped from questioning the validity of the act of 1870. *Mayor, etc., v. M. Ry. Co.*, 143 N. Y. 1, 37 N. E. 491; *Mayor, etc., v.*

Twenty-Third St. Ry. Co., 113 N. Y. 311, 21 N. E. 60.

Therefore the decree is reversed and remanded, with instructions to sustain the demurrer as to each defense of the answer, and for such further proceedings as may be proper.

(51 Or. 318)

HOUGH et al. v. PORTER et al.

(Supreme Court of Oregon. May 19, 1908.)

1. PARTIES—JOINDER.

Where, in a suit to determine water rights in a stream for irrigation purposes, the determination of the rights of the litigants could not otherwise have been had with reasonable accuracy, nor the decree, when entered, effectively enforced, without the presence of other parties, the court was authorized to direct that they be brought in and made parties, under B. & C. Comp. §§ 41, 394, providing that, when complete determination of a controversy cannot be had without the presence of other parties, the court shall cause them to be brought in.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 79.]

2. WATERS AND WATER COURSES—RIGHTS IN STREAM—ACTION—PARTIES—JOINDER.

Where a diversion or use of water of a stream in controversy or any of its branches by any of the defendants affects the interests of each of the plaintiffs, all are interested in the relief demanded and may join as plaintiffs to secure protection of their rights; and the same rule determines who may be made defendants.

3. SAME—COMPLAINT.

Where, in a suit to determine irrigation rights, the complaint sufficiently charged an unlawful interference with plaintiffs' rights in the stream by defendant P., and then alleged that all the other defendants had, or claimed to have, some rights or interest in the waters of the stream, the exact nature of which was to the plaintiffs unknown, but that defendants' interests, if any, were inferior to the rights of plaintiffs in such waters, the complaint sufficiently pleaded a cause of action against all the defendants under B. & C. Comp. § 394, providing that any person may be made a defendant who has or claims an interest in the controversy adverse to plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.

4. PARTIES—NEW PARTIES.

A statute giving a court discretionary power to require all interested to be made parties implies the power necessary to carry orders in reference thereto into effect.

5. JUDGMENT—CONCLUSIVENESS—PARTIES OF RECORD.

The failure on the part of some defendants affirmatively to assert their rights cannot affect the interest of others in the proceeding, but will preclude those in default from subsequently asserting their claims as to matters in controversy against the rights there determined.

6. SAME—RIGHTS OF DEFENDANTS INTER SE—DETERMINATION.

B. & C. Comp. § 391, abolishes cross-bills, but provides that, in actions at law, where defendant is entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense, he may, on filing his answer therein, also as plaintiff file a complaint in equity in the nature of a cross-bill, on which the issues may thereafter be tried as in a suit in equity. *Held*, that under such section, in a suit in equity to determine irrigation rights, defendants were entitled to set up their claims inter se in their answers, and have the same adjudicated on such notice as the court should prescribe.

7. SAME—TRIAL OF ISSUES.

The right of defendants to an adjudication of their rights inter se is limited to proceedings where the cause of the suit is one arising out of or having reference to the subject-matter thereof.

8. PROCESS—IN ANCILLARY PROCEEDINGS.

Defendant, desiring an adjudication of his claim against his codefendants, may cause summons to be issued under the original title of the suit and have the same served on his codefendants, with a copy of his answer, or he may have served a copy of the order of the court, requiring his codefendant to appear and respond to the affirmative matter in the answer within the time therein specified.

9. SAME—RIPARIAN OWNERSHIP.

There is no such thing as prior riparian ownership so far as distribution of water for irrigation purposes between riparian owners is concerned; the rights of a riparian owner to the waters being a variable one, depending on use by other proprietors.

10. WATERS AND WATER COURSES—DIVERSION—EXTENT.

More explicit evidence is required for the determination of water rights between riparian owners than under other claims of right, and in some instances, where the acreage is large and water scarce, a distribution by the rotation method, or by period of time rather than by a division of its quantity, may become necessary.

11. SAME—ABROGATION OF COMMON-LAW DOCTRINE.

It is probable that Desert Land Act March 3, 1877, c. 107, § 1, 19 Stat. 377 (U. S. Comp. St. 1901, p. 1548), abrogates the common-law rule as to the doctrine of riparian rights, so far as applicable to irrigation of land acquired since the date of the act.

Appeal from Circuit Court, Lake County; Henry L. Benson, Judge.

Action by Annie C. Hough and others against S. A. D. Porter and others. From a decree for complainants, certain of the defendants appeal. Affirmed in part, and continued.

The facts appear from the following statement by KING, C.:

This suit was instituted on April 14, 1900, by Marion Conley and Annie C. Hough against Stephen A. D. Porter, to restrain him from interfering with the flow of the waters of Silver creek, in Lake county, Or., to plaintiffs' premises. On the 8th day of October of the same year, by permission of the court, an amended complaint was filed, in which Annie C. Hough appears as the sole plaintiff, with Stephen A. D. Porter as the only defendant, averring, in effect, that plaintiff and her grantors, for more than 15 years prior thereto, were the owners of certain arid land there described, riparian to the stream named, which for more than 20 years has required the use of 500 inches of the waters of Silver creek for the proper irrigation thereof, without which plaintiffs' land would become worthless, etc.; that in the year 1895, Porter wrongfully constructed, and has ever since maintained, and threatens to continue, a dam and head gate in the channel of Silver creek above her premises in such a manner as to interfere with the flow thereof to her farm, thereby depriving her of the use of the water necessary for the irrigation thereof, as to which plaintiff avers that she has 280 acres of land adapted chiefly to the growing of grass and

requiring the amount of water specified for the proper irrigation thereof, without which the lands would become worthless. These averments were followed by the usual prayer for equitable relief. Defendant answered, specifically denying such allegations as were inconsistent with the affirmative matter in the answer, which affirmative averments are, in effect, as follows: That the cause of suit did not accrue within 10 years before its commencement; that Porter is the owner in fee of certain lands described, followed by the usual allegations as to the irrigation season—the lands being arid, requiring irrigation, as well as riparian on the stream—claiming his diversion as prior appropriator from March 3, 1883, and application of the water to a beneficial use to the extent of 100 inches under a six-inch pressure; and that in April, 1895, this point of diversion was changed to a more convenient point about 200 yards below his former dam, from which his diversion was thereafter continued, giving the dimensions of the ditch, etc., and its carrying capacity fixed at 100 inches, all of which it is maintained has been constantly used since March, 1883, in the proper irrigation of his lands, and without which his lands would become worthless, etc. This is followed by a prayer to the effect that: (1) Plaintiffs' suit be dismissed, and defendant go hence unharmed; (2) that the preliminary injunction issued be dissolved; and (3) for such other and general relief as may seem meet and equitable.

An amended reply having placed the cause at issue, it was referred to the official reporter as referee to take and report the testimony, who did so and certified it to the court; and the court then took the cause under advisement. After due consideration, the court, on October 23, 1901, after hearing the evidence and argument of counsel upon the testimony taken, and after being duly advised, and finding it impracticable to settle and make a complete determination of the matters in controversy between the plaintiff and defendant, involving the waters of Silver creek and tributaries, without the presence of other parties before the court, and it appearing that the rights of numerous other parties were involved in the litigation, ordered that all the persons so interested, naming them, be brought in by the plaintiff and made parties to the suit; that they appear and plead on or before March 1, 1902; and that the clerk furnish the sheriff with a duly certified copy of the order for service, to be served by him, as such officer, within 30 days upon the persons designated. The order directed the parties appearing pursuant thereto to plead either as plaintiffs, or defendants, as their respective interests might appear, and that all appearing as defendants should answer to the complaint and interplead as to their codefendants, or any of them.

Pursuant to the court's order, Annie C. Hough thereupon asked permission to amend her amended complaint, which was granted,

and on May 20th, following, filed an amended complaint, to which was added, as coplaintiffs, the names of Mary J. Kittredge, Marion Conley, W. H. Hayes, J. M. Hayes, John Hayes, A. C. Geyer, and W. H. McCall; and as defendants, S. A. D. Porter, C. D. Porter, administrator, Daisy Porter, widow, and W. F. Porter, E. A. Porter and Carl D. Porter, minor heirs of S. A. D. Porter by Daisy Porter, guardian, P. G. Chrisman, John C. Porter, and James C. Porter, his guardian, F. M. Chrisman, B. F. Lane, Jennie Lane, C. C. Jackson, Occidental Land & Improvement Company, a corporation, and Chewaucan Land & Cattle Company, a corporation, its grantee, P. W. Jones, C. E. McKune, Mary C. Brown, and E. D. Lutz. On May 20, 1902, the plaintiffs caused each of the defendants named to be served with a summons, etc., in practically the same form and manner as in the filing of an original suit. The amended complaint last named, omitting formal parts, is as follows:

"That plaintiff, Annie C. Hough, and her grantors have been for more than 17 years last past, and she is now, the owner in fee simple of the S. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of section 2, the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 11, and the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 1, in township 28 S., range 14 E., in Lake county, Or., containing 320 acres. That there is, and ever since the memory of man there has been, a natural stream of water, known as Silver creek, with well-defined bed and banks, flowing a perpetual stream of water. That said Silver creek flows from and over lands of defendant S. A. D. Porter, through and over said lands of plaintiff Hough, and that all her said land is riparian to said stream. That in the year 1876 plaintiff Hough's grantors diverted and appropriated, and ever since and until the year 1895 have used of the waters of said Silver creek in irrigating those portions of said described lands not naturally irrigated by said stream, 280 inches of water, measured under a six-inch pressure, by means of dams and ditches, and by such use of said water raised large and valuable crops of grasses, which were cut and cured for hay. That at the time of said appropriation all the lands on said Silver creek were public lands, belonging to the government of the United States. That plaintiff Mary J. Kittredge is the owner of section 36, in township 27 S., range 14 E., containing 640 acres, in Lake county, Or., and in possession thereof by purchase from the state of Oregon as school lands, having paid one-third of the purchase price and having received a certificate of purchase from said state therefor, which is now in full force and effect; and that Silver creek, after flowing over lands of defendant S. A. D. Porter, flows over all the said lands of plaintiff Kittredge, and all her said land is riparian to said stream. That plaintiff W. H. Hayes is the owner and in possession of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and lot 1 of section 30,

and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and lots 3 and 4, section 19, in township 27 S., range 15 E., in Lake county, Or., containing 151.95 acres. That plaintiff John Hayes is the owner and in possession of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, section 30, township 27 S., range 15 E., in Lake county, Or., containing 160 acres. That said Silver creek, after flowing over lands of the defendant S. A. D. Porter, flows over all of said land of said several plaintiffs Hayes, and all their said land is riparian to said stream. That plaintiff A. G. Geyer is the owner in fee simple of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and lot 4, section 31, township 27 S., range 15 E., in Lake county, Or., containing 105.66 acres, and that said Silver creek, after flowing over lands of defendant S. A. D. Porter, flows over all said land of plaintiff Geyer, and all said land is riparian to said stream. That plaintiff W. H. McCall is the owner in fee simple of the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of section 3, township 28 S., range 14 E., in Lake county, Or., containing 160.04 acres, and that said Silver creek, after flowing over land of defendant S. A. D. Porter, flows over all of said lands of plaintiff McCall, and all his said land is riparian to said stream. That plaintiff Marion Conley and his predecessors in interest, in the year 187—, settled upon and since then by patent from the United States government acquired title to, and he now is the owner in fee simple of, the W. $\frac{1}{2}$ of section 12, township 28 S., range 14 E., in Lake county, Or., containing 320 acres, and during all said times have been in possession of said land. That in the year 1876 plaintiff Conley diverted and appropriated from land of the United States, and ever since and until the year 1895 has used of the waters of said Silver creek, in irrigating his said land, 320 inches of water, measured under six-inch pressure, diverted and applied by means of dams and ditches, and by such use of said water raised large and valuable crops of grass and grain. That at the time of said appropriation all lands on said Silver creek were public lands belonging to the government of the United States. That since the year 1895, by reason of the acts of the defendant S. A. D. Porter hereinafter complained of, the supply of water in said Silver creek has been diminished, but that plaintiffs Hough and Conley have each year used the waters of said stream in the irrigation of their said land, to the extent of the supply of water reaching their land. That all of the lands of the parties plaintiff are arid lands and require irrigation to produce crops of value, and with irrigation produce and will produce large and valuable agricultural crops, that all said land can be irrigated from said Silver creek, and that one inch of water, measured under six-inch pressure, is necessary per acre of said land to irrigate said land and cause the same to produce agricultural crops, during each of

the months of May, June, and July of each year. That in the year 1895 the defendant S. A. D. Porter wrongfully constructed, and ever since has wrongfully maintained and still maintains, and threatens to continue, a dam and head gate in the channel of said Silver creek, above the lands of plaintiffs, at or near the S. E. corner of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 11, township 28 S., range 14 E., in Lake county, Or. That said dam and head gate during the growing season for agricultural crops diverts all the water of Silver creek from its natural channel, and the same is carried off from said point of diversion in an easterly direction and entirely prevented from running down onto the lands of the parties plaintiff, and the plaintiffs are thereby deprived of the use of said water for irrigating purposes, and plaintiffs' said lands are rendered worthless by reason of the wrongful diversion of said water by defendant S. A. D. Porter, as aforesaid, and that it is now the proper season of the year to have the water of said creek flow upon plaintiffs' lands, to grow grasses for hay, and other crops, and unless the said diversion is prevented by a temporary restraining order of this court, plaintiffs will sustain great and irreparable loss in a total failure of crops. That the defendant Occidental Land & Improvement Company is a foreign private corporation, duly organized and existing. That defendants Isa M. Corum and Jewell D. Corum are minors, aged 13 and 10 years, respectively, and that no guardian has ever been appointed or is acting for them. That all the defendants have, or claim to have, some rights or interests in the waters of Silver creek, but that the exact nature or extent of said rights or claims of the defendants are to plaintiffs unknown, and the interests, if any, of the defendants, and each of them, are inferior to the rights of plaintiffs in the waters of said stream. Wherefore plaintiffs pray for a temporary order of injunction against the defendant S. A. D. Porter, enjoining and restraining him from obstructing the natural channel of said Silver creek, and from maintaining the dam or head gate hereinbefore mentioned, and from in any manner diverting the waters of said Silver creek from its natural channel, and thereby or otherwise preventing the waters from running down said Silver creek in its ancient way and volume, and plaintiffs be decreed to have a prior right and interest in the waters of said Silver creek as against the defendants, and each of them, and are entitled to the flow of the waters of said creek to their said lands and use of said waters, to the extent as follows, measured under six-inch pressure, that is to say: Annie C. Hough, 280 inches; Mary J. Kittredge, 640 inches; Marion Conley, 320 inches; W. H. Hayes, 152 inches; John Hayes, 160 inches; J. M. Hayes, 160 inches; A. G. Geyer, 160 inches; and W. H. McCall, 160 inches—of the waters of Silver creek. That a guardian ad litem

be appointed for Isa Corum and Jewell D. Corum, to represent said minors in this suit; and that each of the defendants be required to set forth and show any rights or interests they may have in the waters of Silver creek, and that upon the final determination of this suit said injunction be made perpetual. That plaintiffs have and recover their costs and disbursements herein, and have such other and further relief as to the court may appear equitable."

Answers were then filed by nearly all the defendants, substantially as follows: S. A. D. Porter, after specifically denying the principal averments of the complaint, as an affirmative defense, in substance, avers: That the cause of suit did not accrue, as to any of the defendants, within 10 years from the commencement thereof. That at all times since May 7, 1889, he has been and is the owner in fee simple of the S. E. $\frac{1}{4}$ of section 11, township 28 S., range 14 E. W. M., containing 160 acres; also the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 11, in said township and range aforesaid, containing 80 acres; also the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 11, said township and range aforesaid, containing 80 acres, in Lake county, Or. That all these lands were valuable for agricultural purposes, and since the month of June, 1880, have been possessed, cultivated, occupied, used, and improved by defendant, from which he has annually harvested large and valuable crops, etc. That the lands through which Silver creek, a natural stream, flows in well-defined banks and channels, are arid, and will not produce crops without irrigation. That in the month of March, 1881, defendant Porter entered upon the stream at a point about the center, on the south line of the south side of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 11, township 28 S., range 14 E. W. M., where the creek crosses the section line between sections 11 and 14, and built and placed a dam therein and constructed a ditch leading therefrom, upon the south side of the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 11, and on to the S. E. $\frac{1}{4}$ of the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of said section, in said township and range, by means of which he diverted and appropriated, as prior appropriator, 100 inches of water, conducting the same to and upon the lands described for irrigation and domestic and stock purposes. That at all times since March, 1881, until the service of the injunction herein, defendant continuously and uninterruptedly, and exclusively and with knowledge to all, and adverse to the whole world, during the irrigation season of each year, diverted and appropriated and used upon his lands, through and by means of the said ditch and dam, 100 inches of the waters of Silver creek. That for a more convenient and proper irrigation of his land, in the month of April, 1895, he changed the point of diversion to a point about 200 yards below the dam and head gate, and constructed a ditch leading thence on to the center of the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 11, and thence on to the west side of the S. E.

$\frac{1}{4}$ of said section 11, connecting it with the former ditch, from which he thereafter irrigated his premises. That at the time of the diversions alluded to, all the lands bordering upon the stream below defendant's premises were public lands, and so continued up to the time of the construction of his ditches named. That ever since the year 1870, it has been and is the general custom of the people in and upon and about Silver creek and territory in the vicinity thereof to appropriate, divert, and use, by means of dams and head gates and ditches, all the waters of Silver creek, and such custom is general and well recognized, used, and followed by the people in the locality and territory thereof, and Silver creek was and is an open public stream therefor. "That he and his predecessors in interest herein during the period of over 22 years and more next last past, and openly, notoriously, peaceably, adversely, uninterruptedly, exclusively, continuously, under a claim of right thereto, with notice and knowledge to all, and everybody, and adversely to the whole world, diverted and appropriated and used, as aforesaid, 100 inches, measured under a six-inch pressure, of the waters of Silver creek, for the irrigation of his said lands and for a beneficial and useful purpose, and that such diversion and appropriation and use aforesaid of said quantity of water of said stream is and was necessary and proper therefor during all of said time." That each of the plaintiffs, specifically and separately naming them, has no interest or right in common with each other in the waters of Silver creek. "That the plaintiff Annie C. Hough's husband, Wm. Hough, with said plaintiff's knowledge, approval, and acquiescence and connivance, together with plaintiff W. H. McCall, and defendant Geo. H. Small, during the year 1889, and in the year 1900, up to April 15, 1900, in concert, did connive, conspire, and combine to cheat and defraud the defendant S. A. D. Porter out of his rights in and to the waters of Silver creek, and that since the 15th day of April, 1900, and up to the present time, the said parties, conspirators, have and still are contriving unlawfully and conniving, conspiring, and combining unlawfully, deceitfully, and wickedly, to deprive this defendant of the waters of Silver creek to which he is lawfully and legally entitled and his just and lawful right thereto and therein. That the said conspiracy, among other things, consisted in and as a part of said conspiracy, that the plaintiff Hough was to commence this suit which was the direct result of such conspiracy aforesaid, and the said defendant Geo. H. Small, under and by virtue of said conspiracy and as a part thereof, was to and did turn the water off above, and they, the conspirators and others, would all testify and claim that S. A. D. Porter did and caused it, the diversion of the waters alleged; and said McCall was to help, and if they, the said conspirators, could by such unlawful means deprive the said defendant S. A. D. Porter of the water of Silver creek,

said Small was then to turn the waters down the creek so Hough would get water which they were not entitled to, and then Hough and Small were to let McCall have water to which the said McCall was not entitled to, and thereby dry up this defendant's lands and drive this defendant out of the country, which the said conspirators have repeatedly threatened so to do. That if the party conspirators above named are allowed their dire way, it will ruin the defendant's lands and his home and this defendant. Wherefore defendant demands judgment and decree: (1) That plaintiffs' said suit be dismissed, and that defendant go hence unharmed; (2) that the preliminary injunction heretofore issued herein upon the filing of this answer be dissolved; (3) for general relief, and for such other and further or other or further relief as may seem meet and equitable and as is usual in such cases; and (4) for general relief and for costs and disbursements of suit."

P. W. Jones answers, in substance, to the same effect as set out in the answer of S. A. D. Porter, except as to the description of lands and date of acquiring title thereto, and character and date of inception of water right. The description of the lands and date of acquiring title thereto is as follows: The E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and lots 1, 2, and 3 of section 31, township 27 S., range 15 E. W. M., 155.42 acres; also, the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and lots 3 and 4 of section 31, township 27 S., range 15 E. W. M., 169.15 acres. The lands are alleged to be riparian to Silver creek, to which defendant's rights attached by settlement on the lands described, October 22, 1892, and the prayer is for the dismissal of the suit, and that defendant P. W. Jones be adjudged to have a reasonable use of the waters of Silver creek, to an extent of five-fourteenths of an inch per acre under a six-inch pressure, with costs, etc., and for general relief.

P. G. Chrisman and John C. Porter, by his guardian, Jas. C. Porter, demurred to the amended complaint, on the ground that it did not state facts sufficient to constitute a cause of suit against either of the defendants named, and for the further reason that it is uncertain, in that it cannot be ascertained therefrom where or by what means the plaintiff Hough or plaintiff Conley, or either of them, diverted or appropriated the waters of Silver creek, or the size or the capacity of the ditch or ditches, or the location thereof. The demurrer was overruled. An answer was filed by them, which, after the usual specific denials, avers: That the cause of suit did not accrue within ten years before the commencement thereof. That John C. Porter, since July 9, 1884, has been and is the owner of the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 24, and the N. E. $\frac{1}{4}$ of section 23, township 28 S., range 14 E. W. M., containing 320 acres of land, all of which is agricultural, arable, etc., and which he has cultivated at all times since July, 1884. That P. G. Chrisman now is the owner, and he and his grantors have been at

all times the owners since 1884, of the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and all that part of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, except the tract upon which the town of Silver Lake is situated, section 22, township 28 S., range 14 E. W. M., containing about 140 acres of land, all of which is agricultural, requiring irrigation, etc. That all of the lands of the defendants described are arid, and during the months of May, June, July, August, September, and October of each year require irrigation in order to produce crops thereon. That Silver creek is a natural stream of water flowing through defendants' lands in well-defined banks and channels. That in the year 1885, defendants John C. Porter and P. G. Chrisman, at a point above their lands, and by means of dams and ditches, diverted and appropriated 218 inches of water therefrom to and upon the lands described as belonging to them for the irrigation thereof and for domestic uses. That their use of the water has been continuous since the date named, and in accordance with a general custom which, ever since the year 1870, has been and is in force among the people in and around Silver creek, under which it was usual to appropriate, divert, and use the water, by means of dams, head gates, and ditches, etc. That none of the plaintiffs have any interest in common with each other in the waters of Silver creek. "That they and their predecessors in interest herein during the period of over 17 years and more next last past, and openly, notoriously, peaceably, adversely, uninterruptedly, exclusively, continuously under a claim of right thereto, with notice and knowledge to all, and everybody, and adversely to the whole world, diverted and appropriated and used, as aforesaid, 218 inches, measured under a six-inch pressure, of the waters of Silver creek, for the irrigation of their said lands, and for a beneficial and useful purpose, and that such diversion and appropriation and use as aforesaid of said quantity of water of said stream is and was necessary and proper therefor during all of said time. Wherefore defendants demand judgment and decree: (1) That plaintiffs' said suit be dismissed, and that defendants go hence unharmed; (2) that said defendants be adjudged to have a right to divert, appropriate and use 218 inches, measured under a six-inch pressure, of the waters of Silver creek, through and by means of the dam and ditch described in this answer; (3) for general relief, and for such other and further or other or further relief as may seem meet and equitable and as is usual in such cases; and (4) for general relief, and for costs and disbursements of suit."

George H. Small, in his answer, after the usual specific denials for affirmative defenses alleges: That for more than 10 years prior to the commencement of the suit he has been and is the owner and in possession of the E. $\frac{1}{2}$ of section 9, the S. $\frac{1}{2}$ and the N. W. $\frac{1}{4}$ of section 10, the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the

N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 11, all of section 15 except the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 16 and the N. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 22, all in township 28 S., range 14 E. W. M. That the lands described were arid, requiring irrigation, and that Silver creek is a natural stream of water flowing through the same in well-defined banks and channels. "That more than 10 years prior to the commencement of this suit, and while all of the lands upon said Silver creek were owned by the United States or the state of Oregon, this defendant appropriated from the said lands of the United States and the state of Oregon and diverted and carried away from said Silver creek 800 inches of the waters of said stream (computed by miner's measurement under a six-inch pressure) by means of dams and ditches, and carried the same to and upon his said lands, and during all of said time has used all of said water in irrigating said lands, and has so used, occupied, and possessed said 800 inches of water in an open, notorious, conspicuous, and continuous manner, during all of said time, claiming to own the same as against all the world, and that all of said water is and was necessary for the successful irrigation of said lands so as to cause crops to grow and mature thereon. That the diversion, use, and appropriation of said water by the defendant, as aforesaid, was made long prior to any use, diversion, or appropriation of any of the waters of said stream by either or any of the plaintiffs or defendants, and long prior to any ownership or occupation of any of the lands upon said stream by either or any of the plaintiffs or defendants or their grantors. Wherefore the defendant prays that it be decreed herein that this defendant is the absolute owner of 800 inches, miner's measurement under a six-inch pressure, of the waters of said Silver creek; that this defendant have judgment for his costs and disbursements herein; and for such other and further relief as to the court may seem just and equitable."

B. F. Lane and Jennie Lane, after the usual specific denials, aver: That the cause of suit in favor of each of the plaintiffs did not accrue within 10 years before the commencement of this suit. That B. F. Lane and Jennie Lane, husband and wife, and B. F. Lane is the owner, and has been since March, 1890, of the N. E. $\frac{1}{4}$ of section 18, township 28 S., range 15 E. W. M., containing 160 acres; and, also, the E. $\frac{1}{2}$ and lots 1 and 2 of the N. W. $\frac{1}{4}$ of section 18, township 28 S., range 15 E. W. M., containing 159.96 acres of agricultural land, requiring irrigation to make it productive. That from and after March, 1890, defendant has possessed, cultivated, occupied, used, and improved all of said lands, and during all the time since has harvested annually therefrom large and valuable crops,

etc. That the irrigation season in the vicinity of the land is from April to October, inclusive, during which time irrigation is necessary to the productiveness of said premises. That the lands described are situated upon Bunyard Branch of Silver creek, upon which they are riparian owners. That the branch referred to, having flowed in well-defined channels through the premises described, from time immemorial, and by reason of the natural flow, seepage, and percolation of the Bunyard Branch through its lands, they are irrigated, moistened, made fertile and valuable, and defendants are entitled to a reasonable use of the waters of said stream by reason of their riparian ownership of the lands described and need the waters thereof for irrigation and "stock water." That four-fifteenths of an inch, measured under a six-inch pressure, is necessary per acre for such irrigation; the same being a reasonable and necessary amount thereof. That each of the plaintiffs have no interest in common with the other in the subject-matter of the suit. A decree is demanded: (1) That the suit be dismissed; (2) that defendants be adjudged a reasonable use of the waters of Silver creek to an extent of four-fifteenths of an inch of water per acre; and (3) for general relief, such as may be deemed equitable, etc.

Lucinda Egli, after the usual denials and averments in reference to the character of the land that requires irrigation, etc., alleges: "That for more than 10 years prior to the commencement of this suit defendant and her grantors have been the owners and in possession of the following described real estate: The S. W. $\frac{1}{4}$ of section 28, and the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 29, and the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 33, all in township 28 S., range 14 E. W. M. That more than 10 years prior to the commencement of this suit, while all the lands above defendant and all the lands claimed by the plaintiffs were government lands or belonging to the state of Oregon, the defendant appropriated from the said lands of the United States and the state of Oregon, and diverted and carried away from said stream, about 200 inches, miner's measurement, under a six-inch pressure, of the waters of said stream by means of dams and ditches, and carried the same to and upon defendant's said lands, and there used the same and all thereof for the purposes of irrigation, and has continued to so use all of said water openly, notoriously, continuously during all of said time, claiming the right so to do as against all the world without interruption or protest from any one, and all of the said water was and is necessary for said purposes. That said diversion and use of said water by the defendant was made prior to any diversion or use of the waters of said Silver creek by any of the plaintiffs or defendants or their grantors or predecessors in interest. Wherefore the defendant prays that it be decreed herein that this defendant is the ab-

solute owner of 200 inches of water of said Silver creek, miner's measurement, under a six-inch pressure; that this defendant have judgment for her costs; and for such other and further relief as to the court seems just and right."

John C. Porter, by his guardian, Jas. C. Porter, after the overruling of a demurrer to the complaint, answered, in substance, the same as S. A. D. Porter, and for an affirmative defense alleges that on December 6, 1900, in Lake county, Or., John C. Porter was adjudged insane, and Jas. C. Porter appointed his guardian; that John C. Porter is the owner, and he and his grantors since April, 1873, have owned the N. $\frac{1}{4}$ of section 14, township 28 S., range 14 E. W. M., containing 320 acres of land; that at all times since April, 1874, he and his grantors have cultivated, occupied, and improved the lands described, annually harvesting large crops therefrom by means of irrigation, without which the lands would be worthless; that the lands described are riparian to Silver creek and Bunyard Branch thereof; that Bunyard Branch, when unobstructed, flows in its natural channel through his land and naturally irrigates the same, and from time immemorial has, in well-defined banks and channels, flowed through his premises and by reason of such natural flow, seepage, and percolation, has irrigated the greater portion of the lands described; that defendant uses and needs the waters of said stream for irrigation and stock water, and four-fifteenths of an inch of water per acre, measured under a six-inch pressure, is necessary and reasonable for the irrigation of the said lands; that at all times, except when interrupted by dams and head gates and ditches leading therefrom and placed therein by defendant and his grantors for the purpose of irrigation upon the premises, the waters of Silver creek and branches, in their natural channels, flow upon the premises described, by reason of which seepage and percolation the dams, head gates, and ditches leading therefrom irrigate, moisten, and make fertile and valuable a large portion of defendant's land, and all of which are necessary for irrigation, to the extent of four-fifteenths of an inch per acre; and that none of the plaintiffs have any interest or right in common with each other. A decree is demanded: (1) That the suit be dismissed; (2) that defendant be adjudged to have a reasonable use of the waters of the main branch of Silver creek, to the extent of four-fifteenths of an inch of water per acre; (3) that defendant be adjudged a reasonable use of the waters of Bunyard Branch in the same amount; (4) for general relief, such as may be deemed equitable, etc.; (5) that it be adjudged and decreed that Silver creek divides as alleged, and forms what is known as the Main Branch and Bunyard Branch, and that Bunyard Branch has at all times flowed and now flows one-third of the waters of Silver creek, and that it be per-

mitted to continue in the same proportion without interruption or diminution in the proportions averred.

F. M. Chrisman, after the usual denials, as an affirmative defense, avers that the cause of suit in favor of each of the plaintiffs did not accrue within 10 years before the commencement thereof; that at all times since February 21, 1890, defendant has been and is the owner of the S. E. $\frac{1}{4}$ of section 12, township 28 S., range 14 E. W. M., containing 160 acres of land, all of which are agricultural in character and required irrigation to make them productive, and are situated on the banks of, and are riparian to, Bunyard Branch of Silver creek, and during the months of from April to October, inclusive, are necessary for the irrigation of the lands described; that none of the plaintiffs have any interest or right in common with each other in or to the waters of Silver creek, or its branches. A decree is demanded that the suit be dismissed, that defendant be adjudged to have a reasonable use of the waters of Silver creek, to an extent of four-fifteenths of an inch per acre, and for general relief.

Mary C. Brown, after the usual denials, complains that the cause of suit did not accrue within 10 years before the commencement thereof; that at all times since November 21, 1892, defendant has been and is the owner of the S. E. $\frac{1}{4}$ of section 31, township 27 S., range 15 E. W. M., containing 160 acres of land, all of which is valuable agricultural land, arid in character, and requiring irrigation from April to October of each year to make the lands productive, which lands are situated upon, and riparian to, Silver creek; and that none of the plaintiffs have any interest or right in common with each other to the waters of said stream; and prays for a decree, to the effect that the suit be dismissed, that defendant be awarded, as a reasonable use of the waters of the stream, five-fourteenths of an inch of water per acre, and for general relief.

C. C. Jackson, after the usual denials, says that the cause of suit did not accrue within 10 years before its commencement; that he at all times since the year 1886 was, has been, and is the owner of the N. E. $\frac{1}{4}$ of section 12, township 28 S., range 14 E. W. M., containing 160 acres of land, all of which is valuable agricultural land, requiring irrigation during the months of April to October of each year to make them productive; that it is situated upon, and riparian to, Conley Branch of Silver creek, the seepage and percolation from which serves to irrigate, moisten, and make fertile and valuable the greater portion of the lands named, and by reason of which defendant is entitled to a reasonable use of the waters of the stream for irrigation and domestic purposes, to the extent of four-fifteenths of an inch per acre; and that none of the plaintiffs have any interest or right in common with each other to the waters of Silver creek or its branches. A decree is asked for dismissal of the suit;

and that defendant be awarded four-fifteenths of an inch of water per acre, and for general relief.

C. E. McKune, for answer, after the usual denials, alleges that the cause of suit did not accrue within 10 years before its commencement; that at all times since February 28, 1900, defendant has been and is the owner of the N. E. $\frac{1}{4}$ of section 31, township 27 S., range 14 E. W. M., containing 160 acres, all of which are agricultural lands, arid in character, and requiring irrigation to make them productive, and are situated upon, and riparian to, Silver creek, which stream naturally irrigates portions of the lands named, and by reason of such natural flow, seepage, and percolation, the greater portion thereof are irrigated and made fertile and valuable, for which defendant is entitled to a reasonable use of the waters of the stream by reason of his riparian ownership, to the extent of five-fourteenths of an inch of water per acre; that none of the plaintiffs have any interest or right in common with respect to each other in respect to the subject-matter of the suit; and asks for a decree to the effect that the suit be dismissed, and defendant be awarded five-fourteenths of an inch of water per acre, and for general relief.

The Occidental Land & Improvement Company, for answer, after the usual denials alleges: That the cause of suit in favor of plaintiffs did not accrue within 10 years before its commencement. That defendant is a corporation, and at all times since the year 1874 defendant and its grantors have been and are the owners of certain lands in Lake county, Or., particularly described as follows: First tract, No. 1, to wit: The S. $\frac{1}{2}$ of the N. $\frac{1}{2}$, S. $\frac{1}{2}$ of section 16; the N. $\frac{1}{2}$, N. $\frac{1}{2}$ of the S. $\frac{1}{2}$, and the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 21; the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, section 22, and the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 20—all in township 28 S., range 14 E. W. M., containing 1,320 acres. And the second tract, No. 2, to wit: The N. $\frac{1}{2}$ and the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of section 2, in township 28 S., range 14 E. W. M.; the S. $\frac{1}{2}$ of the S. $\frac{1}{2}$, the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 35; the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 34; and the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, section 26—all in township 27 S., range 14 E. W. M., containing 880 acres of land. That all the lands described are agricultural in character, requiring irrigation to make them productive, and since the year 1874 they have been cultivated, occupied, used, and improved, and crops annually harvested therefrom, and require irrigation from April to October of each year to make them productive. That the lands are situated upon, and riparian to, Silver creek. That in the year 1875 the defendant corporation's grantors diverted and appropriated, and at all times since have appropriated and used of the waters of Silver creek in the irrigation of the portion of lands described in tract No. 1, not naturally ir-

rigated by said stream, 586 inches, under a six-inch pressure, by means of dams and ditches, by the use of which valuable crops have been produced thereon, and at the time of the appropriation referred to, all the lands on Silver creek were public lands belonging to the government of the United States and to the state of Oregon. That none of the plaintiffs have any interest or right in common to the waters of Silver creek with all or any of the other plaintiffs. A decree is demanded to the effect that the suit be dismissed; that defendant corporation be adjudged a reasonable use of the waters of Silver creek to the extent of eight-fourteenths of an inch of water per acre on all the lands possessed by it; and that the right to the use of the water to the extent named be decreed superior to any right or claim by defendants of either of them, and for such general relief as may be deemed just and equitable, etc.

E. K. Henderson, after the usual denials, alleges that for more than 10 years prior to the commencement of the suit defendant has been and is the owner and in possession of all of section 1, township 28 S., range 14 E., except the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, all of sections 6 and 7, and the W. $\frac{1}{2}$ of section 8, and lots 1, 2, 3, 8, and 9, in section 17, township 28 S., range 15 E. W. M., all of which lands are meadow and grass lands and arid in character, requiring irrigation to make them productive, and are situated upon, and riparian to, Silver creek, requiring one inch of water per acre, miner's measurement, for the proper irrigation thereof, for which a decree is demanded that defendant be decreed and entitled to the use of 2,350 miner's inches of the waters of Silver creek for the use of the lands described, and for general relief.

Geo. Durand, for answer, after the usual denials, admits the "acts of the defendant S. A. D. Porter as alleged in the complaint, and the effect thereof," and avers that for more than 10 years prior to the commencement of this suit defendant and his grantors have been the owners, and in possession, of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 18, and the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 19, and the N. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 30, in township 30 S., range 14 E. W. M., all of which lands are agricultural in character, requiring irrigation to make them productive, etc., and are situated upon, and riparian to, Silver creek; that more than 10 years prior to the commencement of this suit, when all the lands bordering upon the stream were the property of the United States and of the state of Oregon, defendant appropriated and diverted from Silver creek, for the irrigation of the premises, 250 inches of water, and has continued so to use all of that amount openly, notoriously, and continuously, without interruption, claiming the right to do so as against all the world; that

the use thereof was necessary for irrigation purposes, and was made prior to any diversion or use of any of the waters of the stream by any of the plaintiffs or defendants or their grantors or predecessors in interest. And demands a decree to the effect that he is the absolute owner of 250 inches of the waters of Silver creek, and for general relief.

E. D. Lutz, for answer, after the usual denials, avers that he is the owner of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 15, township 28 S., range 14 E. W. M., and the N. E. $\frac{1}{4}$ of section 10, township 28 S., range 14 E. W. M., all in Lake county, Or., and containing 400 acres of land, and has been such owner at all times since 1890; that the lands described are arid in character, requiring irrigation to make them productive, and are situated upon, and riparian to, Silver creek; that defendant and his grantors, by means of dams and ditches, have diverted, used, and appropriated large quantities of water from Silver creek in the irrigation of the premises described for more than 15 years next before the commencement of this suit. And demands a decree to the effect that he be adjudged to have the right to take from the stream a sufficient quantity of water for the irrigation of his land, and for general relief.

Walter C. Buick, Corinna Buick, Lulu Corum La Brie, Isa M. Corum, a minor, by L. F. Conn, guardian ad litem, Jewell D. Corum, a minor, by L. F. Conn, guardian ad litem, and J. M. Small, after the usual denials, in substance aver: That at all times since the — day of —, 1884, Walter C. Buick and his grantors have been the owners and in possession of and entitled to the possession of the S. W. $\frac{1}{4}$ of section 14, township 28 S., range 14 E. W. M., which are naturally dry and arid lands, and, without artificial irrigation, are unproductive. That the remainder of the lands, viz., the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section 14, are meadow lands, but of such character that a flow of one inch of water per acre is necessary for the proper irrigation thereof, requiring 160 inches to irrigate the entire premises during the months of May, June, and July, which amount is a reasonable use for the purposes named. That for more than 10 years prior to the commencement of the suit, while all the lands on Silver creek and its various branches were owned by the United States and the state of Oregon, defendant Buick and his grantors, by means of dams, ditches, etc., diverted and appropriated from Silver creek 250 inches of the waters of the stream to and upon said lands, and during all of the time mentioned have so used, occupied, and possessed 250 inches thereof in an open, notorious, conspicuous, and continuous manner, claiming to own the same against the world, all of which was and is necessary for the successful irrigation of the property described, and all of which diversion, use, and appro-

priation by defendant and his grantors were made prior to any use, diversion, or appropriation thereof by either or any of the plaintiffs or defendants, and prior to any ownership or occupancy of any lands on the stream by either or any of the plaintiffs or defendants and their grantors, except the defendants Corinna Buick, Lulu Corum La Brie, Isa M. Corum, and Jewell D. Corum, and their grantors, and the defendant J. M. Small and his grantors; they and each of them and their grantors having appropriated and diverted, in conjunction and simultaneously with this defendant and his grantors, certain of the waters of said stream. That such use of all the water by defendant Walter C. Buick and his grantors has been uninterrupted and exclusive and adverse to all the world all of said time. That at all times since 1884 defendant Corinna Buick and her grantors have been the owners, and in possession and entitled to the possession, of the S. E. $\frac{1}{4}$ of section 14, township 28 S., range 14 E. W. M., all of which, except the N. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of said section 14, are naturally meadow lands, but of such character as to be unproductive and unprofitable without irrigation, and all the lands mentioned are situated upon, and riparian to, Silver creek, and require one inch per acre of the waters thereof for their proper irrigation, making necessary, in the aggregate, 160 inches during the months of May, June, and July of each year for their proper irrigation. That for more than 10 years prior to the commencement of the suit, and while all the lands on Silver creek and its various branches were public lands of the United States or property of the state of Oregon, defendant Corinna Buick and her grantors diverted and appropriated from the stream at a point above their premises, by means of dams, ditches, etc., to and upon the property described, and during all of the time mentioned she and her grantors have used all of the waters in the irrigation thereof and have so used, occupied, and possessed 250 inches of water in an open, notorious, conspicuous, and continuous manner during all of said period and claiming to own the same as against the world, and that all is necessary for the successful irrigation of said lands to the growing and maturing of crops thereon. That all of the diversion and appropriation was prior to that of the diversion of any of the waters of Silver creek by either or any of the plaintiffs or defendants, and long prior to any ownership or occupancy of any other lands upon the stream by either or any of the defendants or their grantors, excepting the defendants Walter C. Buick, Isa M. Corum, Lulu Corum La Brie, Jewell D. Corum, and J. M. Small, and their grantors, and they and each of their grantors have appropriated and diverted, in conjunction and simultaneously with this defendant and her grantors, certain of the waters of said stream, and such use of all the waters by defendant Corinna Buick and her grantors has been uninterrupted, ex-

clusive, and adverse to all the world during all of said time. That Isa M. Corum, Jewell D. Corum, and Lulu Corum La Brie are tenants in common and joint owners of the W. $\frac{1}{2}$, and the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 13, and the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 24, township 28 S., range 14 E. W. M., and they and their grantors at all times since the — day of —, 1884, have been the owners of said premises. This is followed by similar averments to those contained in the answer of Walter Buick and Corinna Buick, except that they claim in the aggregate 480 inches, miner's measurement, of the waters of the stream for the irrigation of the premises, during the months of May, June, and July, and 10 years' adverse possession to the use of 250 inches of the waters of the stream, and that their diversion and use and appropriation is prior to that of any of the plaintiffs or defendants, except Walter Buick, Corinna Buick, and J. M. Small, as to whom it is averred the appropriation and diversion was made in conjunction and simultaneously. That J. M. Small and his grantors have been the owners and in possession at all times since the — day of —, 1884, of the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of section 13, and the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 24, township 28 S., range 14 E. W. M., and the S. W. $\frac{1}{4}$ of section 18, and the N. W. $\frac{1}{4}$ of section 19, township 28 S., range 15 E. W. M., all of which lands are agricultural in character and situated upon the channels of Silver creek and its branches, as to which they are riparian and require one inch of water per acre under six-inch pressure for the proper irrigation thereof, during the months of May, June, and July of each year. This is followed by an allegation of 10 years' adverse possession to the extent of 250 inches of the waters of said stream; that the use, appropriation, and diversion thereof is prior in time and superior in right to the plaintiffs or defendants, and long prior to any ownership or occupancy of any of the lands upon said stream by either or any of the plaintiffs or defendants or their grantors, except Walter C. Buick, Corinna Buick, Isa M. Corum, Lulu Corum La Brie, and Jewell D. Corum and their grantors, whose appropriation is alleged to have been made in conjunction and simultaneous with that of J. M. Small. A decree is demanded by each of the defendants to the effect that they be awarded a prior right and interest in the waters of Silver creek as against plaintiffs and all of the other defendants and each of them to the flow of the waters of Silver creek to their lands, as follows: To Corinna Buick, 250 inches; Isa M. Corum, Lulu Corum La Brie, Jewell D. Corum, as tenants in common and as prior appropriators, 250 inches; J. M. Small, as prior appropriator, 250 inches; Walter C. Buick, as riparian proprietor, 160 inches; defendant Corinna Buick, as riparian proprietor, 160 inches; defendants Isa M. Corum, Lulu Corum La Brie, and Jewell D. Corum, as ten-

ants in common and as riparian proprietors, 480 inches; defendant J. M. Small, as riparian proprietor, 680 inches, of the waters of Silver creek and its branches.

To each of the answers of the several parties named, plaintiffs filed a reply, and as between themselves defendants proceeded as follows:

Geo. H. Small, for answer to the affirmative matter contained in the answer of S. A. D. Porter, admits that in the year 1895 S. A. D. Porter constructed a dam in the channel of Silver creek at the point claimed, by which he conducted water from the stream upon the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 11, but denies that it was constructed for a more convenient or any use of the water which had been theretofore appropriated by him, or that it constituted a change in the point of diversion which had been previously made, and denies that he at all times since the year 1881, or at any time except since 1895, diverted or appropriated or used, adversely or otherwise, upon his lands or otherwise through said or any ditches, 100, or any other number of, inches of the waters of the stream, and denies specifically the other affirmative allegations of the answer, and demands the same affirmative relief as in his "first original answer."

E. K. Henderson and Lucinda Egli, for answer to the affirmative averments in the answers of S. A. D. Porter to the amended complaint, plead, in effect, and ask the same relief as in the answer thereto of Geo. H. Small.

Geo. H. Small, Geo. Durand, Lucinda Egli, and E. K. Henderson, for answer to the affirmative averments of the answer to P. G. Chrisman and Jno. C. Porter, deny the affirmative averments therein.

S. A. D. Porter, for response to the affirmative matter in the answer of Geo. H. Small, denies all the allegations, except to admit that at the time of the commencement of the original suit in May, 1900, Small had diverted from the main channels of Silver creek all the waters thereof, and was then diverting and conveying the same from defendant's lands, and at the time of the commencement of the suit, and for more than one month prior thereto, Small had been entirely depriving defendant of all the waters of the stream, and that during a period of five years immediately prior thereto, Geo. H. Small had at various times diverted large quantities of water from the stream by means of dams and ditches, but denies that any such diversion has been continuous, uninterrupted, or that at the time of any diversion or appropriation of the waters of Silver creek by him all the lands bordering upon the stream were public lands or the property of the state of Oregon, or that any appropriation or diversion by defendant was prior to the occupation or possession of the lands occupied by defendant along Silver creek, and prays that Geo. H. Small take nothing by reason of the separate allegations of his answer.

P. W. Jones, P. G. Chrisman, John C. Porter, by his guardian, Jas. C. Porter, B. F. Lane and Jennie Lane, F. M. Chrisman, Mary C. Brown, C. C. Jackson, C. E. McKune, Occidental Land & Improvement Company, and E. D. Lutz, for response to the affirmative averments in the answer of Geo. H. Small, on information and belief, specifically denied them.

Geo. H. Small, Lucinda Egli, E. K. Henderson, and Geo. Durand answer the affirmative averments in the answer of B. F. Lane and Jennie Lane, and, after denial thereof, allege "that the stream or channel designated as 'Bunyard Branch' is an artificial channel and was first constructed about nine years ago, when it was a very small ditch conveying a small amount of water, and since said date, by artificial means and by the flow of water through the said channel, it has become greatly enlarged so that the said 'Bunyard Branch' now carries about five times as much water as it did when it was first built," and pray that it be decreed that B. F. Lane and Jennie Lane have no interest in the waters of said stream, and pray for the relief demanded in their first answer.

B. F. Lane and Jennie Lane move to strike out the separate and several answers of defendants Geo. H. Small and Lucinda Egli to their answer to the amended complaint as unauthorized by law or the rules of practice in equity, and as sham, frivolous, and irrelevant, and filed their separate and several demurrers to the same answer, on the grounds: "(1) That such 'does not state facts sufficient to constitute any cause of suit against the defendants B. F. Lane and Jennie Lane'; (2) that it 'does not state facts sufficient to constitute a defense to the affirmative matter set out in the answer of said B. F. Lane and Jennie Lane'; (3) that it 'does not state facts sufficient to constitute any cause of counterclaim or owner's complaint against the defendants B. F. Lane and Jennie Lane'; and (4) that 'it now appears upon the face of the complaint, and upon the answer of the defendants B. F. Lane and Jennie Lane, and the answer of the defendant, * * * and the further and separate answer of B. F. Lane and Jennie Lane, that there is a misjoinder of parties defendant, as well as a misjoinder of parties plaintiff, and that the defendant * * * cannot obtain relief against these defendants in this suit.'" The motions and demurrers were overruled.

S. A. D. Porter, F. M. Chrisman, C. C. Jackson, B. F. Lane and Jennie Lane, Jno. C. Porter, by his guardian, Jas. C. Porter, Mary C. Brown, C. E. McKune, E. D. Lutz, P. W. Jones, Occidental Land & Improvement Company, a corporation, and P. G. Chrisman, responding to the affirmative averments in the answer of Lucinda Egli, specifically denied the material portions thereof.

Geo. H. Small, Geo. Durand, Lucinda Egli, and E. K. Henderson, for response to John C. Porter's answer, specifically denied the material averments.

Geo. H. Small, Lucinda Egli, E. K. Henderson, and Geo. Durand specifically denied the affirmative averments in the answer of F. M. Chrisman, which answer Chrisman moved to strike out as sham, frivolous, and irrelevant, also demurring on the grounds that they did not state sufficient facts to constitute a cause of suit or counterclaim against him, and as showing a misjoinder of parties defendant, which the court overruled.

Geo. H. Small, Lucinda Egli, E. K. Henderson, and Geo. Durand responded to the affirmative averments in the answer of Mary C. Brown, specifically denying the material portions thereof, as to which motion a demurrer was filed, the same as by F. M. Chrisman, and overruled by the court, and separate answers were filed by the same parties to the affirmative averments in the answer of C. C. Jackson, specifically denying the material portions of his answer, to which Jackson demurred, and the demurrer was overruled. The same parties answered and denied specifically the averments in the answer of C. E. McKune, which was unsuccessfully attacked by a motion and demurrer.

Walter C. Buick, Corinna Buick, Lulu Corum La Brie, Isa M. Corum by her guardian ad litem, L. F. Conn, Jewell D. Corum by her guardian ad litem, L. F. Conn, and J. M. Small filed their separate and several answers, and the defendants Geo. H. Small, Geo. Durand, Lucinda Egli, E. K. Henderson, S. A. D. Porter, B. F. Lane and Jennie Lane, P. G. Chrisman, Jno. C. Porter by his guardian, Jas. C. Porter, F. M. Chrisman, P. W. Jones, Mary C. Brown, C. E. McKune, C. C. Jackson, Occidental Land & Improvement Company, a corporation, and E. D. Lutz jointly answered, specifically denying each of the averments, and putting in issue all of the new matter set up in each of the answers of defendants Geo. H. Small, Lucinda Egli, E. K. Henderson, and Geo. Durand, to the answer of the Occidental Land & Improvement Company, specifically denying each of its material averments.

S. A. D. Porter, F. M. Chrisman, C. C. Jackson, John C. Porter by his guardian, Jas. C. Porter, Mary C. Brown, C. E. McKune, E. D. Lutz, P. W. Jones, Occidental Land & Improvement Company, a corporation, Jno. C. Porter, and P. G. Chrisman specifically denied the affirmative matter in the answer of defendant Geo. Durand.

Defendants Geo. H. Small, Lucinda Egli, E. K. Henderson, and Geo. Durand also specifically denied the affirmative averments of the answer of E. D. Lutz.

On October 20, 1902, defendants Geo. Durand, Geo. H. Small, Lucinda Egli, E. K. Henderson, F. M. Chrisman, C. C. Jackson, B. F. Lane and Jennie Lane filed a written stipulation as to the intention and effect of certain pleadings, as follows: "Be it remembered that it is hereby stipulated and agreed by and between counsel, A. S. Hammond, appearing for defendants George Durand, George H. Small, Lucinda Egli, and E.

K. Henderson; and counsel W. J. Moore and Spencer & Raker, appearing as counsel for defendants F. M. Chrisman, C. C. Jackson, B. F. Lane, and Jennie Lane: That each and all of the statements and paragraphs set out in each one and all of the answers filed or presented by said attorney A. S. Hammond for each or either of said defendants, stating or alleging to the effect that the stream or channel described as the 'Bunyard Branch' is an artificial channel, and was constructed about nine years ago, and to the effect that the so-called 'Conley Branch' is not a natural stream of water, but was caused by cutting a ditch, shall be taken, considered, and treated only as denials, and not as allegations of new matter calling for a denial or reply."

On October 24, 1904, judgment by default for want of answer or other appearance was taken as to L. Heusmand, Morris Ranner, John Partin, Jr., L. P. Klippel, Emil Egli, Henry Egli, Martie Ward, Angeline West, Mary Small, Jas. M. Martin, J. M. Sherer, Maude Small, J. Hall, C. D. Buick, R. E. Smith, J. A. Smith, J. C. Harrow, and F. F. McCarty. A voluntary nonsuit was taken as to A. C. Geyer, John Hayes, and J. M. Hayes. The testimony was taken on the foregoing issues upon which, with the testimony first taken, the cause was submitted to the court, and a decree rendered, which, omitting formal parts, is as follows:

"It is hereby ordered, adjudged, and decreed:

"That the defendant S. A. D. Porter be and he is hereby perpetually enjoined from in any manner diverting or interfering with the flow in said Silver creek of the amount of water which this decree grants to the plaintiff Annie C. Hough.

"That the said plaintiff Annie C. Hough is the owner in fee simple of the following described lands, to wit, the S. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of section 2, the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 11, the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 1, township 28 S., range 14 E. W. M., in Lake county, Or., containing 320 acres of land, in Lake county, Or. That Silver creek in Lake county, Or., flows to and upon said lands. That said lands are riparian thereto. That the predecessor in interest of plaintiff Annie C. Hough, in the year 1878, appropriated, and said Annie C. Hough and her predecessors in interest in said land have ever since used, 240 inches of the water of Silver creek, measured under six-inch pressure, and the same was and is a reasonable and necessary use of said water, for the irrigation of said land, and her right to the use of said water is superior and prior to the rights of all others in said stream, save the rights as herein decreed to George H. Small and Lucinda Egli.

"That the plaintiff Mary J. Kittredge is the owner in fee simple of the following described lands, to wit, all of section 36, township 27 S., range 14 E., containing 640 acres of land in Lake county, Or. That Silver creek in Lake county, Or., flows to and upon said

lands. That said lands are riparian thereto. That the said Mary J. Kittredge, as such riparian owner, is entitled to the use of 480 inches of the waters of said Silver creek, measured as aforesaid, as a reasonably necessary use of the water for the irrigation of her said lands; said plaintiff's right to the use thereof being subsequent and inferior to the right of the defendants S. A. D. Porter, George H. Small, and plaintiffs Annie C. Hough and Marion Conley, to the use to the extent granted in this decree of the said waters of said Silver creek, measured in like manner.

"That the plaintiff Marion Conley is the owner in fee simple of the following described lands, to wit, the W. $\frac{1}{2}$ of section 12, township 28 S., range 14 E. W. M., containing 320 acres of land in Lake county, Or. That in the year 1880, said plaintiff appropriated and has ever since used 250 inches of the waters of said Silver creek, measured as aforesaid. That said Marion Conley, as such appropriator, is entitled to the use of 250 inches of the waters of said Silver Creek, measured as aforesaid, as a reasonably necessary use of the said water for the irrigation of his said lands, aforesaid; but that said plaintiff's right to the use is subsequent and inferior to the uses, to the extent granted by this decree, of plaintiff Annie C. Hough, defendants George H. Small, Lucinda Egli, John C. Porter, and the Occidental Land & Improvement Company. That said water has been and should be diverted through what is known as the 'Conley Ditch.'

"That the plaintiff W. H. McCall is the owner in fee simple of the following described lands, to wit, the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of section 3, township 28 S., range 14 E. W. M., containing 160.04 acres of land in Lake county, Or. That Silver creek in Lake county, Or., flows to and upon said lands. That 120 acres of said lands are riparian thereto. That the said W. H. McCall, as such riparian owner, is entitled to the use of 60 inches of the waters of said Silver creek, measured as aforesaid, as a reasonably necessary use of the said waters for the irrigation of his said lands. That said use is subsequent and inferior to all of the appropriations herein set out, to the extent granted by this decree.

"That the defendant S. A. D. Porter is the owner in fee simple of the following described lands, to wit, the S. E. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 11, township 28 S., range 14 E. W. M., containing 320 acres of land in Lake county, Or. That the said defendant, in the year 1883, appropriated, and has ever since used, 100 inches of the waters of Silver creek, measured as aforesaid. That the said S. A. D. Porter, as such appropriator, is entitled to the use of 100 inches of the waters of said Silver creek, measured as aforesaid, as a reasonably necessary use of the said water for the irrigation of his said lands aforesaid; but that said defendant's right and use is subsequent and inferior to the rights of plaintiffs Annie C. Hough and Marion Conley and defendants

Lucinda Egli, George H. Small, Occidental Land & Improvement Company, and J. C. Porter, to the extent granted by this decree.

"That the defendant Lucinda Egli is the owner in fee simple of the following described lands, to wit, the S. W. $\frac{1}{4}$ of section 28 and the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 29, and the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 33, in township 28 S., range 14 E. W. M., containing 400 acres of land in Lake county, Or. That in the year 1878, said defendant appropriated and diverted 200 inches of the waters of said Silver creek, measured as aforesaid, and has ever since used the same. That the said Lucinda Egli, as such appropriator, is entitled to the use of 200 inches of the waters of said Silver creek, measured as aforesaid, as a reasonably necessary use of the said water for the irrigation of her said lands aforesaid; but that said defendant's right and use is subsequent and inferior to the rights, to the extent granted in this decree, of defendants George H. Small, Occidental Land & Improvement Company, and John C. Porter.

"That the defendant George H. Small is the owner in fee simple of the following described lands, to wit the E. $\frac{1}{2}$ of section 9; the S. $\frac{1}{2}$ and the N. W. $\frac{1}{4}$ of section 10; the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 11; the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 11; all of section 15, excepting the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 16; the N. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 22—all in township 28 S., range 14 E. W. M., containing 1900 acres of land in Lake county, Or. That the said defendant, in the year 1878, appropriated and has ever since used 650 inches of the waters of said Silver creek, measured as aforesaid. That said George H. Small, as such appropriator, is entitled to the use of 650 inches of the waters of said Silver creek, measured as aforesaid, as a reasonably necessary use of the said water for the irrigation of his said lands aforesaid. That said appropriation was and is prior to the rights of all of the other parties herein.

"That the defendant John C. Porter is the owner in fee simple of the following described lands, to wit, the N. $\frac{1}{2}$ of section 14, township 28 S., range 14 E. W. M., containing 320 acres of land in Lake county, Or. That Silver creek in Lake county, Or., flows to and upon the said lands. That said lands are riparian thereto. That said John C. Porter, as such riparian owner, is entitled to the use of 100 inches of the waters of said Silver creek, measured as aforesaid, as a reasonably necessary use of the said water for the irrigation of his said lands; 75 inches of the said waters, measured as aforesaid, to be diverted from the said Bunyard Branch of said Silver creek, and the remaining 25 inches from the main channel of said Silver creek. That said use is subsequent and inferior to the appropriation of Marion Conley and George H.

Small and Annie C. Hough, to the extent granted in this decree.

"That the defendant E. K. Henderson is the owner in fee simple of the following described lands, to wit, all of section 1, township 28 S., range 14 E., excepting the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$; all of sections 6 and 7, and the W. $\frac{1}{2}$ of section 8, lots 1, 2, 3, 8, and 9, section 17—all in township 28 S., range 14 E. W. M., containing _____ acres of land in Lake county, Or. That Silver creek in Lake county, Or., flows to and upon the said lands. That 640 acres of said land is riparian to said Silver creek. That the said E. K. Henderson, as such riparian owner, is entitled to the use of 170 inches of the waters of said Silver creek, measured as aforesaid, as a reasonably necessary use of the said water for the irrigation of his said lands. That said use is subsequent and inferior to all of the rights acquired by appropriation, to the extent granted in this decree.

"That the defendant P. W. Jones is the owner in fee simple of the following described lands, to wit, the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and lots 1, 2, and 3 of section 31, in township 27 S., range 15 E. W. M., containing 155.42 acres; also the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, the S. E. $\frac{1}{4}$, of the S. W. $\frac{1}{4}$, and lots 3 and 4 of section 31 in township 27 S., range 15 E. W. M.—containing 169.15 acres of land in Lake county, Or. That Silver creek in Lake county, Or., flows to and upon the said lands. That said lands are riparian thereto. That the said P. W. Jones, as such riparian owner, is entitled to the use of 110 inches of the waters of said Silver creek, measured as aforesaid, as a reasonably necessary use of the said water for the irrigation of his said lands; but said use is subsequent and inferior to all of the rights acquired by appropriation, to the extent granted in this decree.

"That the defendant Mary C. Brown is the owner in fee simple of the following described lands, to wit, the S. E. $\frac{1}{4}$ of section 31, township 27 S., range 15 E. W. M., containing 160 acres of land in Lake county, Or. That Silver creek in Lake county, Or., flows to and upon said lands. That said land is riparian thereto. That the said Mary C. Brown, as such riparian owner, is entitled to the use of 50 inches of the waters of said Silver creek, measured as aforesaid, as a reasonably necessary use of the said water for the irrigation of her said lands. That said use is subsequent and inferior to all of the rights acquired by appropriation, to the extent granted by this decree.

"That the defendant C. E. McKune is the owner in fee simple of the following described lands, to wit, the N. E. $\frac{1}{4}$ of section 31, township 27 S., range 14 E. W. M., containing 160 acres of land in Lake county, Or. That Silver creek in Lake county, Or., flows to and upon said land. That said land is riparian thereto. That the said C. E. McKune, as such riparian owner, is entitled to the use of 50 inches of the waters of said Silver creek, measured as aforesaid, as a reasonably necessary use of the said water for the irrigation of her said lands. That said use is subse-

quent and inferior to all of the rights acquired by appropriation, to the extent granted in this decree.

"That the defendant E. D. Lutz is the owner in fee simple of the following described lands, to wit, the N. E. $\frac{1}{4}$ of section 10, and the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 15, township 28 S., range 14 E. W. M., containing 400 acres of land in Lake county, Or. That Silver creek in Lake county, Or., flows to and upon the said land. That said land is riparian thereto. That the said E. D. Lutz, as such riparian owner, is entitled to the use of 107 inches of the waters of said Silver creek, measured as aforesaid, as a reasonably necessary use of the said water for the irrigation of his said lands. That said use is subsequent and inferior to each of the rights acquired by appropriation, to the extent granted by this decree.

"That the defendant George Durand is the owner in fee simple of the following described lands, to wit, the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 18, the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the S. W. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 19, the N. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 30, township 30 S., range 14 E. W. M., containing 640 acres of land in Lake county, Or. That the said defendant Durand is the owner by prescription of the right to the use of 160 inches of the waters of said Silver creek for the reasonably necessary irrigation of his lands.

"That the defendant C. C. Jackson is the owner in fee simple of the following described lands, to wit, the N. E. $\frac{1}{4}$ of section 12, township 28 S., range 14 E. W. M., containing 160 acres of land in Lake county, Or. That the said defendant C. C. Jackson is the owner of a right to the use of the surplus waters from the Conley Ditch flowing past the lands of the said plaintiff Marion Conley. That the same is not riparian to Silver creek.

"That the defendant the Occidental Land & Improvement Company, a corporation, is the owner in fee simple of the following described lands, to wit: Tract No. 1: The S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ and the S. $\frac{1}{2}$ of section 16; the N. $\frac{1}{2}$ and the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ and the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 21; the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 22; the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 20—in township 28 S., range 14 E. W. M., containing 1,320 acres of land in Lake county, Or. Tract No. 2: The N. $\frac{1}{2}$ and the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of section 2, township 28 S., of range 14 E., and the S. $\frac{1}{2}$ of the S. $\frac{1}{2}$ and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 35, the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 34, the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 26, township 27 S., range 14 E. W. M., containing 880 acres of land in Lake county, Or. That Silver creek in Lake county, Or., flows to and upon the said lands. That said lands are riparian thereto. That the Occidental Land & Improvement Company, as

such riparian owner, is entitled to the use of 355 inches of the waters of said Silver creek, measured as aforesaid, as a reasonably necessary use for the irrigation of the tract of land hereinbefore designated as tract No. 1. That the Occidental Land & Improvement Company, as such riparian owner, is entitled to the use of 235 inches of the waters of said stream, measured as aforesaid, as a reasonably necessary use for the irrigation of the tract of land hereinbefore designated as tract No. 2. But said use by said defendant, the Occidental Land & Improvement Company, upon the above-named tracts of land, is subsequent and inferior to the appropriation, to the extent granted by this decree, to the defendant George H. Small.

"That in the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 15, township 27 S., range 14 E. W. M., in Lake county, Or., a branch of said Silver creek, known as the 'Bunyard Branch,' diverges and flows in a southeasterly direction. That said Bunyard Branch is an ancient and well-defined channel of the said Silver creek. That there has been accustomed to flow through the said Bunyard Branch at that point of diversion one-quarter of the waters of said Silver creek.

"That the defendant Walter C. Bulck is the owner in fee simple of the following described lands, to wit, the S. W. $\frac{1}{4}$ of section 14, township 28 S., range 14 E. W. M., containing 160 acres of land in Lake county, Or. That the defendant Corinna Bulck is the owner in fee simple of the following described lands, to wit, the S. E. $\frac{1}{4}$ of section 14, township 28 S., range 14 E. W. M., containing 160 acres of land in Lake county, Or. That the defendants Isa M. Corum, Jewell D. Corum, and Lulu Corum La Brie are the joint owners and tenants in common of the following described lands, to wit, the W. $\frac{1}{2}$, the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 13, the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 24, township 28 S., range 14 E. W. M., containing 480 acres of land in Lake county, Or. That the defendant J. M. Small is the owner in fee simple of the following described lands, to wit, the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of section 13, and the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 24, in township 28 S., range 14 E. W. M., the S. W. $\frac{1}{4}$ of section 18, the N. W. $\frac{1}{4}$ of section 19, in township 28 S., range 15 E. W. M., containing in all 680 acres of land in Lake county, Or. That in the year 1885, the defendants Walter C. Bulck, Corinna Bulck, Lulu Corum La Brie, Isa M. Corum, Jewell D. Corum, and J. M. Small and their grantors appropriated from the United States and the state of Oregon, and diverted and carried away from said Silver creek at a point near the S. W. corner of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 22, township 28 S., range 14 E. W. M., in Lake county, Or., by means of dams, head gates, and ditches, 600 inches of the waters of said Silver creek, and ever since said date the said defendants and their grantors have used all of the said water for the necessary irrigation of their tracts of land as hereinbefore set out. That

the said defendants Walter C. Bulck and Corinna Bulck, as such appropriators, are entitled to the joint use of 200 inches of the waters of said Silver creek, measured as aforesaid, to be deducted from the flow of the said Bunyard Branch of said Silver creek, as a reasonably necessary use of said waters for the irrigation of their said lands; said right to be subsequent and inferior to the rights of plaintiffs Marion Conley and Annie C. Hough, and the defendants John C. Porter, George H. Small, Lucinda Egli, Occidental Land & Improvement Company, and S. A. D. Porter, to the extent granted by this decree. That the defendants Lulu Corum La Brie, Isa M. Corum, and Jewell D. Corum, as such appropriators, are entitled to the joint use of 100 inches of the waters of said Silver creek, measured as aforesaid, and deducted from the flow of the Bunyard Branch aforesaid, as a reasonably necessary use of said waters for the irrigation of their said lands; said right to be subsequent and inferior to the rights of the plaintiffs Marion Conley and Annie C. Hough and the defendants John C. Porter, George H. Small, Lucinda Egli, Occidental Land & Improvement Company, and S. A. D. Porter, to the extent granted by this decree. That the defendant J. M. Small, as such appropriator, is entitled to the use of 200 inches of the waters of said Silver creek, measured as aforesaid, to be deducted from the flow of the Bunyard Branch of said Silver creek, as a reasonably necessary use of said waters for the irrigation of his said lands; said right to be subsequent and inferior to the rights of the plaintiffs Marion Conley and Annie C. Hough and the defendants John C. Porter, George H. Small, Lucinda Egli, Occidental Land & Improvement Company, and S. A. D. Porter, to the extent granted by this decree.

"That the defendants B. F. Lane and Jennie Lane, his wife, are the owners in fee simple of the following described lands, to wit, the N. E. $\frac{1}{4}$ of section 18, township 28 S., range 15 E. W. M., containing 160 acres of land in Lake county, Or., also the E. $\frac{1}{2}$ and lots 1 and 2, and the N. W. $\frac{1}{4}$ of section 18, in township 28 S., range 15 E. W. M., containing 159.96 acres of land in Lake county, Or. That Silver creek in Lake county, Or., flows to and upon said land from the said Bunyard Branch of said Silver creek. That said land is riparian thereto. That the said B. F. Lane and Jennie Lane, his wife, as such riparian owners, are entitled to the use of 90 inches of the waters of said Bunyard Branch of said Silver creek, measured as aforesaid, as a reasonably necessary use of the said water for the irrigation of their said lands; but said use is subsequent and inferior to all of the rights acquired by appropriation hereinbefore set out, to the extent granted by this decree.

"That the defendant F. M. Chrisman is the owner in fee simple of the following described lands, to wit, the S. E. $\frac{1}{4}$ of section 12, township 28 S., range 14 E. W. M., containing 160 acres of land in Lake county, Or. That the

Bunyard Branch of Silver creek flows to and upon said land. That said land is riparian thereto. That the said F. M. Chrisman, as such riparian owner, is entitled to the use of 40 inches of the waters of said Bunyard Branch of Silver creek, measured as aforesaid, as a reasonably necessary use of the said water for the irrigation of his said land. That said use is subsequent and inferior to all of the rights acquired by appropriation, to the extent granted in this decree.

"That the defendants L. Huesmand, Morris Ranner, John Partin, Jr., L. P. Klippel, Emil Egli, Henry Egli, Martie Ward, Angeline West, Mary Small, James M. Martin, J. M. Sherer, Maude Small, J. Hall, C. D. Bulck, R. E. Smith, J. A. Smith, J. C. Harrow, and F. F. McCarty have been duly served with summons and complaint herein, as more particularly appears from the records and files in this court, and a default has long since been ordered entered against them for the want of appearance or answer. It is adjudged and decreed that said defaulting defendants have no right, title, or interest in the waters of Silver creek, or any of its tributaries or branches, or the use of such water. It is further adjudged and decreed that P. G. Chrisman has no right, title, or interest in the waters of Silver creek, or the use thereof. It is decreed that none of the parties to this suit are entitled to recover either costs or disbursements herein. That there is to be allowed to flow from Silver creek into its Bunyard Branch not to exceed one-fourth of the flow of Silver creek at the head of Bunyard Branch, less 600 inches of water, measured under six-inch pressure, being the diversion in and through the Bulck Ditch."

From this decree the following parties appeal: S. A. D. Porter, C. D. Porter, administrator, Daisy Porter, widow, and W. F. Porter, E. A. Porter, and Carl D. Porter, minor heirs of S. A. D. Porter, by Daisy Porter, guardian, P. G. Chrisman, John C. Porter, and James C. Porter, his guardian, F. M. Chrisman, B. F. Lane, Jennie Lane, C. C. Jackson, Occidental Land & Improvement Company, a corporation, and Chewaucan Land & Cattle Company, a corporation, its grantee, P. W. Jones, C. E. McKune, Mary C. Brown, and E. D. Lutz.

E. B. Watson and W. J. Moore, for appellants. J. C. Rutenic, for respondents Annie C. Hough and others. L. R. Webster, for respondents Walter C. Bulck and others. Covert & Stapleton, for respondent Geo. H. Small.

KING, C. (after stating the facts as above). We have given above a synopsis of the pleadings filed, including the orders and decree of the circuit court, extracted from the 300 pages of printed abstract of record, with a view to the proper understanding of the issues upon which the main contentions of the numerous parties to the suit are based and argued on this appeal. The first point to which our attention is directed is in respect

to the order of the court directing that all parties having, or claiming, an interest in the subject-matter of the controversy, be brought into the suit, which order, it is maintained, is not authorized by law, by reason of which it is argued the rights of only the parties to the suit as first filed can be adjudicated, requiring a dismissal thereof as to all others. The statute under which the order was made is as follows: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in." B. & C. Comp. § 41; Id. § 394. The facts presented by the testimony taken in the suit as first instituted, and upon which the order was made, developed a serious controversy as to who was the real party causing the alleged injury. It appears that Silver creek is a perennial stream with well-defined banks and channels, carrying from 11½ second-feet during the low-water season to 100 second-feet when at its highest water mark, and that the lands of all parties to the suit are dependent upon this stream for irrigation. Hough's farm is a short distance below that of Porter on the creek, and it is disclosed by the first testimony taken, as well as that taken later, that above Porter's point of diversion George H. Small and others had for a long time diverted a large quantity of water from this stream. Hough claimed 100 inches as the quantity necessary for the proper irrigation of her farm, to which quantity she asserted her right was superior to that of Porter, whom she maintained was wrongfully interfering with her right to the use thereof. In response thereto, Porter claimed a right as prior appropriator to 100 inches of the waters of Silver creek and its branches for the irrigation of his lands above the Hough farm, and insisted that, whether his rights were superior to Hough's rights or not, he at all times permitted not less than 100 inches of water to flow below his point of diversion, which would have reached Hough's farm but for the wrongful interference of Geo. H. Small, who was not a party to the suit. Others, not parties, but situated upon and in the immediate vicinity of the stream, also appear to have claimed water rights therein, and to have been diverting water in various quantities for irrigation purposes, and that during the months of June, July, August, September, and October of each year there was not a sufficient quantity of water to supply the demands of all; the amount during the latter part of the irrigation season consisting of but 11½ second-feet.

It is manifest that plaintiff, in the first instance, could have made as defendants all persons along the stream and on its tributaries and branches, against whom she might have claimed adversely. B. & C. Comp. § 394. Although some may not have been

necessary, all would have been proper parties to the suit. But as to the interruptions by Small and those using water through the small ditches and in connection therewith, it is apparent from the character of the testimony adduced, that in order to properly determine the rights of Hough and Porter, they were necessary and were properly made defendants, for if true, as claimed by Porter, that he let sufficient water pass his premises to supply Hough's needs and demands, the court could not have determined who was entitled to the use thereof, as between Small and Hough, or between Small and Porter or Porter and Hough, as the case might have been, unless they were parties to the suit. To illustrate: Assume the court had determined the respective rights of Hough and Porter in the first suit under the first amended complaint, and had found there were 460 inches in the stream during the low-water season; that Hough was entitled to the first 100 inches, and, as between them, Porter was awarded the second 100 inches and had entered a decree to that effect; and that after the entry thereof Porter had diverted water for irrigation purposes, by reason of which he was cited to appear and show cause why he should not be held for contempt of court, but at the hearing should have proved that he used 100 inches only, leaving 360 inches to pass his head gate. Would he then have been in contempt because the water passing his point of diversion did not reach plaintiff? In other words, could he be held for the interference by Small, or others not parties to the suit? This illustration serves to demonstrate the ineffectiveness of a decree entered under such circumstances. Numerous instances occur where the rights between two persons can be, and have been, determined without bringing in others, for example, assume that A. and B. are at the head of a stream, and B., who is below A., has the first right to 100 inches of water. A suit to enjoin A. from a wrongful interference could easily be maintained, where there was no one diverting water from the stream between their respective points of diversion, for a decree in that case favorable to B., it can readily be seen, would be effective, as it would be such that its violation could be punished. Such a decree, it is true, would not bind others not parties to the proceeding, but it would be efficient as between the parties to it, and constitute an adjudication of their respective rights, of which either could avail himself in the event both should subsequently be joined with others in litigation over the same stream. Many of the suits where water rights have been adjudicated have been of this class, and the decrees have accordingly been effectual, while a large number, no doubt, have passed through the courts and to final decree as between a few on the stream, when, to have afforded a complete remedy, and to have avoided a multiplicity of suits, others should have been made par-

ties, as was done in the case under consideration; but the failure to do so in such cases has been due to the point not having been raised, nor the court's attention called to the status of litigants in this respect. It is manifest that in the suit under consideration the rights of any of the three parties named could not have been determined with respect to each other without all being in court, and the same could be said of others along the stream.

We are of the opinion therefore that much discretion must be allowed the trial court in such cases, and that it comes within the reason and spirit of the statute to hold that all who may have an interest, directly or indirectly, in the subject-matter of the suit, may, by order of the court, be made parties thereto, especially where, as in the case before us, the determination of the rights of the litigants before the court could not otherwise have been had with reasonable accuracy, nor the decree, when entered, effectively enforced. The discretion of the court below in this respect was exercised by requiring all persons owning lands adjoining or claiming an interest in the waters of Silver creek, its tributaries, or branches, to be brought in and made parties, either plaintiff or defendant, as their interests appeared, with directions to interplead as to each other, and we think the evidence adduced at the trial confirms the wisdom of the course pursued. It is consonant with public policy, and public interests require, that when in the determination of conflicting claims to the right to the use of public streams, for irrigation, manufacturing, or other useful purposes, it appears that many suits must eventually be brought to determine the various rights of persons whose property is to be affected by such use, it should be within the sound discretion of the trial court to require all, or any of the persons interested, to be made parties, as was done here, in order that the rights of each may be adjudicated and finally determined in one proceeding. This course should be permitted, and is obviously contemplated by the statute, not only with the view to economy in litigation, but that the respective interests of all affected may be justly, peaceably, and permanently ascertained and settled during the lifetime of those cognizant of the facts upon which the adjudications must be had. It is obvious that it is not only impracticable to determine such rights in many instances without adopting such course, but that if left to separate suits to be brought from year to year as disputes may arise, not only will much valuable evidence pass beyond the reach of all, but such course, if pursued, must necessarily result in years of litigation and turmoil, and, in many instances, in a complete denial of justice. We are of the opinion therefore that no error was committed by the court in requiring the appearance of all the defendants.

The next point to which our attention is directed is that there is a misjoinder of par-

ties plaintiff and of parties defendant. Some of the defendants having demurred on this ground, and otherwise raised the question, a determination thereof becomes necessary. These points, however, are necessarily disposed of adversely to appellants' contention under the first question considered. Since this court holds that the persons named as plaintiffs and defendants were necessary to a proper determination of the respective rights of Hough and Porter, they were, accordingly, properly made parties to the suit, and as to who should have been joined as plaintiffs, and who should have been made defendants, accordingly, depends upon the facts alleged or proved. Since it appears that the diversion or use of the water of Silver creek, or of its branches or tributaries, by any of the defendants, affects each of the plaintiffs' alleged rights thereto, then all are interested in the relief demanded, by reason of which they were entitled to join as plaintiffs to secure the required protection. B. & C. Comp. § 394; *Stingel v. Nevel*, 9 Or. 62, 65. This also disposes of the question in reference to the alleged misjoinder of the defendants, for the same authorities and reasoning are applicable to their relative positions as to the plaintiffs.

Another and more serious point urged is that the complaint, as amended, after the order bringing in the additional parties, does not state sufficient facts to constitute a cause of suit against any of the defendants, except S. A. D. Porter, on which grounds the defendant P. G. Chrisman and others demurred. It is, in effect, conceded that the complaint is sufficient as to Porter, since it alleges sufficient interference by him in the use of the stream to constitute a substantial injury. After averring the facts constituting the injury by Porter, and upon which an injunction against him is sought, the complaint avers: "That all the defendants have, or claim to have, some rights or interest in the waters of Silver creek, but that the exact nature or extent of said rights or claims of the defendants are to plaintiffs unknown, and the interests, if any, of defendants and each of them are inferior to the rights of plaintiffs in the waters of said stream." It is to this allegation that the demurrers of various defendants appear to be directed. In the arid states, where the sufficiency of this manner of pleading has been questioned, it has been sustained. *Cache L. P. R. Co. v. Water S. & S. Co.*, 27 Colo. 532, 62 Pac. 420; *Harris v. Harrison*, 93 Cal. 676, 29 Pac. 325; *Wiggins v. Muscupabe L. & W. Co.*, 113 Cal. 182, 45 Pac. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; *Farm Inv. Co. v. Carpenter et al.*, 9 Wyo. 110, 61 Pac. 258, 87 Am. St. Rep. 918, 50 L. R. A. 747. Averments to that effect would seem to come within the language and spirit of B. & C. Comp. § 394, which, *inter alia*, provides: "Any person may be made a defendant who has or claims an interest in the controversy adverse to plaintiff, or who is

a necessary party to a complete determination or settlement of the questions involved therein."

In *Umatilla Irr. Co. v. Umatilla Imp. Co.*, 22 Or. 386, 30 Pac. 30, the rights attempted to be maintained, and for the determination of which a decree was sought, were asserted under a special statute governing corporations, wherein a specific manner was provided for acquiring title to water by appropriation; and, when the court there observed that the statute required a strict construction, it evidently had reference to that act. In the consideration of that case, attention is called to the fact that the plaintiff had not perfected a claim to the water rights there asserted, in reference to which the court, at page 389 of 22 Or., page 37 of 30 Pac., say: "The plaintiff has failed to bring itself within any principle of equity jurisdiction which would enable a court of equity to consider or pass upon the supposed rights alleged in its complaint." And at page 387 of 22 Or., page 37 of 30 Pac.: That the clear logic of the position seemed to be to ask the court "to certify that the plaintiff owns the water which it claims, for the purpose of enabling it to make a sale of its bonds." The rule there announced can have no application to cases where the defendants, or some of them, may be necessary to a proper determination of the rights between any of the plaintiffs, who may allege facts disclosing an established right, and defendants in a suit based upon acts, real or threatened, sufficient to constitute reasonable grounds for the apprehension of some substantial injury to vested property rights. Section 394 of the Code would appear expressly to give the right, under such circumstances, to make any person a party who has, or claims to have, an interest in the controversy adverse to plaintiffs. But, independent of that section of the statute, the right existed at common law, as a part of the general equity jurisdiction. As observed in *Ballou v. Inhabitants of Hopkinton*, 4 Gray (Mass.) 324, 328: "In regulating the rights of mill owners and all others in the use of a stream, wherein numbers of persons are interested, equity is able, by one decree, to regulate their respective rights, to fix the time and manner in which water may be drawn, and within what limits it shall or shall not be drawn by all parties, respectively; and thus it is peculiarly adapted to the relief sought against such alleged nuisance and disturbance, and affords a more complete and adequate remedy than can be afforded by one or many suits at law. *Bemis v. Upham*, 13 Pick. (Mass.) 169; *Bardwell v. Ames*, 22 Pick. (Mass.) 333."

Again, since sections 41 and 394 of the Code, when construed together, give to the court discretionary power to require all persons interested in the subject-matter of the suit to be made parties, these provisions of the statute, by implication, include all such powers essential to the proper carrying of the

order into effect. In this connection it is manifest that, as to those persons not actually interfering with plaintiffs' alleged rights along the stream, no averment, except of similar import to that set out in the complaint, could well have been made. It is obvious therefore that the allegation that all of the defendants have, or claim to have, an interest in the distribution of the waters of Silver creek, the nature of which is unknown to complainants, etc., should be sufficient for the purpose of requiring all to interplead and assert their respective rights, whatever they may be, in the subject-matter of the suit; and this was the course of procedure adopted in respect to all, except as to S. A. D. Porter. While some did not see proper to affirmatively assert their rights, the neglect on their part to do so cannot affect the interests of the other parties to the suit, and, at most, could only result in a decree being entered precluding those in default from hereafter asserting any rights against the parties whose interests under the issues as made may here be adjudicated. We are therefore impelled to hold that, whether brought in question by demurrer, or otherwise, the averments of the complaint and procedure adopted are sufficient.

The next question for determination relates to the right of defendants to have their interests and claims adjudicated between themselves. It appears that practically all of the defendants who are not in default have filed pleadings in response to the answers of their codefendants, specifically denying the affirmative averments or counterclaims in the answers of the several defendants. In this respect the case is unlike that of *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 83, 45 Pac. 472, 60 Am. St. Rep. 777, in which it is held that while each of the defendants therein denied the averments of the complaint and affirmatively set up their rights, and in some instances had alleged their claims to be prior and superior to the rights of all the other defendants, and of those of plaintiff, the procedure there adopted was insufficient to permit the court to adjudicate the quantity and priority of any of the appropriations, except as between the plaintiff therein and the several defendants. Since our statute does not indicate the course to be pursued, the proper procedure in such cases would seem to be that the general methods of chancery, as modified by the spirit of the Code, must be adopted. *Pomeroy*, Rem. (3d Ed.) § 808; *Bliss*, Co. Pl. (3d Ed.) § 390; *Eve v. Louis et al.*, 91 Ind. 457, 470; *Diamond F. G. Co. v. Boyd*, 30 Ind. App. 485, 488, 66 N. E. 479; *Tucker v. St. Louis Life Ins. Co.*, 63 Mo. 588, 594.

In the chancery courts, when a defendant sought relief against a codefendant, as to matters not apparent upon the face of the original bill, he filed his cross-bill, alleging therein the matters upon which he relied for relief, making defendants thereto of such co-

defendants and others as was proper, and process was necessary to bring them in. B. & C. Comp. § 391, abolishes cross-bills, but provides that in actions at law, where a defendant is entitled to relief, arising out of facts requiring the interposition of a court of equity, and material to his defense, he may, upon filing his answer therein, also as plaintiff file a complaint in equity, in the nature of a cross-bill, upon which the issues may thereafter be tried out as in a suit in equity. This provision implies that, when a suit in equity is brought, the same right would follow, except that the necessity of filing a separate and distinct pleading is obviated, leaving the defendant affirmatively to set up his defense, commonly termed a counterclaim, alleging the facts necessary to relief against all or any of the parties to the suit. This method is applicable, however, only where the cause of suit set up against the codefendants is one arising out of, or having reference to, the subject-matter of the original suit; and such appears to be the status of the defendants in the suit under consideration, as each appears to claim an interest in the main stream involved and to claim and assert some right in respect thereto as against the other. "No court," says Mr. Bliss (section 390), "would deny one's right, or invent an original mode of proceeding for protecting it, because of an omission in the Code, so long as the common-law or equity practice furnished a remedy." Here the Code abolishes the form, but leaves the substance, and this court appears to recognize this remedy as available under it. *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 83, 45 Pac. 472, 60 Am. St. Rep. 777. It is necessary, however, in such cases, that sufficient notice be given the codefendant against whom the relief is sought. In *Tucker v. St. Louis Life Ins. Co.*, 63 Mo. 588, 595, it is remarked that in that state "it has not been the practice to issue process in such cases; but it has always been customary to afford ample time to a codefendant to answer as to the relief sought—a time which is generally fixed by the court's order to that effect. And if, in the absence of any statutory rule, we are to be governed by parity of reasoning deduced from cases where relief is sought by petition, at least the same time and opportunity to plead should be granted where relief is sought by an answer in the nature of a cross-bill, as when prayed for by petition." But from *Pomeroy*, Co. Rem. § 808, cited with approval in *Nevada Ditch Co. v. Bennett*, at page 83 of 30 Or., page 472 of 45 Pac. (60 Am. St. Rep. 777), it would appear that service of a notice of some substantial nature would be essential to jurisdiction in such cases. As the notice required in such cases is not pointed out by the Code, it would seem that since there exists the right to affirmatively set up in the answer the matter constituting the cross-complaint, or counterclaim, in place of by an

original bill, as in the chancery practice, the defendant in so doing, to all intents and purposes, places himself in the position of a plaintiff in respect to his codefendants, with the result that the issue and service of a summons accompanied by a copy of the answer in a similar manner to that provided for a plaintiff in an original proceeding would be sufficient. In the case at bar, however, the order of the court, a copy of which was directed to, and served upon, each, required that all should appear within a time there specified, and plead and interplead with respect to each other as their several interests might appear, which was in effect the same, and served the same purpose, as a summons, and was sufficient to require the appearance and interpleas demanded. In that respect the order having directed the interpleas between each, only such proceedings were required after service thereof, in reference to serving copies of answers, etc., as were required by the rules of the district in which the suit was brought.

Without, at this time, determining whether the affirmative defenses constituting the counterclaims are sufficiently pleaded, or state sufficient facts, etc., we hold that the method of procedure adopted by the court and parties responding thereto was ample, and, if the pleadings state sufficient facts for the purpose, is sufficient to give the court the jurisdiction necessary to determine the rights of each and all who may appear to have been duly and regularly served with the court's order in reference thereto.

Thus far we have disposed of the principal points discussed in the briefs and oral arguments of counsel for the respective parties, the determination of which, it was argued with much force, must result in a dismissal of the suit so far as affects all, except the parties to the original suit. The conclusion reached, however, leaves all in court, making necessary an adjudication of their respective rights so far as practicable under the issues and evidence, which brings us to the merits of the controversy.

As will appear from the issues stated, some of the parties to the proceeding claim as riparian proprietors, while others invoke the doctrine of prior appropriation. Throughout the discussion, oral and otherwise, it has been and is taken for granted that all the lands on the streams involved are riparian thereto for irrigation purposes. If this assumption, as a matter of law, is correct, then, so far as such riparian owners are concerned, the water to which each thereof may be entitled must be distributed on that basis; their rights thereto being subject only to the rights of those who may have appropriated the water prior to the time of the inception of such riparian interests. What, then, must be the basis of the distribution between the riparian owners, if any? During the low-water season, and when most needed, the water flowing in Silver creek is approximately

460 inches, with about 4,000 acres of riparian lands demanding water rights as such. These lands cover a large territory, and to divide the water proportionately between them—to say nothing of about 7,000 acres of lands of parties hereto claiming as prior appropriators—would result in such scarcity of water that it would seem that none could be very materially benefited under such circumstances. A large portion of this acreage has never been irrigated, yet the owners thereof demand water for this acreage on an equality with lands long since brought into cultivation by irrigation. If the riparian doctrine must prevail, their rights, under the law, appear entitled to the same consideration as those who have diligently applied the water to a beneficial use. It was, in effect, announced, in *Jones v. Conn*, 39 Or. 30, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634, and in *Williams et al. v. Altnow et al.* (decided April 28, 1908) 95 Pac. 200, that there is no such thing as prior riparian ownership, so far as distribution of water for irrigation purposes between riparian owners is concerned. In *Williams v. Altnow*, Mr. Chief Justice Bean says: "A riparian proprietor has no title to the water flowing over his land, but only the right to use it while it is passing his place, and this right is subordinate to a corresponding right in all the other proprietors. One proprietor cannot unreasonably detain or give the water another direction or use it in any way to the injury of the others. It necessarily follows, therefore, that the nature and extent of the right of a riparian proprietor to the water of a stream, for irrigation, cannot be measured by any definite or fixed rule, nor can the amount of water to which he is entitled to use for that purpose ordinarily be definitely ascertained or determined, although this may, perhaps, be done in exceptional cases. It is necessarily a varying quantity, depending upon the use by other proprietors and whether it is an injury to them."

If, then, the distribution of the water, or of any material portion of it, in the case at bar, is to be made under the so-called modified riparian doctrine, we are confronted with a serious problem as to how it shall, in this case, be accomplished. While the cause has been tried largely on the theory that riparian rights have attached to the lands, the evidence seems to be inadequate for the purpose of making an equitable distribution under that rule. Before the distribution can be made, we must first know the quantity of water in the stream from time to time during the irrigation season, the acreage of each farm in crops, character thereof, the amount required for the proper irrigation of each crop and kind of crop, time for irrigation of each, etc., and all of the lands should be properly surveyed and platted, showing its status in this and various other respects in detail. But the record, although voluminous, discloses but little evidence of a definite na-

ture upon these and other points required. When there is a scarcity of water, and the acreage is large, much and more explicit evidence is required in order to adjust the rights between riparian proprietors than under ordinary conditions. It has been held in California that the distribution among riparian owners, in some instances, may be made under the rotation method, or by periods of time, rather than by a division of its quantity. *Wiggins v. M. L. & W. Co.*, 113 Cal. 182, 190, 45 Pac. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337. In fact, as stated in *Jones v. Conn*, *supra*, each case must depend upon the particular facts in it, and no definite rule can be adopted for that purpose. It is clear, therefore, that greater particularity is required in the proof in such cases than where the question of riparian ownership does not arise. But this case appears to have been tried upon the theory that the converse is true, and if the riparian doctrine is in law applicable to the lands owned by the several parties, or by a great number of them, it may become necessary to remand the cause for further light on the points suggested.

The record, however, discloses that none of the lands were settled upon by those subsequently acquiring title thereto, until beginning with about the year 1878, which is subsequent to the passage of the desert land act, and as indicated in *Williams v. Altnow*, *supra*, it is a serious question whether this act does not abolish the common-law rule rela-

tive to the doctrine of riparian rights, so far as its interpretation has been applied to irrigation of lands to which title has been acquired since that act became a law. Act March 3, 1877, c. 107, § 1, 19 Stat. 377 (U. S. Comp. St. 1901, p. 1548), 6 Fed. St. Ann. 393; *United States v. Rio Grande Irr. Co.*, 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136; *Farm Inv. Co. v. Carpenter et al.*, 9 Wyo. 110, 138, 61 Pac. 258, 265, 50 L. R. A. 747, 87 Am. St. Rep. 918, 935. While this question was neither raised in the court below nor here, it so materially affects rights of the parties to the suit, some of whom are not represented by counsel, that it cannot be passed unnoticed. Nor do we feel disposed to pass upon a question of such vast importance, not only to the litigants here, but, perhaps, to numerous others throughout the state, without first giving those concerned an opportunity to be heard.

It is therefore deemed proper to continue the cause for further argument, by such as may wish to be heard, upon the points indicated, leaving open for discussion any other points involved and not here determined, among which may be the sufficiency of the pleadings to determine the rights of the several defendants, as well as the respective priorities between the parties claiming as prior appropriators, together with the right to a full discussion of any other points that may arise, with the privilege of filing such other and additional briefs bearing on the points to be considered as may be desired.

RUTHERFORD v. UNITED STATES.

(Supreme Court of Oklahoma. May 16, 1908.)

CRIMINAL LAW—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where, in a criminal case, circumstantial evidence solely is relied on for a conviction, it is error for the trial court to fail and refuse to instruct on the law applicable thereto when the defendant requests it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1883.]

(Syllabus by the Court.)

Error to the United States Court for the Central District of the Indian Territory, at Atoka; Thomas C. Humphrey, Judge.

Emmett Rutherford was convicted of grand larceny, and appeals. Reversed.

On the 14th of November, 1905, the grand jury for the United States Court in Indian Territory, Central District, sitting at Durant, returned its indictment into open court charging Emmett Rutherford and Charles Jones with having on the 12th day of June, 1905, within that jurisdiction, committed the crime of grand larceny of certain saddles and harness belonging to E. R. Benson of the value of \$62. Jones fled and was not caught. The defendant, Rutherford, on arraignment, pleaded not guilty. The evidence connecting Rutherford with the offense was entirely circumstantial. The facts are briefly as follows: Benson, the prosecuting witness, lived on a farm near the little town of Utica. On the night of the 12th of June, 1905, there was taken from his barn and harness house the goods mentioned in the indictment. He went to town the next morning, secured the services of one Dobbs, who, on going to the place where Rutherford lived and where two Jones brothers were stopping, found a borrowed buggy in the yard in which was a whip, part of the goods which had been stolen from Benson. On going into the house and calling for defendant, who lived there, he, being upstairs, came down, and observing Dobbs, ran back again. Dobbs, having no warrant for his arrest, went to town to procure it, and coming back, found that the Jones boys who had been there when he first went to the place were gone, and after a search the defendant was found concealed or partially concealed about a half mile from his home. Tracks of two parties led toward the place where the stolen property was afterwards found. The searching party was led to the place of its concealment, which was about $3\frac{1}{2}$ miles from defendant's home, by the defendant, and while he did not take the stand, it developed from cross-examination of members of the searching party that they were informed by him that the Jones boys had told him where the property was located, and in this manner he was able to disclose it. The case was tried to a jury, which returned a verdict finding the defendant guilty as charged, and the court sentenced him to serve two years in the United

States penitentiary. Motion for new trial was filed and overruled, and the case was taken by writ of error to the United States Court of Appeals for the Indian Territory at South McAlester, and was pending there on the passing of that court with the organization of the state of Oklahoma, and is before us by virtue of the terms of the Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 267).

Hatchett & Ferguson, for appellant. Fielding Lewis and W. C. Reeves, for the State.

DUNN, J. (after stating the facts as above). Defendant requested the court to give the following instruction: "The jury are instructed that if in this case they can reconcile the circumstances tending to show defendant's guilt, if any, reasonably with the fact of the innocence of defendant, then it is your duty to acquit him." In addition to this, on the refusal of this instruction, counsel for defendant again urged the court to charge the law on circumstantial evidence. The instruction which was presented and the specific request were both refused by the court, and error, which is confessed by the Attorney General, is assigned therefor. The instruction asked for, or one governing the proposition involved, should have been given, and it was error for the court to refuse it. The Annotated Statutes of Indian Territory for 1890, § 1600, provides: "When the evidence is concluded, the court shall, on motion of either party, instruct the jury on the law applicable to the case"—and the authorities all hold, and without dissent, that where circumstantial evidence is relied upon for conviction this necessitates the court on the trial, when requested, to give the law applicable thereto in its instructions to the jury, and a failure to do so is error. 12 Cyc. 633; State v. Cohen, 108 Iowa, 208, 78 N. W. 857, 75 Am. St. Rep. 213; Hamilton v. State, 96 Ga. 301, 22 S. E. 528; Wantland v. State, 145 Ind. 38, 43 N. E. 931; Gablick v. People, 40 Mich. 292; Territory v. Lermo, 8 N. M. 566, 46 Pac. 16; 1 Greenleaf on Evidence, § 34; People v. Scott, 10 Utah, 217, 37 Pac. 335.

The rule as announced in Cyc., supra, is as follows: "Where the prosecution relies solely upon circumstantial evidence, the court must always instruct upon the nature of circumstantial evidence. Such evidence should be expressly defined, and the rules governing its effect concisely stated."

In discussing the law of presumptive evidence Mr. Greenleaf, in the section cited above, thus states the reasons of the propriety and righteousness of such instruction: "Thus, as men do not generally violate the Penal Code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury in every case as matter of evidence, to the benefit of which

the party is entitled. And where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion."

In commenting on the refusal of an instruction requested by a defendant on circumstantial evidence in a Michigan case, *Gablick v. People*, supra, Mr. Justice Cooley, who was at that time a member of the court, says: "We think the plaintiff in error was entitled to the instruction requested. It is perfectly true that the jury must judge of the proper weight of the evidence; but when evidence is laid before them which only indirectly tends to raise an inference of guilt, and the importance of which must depend altogether upon circumstances, it is the right of the respondent to have the jury instructed how these circumstances bear upon the presumption of guilt. Possession of stolen property, if immediately subsequent to the larceny, may sometimes be almost conclusive of guilt (see *People v. Walker*, 38 Mich. 156); but the presumption weakens with the time that has elapsed, and may scarcely arise at all if others besides the accused have had equal access with himself to the place where it is discovered. A jury may or may not attach importance to these circumstances; but as the law permits the inference of guilt to be drawn under some circumstances, and not under others, the jury should have some instruction how to deal with these circumstances when they are placed before them."

The compiled laws of Utah relating to instructions to juries are, in effect, substantially the same as those of Indian Territory, and in the case of *People v. Scott*, supra, it appears that the evidence on which it was sought to convict the defendant was circumstantial, and that defendant offered an instruction on this point, which was denied by the court, and the Supreme Court in that case held that, "where the testimony in a criminal case is entirely circumstantial, it is the duty of the court to charge upon the law of the subject, though the request offered by defendant on this subject was erroneous"; this being based upon the proposition that, although the instruction may not have been strictly formal, it at least amounted to a request or a motion, the denial of which was error.

The danger in cases where circumstantial evidence is entirely relied upon for conviction is that jurors being brought into court and impaneled for the purpose of determining the guilt or innocence of the defendant, and the court admitting the circumstances as evidence against the defendant, unless warned in some manner, might be inclined to believe that absolute proof of the circumstances would be conclusive proof of the crime, and their attention would be exclusively directed to the evidence which established the incriminating circumstances, instead of weighing and judging whether or

not the incriminating circumstances proven established the ultimate fact and proved beyond a reasonable doubt that defendant was the guilty party.

There are other assignments of error urged, practically all of which relate to alleged erroneous instructions, and, as the same questions will probably not arise in a further trial hereof, there will be no value in the discussion thereof.

The judgment of the trial court is accordingly reversed and set aside, and the defendant granted a new trial. All concurring.

MCLEOD v. SPENCER.

(Supreme Court of Oklahoma. May 15, 1908.)

1. PUBLIC LANDS — INJURY TO HOMESTEAD RIGHTS—DAMAGES.

A homesteader upon public land, proceeding lawfully to perfect his title, is entitled to compensation for injury done to the premises, but the measure of damages is not the same as if he owned the land in fee simple.

2. SAME.

In such a case it is error for the court to instruct the jury that the measure of damages is just the same as if the plaintiff owned the land in fee. The court ought to have defined the rights of the settler in the homestead, and left the question to the jury to determine his interest, and from such interest the liability of the defendant.

(Syllabus by the Court.)

Error from District Court, Comanche County; F. E. Gillette, Judge.

Action by E. B. Spencer against N. I. McLeod. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Stevens & Myers, for plaintiff in error.

KANE, J. This was an action by defendant in error, plaintiff below, for the alleged wrongful filling up by the plaintiff in error, defendant below, of a natural waterway by reason of which the waters were turned over and upon the portions of plaintiff's homestead, so overflowing and damaging same as to render such portions worthless. The answer of defendant was a general denial. The petition of plaintiff alleged that the land was a homestead, and that he was occupying it as a homestead entryman under the homestead laws of the United States, and upon the trial it was admitted by the parties that such was the case. The trial was had before a jury, and resulted in a verdict and judgment for the plaintiff in the sum of \$100, from which judgment the defendant appealed to this court.

There are several grounds of error argued by counsel for plaintiff in error in his brief, only one of which, however, we believe has merit. Instruction No. 5, given by the court, to which exception was duly saved, is to the effect that the proper measure of damages is the difference in value of the land immediately before and immediately after the act complained of. We believe it was error for the court below to give this instruction. It is ad-

mitted that the plaintiff's interest in the land was that of a homestead entryman. While it is true that a homesteader who proceeds lawfully to perfect his title to land entered is entitled to compensation for injury done to the premises, yet we believe the measure of damages is not the same as though he owned the land in fee simple. Mr. Justice Johnston, in *Burlington, Kansas & S. W. R. R. Co. v. Johnson*, 38 Kan. 142, 16 Pac. 125, speaking of the nature of a homesteader's title to land occupied under the homestead laws, says: "The interest which the settler has may be appropriated for a right of way by adversary proceedings, as we have already seen that Congress has provided for the condemnation of a right of way through a homestead, as well as for its purchase from the settler. Of course the settler does not part with the same interest or value that he would if he had the legal title, and he should only receive compensation for the interest taken from him." In the case of *Ellisworth, etc., R. R. Co. v. Gates*, 41 Kan. 574, 21 Pac. 632, *Clogston, C.*, who wrote the opinion, uses the following language: "In this case the court instructed the jury and gave the rule for the measure of damages just as it would have given it had the plaintiff, instead of having a homestead right, owned the fee. This was error. The court ought to have defined the rights of the settler in such homestead, and left the question to the jury to determine his interest and from such interest the liability of the company. Just what that interest would be is a question of fact in each case, to be determined by the jury, and depends upon the improved condition and the length of time the homestead has existed, and all other facts that go to make up its value. Its value may be much less than if the settler owned the fee of the land, or it may be substantially the same or a little less than its actual value including the fee. "We are therefore of the opinion that the instructions of the court are erroneous, and recommend that the cause be reversed, and a new trial ordered." The above case seems to be in point here, and is to our mind supported by sound reason.

It is therefore ordered that the judgment of the court below be reversed, and the cause remanded for a new trial. All the Justices concur.

CITIZENS' BANK OF WAKITA v. GARNETT et al.

(Supreme Court of Oklahoma. May 15, 1908.)

1. TRIAL—DEMURRER TO EVIDENCE.

If there is some evidence fairly tending to establish each fact necessary to the defense of the defendant in an action on a promissory note, a demurrer to such evidence should be overruled by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 346-354.]

2. SAME — INSTRUCTIONS—APPLICABILITY TO PLEADINGS AND EVIDENCE.

It is not error for the court to refuse to instruct the jury upon an issue that is not pre-

sented by either the pleadings or the evidence in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 584-586.]

3. SAME—REQUESTED INSTRUCTIONS COVERED BY INSTRUCTIONS GIVEN.

It is not error for the court to refuse to give a requested instruction upon a proposition when the same proposition is submitted to the jury by another instruction of the court, and when the instructions of the court, taken as a whole, fairly submit to the jury all the law applicable to the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

4. BILLS AND NOTES—TITLE OF ASSIGNEE OF NONNEGOTIABLE NOTE.

The assignee of a nonnegotiable note acquires only the title of the assignor subject to all the equities and defenses which the makers of the note would have against the same in the hands of the payee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 751.]

(Syllabus by the Court.)

Error from District Court, Grant County; James K. Beauchamp, Judge.

Action by the Citizens' Bank of Wakita against J. E. Garnett and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Sam P. Ridings, for plaintiff in error.
Charles West, Winfield Scott, C. H. Parker, and P. C. Simons, for defendants in error.

HAYES, J. The Citizens' Bank of Wakita brought this action in the district court of Grant county against J. E. Garnett and W. O. Jones on a promissory note payable to the order of W. E. Lemon for the sum of \$1,380, executed by J. E. Garnett as principal and W. O. Jones as surety, and indorsed without recourse by W. E. Lemon to the Citizens' Bank of Wakita. Plaintiff's petition in the court below contained the usual necessary averments of a petition in an action on a promissory note. Defendants by their answer admit the execution of the note sued on, but allege that the circumstances under which said note was executed by them to W. E. Lemon were that J. E. Garnett, prior to the execution of the note, had been one of the stockholders and officers of the Citizens' Bank of Wakita, and that he had sold his stock or a great portion of the same to W. E. Lemon; that at the time of the sale there was held by the said bank a note executed by J. E. Koontz to it in the sum of \$2,570; that said note was an excessive loan made by the bank under the laws of the territory of Oklahoma; that at the time defendants executed to Lemon the note sued upon Lemon agreed with them that the plaintiff would transfer to defendant Jones the said J. E. Koontz note, allowing him to collect the same and apply the proceeds of the collection of it to the payment of the note sued upon in this action; that the execution and delivery of the note in this action to Lemon was upon the condition that the Koontz note should be delivered to Jones; that the plaintiff knew

of this agreement at and before the note sued upon was transferred by Lemon to it; that the Koontz note had never been delivered to the defendant Jones, or any one for him, and that Lemon had refused to deliver the same in accordance with the agreement without which the note sued upon was not to be binding upon the defendants. The case was tried before a jury and verdict returned and judgment rendered in favor of the defendants.

Plaintiff demurred to the defendants' evidence, which demurrer was overruled by the court, and this action of the court is the first alleged error discussed by plaintiff in its brief. It is admitted that the note sued upon is a nonnegotiable instrument. Plaintiff therefore took the note subject to whatever equities defendants had against the same in the hands of Lemon. There was abundant testimony introduced by defendants to the effect that the note sued upon was executed by them to Lemon solely upon the condition that the Koontz note was to be delivered to them, and at the time of the execution of the note by them it was the understanding that it had been agreed by the officers of the plaintiff bank that the Koontz note should be delivered to Jones upon defendants executing a note to Lemon, and there is no controversy that the Koontz note has never been delivered to defendants. Plaintiff requested the court to instruct the jury as follows: "If you find that the defendants recognized the right of the plaintiff bank to take the note sued on herein and hold the same as a part of the property and assets of the bank before or without the said Koontz note being delivered to the said Jones, then the defendants are estopped and precluded from denying the effectiveness of the note sued on." Plaintiff attempted by this instruction to have the court submit to the jury the question of estoppel, but the court properly refused to give this instruction. No issue of estoppel is alleged in plaintiff's petition, nor is there any evidence in the record that presents such issue. It is true that two of the witnesses testified that, after the maturity of the note sued upon, defendants came to the bank and requested that the note be renewed. This evidence was competent for the purpose of contradicting the contention of defendants that there was never any delivery of the note sued upon except on condition that the Koontz note should be delivered to them by the plaintiff, but such evidence is not sufficient to support an instruction on estoppel, for the reason that, if a plea of estoppel had been plead by plaintiff in its petition, it would not have been sufficient, for it to have shown only that defendants had requested it to renew the note, but it would have been necessary for it to prove that it was misled by such conduct and request of the defendants, to its injury, or that it was induced thereby to act and did act to its injury. 16 Cyc. 744; 1 Daniel on Negotiable Instruments, 859. The evidence does not disclose that the act

of the defendants in going to the bank and requesting a renewal of the note, which evidence was contradicted by the testimony of defendants, the plaintiff was induced to act or did in any way act upon same. On the contrary, the evidence discloses that it refused the request of defendants, and shortly thereafter instituted this suit. The issue of estoppel is not presented by the pleadings nor by the evidence in this case, and the court did not err in refusing to give the instruction thereon requested by plaintiff.

Plaintiff cites *National Bank v. Dosbaugh*, 11 Okl. 664, 69 Pac. 797, as supporting its right to this instruction. That was an action brought by Dosbaugh's Bank against the Guthrie National Bank for a balance on a draft drawn by H. H. Hagan in favor of Dosbaugh's Bank on the Guthrie National Bank. Before accepting the draft and advancing any money thereon, the Dosbaugh Bank sent a message to the Guthrie National Bank asking if Hagan's check for \$10,500 was good. The Guthrie National Bank answered that Hagan's check for the balance due Wilson was good. On the same day the president of the Guthrie National Bank wrote a letter to Wilson, in which he said that Hagan had made arrangements with the Guthrie National Bank to pay his check for the balance due Wilson on a cattle deal, the amount of which was not known to the Guthrie National Bank, but was about \$10,500. Then the draft drawn by Hagan on the Guthrie National Bank for the sum of \$10,268.40 was presented to Dosbaugh's Bank, the letter from the president of the Guthrie National Bank was exhibited to the officers of Dosbaugh's Bank, and Wilson and Hagan made statements to the officers of the bank to the effect that the draft was the balance due Wilson by Hagan, and, upon such statements, letter, and message from the Guthrie National Bank, the Dosbaugh Bank paid the draft. The court held that the Guthrie National Bank was estopped by its message and the letter of credit to Hagan from denying the right of Hagan to check on it for the amount of said draft, and correctly so, for the reason that Dosbaugh's Bank by such representations had been induced to act thereon and to part with its property. But the evidence in the case at bar does not prove or tend to prove that the plaintiff was induced to part with any of its property, or to change its position in any way to its injury by reason of defendants' requesting an extension of their note.

Plaintiff further requested the court to instruct the jury as follows: "If you find that the consideration for the giving of the note sued on was the extinguishing of the liability of Garnett and Lemon on the Koontz note, and that such liability has been extinguished, then your verdict must be for the plaintiff." The court refused to give this instruction as requested, but instructed the jury as follows: "You are instructed that if you find that the note sued on herein was trans-

ferred to the said bank together with other money, or moneys and notes, by certain stockholders of the bank for the purpose of replacing and taking up said note given by the said J. A. Koontz to said bank, and not upon condition that the Koontz note was to be delivered to Jones, and that thereafter or thereupon a controversy or disagreement arose between the said stockholders who helped to replace and take up said note, as to which should hold and collect the said Koontz note, then, and in that event, the said disagreement or controversy between said stockholders can in no way affect the right of the plaintiff to recover on the note sued on herein." The instruction given by the court fairly submitted to the jury the issue contended for both by plaintiff and defendants. Plaintiff contends that the consideration for which the note was given and transferred to the bank was a release of Lemon and Garnett from their liability as stockholders of the bank on the J. A. Koontz note on account of same having been an excessive loan, and that the disagreement relative to who should have possession of the Koontz note arose between the stockholders after the execution and delivery to the bank of the note sued upon, and after the Koontz note had been withdrawn from the papers of the bank. The instruction given by the court presented the same proposition contended for in the instruction requested by plaintiff and refused by the court, and it is a well-settled rule of law that the refusal of the court to give an instruction which properly states the law is not reversible error, if the same proposition of law is presented by the court in other instructions, and the whole of the instructions of the court clearly states the law applicable to the issues in the case. *Atchison, Topeka & Santa Fé Ry. Co. v. Marks*, 11 Okl. 82, 65 Pac. 906. The court further instructed the jury as follows: "You are further instructed that the Citizens' Bank of Wakita is not an innocent purchaser of the note sued upon herein, and that any defense which the defendants herein may have against the payee, W. E. Lemon, is a good defense as against said bank." Plaintiff excepted to this instruction, and assigns it as one of the errors for which a reversal is asked. There is no dispute that the note in controversy is a nonnegotiable instrument, nor is there any dispute in the evidence that the note was acquired by the bank from W. E. Lemon, who is the payee in the note, and who indorsed the same without recourse to the bank. It is an elementary proposition of law that the assignee of a nonnegotiable instrument acquires only the title that the assignor had. The plaintiff took the note in this action from Lemon subject to all the equities and defenses against it in favor of the defendants that the defendants would have had if the note had remained in the hands of Lemon, and the fact that the note is nonnegotiable was notice to plaintiff of such equities and defenses. The

instruction of the court that the plaintiff was not an innocent purchaser was not error. The case was submitted to the jury upon the evidence and the instructions of the court which fairly presented to the jury all the propositions of law raised by the pleadings and the evidence; and, since we find no error in the record, the judgment of the trial court is affirmed.

WILLIAMS, C. J., and DUNN, TURNER, and KANE, JJ., concurring.

HUNTER REALTY CO. et al. v. SPENCER et al.

(Supreme Court of Oklahoma. May 14, 1908.)

1. APPEAL—REVIEW—FINDINGS BY COURT.

In a cause tried to the court, a general finding includes the finding of all facts necessary to constitute the claims of the party in whose behalf the judgment is rendered, and upon appeal the court will not review the evidence upon which such finding is made to determine its sufficiency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3969.]

2. DEED—DELIVERY.

No title will pass by a deed which is not delivered by the grantor or some one duly authorized by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 118.]

3. ESCROW—PERFORMANCE OF CONDITIONS.

Where possession of an escrow is obtained, without performance of the condition upon which a delivery to the grantee was to be made, no title passes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Escrows, § 11.]

4. PRINCIPAL AND AGENT—CONTRACTS—PUBLIC POLICY—VALIDITY.

Where an agent acts for both parties in making a contract requiring the exercise of discretion, the contract is contrary to public policy, and voidable in equity upon the application of either party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 588.]

(Syllabus by the Court.)

Error from District Court, Garfield County; John L. Pancoast, Judge.

Action by Martha Spencer and others against the Hunter Realty Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

The pleadings and proof in this case disclose that on March —, 1903, Martha Spencer, defendant in error, plaintiff below, was the owner of a quarter section of land in Garfield county where she lived; that Daisy Hutto was the owner of lots 1 and 2, block 44, in Okeene, Blaine county, upon which was built a hotel, in which she lived; that Thomas B. Cooper lived near Mrs. Spencer in Garfield county, and owned 180 acres of land in Texas county, Mo.; that Harry N. Horner and J. E. McCarty were partners in the real estate business in Enid, Okl., under the name of the Hunter Realty Company. That about that time Martha Spencer listed her farm, worth

\$3,500, for sale with the Hunter Realty Company on commission; that shortly thereafter Horner went to the home of Mrs. Spencer, and told her that he had a good trade for her, and got her to go with him to Okeene to see the hotel property belonging to Daisy Hutto, worth some \$1,500, which he said he could trade her farm for, and which he represented to be worth \$5,500, and that it was leased for \$75 per month, and one month's rent would be due in a few days; that she went with Horner, and after a hurried inspection of the hotel property returned with him to Enid. Late that night she was induced by him to sign a contract binding herself, in substance, in consideration of a transfer of the hotel property from Daisy Hutto to herself, together with its fixtures and furniture, as per invoice thereto attached "and a lease to D. A. Skillen until January 1, 1904, at the rate of \$75 per month rent, and assignment of \$1,500 insurance," she would convey her farm by warranty deed, "except a mortgage of \$500, which first party assumes," and first party "agrees to pay for second party debts to the amount of \$460 in cash, and the second party agrees to give to the first party a mortgage on lots one and two, block forty-four and the furniture in the hotel * * * as security for the debts and \$500.00 evidenced by a mortgage on the farm herein described, total of mortgage to be \$960, on the Okeene property, with interest, etc., * * * and to pay all taxes, assessments or impositions that may be legally imposed on said land subsequent to the year 1903." This contract was afterwards signed. "Daisy Hutto, by Her Attorney in Fact, Harry N. Horner;" but the same appears to have been done beyond the scope of his authority, and without her knowledge or consent. It was represented by Horner that this contract was to bind the trade until her brother came up from Caddo county to investigate and advise her in the matter. Her acknowledgement was taken thereto by J. E. McCarty, the other member of the firm of Hunter Realty Company. At the same time, and with the same understanding, she executed a deed conveying her land to Thomas B. Cooper, and both documents were left with said Horner. A few days after, Martha Spencer and her brother went to the office of the Hunter Realty Company, and demanded of McCarty to see the contract and deed. He told them that they were in the bank, and could not be obtained until Horner returned, which would be the following Sunday. She told McCarty to tell Horner when he got back to go no further with the trade, which McCarty agreed to do. That afternoon (March 26th) Horner put the deed on record. They came back in a day or two, and Horner was there. They again demanded the deed, stating that she did not want to trade for the hotel. Horner informed her that she could not get it; that he would not give it up; that the trade had gone too far, and that the

deed had been recorded. In the meantime, while Horner was acting as the agent of Mrs. Spencer, but unknown to her, he was trying to manipulate a three-cornered trade, and had arranged with Daisy Hutto to exchange her hotel property for 180 acres of land, belonging to Thomas B. Cooper, in Missouri, and \$1,000 "to boot," \$100 of which was to go to Horner as commissions, she to deed her property to Mrs. Spencer. With this understanding said deed was placed by her in escrow in the Citizens' Bank at Enid, under the terms of an instrument of writing as follows:

"Enid, O. T., March 30, 1903.

"This deed is deposited by Daisy Hutto to be held by this bank until the abstract for 180 acres of land, S. ½, N. E. ¼ and N. ½, S. E. ¼ and a part Sec. 26, Twp. 30, R. 11 is brought down to date and approved by her agent, A. M. Horner, of Lawndale, and returned to the bank with instructions, then to be turned over to Harry N. Horner upon the delivery of a deed to above described land and \$900 in cash. [Signed] A. M. Horner, Attorney in Fact for Daisy Hutto. Harry N. Horner."

Indorsed across the face: "March 30, 1903, I acknowledge receipt of the deed herein described. [Signed] A. M. Horner."

In the meantime, and as his agent, Horner arranged with Thomas B. Cooper to exchange his land for that of Mrs. Spencer, by receiving her deed, obtained as aforesaid, and executing a deed to his land to Daisy Hutto, and giving her \$1,000 "to boot." With this understanding his deed, mentioned in the escrow, was turned over to A. M. Horner, agent of Daisy Hutto, that same day, for the purpose of bringing down the abstract to show title in her, and his receipt indorsed thereon. Cooper's abstract proving unsatisfactory, A. M. Horner, agent for Daisy Hutto, wrote: "Cunningham, Kan. April 22, 1903. Citizens' Bank, Enid, Okla. I have returned to Harry N. Horner abstract and quitclaim deed to 180 acres of land in Texas county, Missouri, after having had the abstract to same examined, and find the title not satisfactory. Please return to me the deed to property in Okeene, O. T., from Daisy Hutto to Thomas B. Cooper, and oblige, yours respectfully, [Signed] A. M. Horner." To the letter returning abstract Horner replied: "Hunter Realty Co. Enid, Okla., April 23, 1903. A. M. Horner, Esq., Lawndale, Kan. Dear Sir: Your letter received containing abstract. Now this deal was made and you accepted the deed to the Mo. land. Of course Mr. Cooper guarantees the title, and he is amply able to make it all good, and the title to the hotel has passed to a third party, and I cannot see at this time how all these changes can be as they once stood. A. cannot call the deal off. I will see Mr. Cooper as soon as possible. Yours truly, [Signed] Harry N. Horner." About the time he received the letter returning the abstract, Horner went to the Citizens' Bank of Enid, and in violation

of the escrow surreptitiously obtaining the deed from Daisy Hutto to Mrs. Spencer, and placed the same on record, leaving at the same time a check for the \$900 mentioned in the escrow, but which was never accepted by Daisy Hutto. As a matter of fact he received \$1,500 from Cooper on this deal, \$1,000 of which was to be paid to Daisy Hutto, of which she was to give him \$100, as commission. He retained, by this arrangement, said \$100, and \$500 from Cooper, making \$600 net to him, as commission paid by the two.

Shortly before this time Horner was having trouble with Mrs. Spencer, who was pressing him to explain why he had placed her deed on record, and wanted to get it back. He told her the hotel was standing open and vacant. Any one could steal what they wanted out of it; that she had better close the deal and take the hotel, or else she would gain nothing; that he would sell it to advantage for cash; that she would thereby avoid a lawsuit; that he wanted \$150 from her for commission, but finally agreed to take \$100; that just as soon as she signed the mortgage on the hotel property, she would get a deed to it; that she owed Cooper for paying off the \$500 mortgage on the farm, and for paying off the one to Fleming for \$150, and prepared a mortgage for \$650 on the hotel property for her to sign, payable to J. E. McCarty, which she did, but nowhere in the record does it appear that Cooper ever paid said mortgage, as represented, or assumed its payment, or that Mrs. Spencer ever got a deed to the Hutto property. Horner further claimed that certain taxes remained unpaid, whereupon she was induced to sign the following: "Hunter Realty Company. Farm and City Property. Farm Loans a Specialty. Enid, Oklahoma, April 17, 1903. This agreement, made and entered the day and date above written by and between Martha Spencer, first party, and Harry Horner, a partner in the Hunter Realty Company, representing Thomas B. Cooper and Daisy Hutto, second parties, witnesseth: That in consideration of a full and complete settlement made by all parties hereto, that in exchange of property, that Martha Spencer is to assume and agrees to pay the taxes for the year 1902 on L. 1 and 2, B. 44, city of Okeene, known as 'Okeene Hotel,' and that the second parties, through their agent, agrees to assume and to pay the taxes on the S. W. ¼ Sec. 17, Twp. 23, N. R. 4 W. I. M. and pay a mortgage on the land herein named for \$150.00 held by O. J. Fleming. [Signed] Martha Spencer. Harry N. Horner."

Nowhere in the record does it appear that possession of any of the property purported to be traded for changed hands. After the abstract of the Cooper land had been rejected by Daisy Hutto she tendered back a quitclaim deed thereto, and upon the same being refused, on May 4, 1903, brought suit against all parties in interest to clear her

title, which, by consent of all parties, was, on October, 21, 1903, taken on a change of venue to the district court of Garfield county. On May 11, 1903, Martha Spencer having filed her suit in the district court of Garfield county against all parties in interest for the same purpose, by order of court these cases were consolidated, and tried to the court and resulted, in a decree on May 25, 1905, granting Daisy Hutto and Martha Spencer sweeping relief, in effect, cancelling the deeds of Spencer to Cooper and Hutto to Spencer, and decreeing that Martha Spencer "pay to Thomas B. Cooper the sums of money paid upon liens and mortgages against her land, amounting to the sum of \$273.44," from which decree Harry N. Horner, J. E. McCarty, and Thomas B. Cooper have appealed, and the same is before us on case-made.

Manatt & Sturgiss and Roberts & Curran, for plaintiffs in error. J. M. Dodson, for defendant in error Spencer. C. C. Calkins, for defendant in error Hutto.

TURNER, J. (after stating the facts as above). The principal contention of plaintiffs in error is that the trial court erred in overruling their motion for a new trial, and under this head contend that the judgment is contrary to the law and the evidence. Let us see how this is. There was a general finding in this case by the trial court in favor of the defendants in error, plaintiffs below. When this is the case, the rule is, as laid down in the syllabus in *Brewer v. Black*, 5 Okl. 57, 47 Pac. 1089: "A general finding includes the finding of all necessary facts to constitute the claim of the party in whose behalf the judgment is rendered; and upon appeal the court will not review the evidence upon which such finding was made, to determine its sufficiency." See, also, *Meyer Bros. Drug. Co. v. Kelley*, 5 Okl. 118, 47 Pac. 1065.

It goes without saying that Horner was guilty of the grossest fraud, while acting as the agent of Martha Spencer, to induce her to believe that it was to her interest to trade her farm, worth \$3,500, for the hotel property of Daisy Hutto, worth \$1,500, and agree to give her a mortgage thereon for \$960, \$460 of which was to reimburse her for paying certain indebtedness of Mrs. Spencer. She had a right to and did rely upon his judgment in the matter, and executed a deed to Cooper with the understanding that the same was not to be delivered until she could be further advised by her brother. It also goes without saying that, when she later visited Horner's office and left instructions for the sale to be proceeded with no further, the subsequent recording of her deed by Horner passed no title to Cooper, for the reason that no title will pass by a deed which is not delivered by a grantor or one duly authorized by him. *Fitch v. Bunch*, 30 Cal. 209; 1 Devlin on Deeds, §§ 261, 262. Neither did the title pass from Daisy Hutto to Mrs. Spencer for the reason

that the terms of the escrow were not complied with. 1 Devlin on Deeds, §§ 322, 323; *Hogueland v. Arts*, 113 Iowa, 634, 85 N. W. 818; *Fitch v. Bunch*, supra. It follows that the minds of these parties did not meet, and that their respective deeds constituted a cloud upon their respective titles.

But, independent of anything we have said, it is apparent from the record that Harry N. Horner and J. E. McCarty, partners doing business as the Hunter Realty Company, were acting as agent for all concerned in this "triangular transaction." In fact, Horner expressly admits such to be the case, when he testifies: "Q. You were agent for Daisy Hutto in this transaction, were you? A. Yes, sir; for them all, Mrs. Spencer, Daisy Hutto, and Cooper." That being true, this entire transaction, independent of the question whether any of the parties thereto were injured, was against public policy, and voidable in equity at the suit of any of the parties thereto.

In *Am. & Eng. Enc. of Law*, p. 1073, it is said: "When an agent acts for both parties in making a contract requiring the exercise of discretion, the contract is voidable in equity upon the application of either party. * * *"—citing authorities. In *Ramspeck v. Pattillo*, 104 Ga. 772, 30 S. E. 962, 42 L. R. A. 197, 69 Am. St. Rep. 197, the court, quoting approvingly from *Farnsworth v. Hemmer*, 1 Allen (Mass.) 449, 79 Am. Dec. 756, say: "It is of the essence to his [the agent's] contract that he will use his best skill and judgment in promoting the interest of his employer. This he cannot do where he acts for two persons whose interests are essentially adverse. He is therefore guilty of a breach of his contract. Nor is this all. He commits a fraud on his principals in undertaking, without their assent or knowledge, to act as their mutual agent, because he conceals from them an essential fact, entirely within his own knowledge, which he was bound, in the exercise of good faith, to disclose to them. *Story on Agency*, § 31; *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198-204; *Pugsley v. Murray*, 4 E. D. Smith (N. Y.) 245; *Rupp v. Sampson*, 16 Gray (Mass.) 398, 77 Am. Dec. 416. See, also, *Mechem on Agency*, §§ 66, 67."

In *McKinley v. Williams*, 74 Fed. 94, 20 C. C. A. 312, the court said: "To permit the agent of a vendor to become interested, as the purchaser or as the agent of a purchaser, in the subject-matter of the agency inaugurates so dangerous a conflict between duty and self-interest that the law wisely and peremptorily prohibits it. An agent of a vendor, who speculates in the subject-matter of his agency, or intentionally becomes interested in it as a purchaser, or as the agent of a purchaser, violates his contract of agency, betrays his trust, forfeits his commission as agent, and becomes indebted to his principal for the profits he gains by his breach of duty"—citing a number of authorities.

In *N. Y. Central Ins. Co. v. Nat. Protection*

Ins. Co., 14 N. Y. 91, Mr. Chief Justice Denio, speaking for the court, says: "It has been settled, by a long course of adjudications in the courts of equity, that a trustee or agent of one person cannot make a valid contract respecting the subject-matter to which the trust or agency relates, where he has a personal interest. His constituent, it is said, is entitled to have all his skill and judgment employed in his service, but if he is himself the other party to the contract, the utmost which could be expected from a very honest man would be the ordinary fairness of an umpire. * * * The courts of this state have followed the principle of these cases with great consistency, and the rule may be considered perfectly well settled. *Torrey v. Bank of Orleans*, 9 Paige, 663; *Van Epps v. Van Epps*, Id. 237; *Hawley v. Cramer*, 4 Cow. 736; *Bostwick v. Adkins*, 3 N. Y. 53. * * * The precise case of one person assuming to act as the agent of both parties has been considered as within the rule. *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198; *Story on Agency*, § 211; *Paley on Agency* (by Dunlap) 33, and note 3; *Ex parte Bennett*, 10 Ves. 381."

In *Blood v. Le Serena L. & W. Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252, the court say:

"That a broker cannot represent both parties to a contract of sale, in which discretion, judgment, and skill had to be exercised by him, unless they have knowledge of his double capacity, and consent to be so represented, and that a party led unwittingly into a contract by means of such double agency may avoid the contract by methods suitable to the circumstances of the case are propositions not to be denied. *Empire State Ins. Co. v. Am. Cent. Ins. Co.*, 138 N. Y. 446, 34 N. E. 200, and cases cited; *Cassard v. Hinman*, 6 Bosw. (N. Y.) 8; *Hunsaker v. Sturgis*, 29 Cal. 142; *Davis v. Rock Creek Co.*, 55 Cal. 359, 36 Am. Rep. 40.

In *Black v. Miller*, 71 Ill. App. 344, the court, quoting approvingly from *Story on Agency*, § 211, says: "Hence, it is well settled that an agent employed to sell cannot become the purchaser, and an agent employed to buy cannot himself be the seller. And upon the same principle it is held that a contract, made by one who acts as the agent of both parties, may be avoided by either principal. * * * The question in such cases does not turn upon the point whether there was an intention to cheat, or whether the purchaser has suffered an injury. It is upon the ground of public policy that the law declares such a purchase fraudulent. * * * And for that reason our Supreme Court has repeatedly held that an agent cannot, either directly or indirectly, have an interest in a sale of property of his principal which is within the scope of his agency, and that it is immaterial in such case that no fraud was actually intended."

Mechem on Agency, § 66, says: "An agent owes to his principal a loyal adherence to his

interests, and it would be fraud upon the principal, and would contravene the public policy, to permit an agent, without the full knowledge and consent of his principal, to enter into a relation involving such a duty, when his allegiance had already been pledged to one having adverse interests * * *—citing authorities.

It follows that the decree of the lower court must be affirmed, and it is so ordered. All concur.

(21 Okl. 574)

CORDRAY v. MORGAN.†

(Supreme Court of Oklahoma. May 14, 1908.)

1. HOMESTEAD—TITLE IN HUSBAND.

Under the law as it existed in the territory of Oklahoma prior to the passage of the act of March 15, 1905 (Sess. Laws 1905, p. 255, c. 18), the title or ownership to the property used by the family as a home to acquire the status of a homestead was required to be in the husband, as he was declared to be the head of the family. If it was in the wife, it was not a homestead, though occupied by the family.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 23.]

2. SAME—CONVEYANCE—TITLE IN WIFE.

Where in 1901 the husband by quitclaim deed conveyed the homestead to his wife and abandoned her in 1902, and the wife and children shortly removed from the land, which was thereafter occupied by tenants, his sole occupancy of the land during 1905 and prior to March 28th of that year would not impress it with the homestead character, or re-establish in him any such interest as would render it necessary to convey that he join in his wife's deed executed after the passage of the act of March 15, 1905 (Laws 1905, p. 255, c. 18), above referred to, which reserved the homestead to the use of the family without reference to whether the title or ownership was in the husband or wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homestead, § 332.]

(Syllabus by the Court.)

Error from District Court, Canadian County; C. F. Irwin, Judge.

Action by J. W. Cordray against H. W. Morgan. Judgment for defendant, and plaintiff brings error. Affirmed.

This was a suit brought in the district court of Canadian county by John W. Cordray against H. W. Morgan for the purpose of quieting title in plaintiff to the northwest quarter of section 15, township 11, range 8 W., a tract of land situated in that county. The facts out of which the controversy grows are substantially as follows:

Plaintiff secured title to this tract of land as a homestead from the government, and occupied it with his wife as the home of the family to July, 1902. In the month of May, 1901, he executed and delivered to his wife, and had the same entered of record, a quitclaim deed to the land. A consideration of \$400 was expressed therein, but this was the amount of the mortgage on the land she assumed and agreed to pay. This was the only consideration. A year from the following July, in order to avoid trouble which he was

having, he left Canadian county, going to California, where he remained until February, 1903, when he induced his wife to visit him in the city of South McAlester, Ind. T., at the home of her sister, and in whose care she had placed their children in September, 1902. After plaintiff left in July, 1902, his wife the following September sold the personal property on the farm, applying the proceeds to the payment of plaintiff's debts, approximating \$2,000, rented the land to a tenant by the name of Hill, and afterwards by a written lease, dated November 7, 1904, rented the premises to one S. G. Bradley, the term of said lease being from the 1st day of September, 1904, to the 1st day of September, 1905, and Bradley went into possession of the farm under this lease. During the term of plaintiff's absence he returned on one or two occasions for an interval of a few days, when he visited the farm occupied by the tenants of his wife, though he also claimed them as his own. November 12, 1902, his wife instituted a suit for divorce against him, which was granted by the district court of Canadian county February 23, 1903. After leaving the farm Mrs. Cordray went out to service for the purpose of earning money to maintain herself and the children. Plaintiff returned to the place in January or February, 1905, found in possession the tenant Bradley, and some time prior to, or on or about March 28, 1905, Bradley removed from the land and plaintiff occupied it. We have been referred by counsel to the case of Cordray v. Cordray, not at this time published in the official reports, which shows that service was secured on plaintiff by publication, and that the cause was tried and judgment rendered in the district court of Canadian county on February 23, 1903; that on the 25th day of April, 1905, the plaintiff in this case appeared in the district court of Canadian county and filed his motion to vacate the judgment and decree of the court for the reason that the court was without jurisdiction of the person of defendant because of defects in the service. The district court overruled the motion, but on appeal the Supreme Court reversed it, and held the judgment granting a divorce void for want of jurisdiction over the defendant in that case. After the divorce was granted, and in September, 1903, Mrs. Cordray was married to a man by the name of Hand, moving to and living with him in Caddo county. On the 28th day of March, 1905, Mrs. Cordray, as May Hand, gave a warranty deed to the tract of land above described to the defendant, H. W. Morgan, receiving from him in consideration thereof \$200 cash and notes, making a total consideration of \$4,000. Thereafter, and on the same day, he procured a team, drove to the farm which up to that time he had known by reputation only, and found plaintiff there on the place in possession.

On the trial of this cause plaintiff introduced a paper purporting to be an instrument

† Rehearing denied May 10, 1909.

establishing in his wife a trust of the land for her benefit and that of himself and children. This instrument is as follows: "May 28, 1901. El Reno, Oklahoma Territory, Canadian County. Contract between John Wesley Cordray, the first part, Sallie May Cordray, the second part. John Wesley Cordray, the first part agrees to deed to the second part the northwest quarter, section fifteen, town seven, range eight, without no consideration whatever except four hundred dollars mortgage on the west eighty acres which we both agreed to and split the best we knew how. The first part also agrees to not sell or offer the farm for sale. The second party agrees to hold the northwest quarter of fifteen T seven, R. eight for a home for John Wesley Cordray and Sallie May Cordray and Ina May Cordray and Birtha ——— Cordray, and never offer said land for sale and also agrees to listen no more what Lizzie Thomas says to you and also agrees to rent the farm and go west until further changes takes place here, the second part also agrees if any change be made whatever, the northwest quarter fifteen T. seven, Range eight shall fall back to John Wesley Cordray and Ina May Cordray, and Birtha ——— Cordray, the second part also agrees that there was no consideration paid on the land whatever, except four hundred dollars mortgage on the west eighty acres. John Wesley Cordray.

her
[Seal.] Sallie X Cordray. [Seal.] Witness:
mark.

F. L. Bonham. Ben Hudson."

Plaintiff and Ben Hudson both testified to the execution of this instrument. The testimony of Mrs. Cordray in reference to the reason the deed to the farm had been made to her by her husband was as follows: "He gave it to me for mine and their [the children's] support. When he left he said he never intended to return to this country. He never aimed to come back." That she sold the personal property, including the household furniture, on the place, and went to work by the week to support the family. That plaintiff sent some money to the children, who were with her sister, but not enough to support them. That she paid the interest on the mortgage, and had paid the taxes on the place and supported herself and the children during all the time of plaintiff's absence. In reference to the trust instrument and the evidence given by her husband and the witness Ben Hudson she testified as follows: "Q. Will you examine that, Mrs. Hand, and state if you ever signed any such instrument as that? A. No, sir; never saw that before until to-day. Q. Is that your signature? A. It is not. Q. You heard the testimony of Ben Hudson this morning? A. Yes. Q. Heard the testimony he gave in reference to your stopping at his house with Mr. Cordray and signing this? A. Yes, sir. Q. Did you stop at his house that day? A. No, sir; and we did not go within three miles

of Mr. Hudson's place. Q. Do you remember the time you came to town? A. Yes; we came to town about 8 o'clock that morning, and believe we got back about 7 o'clock. It was not dark yet. I believe it was between 6 and 7. Q. Ask you to state whether or not you was ever up there that day? A. No, sir; never was. Q. Were you there that day? A. No, sir. Q. Were you there any other day when this instrument was produced? A. No, sir; it was never mentioned, and I did not know that Mr. Hudson knew that I had a deed to the place until to-day." The testimony of the wife and her sister both were to the effect that at the time plaintiff was at South McAlester in February, 1903, he said that he was glad that he had deeded her the place, and that if he had another one he would deed it to her for support of herself and children, and that he never intimated that he laid any claim whatever to the place or expected to return to it. In the several letters written by plaintiff, which appeared in the record, he nowhere mentions any claim which he made upon the land or in the land, although in one of them dated February 11, 1903, he states that his wife told him that she was suing him for divorce. This information being given him at the time his wife visited him at his instance at South McAlester, still it is not shown that he took any steps to protect any interest he still claimed in the land, nor is it shown that he asserted he had any.

When Morgan went to the place he testifies he first heard of the alleged contract. Cordray then told him of his claim to the land under it, stating that the same was with his papers with Judge Lowe, and giving Morgan permission to call there and inspect it. He told Morgan that his wife had no right to convey it or sell it. Morgan called on Judge Lowe, who was counsel for Cordray, but did not see the contract, and Judge Lowe testified that he did not have it at that time, stating that Morgan asked to see the divorce papers and did not ask him for the contract. Morgan further testified that before purchasing the land he made a very careful inspection of the records at the recorder's office and ascertained that the title was in his grantor; that he never heard of any terms or agreement between Mrs. Cordray and her husband until the afternoon after the trade was made.

As the character of the connection of Cordray with the land after his return in January or February, 1905, will be material in determining the question of whether he had in fact any interest in the land at the time of its conveyance by his wife we will notice it. The trial of this case took place on the 13th day of March, 1906. Cordray testified: "Q. You were in possession, were you, on the 28th day of April last year? A. Yes, sir. Q. How long had you been in possession before that? A. In January when I started to live there. I was back there in August, 1904."

Witness Richardson testified: "Q. Do you know where he (Cordray) lived in April, May, and June last year? A. 1905? Q. Yes. A. Yes, sir; he was living on his place. Q. This land in question? A. Yes, made that his home. Q. How long had he been living there? A. I met him on the morning of the 11th of February, and he said he came from the place, was living there then, and was going to move there, and he went with me to Minco that day, and a few days afterwards I seen him there in the neighborhood again. Q. He was farming the place last year? A. He farmed part of it, and he worked with me some, and he was back to the place from time to time." Witness Erbar testified: "Q. Who has had possession of that place for the last two years, if you know? A. The last year Mr. Cordray has had possession of it. Q. And when did he have possession? A. If I am not mistaken, it was the 10th or 17th of February. I know it was awful cold when I first seen him." The testimony of his former wife in reference to the occupancy of the land by her husband is as follows: "Q. You knew your husband was at home on the farm when you made this deed to him, did you not? A. No, sir; I had been to the place about two weeks before I made the deed. Mr. Cordray was there, and I had rented the place to Mr. Bradley, and Mr. Cordray was there all dressed up and his hands in his pocket. Q. Did you make any inquiry whether he was there for any length of time or had been? A. No sir; I didn't make any inquiry." The defendant, Morgan, testified: "When I went to the place and found Mr. Cordray there claiming title to it of some kind, I came back and informed Mrs. Hand of that fact, and we agreed to let the matter rest until the title to the land was quieted." There is no evidence to contradict this or to show that any of his family at any time after his return occupied the place with him, or that it was used by the family as a home-stand. Morgan also testified that when he found Cordray there Cordray told him that he owned the place, and that it belonged to him, "and I told him that I would like to know how it belonged to him, and he said he got it in the opening and had a patent to it. I said: 'I understand that you got it in the run; but I see you have conveyed it to Mrs. Cordray when she was your wife, is not that true?' He then said, 'Yes,' and I said, 'Where does your title come in?' and he said, 'Well, the deed was that she was to keep the place and never deed it away,' or words to that effect."

Upon these facts the district court rendered a general judgment in favor of Morgan, the defendant, and against Cordray, and the cause is before us on proceedings in error.

Joseph G. Lowe and J. J. Carney, for plaintiff in error. Glitsch, Morgan & Glitsch, for defendant in error.

DUNN, J. (after stating the facts as above). Under the complicated relationship which has grown up between all the parties interested in this litigation, and in view of the conflicting and irreconcilable evidence given upon some of the material points involved, no decision which could be rendered by any court could be entirely satisfactory to it. It is one of the inherent limitations upon even the extended, far-reaching powers of a court that with all the aid skillful counsel can yield it, and after it has exercised its utmost ingenuity to ascertain the truth in a case of this character, there may still inherently lurk the suspicion that, notwithstanding the rules of evidence and law are all observed and vindicated, it is yet possible for the judgment to be incorrect. The time-honored haven into which appellate courts drift on disputed facts is in recognition of the rule so frequently enunciated, "that the trial court, having heard the testimony, seen the witnesses, and had the opportunity of determining, from their appearances and deportment and manner of giving their testimony upon the witness stand, who should be believed, and who should not be believed, and the evidence reasonably tending to support the conclusion of the court, its finding will not be disturbed here." *Jenks v. McGowan*, 9 Okl. 306, 60 Pac. 239. And in fact we are not able to say, after reading the record, that the trial court did not decide correctly; for unquestionably it had advantages superior to ours for learning the real truth, as it had before it the living witnesses, whom it could view face to face, while the record before us presents the evidence of the frank, honest witness with no greater clearness than it does that of the halting, shifty one, whose manner of delivering his statements clearly manifests the evasion or the falsehood practiced. The judgment of the court rendered was general in favor of defendant and against the plaintiff, and, like the verdict of a jury, will draw to it for its support, not only all of the things which are directly testified to and established by the evidence, but also all the logical deductions and inferences which may be properly drawn therefrom.

Our duty is to apply the law accordingly, and the initial proposition presenting itself in the case is, what, in fact, was Cordray's legal or equitable interest in the land? Did he in fact have any at the time the deed was made by his wife to Morgan? If he had no interest, then it will not be necessary for us to notice many of the questions which are raised and argued in the briefs of the parties. In the oral argument of counsel before the court the changed situation, brought about by the action of the Supreme Court in the divorce suit above mentioned, was presented and issue joined, and it became necessary to consider it in determining this question.

On February 23, 1903, Mrs. Cordray was granted what she and all parties doubtless

believed was a valid divorce. Acting upon this, she was married the following September to a man by the name of Hand. Cordray returned to Oklahoma in the first part of the year 1905, and in April began proceedings to have the judgment of divorce set aside. The district court denied his application, and the matter was pending in the Supreme Court at the time of the trial of this case in the district court in March, 1906. The Supreme Court, after the trial of the case at bar, reversed the district court in the divorce case, set aside, annulled, and held void the judgment recovered by Mrs. Cordray in her divorce suit, which necessarily dissolved the relationship which had arisen between herself and Hand, and she was once more Mrs. Cordray as effectually as if no divorce suit had been filed. *Cordray v. Cordray* (Okl.) 91 Pac. 781. Wilson's Revised and Annotated Statutes of Oklahoma for 1903, § 2985, is as follows: "The following property shall be reserved to the head of every family residing in the territory exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: The homestead of a family not in a town or city shall consist of not more than one hundred and sixty acres of land, which shall be in one tract or parcel, with the improvements thereon. The homestead in a city, town or village, consisting of a lot or lots, not to exceed one acre with the improvements thereon: Provided, that the same shall be used for the purpose of a home for the family." Section 3140 of Wilson's Revised and Annotated Statutes of Oklahoma for 1903 provides: "The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto." Under these statutes the placing of the title and ownership to a tract of land on which the family lived and which was used by them as their home in the wife at once deprived it of its homestead character, and rendered it subject, as all other property, to liens, forced sale, and the right of the wife to convey the same without the assent of her spouse. *McGinnis v. Wood*, 4 Okl. 499, 47 Pac. 492. It was not a homestead in legal contemplation, notwithstanding the fact that it was occupied and used by the family as a home, for the reason that title to a homestead could be in the head of the family only, and the husband was the head of such family. This continued to be the law of the territory until March 15, 1905, when the Legislature amended the section, and provided that: "The following property shall be reserved to every family residing in the territory, etc. First: the homestead of the family, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife." Sess. Laws 1905, p. 255, c. 18. This, as will be seen, amended the law so that the wife, who was not the head of the family, might hold

the title to the land on which the family resided, and it would still be a homestead. The deed to Morgan was made March 28, 1905, 13 days subsequent to the time when this law came into effect. Section 880 of Wilson's Revised and Annotated Statutes of Oklahoma for 1903 provides: "No deed, mortgage or contract relating to the homestead * * * shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced except to the extent hereinafter provided." Section 882 provides: "Where the title to the homestead is in the wife and the husband voluntarily abandons her, or from any cause takes up his residence out of the territory for a period of one year, she may convey, mortgage or make any contract relating thereto without being joined therein by him." As we have seen, prior to the passage of the act of March 15, 1905, the title to the homestead could not be in the wife. If the title to the home place was in the wife, it was not a homestead.

Now the question arises, construing the act of 1905 with the provisions of sections 880 and 882, and weighing in the terms of these statutes the undisputed facts shown in the record relating to the actions of Cordray, was it necessary at the time of the transfer from Mrs. Cordray to Morgan to have had the signature of the husband to this deed in order that a valid conveyance could be made? It is shown by undisputed testimony that in July, 1902, Cordray left the land and the territory for the purpose of avoiding trouble, stating, as his wife testifies, and it is not contradicted, that he never intended to return to it. His wife, relying on this statement, on his part, shortly sold the household goods and personal property on the farm, applied the proceeds to plaintiff's debts, placed her children with a relative, left the farm in the possession of tenants, and went to work at hotels and elsewhere to earn support for herself and her children. Cordray testified that he sent money to the party who had the children, to support them. His wife testified that she supported them, but nobody testifies that Cordray sent any money whatever to his wife, or that he aided her in any capacity. She told him, according to his letter, in the fore part of February, 1903, that she was suing him for divorce. He made no objections to this and no appearance, did not remonstrate with her, or endeavor to get her to go with him, or do anything to again create the relationship of a family between them, and, taking this testimony in conjunction with all the other evidence in the case, we come to the conclusion that his absence from his wife was an abandonment of her, and that under the provisions of section 882 she had a right to convey the land without his joinder in the deed. The quitclaim deed made by Cordray to his wife was in substantial compliance with the provisions of the Oklahoma statute relating to the conveyance

of real estate, and conveyed all the right, title, and interest that Cordray had in and to the land, and thereby completely divested it of its homestead character, and as it was never used as a homestead of the family after the passage of the act of March 15, 1905, and prior to the execution of the deed to Morgan, Cordray had no interest in the land which rendered it necessary for him to join with his wife in a deed for the conveyance of the same. It must follow from this, then, that it was of no consequence to him what the transaction was between his wife and Morgan, and that his possession of the land nor the character of the deed by which his wife held it nor the consideration received by her on its sale were all of no legal or equitable concern to him such as would give him a standing in court to require the annulment of Morgan's title. This being true, it will not be necessary to consider these propositions, although raised and argued in the briefs of the parties. Nor does the question of rescission enter into the matter, for, if Cordray was without interest, he has no standing to assail the contract or the arrangement made between his wife and her transferee. For the reasons assigned, we conclude, therefore, that the deed to defendant was valid and sufficient to convey the land without plaintiff joining therein.

The remaining question in the case is in reference to the judgment which was rendered by the trial court in giving defendant complete relief entitling him to the possession of the property. Plaintiff invoked the jurisdiction of a court of equity, and having done so, and if, having all parties before it, the court was authorized to grant and give complete relief, he is not in a position to complain of such action.

Finding no error in the judgment of the district court, the same is accordingly affirmed. All concur.

HOPPE HARDWARE CO. v. BAIN, Sheriff, et al.

(Supreme Court of Oklahoma. May 15, 1908.)

1. FRAUDULENT CONVEYANCES — PREFERENCES — KNOWLEDGE OF GRANTEE.

A failing or insolvent debtor may prefer one or more of his creditors, but if the arrangement by which he does so stipulates or provides a benefit for him, it is fraudulent on his part, and if the preferred creditors knew of the existence of other debts due by the failing debtor, they are charged with participating in the fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 504-506.]

2. SAME—EVIDENCE.

An insolvent debtor organized a corporation with a capital stock of \$7,000, and in payment of indebtedness due by him to his wife and brother-in-law, who knew of the existence of other debts, he had issued to them all the stock of the corporation except one share of the value of \$100, and transferred to the corporation by a bill of sale all of his assets of the value of about \$11,000 for a consideration of \$10,000, and by a collateral agreement the debtor was retained as president and manager

of the corporation at a salary of \$40 per month, and the corporation was to pay debts due by him to other creditors in the sum of about \$4,000. *Held*, that the transfer by the debtor of his assets to the corporation was fraudulent and void as to a creditor not assenting thereto.

(Syllabus by the Court.)

Error from District Court, Kay County; Bayard T. Hainer, Judge.

Action by the Hoppe Hardware Company against Dan A. Bain and C. O. Baker. Judgment for defendants, and plaintiff brings error. Affirmed.

This is an action in replevin, brought by the plaintiff in error (plaintiff below) against the defendants in error (defendants below) in the district court of Kay county, which resulted in judgment in that court for defendants. The material facts disclosed by the evidence in the case and involved in the consideration of the assignments of error are as follows: For a number of years prior to January, 1901, Fred H. Hoppe resided at Chillicothe, Mo. In January, 1901, he came to Blackwell, Okla., and purchased from W. R. Stapleton a stock of hardware for a consideration of \$7,600, and gave to Stapleton for said property real estate valued at \$4,200, \$500 in cash, and a note for \$1,400. Mr. Hoppe afterwards made payments on the note until the same was reduced to \$660. He continued to conduct the hardware business which he had purchased from Stapleton at Blackwell until May, 1902. At that time he was owing various wholesale houses and the First National Bank of Blackwell in the aggregate the sum of about \$4,000. He also owed Mary L. Hoppe, his wife, \$3,100, and Wm. A. Lockwood, his brother-in-law, \$3,600. He owed other indebtedness as surety on notes the exact amount of which the evidence does not disclose, and he owed a balance on his note to Stapleton. His stock of hardware at that time involved about \$11,000. He was in an insolvent condition, and his creditors were crowding him for payment on their accounts. He went to St. Louis in the month of May, 1902, to try to borrow money from Lockwood, his brother-in-law, with which to pay off the accounts of those who were urging him for payment. He took with him to St. Louis the invoice of his stock of goods which had been made by him in the preceding February, and a statement of the indebtedness he owed the various wholesale houses and the bank at Blackwell. Lockwood refused to advance him further money, for the reason that Mr. Hoppe was already indebted to him in a large sum which he had been owing him since 1889; but Lockwood proposed to Mr. Hoppe that if he would incorporate his business and give him (Lockwood) stock for what he already owed him, he would loan to the corporation the sum of \$3,000, which amount could be applied on the indebtedness Hoppe owed the wholesale houses and the First National Bank of Blackwell, and the remaining \$1,000 could be paid out of the proceeds of

the sales made by the company. Mr. Hoppe went to Chillicothe, Mo., and conferred with his wife about the matter, and finally it was agreed between Lockwood, Hoppe, and his wife that a corporation should be formed whose capital stock should be \$7,000; that Lockwood should take \$3,800 of this stock, and pay therefor \$200 in cash, and surrender to Hoppe the notes he held against him; that Mary L. Hoppe should take \$3,100 of the stock, and pay therefor by surrendering to Hoppe the note she held against him, and Mr. Hoppe should retain one share of the stock of the par value of \$100; and it was agreed between them there at that time, although this agreement was not made in writing, nor does it appear as a part of the bill of sale hereafter referred to, that Mr. Hoppe should be president and general manager of the corporation, and as such should continue in the management and control of the business and should receive a salary in the sum of \$40 per month, and that Mrs. Hoppe should be secretary and treasurer, and should receive as her salary the sum of \$10 per month. The corporation was organized. Hoppe executed a bill of sale to it, conveying his stock of goods for a consideration of \$10,000. This bill of sale was filed for record in the office of the register of deeds of Kay county shortly thereafter, and Mr. Hoppe notified his clerks of the change in the business, and also notified the bank at Blackwell and the various wholesale houses to whom he was indebted, but it does not appear that he gave any notice to W. R. Stapleton, or that W. R. Stapleton ever received any notice of the change in the business until some time thereafter. Lockwood sent to the corporation \$3,000, and the corporation executed to him its note therefor payable on demand. The debts due by Mr. Hoppe to the various wholesale houses and to the First National Bank of Blackwell were paid off by the corporation. Two small payments were made by Mr. Hoppe to W. R. Stapleton after that time. Stapleton, after making diligent efforts to collect the balance due on his note from Hoppe, brought suit thereon, and on December 18, 1903, recovered judgment in the total sum of \$726.85, and on the 2d day of February, 1904, he had an execution issued thereon and levied upon certain hardware claimed by the plaintiff in error. Plaintiff in error, on the 14th day of February, 1904, filed this action to recover the property from the sheriff who served the writ of execution. The case was tried before a jury, and upon motion of defendants a verdict was directed by the court in their favor, and the assignment of error complaining of this action of the court presents to this court for its consideration the only question in the case.

W. C. Tetrick, for plaintiff in error. J. W. Peery and H. S. Gurley, for defendants in error.

HAYES, J. (after stating the facts as above). Counsel for both parties to this suit have, we think correctly, admitted in their briefs that this case turns upon the proposition whether the act of Mr. Hoppe in organizing the Hoppe Hardware Company, a corporation, and in transferring to it his stock of merchandise for a consideration of \$10,000 recited in the bill of sale, and having 38 shares of the stock of the corporation issued to his brother-in-law, and 31 shares to his wife in payment of indebtedness due by him to them, when by a collateral secret agreement it was provided that he should be retained as president and manager of the corporation, and should receive a salary of \$40 per month, and that \$4,000 of his assets transferred by him to the corporation should be used in payment of his debts to certain of his creditors, is in law a fraud against W. R. Stapleton, who was one of his creditors at that time, and who did not assent to the transaction. There can be no question that Mr. Hoppe had the right to prefer his wife and Mr. Lockwood to his other creditors, and if his transaction had consisted only in organizing a corporation and in transferring all of his assets to it, and in having issued certain shares of stock to Mr. Lockwood and Mrs. Hoppe in payment of his debts to them, such act would not have constituted fraud, though it might have had the effect to hinder, delay, or defeat other honest debts owing by him to other creditors. Section 2778, Wilson's Rev. & Ann. St. 1903; Brittain-Smith & Co. et al. v. Burnham et al., 9 Okl. 522, 60 Pac. 241; Jaffray v. Wolf, 1 Okl. 312, 33 Pac. 945; Nix Halseil & Co. et al. v. Underhill et al., 8 Okl. 123, 56 Pac. 959.

Plaintiff in error contends that the case should have been submitted to the jury to find whether such transaction was made by Mr. Hoppe with fraudulent intent to hinder and delay his creditors; but it is the well-settled rule that fraud may arise as an inference of law, and that, when a conveyance is made under such circumstances that fraud exists as an inference of law, then it is the duty of the court to pronounce the conveyance in question void as if the fraudulent intent were directly proved. Lukins v. Aird, 6 Wall. (U. S.) 78, 18 L. Ed. 750. If the collateral and secret agreement made by Mr. Hoppe with Mr. Lockwood and his wife, which appears neither in the articles of incorporation nor in the bill of sale executed by him to the corporation, to the effect that he should be retained as president and manager of the corporation, and should continue in control and management of the business theretofore conducted by him, and that \$4,000 of the assets transferred by him to the corporation should be applied in payment of his debts to certain creditors, constitutes as a matter of law fraud against those of his creditors who did not assent to the transaction, then the action of the court in directing a verdict was not error. It is a well-

settled rule of the common law that a conveyance to the use of the grantor, or which purports upon its face to be absolute, when there exists a secret agreement creating a trust in favor of the grantor, or by which a benefit is reserved to him, is fraudulent in law and void as to creditors, without regard to the intent with which it was made. *Lukins v. Aird*, supra; *Robinson v. Elliott*, 22 Wall. (U. S.) 527, 22 L. Ed. 758. This rule of law was in force in the territory of Oklahoma as part of the common law at the time of this transaction. When the people in 1889 came from the different states into Oklahoma, they brought with them the rules of the common law as recognized and promulgated by the American courts. *McKennon v. Winn*, 1 Okl. 327, 33 Pac. 582, 22 L. R. A. 501. And by section 4200, *Wilson's Rev. & Ann. St. 1903 of Oklahoma*, it is provided that the common law, as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the general statutes.

In *Lukins v. Aird*, supra, the facts were that Aird, being indebted and subsequently having failed, conveyed to Spring certain town lots for the sum of \$1,200 in money, Spring agreeing at the time that Aird should have the use of two of the lots for one year free, and with the privilege to use them thereafter at \$100 per year so long as Spring did not desire to use them. Lukins, one of Aird's creditors, brought the action alleging the transaction was fraudulent, and praying that the conveyance be set aside and the property subjected to his claim. Mr. Justice Davis, who delivered the opinion of the court, said: " * * * A trust thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right—the right of possession—and gives to the debtor the beneficial enjoyment of what rightfully belongs to his creditors. * * * It makes no difference in the legal aspect of this case that the interest reserved was not of great value. It is enough that it was a substantial interest for the benefit of the grantor, reserved in a manner which was inconsistent with the provisions of the deed."

The same justice, in *Robinson v. Elliott*, 22 Wall. (U. S.) 523, 22 L. Ed. 758, said: "But the creditor must take care in making his contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract." In

that case the question before the court was whether a certain stipulation in a chattel mortgage by which it was provided that until default in payment of one of the notes secured thereby the mortgagor might remain in possession of the goods, wares, and merchandise and sell them the same as he had done theretofore, and supply their places with other goods, was fraudulent and vitiated the mortgage. The court held, notwithstanding it was provided by the statute of Indiana where that case arose that the question of fraudulent intent in all cases shall be a question of fact, that the court was the proper party to say whether the mortgage on its face was void.

The same rule is discussed in *Means v. Dowd*, 128 U. S. 273, 9 Sup. Ct. 65, 32 L. Ed. 429, in which case Mr. Justice Miller, speaking for the court, said: "The prevailing doctrine, however, is unquestionably that which we have stated: and its fundamental essence is that an insolvent debtor making an assignment, even for the benefit of his creditors, cannot reserve to himself any beneficial interest in the property assigned, or interpose any delay, or make provisions which would hinder and delay creditors from their lawful modes of prosecuting their claims."

In *McDowell v. Steele*, 87 Ala. 493, 6 South. 288, the court held that a failing or insolvent debtor might select one or more of his creditors and pay them in full, even though he thereby disables himself to pay anything to the others; but if the conveyance or arrangement, going beyond the limits of full payment or security, stipulates or provides, openly or secretly, for a benefit to the debtor, it is fraudulent on his part, and if the grantee or secured creditor knows of the existence of other debts left unprovided for, or has knowledge of facts calculated to put him on inquiry as to them, he is charged with participation in the fraud.

This rule was followed by the same court in the case of *Stephens v. Regenstien & Co.*, 89 Ala. 561, 8 South. 68, 18 Am. St. Rep. 156, in which case T. A. Stephens, a failing debtor, sold to B. F. Stephens, his brother, who knew of his failing condition, his stock of goods. B. F. Stephens, the purchaser, knew that the sale was being made by his brother for the purpose of preferring certain of his creditors, one of whom was his mother. It was agreed in the sale that T. A. Stephens, the vendor, should be placed in control and management of the business at a monthly salary of \$40. The court held that one of the direct results of the sale was that by the agreement a failing debtor secured for himself a paying employment, which, but for the sale, he could not have had, and that this benefit going to him rendered the transaction fraudulent.

The court held in *Robinson v. McKenna*, 21 R. I. 117, 42 Atl. 510, 79 Am. St. Rep. 793, that where a debtor who owed a merchant for groceries assigned to the merchant his wages

due and that might become due for a period of six months in payment of his account, with an agreement that the merchant was to continue to furnish the debtor with groceries and to give him eleven dollars per month to pay his rent, and also from time to time during six months to let him have such other sums as he needed out of his earnings, and apply the remainder to his old and running account, such contract was fraudulent and void. In that case, as in the case at bar, it was insisted that fraudulent intent is always a question of fact, but the court upon that proposition said: "While we do not question the general accuracy of this proposition of law, yet it is by no means absolute or without exception; for, while a fraudulent intent in the making of a conveyance is ordinarily a question of fact, yet it is not always so."

In *McDonald & Co. v. Hoover et al.*, 142 Mo. 484, 44 S. W. 334, the court held that a debtor has the legal right to prefer one of his creditors over another so long as he acts in good faith, but he has no right to pay one creditor in such a way that it not only secures that creditor, but places the surplus of his property over and beyond that security in the hands of such creditor to be applied by him in the payment of other debts of the debtor. And in *Ely & Walker Dry Goods Co. v. McLaughlin*, 78 Mo. App. 578, the court used the following language: "A secret trust for the benefit of the grantor, whether express upon the face of the conveyance creating the trust, or shown by proof aliunde, is void as to creditors, and while a debtor has the right to prefer one creditor above another, and thus discriminate in favor of one and against other of his creditors, he cannot delegate this privilege to a third party, and where he makes a conveyance conveying this delegation to his grantee, or where it is proved aliunde, the conveyance will be declared void as to creditors."

In the case at bar the transaction by which Mr. Hoppe preferred his brother-in-law and wife resulted, not only in accomplishing such preference by him, but by the agreement secretly made between them it resulted in giving to him a profitable employment, and, if such transaction is valid, also in placing \$4,000 worth of his assets in the possession of the newly formed corporation, to be distributed for the benefit of Mr. Hoppe in the payment of certain of his creditors. The effect of the transaction was that Mr. Hoppe applied approximately \$7,000 of his assets in making preferred payments to his wife and brother-in-law, and placed the remainder of his assets in the sum of about \$4,000 in the possession of the corporation beyond the reach of his other creditors. If the corporation, with or without collusion with Mr. Hoppe, had refused to pay out this \$4,000 worth of assets to Mr. Hoppe's creditors, and this contract were valid, the effect would have been to have enabled Mr. Hoppe to have still retained in his control and possession said

amount of property beyond the reach of his creditors, thereby hindering and delaying them. At the very time this transaction occurred Mr. Stapleton was urging him to pay the balance on his note, and no doubt Mr. Hoppe thought that by this transaction, as admitted by him in his cross-examination, his property would be protected to a certain extent, but whether he so thought or not is immaterial. The question in this case is not what he may have intended, but what is the result of his deliberate acts? If they resulted in hindering and delaying his creditors, and by secret agreement a beneficial interest in his property was reserved to him, the presumption conclusively arises that such illegal object furnished one of the motives for his making the contract, and it should be held to be fraudulent.

Plaintiff in error has cited *Gardner v. Haines*, 19 S. D. 514, 104 N. W. 244, as being in point. In that case John C. Haines, who had been engaged in business for some time, on the 18th day of October, 1895, organized a corporation to be known as "John C. Haines, Incorporated," the incorporators of which were John C. Haines, May Haines, his wife, and H. C. Loveland, his mother-in-law. The capital stock was \$50,000, divided into 500 shares, 445 shares of which were taken and held by John C. Haines, 50 shares were issued to May Haines, his wife, as payment of a debt due by him to her, and 5 shares were issued to H. C. Loveland, his mother-in-law, without any money consideration. Haines conveyed all his assets to the corporation. On the 28th day of January, 1894, prior to the time the corporation was organized, Haines became liable to O. L. Snyder on assignee's bond. Snyder obtained judgment against Haines on the bond in December, 1897. Haines had in 1889 become indebted to John T. Potter for the sum of \$12,500. In 1896 Haines gave Potter a new note for said indebtedness, which at that time, including interest, amounted to \$23,000. In 1896, a year after the corporation was organized, Haines borrowed from Marshall Field & Co. the sum of \$25,000 with which he took up the Potter note, and assigned to Marshall Field & Co. as collateral his 445 shares of the capital stock of the corporation. About six months thereafter Marshall Field & Co. received from Haines 440 of said shares of capital stock in full payment of their note. Haines in 1898 filed his petition in bankruptcy. As was said by the court in its opinion in that case, it appears that the corporation was organized and the property conveyed to it by Haines two years or more before the judgment of Snyder was obtained against him, and that the petition in bankruptcy was filed three years after the organization of the corporation. It does not appear that in the formation of the corporation there was any agreement between Haines and the other stockholders that he should be retained at a salary of \$100 per month, nor was there any agreement by

which a portion of the assets were to be taken by the corporation and paid out by the debtor to his creditors. Having issued to his wife 50 shares of the capital stock, he thereby preferred her as one of his creditors, and in delivering to Marshall Field & Co. 440 shares of the stock he preferred that company. This he had a right to do; but in making these preferences nothing appears in the record to the effect that any beneficial interest was retained by secret agreement either in the stock thus transferred or relative to the management of the business. The court in its opinion sets forth the seven different contentions made by counsel for the creditor who was assailing the good faith of the transaction, but no contention is made that in any of these transactions there was any secret or public agreement by which Haines retained a beneficial interest in the property transferred, and that case cannot control in the case at bar.

The same is true of *McNerry v. Hubbard*, 3 Neb. (Unof.) 108, 93 N. W. 1123, also relied upon by plaintiff in error. The attack in that case was not upon the good faith of the debtors in the organization of the corporation, but that shares of the stock had been issued to a creditor to pay off an indebtedness and release a mortgage that plaintiff alleged was based upon a fraudulent claim. It was not contended that the conveyance by the debtors who organized the corporation was for their own use, or that they had retained by secret agreement an interest in the property assigned by them which it was alleged they had endeavored to place beyond the reach of their creditors.

We have not overlooked the other authorities cited by counsel for plaintiff in error in his able and exhaustive brief, but, after an examination of the same, we are of the opinion that the rule of law that a debtor who prefers certain of his creditors cannot in doing so retain a beneficial interest by the transaction by a secret agreement is applicable to the case at bar, and is supported by the overwhelming weight of authorities of the American courts, and is in consonance with the utterances of the Supreme Court of the territory of Oklahoma in *Little Co. v. Burnham*, 5 Okl. 283, 49 Pac. 66, in which the court said: "The intention of the parties may have been absolutely fair and honest. The mortgagee may have believed that his mortgagor would appropriate the proceeds to the payment of the mortgage debt. The mortgagor may have honestly intended to do so. But the mortgage was void as a matter of law. The conclusion here arrived at is not based upon what the parties may have intended to do, but is based upon what the mortgage does, in fact, concede to the mortgagor the privilege to do. * * * The decisions of the courts of this country have condemned them with almost entire unanimity, and the instrument itself has been as uniformly held to be fraudulent and void as a matter of law, irre-

spective of the question as to whether any fraudulent intent did in fact exist."

And in *Bank of Perry v. Cooke et al.*, 3 Okl. 534, 41 Pac. 628, the court said: "It does not matter whether such agreement is oral or in writing, contained within the mortgage or without, if such an agreement was had, the mortgage is fraudulent and void as to creditors."

Mr. Hoppe may have intended no wrong by his transactions, but the effect of his transactions, accompanied with the agreement that he should be retained as president and manager at a salary of \$40 per month, and that \$4,000 of his assets transferred by him to the corporation should be applied in payment of his debts to certain creditors, reserved to him a beneficial interest, and these conditions were not made a part of the articles of incorporation, nor a part of the bill of sale executed by him and placed upon record. Mrs. Hoppe had actual notice of the debt of Mr. Stapleton, and while there is no evidence that Lockwood had notice of Stapleton's debt, he does admit that he knew of all the indebtedness of Mr. Hoppe to the wholesale houses and the bank, and that he was surety on notes to other persons whose names he did not know, which was sufficient notice to him that Mr. Hoppe had other creditors than himself and Mrs. Hoppe; and it is therefore our opinion that the transfer by Mr. Hoppe of his property to the Hoppe Hardware Company was fraudulent and void, and that the judgment of the lower court should be affirmed, and it is so ordered.

WILLIAMS, C. J., and DUNN, TURNER, and KANE, JJ., concur.

LEWIS et al. v. CLEMENTS.

(Supreme Court of Oklahoma. May 15, 1908.)

1. INDIANS — CONTRACTS — SALE OF SURPLUS ALLOTMENT.

A contract for the sale of a portion of a surplus allotment, made by an Indian citizen in violation of Act Cong. June 28, 1898, c. 517, § 29, 30 Stat. 507, and of Act Cong. July 1, 1902, c. 1362, §§ 15, 16, 32 Stat. 642, 643, and before his restrictions upon the alienation of the same have been removed by the Secretary of the Interior, is void, and an action for specific performance of the same will not lie.

2. JUDGMENT—DEFAULT—PLEADING TO SUSTAIN.

A judgment by default, upon a complaint that does not contain allegations sufficient to constitute a cause of action, is void, and will be reversed on appeal.

3. QUIETING TITLE—REMOVAL OF CLOUD.

A person who has no interest in the title to real estate cannot maintain an action to remove a cloud upon the title to such real estate.

(Syllabus by the Court.)

Error from the United States Court for the Central District of the Indian Territory, at Atoka; Thos. C. Humphrey, Judge.

Action by M. L. Clements against C. S. Lewis and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

This is an action for specific performance and to clear title, brought by M. L. Clements against C. S. Lewis and wife, Dora Lewis, and B. F. Poole and wife, Jannie Poole, to compel the conveyance of certain land by C. S. Lewis and wife to the said M. L. Clements and to cancel a certain deed executed by C. S. Lewis and wife conveying the same land to B. F. Poole. Plaintiff filed his complaint on September 9, 1905, in the United States Court for the Central District of the Indian Territory, at Atoka. The material facts alleged in his complaint are here given: C. S. Lewis, one of the defendants, is a member of the Choctaw Tribe of Indians, and as such selected and had allotted to him, as a portion of his surplus allotment, certain land situated in the Atoka division of the Central district of the Indian Territory, described as follows: S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, less 8.34 acres for Missouri, Kansas & Texas Railway Company, and the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, less 8.69 acres for Missouri, Kansas & Texas Railway Company, all in section 5, township 3 S., range 11 E., of the Indian Meridian. After Lewis had allotted the land, he surveyed and platted the same into lots and blocks for a town site to be known as the "Town of Peck," or the "Town of Lewis." After he had surveyed and platted the land into a town site, before making application to have his restrictions upon the alienation of said land removed, he offered the same for sale for town site purposes, and in order to induce purchasers to buy he agreed, as a guaranty of title, to execute to purchasers a bond for title to such property as he sold them. On the 15th day of February, 1904, he sold to B. F. Poole a portion of the land within said town site described as lot No. 1, block No. 18, as shown by the plat of the town site in the office of the clerk of the United States Court for the Central District of the Indian Territory at Atoka. Poole immediately took possession of the lot sold to him, and erected a frame store building thereon, and placed a stock of merchandise therein. Poole remained in the peaceable and undisturbed possession of the lot for a period of about 6 $\frac{1}{2}$ months. On or about the 1st day of September, 1904, Poole sold to one C. L. Banks the storehouse, lot, and stock of merchandise. Lewis had knowledge of and acquiesced in the sale of the lot by Poole to Banks, which sale, however, was not in writing. On or about the 4th day of February, 1905, C. L. Banks sold the lot in question, together with the building thereon, and the stock of merchandise to M. L. Clements, the appellee herein, who was plaintiff in the court below. Clements was advised of the condition of the title to said lot, and when he purchased same from Banks he went to Lewis to ascertain whether or not his purchasing the lot from Banks would be satisfactory to Lewis, and whether Lewis would convey to him title to the lot. Lewis informed Clements that it would be satisfactory, and on the 14th day

of February, 1905, he and his wife executed to Clements a bond for title by which they agreed and bound themselves to sell and convey the fee-simple title to said lot to Clements as soon as Lewis could have his restrictions removed under the law. On May 9, 1905, Lewis made application to have his restrictions removed, which was approved by the Secretary of the Interior on the 5th day of August, 1905. Clements immediately thereafter called upon Lewis and demanded a deed to said lot in accordance with the bond for title given by Lewis and his wife to him. Lewis refused to execute the deed, but on the 23d day of August, 1905, executed and delivered to B. F. Poole a deed to the lot. Plaintiff alleges that the execution of the deed by Lewis to Poole was for the purpose of cheating and hindering and defrauding him out of the title to said property, and for the purpose of compelling him to pay to Poole the sum of \$500 which Poole claimed to be due to him by plaintiff. In his prayer, plaintiff prays for a judgment for said land, and that C. S. and Dora Lewis be required to execute to him a deed to the same, and that the deed executed by C. S. and Dora Lewis to B. F. Poole be declared void, and the same be canceled and set aside. B. F. Poole and wife, Jannie Poole, at the time of the institution of the suit, were residents of Arkansas. Service was had upon them by publication. On the 4th day of January, 1906, a demurrer was filed by defendants to plaintiff's complaint. On January 13, 1906, a motion was filed by plaintiff to dismiss the demurrer of C. S. Lewis and Dora Lewis, for the reason that they had been served with summons on the 11th day of September, 1905, and they had failed to appear and plead at the October, 1905, term of the court which was held at Atoka on the 2d day of October, 1905. The court upon hearing the motion sustained the same and struck from the files the demurrer of C. S. and Dora Lewis, and entered judgment by default, declaring the title in and to lot 1 in block 18 of the town site of Lewis to be in M. L. Clements, and divesting the title therein from C. S. Lewis, and ordered and directed C. S. Lewis and Dora Lewis to execute a deed of conveyance to Clements, conveying said lot to him. Defendants C. S. Lewis and Dora Lewis excepted to this action of the court.

On the 16th day of January, 1906, defendants B. F. Poole and Jannie Poole, his wife, filed their answer to plaintiff's complaint, the contents of which we do not consider necessary to repeat. Depositions of various witnesses were taken, and on the 23d day of April, 1906, the case came on to be heard by the court upon the bill, answer, agreements of the parties, and evidence in the case, and the court rendered judgment in favor of plaintiff, ordering and directing that the deed executed by C. S. Lewis and Dora Lewis to B. F. Poole be canceled. From the judgments of the trial court, all the defendants appealed to the

United States Court of Appeals in the Indian Territory, and the case comes to this court under the provisions of the enabling act. Act June 16, 1906, c. 3335, 34 Stat. 267.

Chambers & Gernert, for appellants. Linebaugh Bros., for appellee.

HAYES, J. (after stating the facts as above). The trial court committed several errors which have been cited by appellants in their assignments of error, any one of which affords ground upon which this case should be reversed. We shall not, however, notice all of the assignments made, but shall discuss those that effect directly the merits of plaintiff's case.

Judgment was rendered upon default against C. S. Lewis and wife, but it is contended by appellants that judgment should not have been rendered, for the reason that plaintiff's complaint did not state a cause of action against Lewis and wife. Plaintiff's cause of action, if any he has under the allegations of his complaint, grows out of a contract, made by an Indian citizen prior to the removal of his restrictions upon the alienation of his surplus allotment, to sell to plaintiff a portion of his surplus allotment. By Act Cong. June 28, 1898, c. 517, § 29, 30 Stat. 507, it is provided: "That all contracts looking to the sale or incumbrance in any way of the land of an allottee, except the sale heretofore provided, shall be null and void." And by Act Cong. July 1, 1902, c. 1362, § 15, 32 Stat. 642, to ratify and confirm an agreement with the Choctaws and Chickasaws, it is provided: "Lands allotted to members and freedmen shall not be affected or incumbered by any deed, debt or obligation of any character contracted prior to the time at which said lands may be alienable under this act, nor shall said lands be sold except as herein provided." It is further provided in the latter act that all lands allotted to members of the Five Civilized Tribes of Indians, except such land as is set aside to each for a homestead, shall be alienable after the issuance of patent, as follows: One-fourth in acreage in one year, one-fourth in three years, and the balance in five years. By Act Cong. April 21, 1904, c. 1402, 33 Stat. 204, it is provided that all restrictions upon the alienation of all allottees of the Five Civilized Tribes, who are of Indian blood, except minors and except as to homestead, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe.

It is admitted by plaintiff in his complaint that the contract made by Lewis and wife with him was made before Lewis' restrictions upon the alienation of the land sought to be conveyed had been removed. Such contract was in violation of the laws of the United States governing the conveyance of surplus allotments of members of the Five Civilized Tribes, and by the terms of the statute is

void. *Sayer v. Brown* (Ind. T.) 104 S. W. 877. Plaintiff's complaint therefore failed to allege facts sufficient to constitute a cause of action, or facts sufficient to entitle him to recover against Lewis and wife, and the action of the court in rendering judgment by default against Lewis and wife over their objection was error. If a complaint does not contain allegations sufficient to constitute a cause of action, a judgment rendered by default is void, and will be reversed on appeal. *Fullerton v. Houtp*, 12 Ark. 399; *Chaffin et al. v. McFadden*, 41 Ark. 42; 23 Cyc. 740.

The action of the court in rendering judgment against Poole and wife, canceling the deed executed by Lewis and wife to Poole, was also error, for the reason that, under the allegations of plaintiff's complaint and proof offered by him, the only interest that he had in the land in controversy was such interest as he obtained by virtue of his contract with Lewis, which being a void contract conveyed to him no interest. A person who has no interest in the title to real estate cannot maintain an action to remove a cloud upon the title of such real estate. 1 Ency. Plead. & Prac. 300.

The judgments of the trial court against Lewis and wife and against Poole and wife are reversed, and the cause remanded.

WILLIAMS, C. J., and DUNN, TURNER, and KANE, JJ., concur.

WATTS v. BOARD OF COM'RS OF CLEVELAND COUNTY.

(Supreme Court of Oklahoma. May 15, 1908.)

BANKS AND BANKING—DEPOSIT OF COUNTY TREASURER—INSOLVENCY.

Where a county treasurer, prior to the passage of the law providing for the designation of county depositories, made a general deposit of the county funds in a bank in his own name as treasurer, the title to the money did not pass, although there was no agreement that the identical money should be returned, and upon the bank becoming insolvent the county was entitled to recover an equal amount from the receiver of the bank prior to the payment of general depositors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6. Banks and Banking, §§ 316-321.]

(Syllabus by the Court.)

Appeal from District Court, Cleveland County; C. F. Irwin, Judge.

Action by the board of county commissioners of Cleveland county against John Watts, receiver of the First National Bank of Lexington. Judgment for plaintiff, and defendant brings error. Affirmed.

Ledru Guthrie, for plaintiff in error. A. Nicodemus, County Atty., W. M. Newell, C. L. Botsford, and W. J. Jackson, for defendant in error.

KANE, J. The question to be decided in this case is, did money belonging to a county

deposited by the county treasurer in a solvent bank constitute a trust fund which the county may follow into the hands of the receiver of the bank after its failure? The case was submitted to the court below on an agreed statement of facts, from which the following excerpts are taken: "(1) That the First National Bank of Lexington, Okl. T., is now, and was at all times hereinafter stated, a national bank, organized under and by virtue of the laws of the United States, and that said bank had its place of business at Lexington, in the territory of Oklahoma; (2) that on the 24th day of May, 1905, said bank, being insolvent, was by the Comptroller of the Currency placed under the control of a receiver, and said defendant, John Watts, was duly appointed and is now the duly qualified and acting receiver thereof, and has in his custody and under his control the moneys, property, assets, and effects possessed by said bank at the time of his taking charge thereof as such receiver; (3) that upon the 13th day of October, 1903, there was deposited in said bank and credited to the account of 'Roland Hughes, treasurer,' the sum of \$4,500, and on the 5th day of April, 1905, \$2,500 was paid to said Hughes upon a check signed by him as treasurer, and that there remained on deposit to the credit of Roland Hughes, treasurer, in said bank at the time said defendant took possession thereof as such receiver, the sum of \$2,000, balance of said deposit made as aforesaid by Roland Hughes, treasurer, and all of said funds came into the hands of said treasurer as collection of taxes from the taxpayers of said Cleveland county, Okl. T.; (4) that at the date of making said deposit and ever since said date said Hughes was and has been the duly elected, qualified, and acting county treasurer of Cleveland county, Okl. T., and that said Hughes, before entering upon his duties entered into a bond provided by said plaintiff, and has at all times since maintained and kept said bond in full force and effect; (5) that said deposit was made without the knowledge or consent of the plaintiff, and that said plaintiff had no knowledge of said deposit having been made in said bank until after said receiver took possession of said bank; (6) that said deposit was mixed with the general funds of said bank by the officers and agents of said bank, and went into and swelled the general assets of said bank." The court below found in favor of the defendant in error, granting it a preference, and from the judgment thus rendered, the plaintiff in error appealed to this court.

Counsel for plaintiff in error in his brief raises some objection to the agreed statement of facts being considered by this court, for the reason that the same had been stricken from the files by the court below. This contention is not tenable. The journal entry of the judgment recites that the parties appeared and in open court waived a trial by jury, and by agreement submitted the cause to the

court upon the agreed statement of facts, excerpts of which are above set out. The deposit fund involved in this case was placed in the bank as a general deposit by Mr. Hughes as treasurer of Cleveland county. Under ordinary circumstances such a deposit would constitute a loan, and would create the relation of debtor and creditor between Cleveland county and the bank. We are convinced, though, that under the laws of the territory of Oklahoma, as they existed at the time of this transaction such relation was not thereby created. "A general deposit in a bank is a loan." *Bank of Blackwell v. Dean*, 9 Okl. 626, 60 Pac. 226. Section 6062, Wilson's Revised and Annotated Statutes of Oklahoma of 1903, makes it a crime for a county treasurer to loan public funds. Section 1239, Wilson's Revised and Annotated Statutes of 1903, provides that: "The books, accounts, and vouchers of the county treasurer, and all moneys, warrants or orders remaining in the treasury, shall at all times be subject to the inspection and examination of the board of county commissioners, and at the regular meetings of the board in January and July of each year, and at such other times as they may direct, he shall settle with them his accounts as treasurer, and for that purpose he shall exhibit to them all his books, accounts and money, and all the vouchers relating to the same, to be audited and allowed, which vouchers shall be retained by them for evidence of his settlement; and if found correct the accounts shall be so certified; if not he shall be liable on his bond." It would seem from this section and the section making it a crime to loan public funds that the statutes of Oklahoma, prior to the passage of the bill providing for the creation of public depositories, did not permit county treasurers to make general deposits of public funds, but it was his duty to at all times have the funds of the county under his control so that immediately upon being directed to do so by the board of county commissioners he may exhibit such funds to said board. On this proposition the case of *Thompson v. Territory*, 10 Okl. 409, 62 Pac. 355, is in point. Mr. Justice Burwell, speaking for the court, says: "Territorial funds received by the territorial treasurer remain the moneys of the territory until paid out according to law, and the treasurer and every other person charged with the receipt, safekeeping, or disbursement of such funds is prohibited from loaning them either for his own private use or for the use of the territory, and from in any way appropriating them to his own private use." In *State v. Midland Bank*, 52 Neb. 1, 71 N. W. 1011, 66 Am. St. Rep. 484, Mr. Chief Justice Post, speaking for the court, says: "It is not within the power of public officers to create the relation of debtor and creditor between a municipal corporation and a bank by depositing public funds." By the statutes of Nebraska school district treasurers are forbidden to

lend or use any part of school moneys which may be in their hands, under penalty of fine and imprisonment. Mr. Chief Justice Post in *State v. Midland Bank et al.*, supra, speaking of the power of a school district treasurer under such statutes to create the relation of debtor and creditor between such district and the bank, says: "It is not within the power of the treasurer of a school district by a general deposit of funds held by virtue of his office to create between such district and his banker the relation of debtor and creditor. A banker, by receiving on deposit from a school district treasurer funds known to be held by the latter in his official capacity, becomes thereby a trustee for the beneficial owner with respect to such funds, and the same may, upon his insolvency, be recovered by the owner as a preferred claim against his estate." The learned chief justice further discussing the same proposition, says: "It has been many times held that when, except as specially authorized by statute, a treasurer or other custodian of public money makes a general deposit thereof in his own name, a trust results in favor of the beneficial owner, and that upon the insolvency of the bank receiving such funds with notice of their character its estate is chargeable with the full amount of the deposit to the prejudice of nonpreferred creditors. See *Independent District of Boyer v. King*, 80 Iowa, 497, 45 N. W. 908; *Bunton v. King*, 80 Iowa, 506, 45 N. W. 1050; *Myers v. Board of Education of Clay Center*, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263."

The foregoing authorities are cited only to sustain the proposition which we are convinced is correct that where a county treasurer, prior to the passage of the law providing for the designation of county depositories, made a general deposit of the county funds in a bank, the title to the money did not pass, although there was no agreement that the identical money should be returned, and upon the bank becoming insolvent the county was entitled to recover an equal amount from the receiver of the bank prior to the payment of general depositors. The bank acquires no title to the money so deposited against the county. To the same effect are the following: "Public moneys deposited in a bank in violation of law are trust funds, and do not become the property or assets of said bank and remain trust funds with title in the true owner after the appointment of a receiver and the insolvency of the bank." *First Nat. Bk. v. Bunting & Co.*, 7 Idaho, 27, 59 Pac. 929, 1106; *Green v. Custer County*, 8 Idaho, 721, 71 Pac. 115; *Myers v. Board of Education*, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263.

Having reached the conclusion that the money deposited by the defendant in error in this case was a trust fund, for which Cleveland county is entitled to a preference over the general creditors of the bank, it is only necessary now to determine if it is

shown that the fund is sufficiently identified for the court to enable the county to lay hands upon it. We are of the opinion that on this point there can be no question. The agreed statement of facts states: "That said deposit was mixed with the general funds of said bank by the officers and agents of said bank, and went into and swelled the general assets of said bank; * * * that there remained on deposit to the credit of 'Roland Hughes, Treasurer,' in said bank at the time said defendant took possession thereof as such receiver, the sum of \$2,000, balance of said deposit made as aforesaid by Roland Hughes, treasurer, and all of said funds came into the hands of said treasurer as collection of taxes from the taxpayers of said Cleveland county, Okl. T." This admission brings the case squarely within the rule for tracing trust funds laid down in the two cases of *Cherry v. Territory of Oklahoma*, reported in 17 Okl. 213, 89 Pac. 190, and in 17 Okl. 221, 89 Pac. 192, 8 L. R. A. (N. S.) 1254, respectively. In the latter case Justice Burwell, after citing several cases from other states on this question, says: "In this connection we desire to state that these cases adhere to a more strict rule than we are to adopt. If the claimant can trace his money into the general mass turned over to the receiver, it is sufficient." Mr. Justice Burwell wrote the opinions in both of the cases above mentioned, and, as we understand them, neither of them pass squarely upon the question decided here as to whether moneys deposited in a bank by the treasurer of a county become thereby a trust fund, to which the county is entitled to a preference over the general creditors on the bank becoming insolvent. Justice Burwell bases his opinions in these cases upon the ground that the funds sought to be traced were not sufficiently identified to be available, even if they were impressed with the trust character. "The plaintiff having failed to trace its cash or checks or drafts or proceeds thereof into the hands of the receiver, a preference will be denied." *Cherry v. Territory*, supra.

The judgment of the court below is affirmed. All the Justices concur.

HUSSEY v. BLAYLOCK.

(Supreme Court of Oklahoma. May 15, 1908.)

1. APPEAL—REVIEW—REFUSAL TO DIRECT VERDICT.

In determining whether the court erred in refusing to instruct the jury, at the close of the evidence, to return a verdict for plaintiff, if there is any evidence, direct or circumstantial, fairly tending to support the verdict, it must stand. Every presumption is in its favor, and all doubts must be resolved in its favor. The court will not weigh or balance the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4042; vol. 46, Trial, § 811.]

2. REPLEVIN—EVIDENCE.

In an action of replevin, where the evidence discloses that plaintiff had never parted with

the title to the property, but only with possession thereof, to another, it was error to refuse to instruct the jury to return a verdict for plaintiff, although the evidence disclosed defendant to be an innocent purchaser for value from such possessor.

(Syllabus by the Court.)

Error from the United States Court for the Central District of Indian Territory, at Atoka; before Justice Thomas C. Humphrey.

Action by D. B. Hussey against W. W. Blaylock. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

On July 14, 1905, D. B. Hussey, plaintiff in error, plaintiff below, sued W. W. Blaylock, defendant in error, defendant below, in replevin before the United States Commissioner within and for the Atoka-Coalgate Division of the Central District of the Indian Territory, for one black horse mule, not branded, six years old and about sixteen hands high, "worth \$125"; one blue mare mule, not branded, six years old, about sixteen hands high, and "worth \$125"; one 3¼ Milburn wagon, "worth \$25"; one log chain, "worth \$2"; and one set of harness, "worth \$15." Defendant for answer set up that he was an innocent purchaser for value of the property from one J. L. Cannon. There was judgment for the defendant, and again on trial anew in the United States Court in the Indian Territory, Central District at Atoka, where the case was appealed, from which judgment plaintiff prosecuted a writ of error to the United States Court of Appeals in the Indian Territory, and the same is now before us for review.

Forshee & Brunson and J. R. Ralls, for plaintiff in error. P. E. Wilhelm, for defendant in error.

TURNER, J. (after stating the facts as above). The only assignment necessary for us to consider is: "The court erred in refusing to instruct the jury in favor of the plaintiff."

We are well aware that if there is any evidence, direct or circumstantial, fairly tending to support the verdict, it must stand. Every presumption is in its favor, and all doubts must be resolved in its favor. The court will not weigh or balance the evidence. *Gulf, C. & S. F. Ry. Co. v. Ellis*, 54 Fed. 481, 4 C. C. A. 454.

The testimony discloses that the plaintiff for some time prior to the bringing of this suit was a timber and tie contractor engaged in furnishing such to the Missouri, Kansas & Texas Railway Company at various points on its system in the Indian Territory and Oklahoma, with a branch office at Ada, Ind. T., managed by J. V. Hussey, a brother, his agent, who, as such, had full and complete charge of all the business of plaintiff in both said territories, with authority to pay out money for stock or anything needed to carry on said business. In his employ at

that place was one J. L. Cannon, who was engaged in getting out and hauling ties and whose checks were honored and laborers paid by plaintiff; also, W. W. Blaylock, the defendant. Thinking it would be more economical to buy two teams with which to do the work, one for Cannon and one for defendant, he wrote to Cannon, on January 27, 1904, as follows: " * * * You can also buy two teams if you can buy them cheap enough and you can get haulers to haul satisfactory, * * * and if you buy them I will advance you the money for them, they to be paid for along as your account can stand it, or the teams returned to me or turned over to me in case you can't pay for them in 1904. Or at what time I desire. I am not at all afraid but that you will pay for them in time. I want this understood in case of accident. * * *" After receiving this letter, Cannon came to the office of the writer at Ada, and urged the buying of the teams at once, and that he would drive one and defendant the other. At that time said agent informed him that he "would not sell him the team until he had sufficient money to his credit to pay for them, as I did not want to go to the trouble of taking a mortgage and recording it against the teams." It was so agreed, and that said agent would honor Cannon's check in payment for the property, which he afterward did. This was according to plaintiff's way of running his business, and property, when so purchased and disposed of, was entered upon his books as his "outfit." Pursuant to this agreement, on March 3, 1904, Cannon went to Maud, Okla., and purchased the property in controversy, giving in payment therefor a check signed by himself and J. V. Hussey, said agent, for \$250, which was duly paid as agreed with money belonging to plaintiff. Defendant was present when the property was purchased and heard the seller telephone to the bank upon which it was drawn to know if it would be cashed, and on the trial of the cause identified the check given in payment therefor, which on its face stated the purpose for which it was given. Immediately thereafter, Cannon, unknown to plaintiff, sold the property to defendant for \$348, with the understanding that the same was to be charged to him at that price on the books of Cannon, and paid for in hauling ties for Cannon at a stipulated price. This was done, and defendant at once placed in possession of the property, which he retained up to the time of the bringing of this suit, at which time defendant had paid Cannon in full for the property, but Cannon had never paid plaintiff therefor, or had sufficient money to his credit on plaintiff's books to pay for it.

It is apparent that these facts, which are undisputed, did not constitute a sale of the property as between plaintiff and Cannon, for the reason that it was expressly agreed that plaintiff would not sell him the team

"until he had sufficient money to his credit to pay for them," which it is admitted he never had. That being the case, Cannon had no title to convey Blaylock and could not convey that of plaintiff, without his consent, which he did not have. It follows that Cannon was a mere possessor who undertook to sell the property of another, which can be recovered in this action against an innocent purchaser for value, which Blaylock is conceded to be. 24 Am. & Eng. Enc. of Law, 1161, says: "It is a well-settled general rule that a person cannot be deprived of his title to personal property without his consent, express or implied, and where no fraud or misleading acts on his part are shown; this doctrine is exemplified by the maxim caveat emptor, and the owner of property is entitled to recover it even from a bona fide purchaser who purchased the property from a mere possessor"—and authorities cited, among them, *Quinton v. Cutlip*, 1 Okl. 302, 32 Pac. 269. Hence, as the evidence on the part of plaintiff was sufficient to prove his cause of action, and there was no substantial evidence offered by defendant upon any material issue in the case, it was error for the trial court to refuse to instruct the jury to return a verdict in favor of the plaintiff. *Irwin v. Dole*, 7 Kan. App. 84, 52 Pac. 916; Am. & Eng. Enc. Pl. & Pr., 686, and cases cited.

For that reason this case is reversed and remanded for a new trial. All the Justices concur.

PLOTNER v. CHILLSON & CHILLSON.

(Supreme Court of Oklahoma. May 15, 1908.)

1. BROKERS—PURCHASE OF REALTY—RIGHT TO COMMISSIONS.

It is a condition precedent to the right of an agent to the compensation agreed to be paid him that he shall faithfully perform the services he undertook to render, and if he, when employed to buy, unknown to his principal, accepts compensation from the vendor by dividing commission with his agent in the transaction, he cannot recover compensation agreed to be paid him by his principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 51-53.]

2. SAME—EVIDENCE.

In an action by a principal against his agent to recover in part certain commission alleged to have been erroneously paid, where upon answer and counterclaim for the balance of said commission the original action is dismissed and the cause is tried to the court upon the counterclaim and answer thereto, and where the evidence adduced on the part of the plaintiff shows that defendants, while acting as his agent in the purchase of certain lands, at the same time and unknown to him, received a commission on the sale from the agents of the vendor, sufficiently proves a defense to the action on the counterclaim, and a demurrer to such evidence was improperly sustained.

(Syllabus by the Court.)

Error from District Court, Canadian County; C. F. Irwin, Judge.

Action by A. A. Plotner against Chillson

& Chillson. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

On October 18, 1905, A. A. Plotner, plaintiff in error, plaintiff below, sued M. D. Chillson and Charles Chillson, partners as Chillson & Chillson, defendants in error, defendants below, in the district court of Canadian county, to recover, among other things, \$7,500 alleged to have been paid them as commission on the purchase of certain lands in Matagorda county, Tex., as agents for plaintiff, and which is alleged to have been forfeited for the reason that while acting as agents for plaintiff they were, unknown to him, at the same time acting as agents for and received a commission from the vendors in that transaction. Defendants for answer in effect admit the contract of agency, and that they acted as such for plaintiff in the purchase of the land, but deny that they acted as agents for the vendors or received a compensation or commission from them; that in order to close up said deal and settle the 25 per cent. commission thereon, together with the salaries stipulated for in said contract of agency, plaintiff agreed to pay them \$7,500 in full, but that in fact had only paid \$5,000 of that amount on September 1, 1903; that the remaining \$2,500 is due them with interest from that date, and on said \$7,500 from May 19, 1902, to September 1, 1903, at 7 per cent. per annum, for which they pray judgment. Plaintiff for answer to defendants' counterclaim plead, in substance, a general denial, and allege that if the \$2,500 was due at all it was as the share of Charles Chillson of the firm of Chillson & Chillson in said commission, and that he had since released the same to plaintiff and restated the charge that defendants acted as agents for both buyer and seller of the land in question without the knowledge of plaintiff, and received from the seller a commission on the sale of said lands to plaintiff in the sum of \$5,466, by which conduct, he alleged, they forfeited the right to recover said \$2,500 as commission from him or any other amount. On May 24, 1906, plaintiff dismissed his cause of action, and the cause came on for hearing to the court by agreement of parties upon the "set-off and the counterclaim set forth in defendants' answer." It being agreed that the burden was upon the plaintiff, he proceeded to offer testimony in support of the issues on his part, and after having rested his case, defendants demurred to the evidence, which was sustained by the court and exceptions saved, and judgment rendered in favor of defendants and against the plaintiff for \$2,968.20 and the costs of the suit, from which judgment plaintiff has appealed to this court.

W. W. Wallace, for plaintiff in error. Joseph G. Lowe and J. W. Clark, for defendants in error.

TURNER, J. (after stating the facts as above). The only alleged error necessary for

us to consider is that the court erred in sustaining defendants' demurrer to plaintiff's evidence. In considering this assignment of error, it will be remembered that the rule of law is that: "A demurrer to the evidence not only admits the facts as proved to be true, but admits such facts as may be reasonably and rationally inferred from the facts proved. If there is evidence fairly tending to show each material averment of the petition, it is error to sustain a demurrer to plaintiff's evidence." *Myers v. Presbyterian Church of Perry*, 11 Okl. 551, 69 Pac. 876; *Jaffray v. Wolf*, 1 Okl. 312, 33 Pac. 945; *Edmiston v. Drumm-Flato Commission Co.*, 13 Okl. 440, 73 Pac. 958; *Johnson v. Hays*, 6 Okl. 582, 55 Pac. 1068. Let us, then, determine whether plaintiff has adduced sufficient proof to establish his allegation that defendants, while acting as his agents in the purchase of the land in question, were acting, unknown to him, as the agent of the vendors, and that they received from them a commission as such. The testimony discloses that plaintiff was an elderly man, retired from business, living at Dayton, Ohio; that defendants, father and son, were living in Canadian county, Okl., and were the brother-in-law and nephew of plaintiff; that in the early 70's defendant M. D. Chillson, being then at work on a small salary, asked and obtained leave of plaintiff to go to Nebraska and there act as plaintiff's agent in the care and management of some 6,000 acres of land owned by the plaintiff. In the course of years Chillson continued to do business for plaintiff, and it seems of recent years came to Canadian county, Okl., where he continued to buy and sell land as his agent. Their dealings were never satisfactory to plaintiff. Plaintiff found upon investigation of Chillson's books, through his bookkeeper, sent to Chillson for that purpose, that Chillson had sold some desirable farms belonging to plaintiff and had reinvested the money in less desirable farms and had the deeds made out in his own name; that when he wrote to Chillson about deeding them back to him, under date of September 27, 1900, plaintiff soon thereafter received a reply that: "The farms mentioned cost \$13,840. I consider it equitable if I retain them and a few thousand dollars besides." Negotiations followed, resulting in the following contract between them: "Dayton, Ohio, Jan. 4, 1901. Dear Merrick: Yours of the 19th containing deeds as mentioned reached me in due time. In order to avoid any further or future misunderstanding as to remuneration, I will here repeat the proposition that I made to Charles while here; i. e., that you receive \$10,000 in full for services up to July 4, 1900, and from that date you are to draw a remuneration of \$1,200 per year, and 2 per cent. on sales of land, and in addition to that Charles will receive \$800 per year and 1 per cent. on sales of land, and in case any speculative transactions are made Chillson & Chillson will receive

25 per cent. of the net profits on the same. [Signed] Ambrose." Acting under this contract, M. D. Chillson in the spring of 1902 went to Bay City, Tex., and negotiated for plaintiff a purchase of some 23,000 acres of land of W. E. Austin & Co., as agents for one Kukeydall and others. In the course of the negotiations Chillson told W. E. Austin & Co. that he was a land agent himself, and from extensive experience he knew that divisions of commissions were frequently made, and that as a matter of professional courtesy this had been conceded to him in all purchases he had made, and he had come to require it and would not make a purchase without it, which W. E. Austin & Co. agreed to give him, for the reason, as they stated, that "half a loaf was better than no bread." Accordingly the land was bought and deeded to plaintiff and one Stoddard in consideration of something like \$330,000, the exact amount not being material, which he paid, Chillson receiving on a division of commissions with W. E. Austin & Co. something like \$5,000, the exact amount being unknown and immaterial. Some time during the summer of that year plaintiff and defendants had a settlement of this matter. Plaintiff, not wishing to be annoyed with any 25 per cent. of net profits to be paid defendants on this deal, proposed, and defendants agreed to accept, \$7,500 as their commission, \$5,000 of which was to be paid to M. D. Chillson, the remaining \$2,500 to his son Charles Chillson. Accordingly, on August 29, 1903, at the request of M. D. Chillson, plaintiff sent to the First National Bank of Springfield, Ohio, and paid \$5,000, and took up a note for that amount due from M. D. Chillson to the bank, and received the following receipt: "Received from A. A. Plotner the sum of seventy five hundred dollars (\$7500.00) as commission in full for 25 per cent net profit on lands purchased for his account in Matagorda county, Tex. [Signed] Chillson & Chillson, by M. D. Chillson." The remaining \$2,500 was never paid Charles Chillson, for the reason that in February, 1904, he came to Dayton to see plaintiff, and there stated that at the time of the payment of the \$5,000 to his father he thought it was all right, but since that time had concluded not to accept the \$2,500 for his share, as he did not think it was right and he would not have it. This led plaintiff to investigate, which he did, and about the middle of March following ascertained positively for the first time that Chillson & Chillson had acted as agents of the vendors in the transaction, he having suspected as much September 1, 1903, at which time he had discharged them from his service.

The question then presents itself under this state of facts, which are undisputed, are defendants entitled to recover in this cause? We think not. Defendants were under obligation to plaintiff to buy this land for the lowest price consistent with honesty. W. E. Austin & Co. were under obligations to the ven-

dors to get for it the best price fairly obtainable. In making this agreement with W. E. Austin & Co. to divide their commission with defendants before they would buy defendants very well knew that the more they gave for the land the greater amount of money they would get on such division of commission with W. E. Austin & Co. This was a palpable fraud on the plaintiff, a violation of the contract of agency, a betrayal of trust, was against public policy, and forfeited defendants' right to commission from plaintiff in the transaction. This is well settled by the authorities. In *McKinley v. Williams*, 74 Fed. 95, 20 C. C. A. 313, the court said: "To permit the agent of a vendor to become interested as the purchaser or as the agent of a purchaser in the subject-matter of the agency inaugurates so dangerous a conflict between duty and self-interest that the law wisely and peremptorily prohibits it. An agent of a vendor, who speculates in the subject-matter of his agency, or intentionally becomes interested in it as a purchaser or as the agent of a purchaser, violates his contract of agency, betrays his trust, forfeits his commission as agent, and becomes indebted to his principal for the profits he gains by his breach of duty"—citing numerous authorities. The same is unquestionably true as to the agent of the vendee. In *Campbell v. Baxter*, 41 Neb. 735, 60 N. W. 91, the court, quoting approvingly from a number of cases, said: "* * * In *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459, * * * it was held: 'A broker acting for both parties in effecting an exchange of property can recover compensation from neither, unless his double employment was known and assented to by both.' *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168. In *Bollman v. Loomis*, 41 Conn. 581, it was held: 'The policy of the law forbids that a person acting as the friend and confidential adviser of a purchaser should at the same time be secretly receiving compensation from the seller for effecting the sale, and a contract for such compensation is void.' In *Meyer v. Hanchett*, 43 Wis. 246, it was held: 'One cannot act as agent for both seller and purchaser, unless both know of and assent to his undertaking such agency and receiving commissions from both.' *Holcomb v. Weaver*, 136 Mass. 265; *Byrd v. Hughes*, 84 Ill. 174, 25 Am. Rep. 442; *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541." In *Wadsworth v. Adams*, 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984, the court in its syllabus said: "It is a condition precedent to the right of an agent to the compensation agreed to be paid to him that he shall faithfully perform the services he undertook to render; and if he abuses the confidence reposed in him, and withholds from his principal facts which ought, in good faith, to be communicated to the latter, he will lose his right

to any compensation under the agreement, being no more entitled to it than a broker would be entitled to commissions who, having undertaken to sell a particular property for the best price that could be fairly obtained for it, becomes, without the knowledge of the principal, the agent of another, to get it for him at the lowest possible price." In *Bell v. McConnell*, 37 Ohio St. 399, 41 Am. Rep. 528, the court said: "Unless the principal contracts for less, the agent is bound to serve him with all his skill, judgment, and discretion. The agent cannot divide this duty and give part to another. Therefore, by engaging with the second he forfeits his right to compensation from the one who first employed him." See, also, *Chapman v. Currie*, 51 Mo. App. 40; *Tinsley v. Penniman*, 12 Tex. Civ. App. 591, 34 S. W. 365; *R. W. Ralsin v. Rosa A. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Collins v. McClurg*, 1 Colo. App. 348, 29 Pac. 299; *Hunter Realty Co. v. Martha Spencer* (recently decided by this court) 95 Pac. 757.

The law thus announced is conceded by defendants, but it is urged that the same is not applicable; that this "* * * is not a question of commission on the sale or purchase of land that is involved in the controversy, but it is what was the amount agreed upon as 'net profits' on the 'speculative transaction' in the purchase of the Matagorda, Tex., land." It in effect is contended that defendants were not so much agents working on a commission derived from the purchase of this land as they were "partners" buying land and deriving their compensation in "net profits" after purchase and sale. The usefulness of this distinction fails to appear. In either event they would be agents of plaintiff, receiving a compensation from him, and owing to him in return unswerving loyalty to his interests in the transaction. Anything short of that violated the contract existing between them and forfeited their right to compensation, whether the same was to be paid as commission when the land was bought or "net profits" when the land was sold. But this record discloses that before a resale of the land, and therefore before any "net profits" had accrued to defendants, and before their disloyalty to the trust had been discovered, they agreed to take the lump sum of \$7,500 "as commission in full of 25 per cent. net profit" on these lands, and \$5,000 was paid. It is clear that it was paid "as commission," and that the remaining \$2,500 sued for is also commission which has been forfeited as a result of defendants' misconduct, and cannot be recovered in this action.

It follows that the court erred in sustaining the demurrer to plaintiff's evidence, and for that reason the case is reversed and remanded, with instructions to enter judgment in favor of the plaintiff. All the Justices concurring.

VAN ARSDALE & OSBORNE v. YOUNG.

(Supreme Court of Oklahoma. May 14, 1908.)

1. INSURANCE—PREMIUM NOTES—DEFENSES—BURDEN OF PROOF.

Where, in an action on a promissory note, execution and delivery of which is admitted, which was given for insurance, the contract and application contemplated the issuance and delivery of a policy, and none was delivered, on a defense of no consideration the defendant sustains the burden placed on him, by showing that he received no policy nor any notice that the application had been approved.

2. SAME—EVIDENCE.

Where an application for hail insurance provides that the insurance company shall not be bound until the application is accepted and approved at its home office, in a suit on a note given for such insurance it is incumbent on the holder thereof to show such approval and acceptance, or acts tantamount thereto, in order that he be entitled to recover.

(Syllabus by the Court.)

Error from District Court, Kay County; Bayard T. Hainer, Judge.

Suit by Van Arsdale & Osborne, plaintiffs in error, plaintiffs below, against A. Young, defendant in error, defendant below, to recover on a promissory note given on the 28th day of April, 1902, in the sum of \$22.50, and \$10 attorney's fee. Judgment before a justice of the peace was rendered for the defendant, as it was also in the district court, and plaintiffs bring the case here by proceedings in error. Affirmed.

William Keith (Kos Harris and Green, Martin & Tibbetts, of counsel), for plaintiffs in error. John S. Burger, for defendant in error.

DUNN, J. The note in question was given in payment of a premium for a contract of hail insurance in the St. Paul Fire & Marine Insurance Company, which plaintiffs represented. The evidence shows that defendant signed the application for insurance and the note in payment therefor on the same day, and delivered them to the local agent, Yoeman, at Billings, Kay county, Okl. Yoeman sent them to the plaintiffs at Wichita, Kan., and plaintiff Van Arsdale, testifying in reference to the disposition that was made of the application on its arrival at Wichita, says: "We received it from J. W. Yoeman, our agent at Billings, Okl., on May 1, 1902, and approved the application on the date of receiving it, and forwarded it, on the same day, through the United States mail, to the home office of the St. Paul Fire & Marine Insurance Company at St. Paul, Minn., for their acceptance, approval, and issuance of the policy." The application, signed by the defendant, so far as the same is pertinent to this inquiry, reads as follows: "I, A. Young, of Owens Tp., postoffice Owens, in the county of Kay, in the state of Okla., hereby make application to the St. Paul Fire & Marine Insurance Company, for insurance upon growing grain against damage by hail only, for the season of 1902, to the amount of 500 dollars, from the day this application is accepted and approved at the home office of the company, at

St. Paul, at 12 o'clock noon, until September 15, 1902, at noon, and in no event shall the company be liable after the grain is cut," etc. It also contains this further stipulation: "I hereby declare the above statement of number of acres is true. That I know this application does not bind the company until received and approved at its general office in St. Paul, Minn." The proof also shows that the application in question contained an instruction that the policy was to be sent to the local agent. This was signed by the local agent. The defendant testified that the policy was to be sent to him, showing that, at least in contemplation of the parties, a policy was to be issued and was for delivery to the defendant.

The defendant on the trial admitted the execution and delivery of the note and the application, which placed the burden of proof upon him, and he sustained this by showing that he received no policy. To this evidence the plaintiffs interposed a demurrer, which was by the court overruled, and it is assigned as one of the errors, plaintiffs insisting that it was incumbent upon the defendant to show not that he received no policy, but that the application which he made had not been accepted and approved at the home office of the company. Generally speaking, this would probably be true, as this was required in order to complete the contract between the parties, but the evidence of its completion, which all parties understood defendant was to have, was a policy. He received none, and although he repeatedly visited the agent to whom it was to be sent, and requested it, none was delivered to him, nor did he receive any reliable information or notice that the company had accepted and approved his application. The evidence of the acceptance and approval, if it existed, was entirely in the hands of the opposite party. It was an easy matter, not a difficult one, for them to have established it beyond cavil or controversy, and it was a difficult one for defendant to have established its absence. 16 Cyc. p. 936, and authorities cited. This being true, we believe that there was no error in the court overruling the demurrer to the evidence.

The plaintiffs then undertook to establish by evidence that the application had been accepted and approved at the home office of the company at St. Paul, Minn., in accordance with its terms. To do this, the application was offered in evidence, which had stamped upon it the words: "Approved May 3d, 1902." It was not shown by whom this was placed upon the application, where it was placed upon the application, nor when, nor indeed was any evidence whatsoever offered in reference to it, further than it was upon the same when identified by witness Yoeman on the trial. Under the terms of the contract, it will be noted that the application did not bind the company "until received and approved at its general office in St. Paul, Minn.," and, further, that the insurance would run "until Septem-

ber 15, 1902, at noon, and in no event shall the company be liable after the grain is cut." So that, to have fixed any liability on the company, it was necessary that the application be accepted and approved at the home office of the company in St. Paul, Minn., and this prior to the time when the grain was cut, and, at farthest, September 15, 1902. This must have been shown by the actual approval, or by acts tantamount thereto. There was no evidence on this point before the court, and none offered.

It is contended however, on the part of plaintiffs, that the retention of the application and of the note, without any action whatsoever on the part of the company, was sufficient to constitute the contract. We cannot give our assent to this doctrine because of the plain provisions of the application, which have been construed by many courts. See 16 Am. & Eng. Ency. of Law, p. 851; Alabama Gold Life Ins. Co. v. Mayes, 61 Ala. 163; Pickett v. Insurance Co., 39 Kan. 697, 18 Pac. 903; Insurance Company v. Johnson, 23 Pa. 72; Helman v. Phoenix Mut. Life Ins. Co., 17 Minn. 153 (Gil. 127) 10 Am. Rep. 154; Jacobs v. New York Life Insurance Company, 71 Miss. 658, 15 South. 639; Allen v. Mass. Mutual Accident Association, 167 Mass. 18, 44 N. E. 1053; Coker v. Atlas Accident Insurance Company (Tex. Civ. App.) 31 S. W. 703. The text in Am. & Eng. Ency. of Law, supra, is as follows: "If, however, the application provides that no liability shall attach to the agent's acceptance until the application has been approved by the home office, the company is not liable if the person upon whose life the insurance is placed dies, or if the property which is the subject of insurance is destroyed or damaged, before the application is approved. The acceptance must be signified by some act. The delay of the insurer in accepting or rejecting the proposal for insurance does not take the place of assent." If the company was not liable on its insurance contract, then it necessarily follows that the defendant was not liable on his note.

There was some evidence offered showing that a policy was issued on his application, but nothing whatever was shown as to its terms, who, if any one, was insured under it, and what property it covered. It was not offered in evidence, nor was any foundation laid or effort made to establish the same by secondary evidence.

Exceptions are taken to a number of instructions given by the court, which are all hypothecated upon the proposition that the acceptance and approval of the application had taken place, and that the defendant was, in fact, insured. As there was no evidence upon this controlling factor in the case, plaintiffs were not prejudiced by the instructions.

This case has been twice tried. In the justice of the peace court, defendant was given judgment; and, the plaintiffs appealing to the district court and trial being had before a jury, verdict was again rendered in favor of

defendant. A motion for new trial was then offered to that court, averring that the verdict was not sustained by the evidence, and was contrary to law. On consideration thereof the court overruled the same, and from an investigation of the record we have come to the conclusion that the evidence reasonably tends to sustain it.

Finding no error, the judgment is accordingly affirmed. All the Justices concurring.

McLAUGHLIN v. ARDMORE LOAN & TRUST CO.

(Supreme Court of Oklahoma. May 14, 1908.)

BILLS AND NOTES—ILLEGAL CONSIDERATION.

In a suit on a promissory note, where the proof shows the consideration thereof to be a deed of land from the payee to the payor, in possession of the payee, and held by him in violation of Act Cong. July 1, 1902, c. 1362, 32 Stat. 641, and that the transaction was in violation of Rev. St. U. S. § 2118, discloses an illegal consideration, and a motion to direct a verdict in favor of defendant was properly sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 225.]

(Syllabus by the Court.)

Error from the United States Court for the Southern District of the Indian Territory, at Ardmore; Hosea Townsend, Judge.

Action by E. C. McLaughlin against the Ardmore Loan & Trust Company. Judgment for defendant, and plaintiff brings error. Affirmed.

On January 28, 1904, E. C. McLaughlin, plaintiff in error, plaintiff below, sued Ardmore Loan & Trust Company, a corporation, defendant in error, defendant below, in the United States Court in the Indian Territory, Southern District, at Ardmore, on a certain promissory note as follows: "Ardmore, Ind. Ter., Oct. 12, 1903. January 1st, 1903, without grace, for value received, I, we or either of us, promise to pay to the order of E. C. McLaughlin, at their office at Ardmore, Indian Territory, seven hundred and fifty dollars (\$750.00), with interest at the rate of eight per cent. per annum from maturity until paid, and ten per cent. additional on the principal and interest unpaid for attorney's fees, if placed in the hands of an attorney for collection. This note is given for 330 acres of land evidenced by deed of this date, said land to be delivered to us on January 1st, 1904, free of all incumbrances, otherwise this note is void. Ardmore Loan & Trust Company, by S. M. Torbett, Secretary and Treasurer." Plaintiff alleged "that prior to the 1st day of January, 1904, the said 330 acres of land was delivered to defendant in accordance with said stipulation, and in accordance with said deed mentioned in said note." The complaint further alleges "that plaintiff executed said conveyance to defendant, quitclaiming to it as trustee and for the use and benefit of some person. Choctaw or Chickasaw, entitled to allot same

according to the treaties between the United States and the Choctaw and Chickasaw tribe or nation of Indians, and surrendered the possession to the defendant as trustee." This latter allegation was specifically denied by defendant in its answer, and, as there is no proof to support it, the same may be considered as eliminated from this case. Defendant in effect pleaded failure of consideration. At the close of the testimony on both sides the court instructed the jury to return a verdict for defendant, which was done, and exceptions noted, and from the judgment of the court on the verdict plaintiff appealed to the United States Court of Appeals for the Indian Territory, and the case is now before us for review.

Johnson & Dolman and T. L. Wright, for plaintiff in error. Cruce, Cruce & Blakemore, for defendant in error.

TURNER, J. (after stating the facts as above). The only assignment of error necessary for us to consider is that the court erred in sustaining defendant's motion to direct a verdict in its favor. The proof discloses that at the time of the execution of the note in controversy plaintiff in error was a Choctaw citizen, living at Ardmore, Ind. T., the father of three children, all living with him, all duly enrolled, and as such were each entitled to an allotment upon the public domain of the Choctaw Nation; that, being in possession of more in value than that of 320 acres of average allottable land in said nation than he could hold for himself and his three children, he, on the day the note sued on bears date, entered into a contract with Ardmore Loan & Trust Company, defendant in error, for the sale of 330 acres of said land thus held in excess by him. At that time there were some improvements on the land, such as fencing and houses, but their value does not appear; neither were they mentioned in the trade. The consideration to be paid for said land was \$750, and was evidenced by the note sued on. At the time of its execution and delivery a deed to the land was made, executed, and delivered by the payee to the payor, and the latter placed in possession of the land, which it has since retained.

The question for us to determine is whether there appears in this transaction such a consideration as will support an express promise to pay. By virtue of the terms of Act Cong. July 1, 1902, c. 1362, § 19, 32 Stat. 643, ratified September 25, 1902, plaintiff in error lost the right of possession of the lands attempted to be conveyed to defendant in error, the price of which furnished the consideration of the note sued on. By that act such right of possession went back into the tribe by operation of law. It follows that at the time of this transaction the payee had nothing in these lands which he could convey to a citizen of the Choctaw Nation, much less a citizen of the United States, or to a corpo-

ration organized under its laws, such as is defendant in error. *Turner v. Gilliland*, 4 Ind. T. 606, 76 S. W. 253; *Ikard v. Minter*, 4 Ind. T. 214, 69 S. W. 852; *Holford v. James*, 4 Ind. T. 636, 76 S. W. 263. But the entire object of this transaction was to enable Ardmore Loan & Trust Company to make a settlement on lands granted by treaty with the United States to an Indian tribe. This was in clear violation of Rev. St. § 2118, which reads: "Every person who makes a settlement on any lands belonging, secured or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of one thousand dollars. The President may, moreover, take measures and employ such military force as (he) may judge necessary to remove any such person from the lands."

In *Denton v. Capital Town Site Company*, 5 Ind. T. 396, 82 S. W. 852, the court says: "But this court never at any time has said nor is there any provision of law whereby a member of one of the tribes can sell to a United States citizen the possession or right of any of the tribal lands. The complaint in this action alleges directly a sale from a member of the Creek Nation to them of the lands sought to be recovered in this action—something that is positively inhibited by the statutes. * * * The Indian could not sell these lands, or the right to these lands, and could not convey the same, nor contract to do so. In this case the allegations of the complaint do not show that Mrs. Baysinger held these lands as a part of her allottable portion in the Creek Nation. If these lands at the date of this conveyance were not in her possession as her allottable portion thereof, she would be unable to transfer them even to another Creek citizen. If she could not transfer them to another Creek citizen, she certainly could not transfer them to a United States citizen, nor could she put another United States citizen in legal possession of them."

Swanger v. Mayberry, 59 Cal. 91, was a suit on two promissory notes given in part payment for the purchase money for growing timber on public land of which plaintiff had neither possession nor title, but in which he claimed "a possessory right," and as such "sold and conveyed to defendant all his right, title, and interest * * *" therein. The court said: "Being given for the privilege of cutting down timber growing upon the public lands of the United States, the notes were given for an illegal consideration. It is made a penal offense by act of Congress, passed March 2, 1831, to cut down timber upon any of the public lands of the United States with intent to export, dispose of, use, or employ the same in any manner whatsoever other than the use of the navy of the United States, and the offense is punishable by fine and imprisonment. Rev. St. U. S. § 2461 (U. S. Comp. St. 1901, p. 1527). * * * Under the

act of Congress, even if the plaintiff had been in possession of the land as a settler without proprietary rights in it, it would have been unlawful for him to cut down the timber growing upon it for the purpose of spoliation or traffic; and it would be equally unlawful for him to contract with another to do what the law prohibited him from doing, for what the law directly prohibits a man from doing cannot be done by indirect means. And being an act forbidden by law, a contract founded upon it is invalid, and cannot be made the subject-matter of an action. The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applied to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute, on the ground of public policy. *Ladda v. Hawley*, 57 Cal. 51; *Warren v. Manufacturers' Ins. Co.*, 13 Pick. 521; *s. c.* 25 Am. Dec. 341; *Holt v. Green*, 73 Pa. 198, 13 Am. Rep. 737; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671."

It follows that, as this contract had for its object the violation of law, it is illegal, and cannot be enforced, and that the court did not err in directing the jury to return a verdict in favor of the defendants. 15 Am. & Eng. Enc. of Law, 935, and cases cited.

The judgment of the lower court is affirmed. All concur.

(21 OKL. 189)

HARRIS v. FIRST NAT. BANK OF BOKCHITO.

(Supreme Court of Oklahoma. May 15, 1908.)

APPEAL—REVIEW—THEORY OF CASE.

The right of appellant to recover was properly submitted to the jury on his own theory. The jury finding against him on the theory relied upon, he will not be permitted to change front in this court and claim the right to recover upon some other theory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1053.]

(Syllabus by the Court.)

Appeal from the United States Court for the Central District of the Indian Territory, at Durant; Thomas O. Humphry, Judge.

Action by the First National Bank of Bokchito against W. R. Harris. Judgment for plaintiff, and defendant appeals. Affirmed.

W. T. Sprowls and Robert Crockett, for appellant. Chas. A. Phillips and Williams & Utterback, for appellee.

KANE, J. This was a suit in replevin commenced by the appellee, the First National Bank of Bokchito, as plaintiff below, against the appellant, defendant below, to recover certain specific personal property for the purpose of selling the same under a power of sale contained in a chattel mortgage executed by B. F. Clark to secure payment of a promissory note made by said Clark and pay-

able to the appellee. The appellant admits the execution of the note and mortgage, and that the same were unpaid, but, to defeat recovery, testified that before the execution of the note and mortgage, to wit, on the 14th day of January, 1904, B. F. Clark and Deputy Marshal Stacey came to his place of business and asked him to go on a bond for Clark that Clark might retain possession of the mules and wagon in controversy. The appellant further testified: That at first he refused to go on the bond, but that after two days Clark induced him to sign it and the property was released. The amount of the bond was \$91.95 against the mules and \$17.60 costs. That he signed the bond under the express agreement that Clark should sell and turn over to him the two mules and wagon, and that the appellant was to take them and hold and pay over the purchase money and costs and give Clark the privilege to purchase the mules and wagon back in the fall on payment of the sum paid out on account of the bond and \$25 which Clark was to pay the appellant as a fee. The appellant further testified that Clark took the bond after he signed it and went after the property, and the next day brought the mules and wagon to his place of business in Boswell, and he examined them and took actual possession of them. He told Clark then and there that he would take them and give him up his note of \$25, which he did at that time, to wit, on the 15th day of January, 1904. On the ——— day of June, 1904, he testified that he paid the purchase price of the mules and the costs, which all amounted to \$109.55. He further testified that he knew it was necessary for him to purchase the property outright and take actual possession in order to make it a valid trade under the law, and that he did purchase it in January, as above set out. The appellant then told Clark that he would lend him the mules and wagon to enable him to plant his crops, but that they were to be his (the appellant's) property, and subject to his control, and Clark agreed to all this. The appellant further testified: "I did not buy the property for speculation, but only to hold it, and expected to sell it back to Clark if he raised the necessary money. * * * I had possession of the property, and I loaned them back to Clark before the mortgage in question was executed. After Clark had left the country I again took possession of the mules and was in peaceable possession of them at Boswell when the First National Bank of Bokchito filed their suit in replevin against me." It is clear, from the above excerpts from the testimony of the appellant, that he bases his right to the possession of the property in controversy upon an absolute purchase from Clark, the owner, prior to the execution and deliverance of the note and mortgage by Clark to the appellee. There was evidence introduced reasonably tending to contradict the evidence adduced as to the purchase of the property by the ap-

pellant prior to the execution of the note and chattel mortgage by Clark to the appellee. Upon the issues thus joined and the evidence adduced the case was tried to a jury, and a verdict returned in favor of the defendant, upon which judgment was duly entered. The appellant brings the case here for review, assigning several errors, most of them, however, being based upon alleged erroneous instructions to the jury and the refusal of instructions requested by the appellant.

The specific grounds of complaint will be more apparent by quoting from the brief of counsel for appellant. He states them to be as follows: "To emphasize this point, and in order to bring our contention clearly before this court, we quote from the instructions to the jury delivered by the learned judge. On page 21 of the record, which contains the major portion of the charge of the court, the trial judge uses this language: 'If the acts and doings of Clark and Harris, the trade made, or the contract for any was made, was to secure a debt, then the plaintiff should recover.' Also on the same page the learned judge uses this language: 'I want to state that nothing but an absolute sale would give the property to Harris. An understanding that the mules and wagon would stand good did not carry title, and, unless the title passed, the bank must recover.' Also on the same page of the record the learned judge used this further language: 'Now there is a question for you to determine from the evidence in this case. Whether a sale from Clark to Harris there, or whether an agreement that the property should stand good and be a security to Harris, and that Harris was to be reimbursed but the property was to belong to Clark. In other words, if it was only to secure a debt, the mortgage of the plaintiff would be superior to any title that Harris would get.' We think the language quoted clearly demonstrates the fact that it was the opinion of the trial judge that Harris could acquire the title to and the right to the possession of the property in question only upon the theory that the transaction between appellant and Clark was an absolute sale of the chattel; that an attempt on the part of these individuals to invest such transactions with the character of a conditional sale or a chattel mortgage was abortive and ineffectual on the ground that every conditional sale or chattel mortgage to be valid must be in writing. Such, at least, was the effect of the charge of the trial judge to the jury, whether we have correctly stated his theory or not." We agree with counsel that the effect of the instructions was that Harris could acquire possession of the property upon the theory only that the transaction between appellant and Clark was an ab-

solute sale, but we do not concur in his statement that such instructions were erroneous. The appellant testified on the witness stand that he purchased the property from Clark; that he knew it was necessary for him to purchase the property outright and take active possession in order to make a valid trade under the law. There was not the slightest intimation in his evidence to indicate that his transactions with Clark in relation to this property constituted a conditional sale or a verbal chattel mortgage. The right of appellant to recover was properly submitted to the jury on his own theory. The jury finding against him on the theory relied upon, he will not be permitted to change front in this court and claim the right to recover upon some other theory. *Overstreet et al. v. Citizens' Bank*, 12 Okl. 383, 72 Pac. 379.

There is nothing in the record going to show that the court below rejected the conditional sale or verbal mortgage theory on the ground that such transactions to be valid must be in writing, or that plaintiff's counsel took that view of the case. They certainly did not in this court, as the following quotation from their brief plainly shows: "There is no evidence of a verbal mortgage in the record. The charge requested by the appellant on such theory was therefore properly refused." As was stated by learned counsel for the appellee in their brief, "there was evidence on the question of a sale vel non, and the court properly submitted that issue, and the issue being properly submitted, and the jury having decided against the appellant, they are concluded by the verdict of the jury."

The other errors complained of are predicated upon the theory that the appellant had a verbal mortgage on the property in controversy, which, by reason of irregularities in the acknowledgment of the mortgage of the appellee, and the use of greater diligence by the appellant in acquiring possession of the chattels, coupled with an equity which was at least equal to that of appellee, gave him a title to the chattels, which was superior to that of the bank. We cannot agree with learned counsel for appellant on this proposition. The appellant bases his right to retention of the property on his absolute ownership of it prior to the execution and delivery of the mortgage to the bank, and when that claim failed he is not entitled to have his theory of verbal mortgage considered for the first time in the Supreme Court.

Finding no material error in the record, it follows that the judgment of the court below must be affirmed. All the Justices concurring, except WILLIAMS, C. J., not sitting.

(21 Okl. 194)

SAXON v. WHITE.

(Supreme Court of Oklahoma. May 15, 1908.)

1. WRIT OF ERROR—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS—NECESSITY.

This court will not consider an alleged error of the trial court unless such alleged error appears on the record of the case and exception was taken thereto in the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1432-1468.]

2. SAME—REVERSAL—ERROR AS TO GROUNDS OF DECISION.

Where a jury is waived and the cause submitted to the court, and where complete, separate defenses are set up by defendant, a general finding of the trial court in favor of the defendant will not be disturbed by this court, if the evidence fairly tends to support either of the defenses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

3. SPECIFIC PERFORMANCE—DEFENSES—CONTRACT ABANDONED.

It is not error to refuse a decree of specific performance upon a contract that has been abandoned by both parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 183-187.]

4. SAME—PERFORMANCE IMPOSSIBLE.

A court of equity will not knowingly decree an impossibility, and where W., who owned a farm on which there was a mortgage, made a contract with S. to convey to him the same free of all incumbrance, where it appeared that said mortgage had not been paid, and that defendant was unable to pay the same, and where S. insisted upon a conveyance of said land free of incumbrances, and expressed no willingness to accept the incumbered title, the court correctly refused a decree of specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 30-32.]

(Syllabus by the Court.)

Error from District Court, Pottawatomie County; James K. Beauchamp, Judge.

Specific performance by J. W. Saxon against Clem White. Judgment for defendant, and plaintiff brings error. Affirmed.

Blakeney & Maxey, for plaintiff in error.
Jas. L. Brown, for defendant in error.

HAYES, J. On the 14th day of September, 1903, plaintiff in error, who will hereafter be called plaintiff, and defendant in error, who will hereafter be called defendant, made, executed, and delivered a contract by which defendant agreed and bound himself to make to the plaintiff a clear title by warranty deed to all the southwest quarter of section 18, township 9 north, range 4 east, on or before January 1, 1904. Plaintiff agreed and bound himself by said contract to give as a consideration for said land a promissory note for the sum of \$8,000 due on or before the 1st day of January, 1906, bearing interest at the rate of 10 per cent. per annum from the 1st day of January, 1904, executed by himself and wife, Mattie J. Saxon, and secured by first mortgage lien on said land and other land owned by plaintiff located in the town of Tecumseh. Plaintiff brought this

action in the district court of Pottawatomie county, praying for specific performance of said contract, and alleges that he had performed or offered to perform all of the conditions required of him by the contract. Defendant in his answer admits the execution of the contract, but sets up as defense to this action three defenses as follows: First. That he had after the execution of said contract, and before the 1st day of January, 1904, prior to which time the same was to be executed, offered to perform the same on his part, and demanded the performance of the same on the part of plaintiff and his wife, but that plaintiff and his wife failed, neglected, and refused to perform the conditions required of them by said contract. Second. That prior to the 1st day of January, 1904, it was agreed between him and plaintiff that the contract should be abandoned and rescinded, and that he acted upon said agreement and so changed his financial condition as to render himself unable to remove a mortgage incumbrance of \$2,000 on said tract of land. Third. That the contract is void and nonenforceable, for the reason that it does not afford to defendant the right to compel the specific performance thereof on the part of plaintiff and his wife, Mattie J. Saxon. At the trial a jury was waived, and the case was tried before the court, who found generally in favor of defendant and rendered judgment accordingly. No specific findings of fact were requested or made.

The evidence upon the issues made by the pleadings is conflicting. Plaintiff testified that, shortly after the contract was executed, he sent by mail to defendant blank forms of note and mortgage for his approval, which were returned to him by the defendant not approved. Both plaintiff and defendant testify about conversations thereafter had in which they endeavored to agree upon a form of mortgage, and there is no controversy that no form of mortgage was ever agreed upon. Defendant testified that in the month of November, at their last conversation, they agreed that they would abandon the contract, and a conversation was had about another meeting in the future, at which they would endeavor to reach an agreement on some other plan. Plaintiff denies that there was any agreement to abandon the contract. Defendant testified that, acting upon this agreement to abandon the contract, and since he never saw plaintiff thereafter and no other agreement was made, he changed his financial condition so he was unable to take up on the 1st day of January, 1904, a mortgage existing against the land in controversy. Plaintiff relies upon the following alleged errors of the court for reversal of the case: First. In refusing specifically to enforce the contract. Second. In holding that said contract could not be enforced for want of mutuality. The second of these alleged errors cannot be considered by

this court, for the reason that it is not disclosed by the record that the court made the holding therein complained of. In plaintiff's petition in error one of the errors assigned is that the court erred in holding that the contract could not be enforced for want of mutuality, but, if such holding was made by the court, the record does not disclose it. The three reasons assigned by plaintiff for a new trial in his motion for new trial were: First, that said decision is not supported by sufficient evidence, and is contrary to law; second, for errors of law occurring at the trial and duly excepted to by the plaintiff at the time the same occurred; third, for the reason the decision of the court is contrary to the weight of the evidence." This court will not consider alleged errors of the trial court, unless such alleged errors appear on the record of the case and exceptions were taken thereto by the complaining party. *Mary C. Hardwick v. Atkinson*, 8 Okl. 608, 58 Pac. 747; *Osborne & Co. v. Case et al.*, 11 Okl. 479, 69 Pac. 263.

The first alleged error relied upon by plaintiff for a reversal is in effect the same as the first and third reasons assigned by him in his motion for a new trial as grounds for a new trial, and attacks both the general finding of the court and the judgment thereon rendered. As before stated, defendant's answer presents three alleged defenses to this action, and, if any one of the same is supported by evidence fairly tending to establish it under the general finding of the court in favor of defendant, this court should not disturb the judgment of the trial court. The rule that, where a jury is waived and the cause submitted to the court, the decision of the court will not be disturbed by the appellate court if the evidence reasonably tends to support the judgment of the trial court has been uniformly followed by the Supreme Court of the territory of Oklahoma. *Kilpatrick v. Brennan*, 14 Okl. 42, 76 Pac. 162.

Under the state of the record in this case, it is unnecessary for us to decide whether time was an element in the contract, or whether plaintiff performed or offered to perform all the conditions required of him by said contract in order to entitle him to maintain this suit, for the evidence clearly discloses that plaintiff and his wife did not execute any note or mortgage, and tender the same to defendant until after the time at which it is contended by defendant the contract was abandoned, and, if it were conceded that the contract in this case is a contract enforceable in an action for specific performance, and that plaintiff had done all that the law required him to do in order to entitle him to such relief, still the judgment of the lower court would have to be affirmed if the evidence fairly tends to establish the abandonment of the contract as pleaded by defendant. The evidence upon this point consists in the testimony of the de-

fendant, who testified that he said to plaintiff in a conversation about the 23d day of November, 1903, that they had better call the deal off, and that plaintiff agreed to it, and that defendant acted upon this agreement, and changed his financial condition so that he was unable to take up the mortgage existing against the land, which, under the contract, was to be conveyed to plaintiff. This testimony of defendant is very strongly controverted by plaintiff and other witnesses, but the trial court heard the evidence and saw the witnesses who testified, and is in better position to judge of their credibility and of the weight of their testimony than this court is; and, since there is some evidence fairly tending to establish defendant's defense that they had by agreement abandoned the contract, this court should not disturb the general finding and judgment of the trial court in favor of defendant, for, if the contract had been abandoned by the parties thereto, an action for specific performance of the same would not lie. 26 *Amer. & Eng. Enc. of Law* (2d Ed.) 134.

We think that the judgment of the lower court should be affirmed for the further reason that the evidence in this case discloses without controversy that the land agreed to be conveyed by defendant to plaintiff was incumbered at the time such agreement was made by a mortgage to secure the payment of the sum of \$2,000. This mortgage existed as a lien against the land at the time of the institution of this suit, and at the time of the trial in the lower court it continued to exist, and foreclosure proceedings had been instituted thereon. Defendant testified that he was unable to pay said mortgage. By the terms of the agreement made between plaintiff and defendant, defendant agreed to convey to plaintiff a clear title by warranty deed, but it appears that defendant did not have a clear title to the land at the time of the execution of the contract or at the time of the trial, and he testified, and it is not controverted, that he was unable to pay the mortgage thereon, and the fact that foreclosure proceedings were pending is a circumstance corroborating his evidence. Plaintiff seeks by this action to obtain a clear title to said land. He prays in his petition for a conveyance of the land free from all incumbrances, in accordance with the terms and conditions of said agreement. The court was powerless to order defendant to convey a title that he had not. The only title defendant had at the time of the trial was an incumbered title, and, so far as the evidence discloses, the only title within his power to obtain. *Kennedy v. Hazleton*, 128 U. S. 667, 9 Sup. Ct. 202, 32 L. Ed. 576; *Farrar et al. v. Dean*, 24 Mo. 16; *Corby et al. v. Drew et al.*, 55 N. J. Eq. 387, 36 Atl. 827; *Snell v. Mitchell*, 65 Me. 48. In *Snell v. Mitchell*, supra, the facts are somewhat similar to the facts in the case at bar. The father of plaintiff, who was the father-in-law of defendant

in that case, conveyed one-half of the farm, which plaintiff attempted to have conveyed to him, to defendant, for the consideration that defendant agreed to maintain Caleb Snell and wife during the remainder of their lives, and defendant executed a mortgage back to Caleb Snell to secure the performance of that obligation. The court, in discussing the matter, said: "Now, the obligation which the plaintiff seeks to have specifically enforced, if it entitles him to any title at all, entitles him to an unincumbered one; and he has not signified his willingness to accept any other. Such a title the defendants cannot give. If the plaintiff had taken notice of the fact that defendants could not give him an unincumbered title, and had offered to take such a title as they could give, this objection would be obviated." Had plaintiff in the case at bar elected to take such title as defendant could give and had prayed the court for compensation for the deficiency, it then would have been within the power of the court to grant his prayer if the court found the facts in his favor, but plaintiff did not so elect, but chose to insist upon a conveyance of an unincumbered title which, under the evidence in the case, defendant could not give. *Pomeroy's Equity Juris.* 831-823.

The judgment of the trial court is affirmed.

WILLIAMS, C. J., and DUNN, TURNER, and KANE, JJ., concurring.

FORBES v. FIRST NAT. BANK OF ENID.

(Supreme Court of Oklahoma. May 15, 1908.)

1. BILLS AND NOTES—BONA FIDE HOLDER—ACTION—DEFENSE OF FRAUD.

In an action on a negotiable draft by the holder thereof who acquired it for value before maturity without notice against an indorser from whom the draft was obtained by fraud, knowledge of such facts as would put a prudent man upon inquiry in reference to the draft is not sufficient to defeat the right of the holder to recover, and the court may direct a verdict in favor of the holder, when the circumstances surrounding the transaction are not sufficiently strong for it to be said as a matter of law that bad faith may be reasonably inferred therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1879.]

2. SAME.

A person who was held out by a bank as assistant cashier while in the control and management of the bank, in the absence of the cashier from the state, transferred to a second bank a negotiable draft in part payment of the balance due the second bank by his bank on the day's clearing. *Held*, that the second bank thereby obtained sufficient title to the draft to maintain an action thereon against an indorser who transferred the draft to the first bank.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 826; vol. 6, Banks and Banking, § 260.]

(Syllabus by the Court.)

Error from District Court, Garfield County; B. F. Burwell, Judge.

Action by the First National Bank of Enid

against J. E. Forbes. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action brought by the First National Bank of Enid, Okl., against the Fourth National Bank of Dayton, Ohio, Citizens' Bank of Enid, Emily Smith, J. E. Forbes, and R. L. Denton, receiver of the Citizens' Bank, upon a draft drawn by the Fourth National Bank of Dayton on the Hanover National Bank of New York for the sum of \$700 and indorsed by Emily Smith, Citizens' Bank of Enid, and J. E. Forbes. It does not appear that any service was had upon the Citizens' Bank of Enid, or upon Emily Smith, and no appearance is made for them so far as the record discloses. The case was tried before a jury, and, after evidence was introduced by both parties, the court sustained a motion of plaintiff to direct the jury to return a verdict for it. For convenience the First National Bank of Enid will hereafter be referred to as the plaintiff, or as the First National Bank, and the Citizens' Bank of Enid as the Citizens' Bank. On the 4th day of April, 1904, the Fourth National Bank of Dayton, Ohio, made a draft for \$700 on the Hanover National Bank of New York, payable to the order of Emily Smith. This draft was brought to Enid, Okl., and on the 19th day of April, 1904, Emily Smith indorsed it in blank, and delivered it to J. E. Forbes in payment for certain real estate purchased from him on that day. About 4:15 o'clock p. m. of that day Forbes deposited the draft in the Citizens' Bank, and received credit on his pass book for the amount thereof. The Citizens' Bank was at that time a banking corporation organized under the laws of the territory of Oklahoma, doing business at the city of Enid, Okl. H. H. Watkins was its cashier, Wm. Kennedy, its president, and W. T. Dugan, its assistant cashier, but the evidence does not disclose that Dugan was a stockholder in the bank. On the 19th day of April, 1904, as agreed by the parties to this action, the Citizens' Bank was insolvent. Watkins, the cashier of the bank, on that day had gone to Kansas City for the purpose of securing financial aid to tide him over the difficulties then surrounding the institution. In his absence, the affairs of the bank were carried on by Dugan as assistant cashier. At that time the First National Bank was engaged in the banking business, with S. T. Goltry as its president. On the 19th day of April, 1904, at about the hour of 1:30 p. m., there was a clearance had between the Citizens' Bank and the First National Bank, which showed a balance in favor of the latter in the sum of \$4,400. For the purpose of paying this balance, the Citizens' Bank issued to the First National Bank its draft on the City National Bank of Kansas City for that sum, and the draft was delivered to the First National Bank at the time of the clearance. Dugan, the assistant cashier of the Citizens' Bank, requested that the draft should not be

forwarded for collection until he should see the First National Bank again, stating that he was expecting a telegram from Kansas City which might inform him that the account of the Citizens' Bank had been changed from the City National Bank of Kansas City. About 4:45 p. m. of that day, Dugan not having given the First National Bank any further information relative to the draft for \$4,400, Goltry, president of the First National Bank, took the draft to the Citizens' Bank and inquired of him whether he had heard from Kansas City, and whether the First National Bank should remit the draft, and, on being informed that he had not heard from Kansas City, Goltry asked that the Citizens' Bank make some other arrangement for settlement of the balance due the First National Bank on the day's clearing. Dugan delivered to Goltry in payment of said balance all the checks and drafts the Citizens' Bank had received that day, amounting to the sum of \$3,200. The items delivered by him to Goltry included the draft involved in this action. To secure the remainder of the \$4,400, Goltry took some form of duebill or cashier's check, signed by Dugan, as assistant cashier, and took as collateral a United States bond for the sum of \$500, and a note for \$1,000 executed by the Enid Wholesale Grocery Company in favor of the Citizens' Bank. Goltry then returned the draft on the bank in Kansas City. This transaction occurred on Tuesday. On Saturday prior thereto a draft was issued by the Citizens' Bank for the sum of \$1,800 in favor of the First National Bank, which was forwarded by the First National Bank to its correspondent in Kansas City. On the Monday following, being the 18th day of April, 1904, this draft was presented for payment, which was refused, and the draft went into the hands of a notary public for the purpose of being protested. Of this fact Goltry, the president of the First National Bank, was notified by wire, but later on the same day the draft was taken from the hands of the notary public and was paid. After receiving the telegram on Monday to the effect that his draft had been placed in the hands of a notary public for protest, Goltry called upon Watkins, cashier of the Citizens' Bank, and offered his assistance to tide the Citizens' Bank over its financial embarrassment, but was assured by Watkins that the assistance was not needed. Some time during the night of April 19th, or on the morning of the 20th, the assistant cashier of the Citizens' Bank notified the bank commissioner of the condition of the bank, and on the morning of the 20th the bank went into the hands of the bank commissioner. Early on the morning of the 20th day of April Forbes learned of the failure of the Citizens' Bank, and stopped payment of the \$700 draft sued on in this action. Upon the verdict of the jury directed by the court, judgment was rendered in favor of plaintiff against the Citizens'

Bank, its receiver, and J. E. Forbes. The case is brought to this court on appeal by J. E. Forbes.

Manatt & Sturgis, for plaintiff in error.
Charles West and Winfield Scott, for defendant in error.

HAYES, J. (after stating the facts as above). It is admitted that the Citizens' Bank was insolvent at the time it obtained the draft from Forbes. There is evidence sufficient to go to the jury to the effect that the officers of the bank knew it was insolvent at that time, and that the president of the First National Bank had knowledge at the time it obtained the draft from the Citizens' Bank that the Citizens' Bank was in a failing condition, and that it had knowledge that the Citizens' Bank had acquired the draft on the same day the draft was transferred to it by Dugan, but there is no evidence that the president of the First National Bank or any other officer of the bank had any knowledge of how the Citizens' Bank had acquired the draft from Forbes, or that it had acquired it from Forbes. The draft in question is a negotiable instrument in the strictest sense. It was acquired by the First National Bank for value before maturity. It was accepted by the First National Bank in part payment of the balance due it by the Citizens' Bank on the clearance of that day. The doctrine that the receiving of a negotiable instrument in payment of or as security for a pre-existing debt is receiving it for a valuable consideration is supported by the weight of authorities of both the state and federal courts of the Union. *Swift v. Tyson*, 16 Pet. (U. S.) 1, 10 L. Ed. 865; *Norton on Bills and Notes*, 294; 1 *Daniel on Negotiable Instruments*, par. 184; *Winfield National Bank v. McWilliams*, 9 Okl. 493, 60 Pac. 229. Plaintiff's possession of the draft, indorsed by the payee in Blank, was prima facie evidence that it acquired the same in good faith for value in the usual course of business before maturity, but, when Forbes introduced evidence tending to show that the draft had been obtained from him by the Citizens' Bank at a time when it was insolvent and the officers thereof knew it was insolvent, established such fraud in the Citizens' Bank's obtaining said draft from Forbes that the burden of proof then shifted to the First National Bank to show it had acquired the draft in good faith for value in the usual course of business. However, if plaintiff thereafter established that it received the draft for value in the usual course of business, and under circumstances that did not operate as constructive notice of the fraud by which Forbes had been induced to part with it, then the burden of proof was upon Forbes to prove actual notice of fraud. 1 *Daniel on Negotiable Instruments*, 812, 815, 819; *Winfield National Bank v. McWilliams*, supra. There was no proof that plaintiff had actual notice of fraud

practiced upon Forbes by the Citizens' Bank in acquiring said draft. The fact that the president of the First National Bank may have had knowledge that the Citizens' Bank was in a failing condition does not prove notice to it of the fraud of the Citizens' Bank in procuring the draft in question from Forbes. Plaintiff, by showing that it was a purchaser for value before maturity of said draft, established its right to recover thereon, unless such right be defeated by proof of notice of the equities of Forbes or of its bad faith. In *Atlas National Bank v. Holm et al.*, 71 Fed. 489, 19 C. C. A. 94, the United States Circuit Court of Appeals of the Seventh Circuit said: "There has been a contrariety of rulings on the subject, but the weight of authority has long been (in the federal courts, certainly since *Swift v. Tyson*, 16 Pet. [U. S.] 1, 10 L. Ed. 865) that one who takes an assignment of commercial paper before maturity, paying value, without notice of infirmity in the title or consideration, is deemed a good faith purchaser, and that, to deprive him of that character, it is not enough that he neglected to make the inquiry which under the circumstances a prudent man would or ought to have made."

It is contended by plaintiff in error that the conduct of Goltry in going to the Citizens' Bank after banking hours and obtaining the draft in question, and the other items of remittance which had been received by the Citizens' Bank during that day and the government bond and a note in settlement of the balance due by the Citizens' Bank to the First National Bank, when Goltry had knowledge that the Citizens' Bank was in a failing condition, and that it had acquired said draft on that day, establishes the bad faith of the plaintiff in taking the draft. He contends that the circumstances under which the draft was obtained were such as should have created a suspicion in the mind of Goltry, and put him upon inquiry, and that his not having made inquiry of the assistant cashier of the Citizens' Bank as to how he obtained the draft establishes the bad faith of the plaintiff. We think this contention not well founded, for it has become the well-established rule in the federal courts of the Union and in the greater number of state courts that suspicion of defect of title or even gross negligence on the part of a taker of a negotiable instrument will not defeat his title. *Atlas National Bank v. Holm et al.*, supra; *Murray v. Lardner*, 2 Wall. (U. S.) 110, 17 L. Ed. 857; *Hotchkiss v. National Banks*, 21 Wall. (U. S.) 354, 22 L. Ed. 645; *Clark v. Evans et al.*, 66 Fed. 263, 13 C. C. A. 433; *Goodman v. Simonds*, 20 How. (U. S.) 343, 15 L. Ed. 934; 1 *Daniel on Negotiable Instruments*, 766. In *Murray v. Lardner*, supra, Mr. Justice Swayne, speaking for the court, said: "The possession of such paper carries the title with it to the holder: 'The possession and title are one and inseparable.' The party

who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith." In *Goodman v. Harvey*, 4 Ad. & El. 870, it was held that gross negligence might be evidence tending to show mala fides and as such admissible, but that it did not in itself amount to proof of mala fides, and was not sufficient to deprive the holder of his right to recover. In *Hamilton v. Vought*, 34 N. J. Law, 187, it was held that, when mala fides is the point of inquiry, suspicious circumstances must be of substantial character, and, if such circumstances do not appear, the court can arrest the inquiry, and that the circumstances must be strong so that bad faith can be reasonably inferred. The court in that opinion used this language: "To preserve the negotiability of commercial paper and guard the interest of trade, it is absolutely necessary that large power should be placed in the judicial hand when the question arises as to what facts are sufficient to defeat the claim of the holder of a note or bill which has been taken before maturity, and for which value has been paid. It is only in this mode that the requisite stability in transactions of this kind can be retained." The circumstances that surround the transfer of the draft in this suit by the Citizens' Bank to the plaintiff tend to prove that the plaintiff had knowledge of the failing condition of the bank, but these circumstances are not sufficient to fasten upon the plaintiff a strong suspicion that the draft in question had been fraudulently obtained. There are various ways by which this draft could have been acquired by the Citizens' Bank on the day of its failure and been obtained without fraud. It could have been delivered to the bank in payment of an indebtedness. The bank could have paid cash for it. The bank could have given exchange on other banks for it. There was nothing in the face of the draft to indicate that Forbes had any interest therein. He had delivered the same to the bank as a negotiable instrument. It was within his power, if he had so desired, to have indorsed the same for collection and deposited it, and thereby have given notice to all into whose hands the draft should come that he had an interest in the same, but he

did not do so. He placed it within the power of the Citizens' Bank to transfer it as a negotiable instrument, and to treat it as its property. If one of two equally innocent persons must suffer from the wrong conduct of a third person, the one who places it within the power of the third person to commit the wrong should suffer. There is not the slightest evidence in the record that Goltry had any knowledge whatever of how the bank had obtained the draft from Forbes, nor was there evidence to impute to him guilty knowledge of such facts or willful ignorance thereof. The fact that the evidence may show that Goltry had such knowledge as might have made him suspicious that the Citizens' Bank was in a failing condition, and that he acted diligently in an effort to collect the balance due by the Citizens' Bank to plaintiff, does not prove bad faith. This he had a right to do, and the evidence must show, in order to defeat a recovery, that the plaintiff bank knowingly participated in the perpetration of fraud upon Forbes by the Citizens' Bank, or that it did so in willful ignorance. It was held by the Court of Appeals of New York, in *Magee v. Badger and Another*, 34 N. Y. 247, 9 Am. Dec. 691, that the duty or act of inquiry does not rest upon the purchaser of commercial paper to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by the issue as to his intelligence or ignorance. *Bona fides* is defined in Norton on Bills and Notes, p. 306, in the following language: "'Bona fides' or 'good faith' is a term used as a mere distinction from 'mala fides,' or 'bad faith.' If paper be purchased without anything which the law can construe into notice, it is spoken of as being purchased in good faith. Where, on the contrary, the purchaser has what the law construes to be notice of defects or equities, then he is a purchaser in bad faith, and can secure to himself none of the advantages given to the bona fide purchaser; but bad faith means nothing more than participation in the fraud, and resolves itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith." Tiedeman on Bills and Notes, p. 256, in speaking of the two different rules that have prevailed in the courts upon what constitutes a bona fide holder, uses this language: "But the great weight of authority in this country, as well as reason, supports the contrary doctrine, that the bona fide character of a holder can be destroyed only by proof of participation in or actual knowledge of the fraudulent or illegal character of the instrument."

It is contended by plaintiff in error that by his introducing evidence that the possession of the note by the Citizens' Bank had been obtained from him by fraud, thereby shifting the burden to the plaintiff to show that he was a bona fide holder for value, the court was precluded from instructing the

jury to return a verdict in favor of plaintiff. We cannot agree with this contention of plaintiff in error. It is true that, when the maker or indorser of a negotiable instrument establishes that the execution or transfer of the same was procured by fraud, he prima facie establishes a defense until overcome by evidence of the holder of the instrument that he is a purchaser for value before maturity in good faith, and, upon his doing so, the burden of proving notice of the fraud is then shifted to the defendant. There being no testimony in this case that the First National Bank had notice of the fraud practiced by the Citizens' Bank upon the defendant, Forbes, in the procuring of the draft in controversy, and it having been established that the First National Bank paid full value for the draft before maturity, defendant's defense is reduced to one of bad faith, on the part of the First National Bank, and, since the evidence introduced does not establish bad faith, it was within the power of the court to direct a verdict. "The question is one simply of good faith in the purchaser; and, unless the evidence makes out a case upon which the jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict for the holder." Norton on Bills and Notes, 303.

It is further contended by the plaintiff in error that the First National Bank obtained no title in the draft in controversy, for the reason that Dugan, the assistant cashier, by whom it was transferred to the plaintiff, had no authority to transfer the same to it. The evidence is that Dugan was the assistant cashier of the bank; that on the 19th day of April, 1904, when the transaction between the Citizens' Bank and the First National Bank took place, he was in active management and control of the bank as assistant cashier, in the absence of the cashier from the territory. *Smith v. Lawson et al.*, 18 W. Va. 212, 41 Am. Rep. 688, has been cited by plaintiff in error as decisive of the contention he urges. The facts in that case were that in the year 1866 Anthony Lawson drew a note payable to the order of James A. Nighbert, which was indorsed by Nighbert to the Branch-Bank of Virginia at Charleston. The indorsement of the note to the Branch-Bank of Virginia at Charleston was for the accommodation of both the drawer and the indorser, Nighbert. This note was after maturity assigned by James C. McFarland, president of the Branch-Bank of Virginia, at Charleston, with a number of other notes, to Isaac N. Smith for a valuable consideration, and was delivered to him without any indorsement thereon, except the blank indorsement of the payee, Nighbert. Afterwards money was deposited by Nighbert with the bank of Virginia at Charleston in the sum of \$3,100, with which to pay this note. Nighbert, who made the deposit of the money, did not know at the time he made same that the note had been

assigned to Smith. Suit was brought by Smith against Lawson and Nighbert for the recovery of the amount of the note, and it was held by the court that McFarland, the president of the Branch-Bank of Virginia, at Charleston, was without authority to make the assignment, and that Smith obtained no title, and therefore could not recover against defendants. But the facts upon which the court made this finding are quite different from the facts in the case at bar. In that case the consideration for which the president of the Bank at Charleston assigned the note to Nighbert, with other notes of the bank, was the payment of bank notes issued by the Bank of Virginia in the sum of \$27,182, payable at Richmond, and at various other branches of said bank, and in payment of the sum of \$1,500 on notes payable at the Branch-Bank of Virginia, at Charleston. It had not been the custom of the bank at Charleston to take up and pay the notes of the Bank of Virginia payable at its other branches. Of this fact Smith was advised at the time, and in the written assignment made by the president of the bank at Charleston to Smith of the note involved in that action it is stated by the president that he did not admit the right of Smith to present the notes of the Bank of Virginia payable at Richmond and other branches of the bank to the bank at Charleston, and the language of that assignment clearly advised Smith of the lack of authority of the president of the bank to assign the notes, and advised him that it was an unusual transaction of the bank. It further appeared from the evidence that the directors of the bank, up to the time the suit was brought by Smith against Lawson, had never been advised of the action of its president, assigning the note, and had never confirmed such action. That was a transaction by an officer of the bank not authorized by law, and out of the usual course of business of the bank, to wit, paying off notes of the principal bank of Virginia that were made payable at other branches of the bank, by assigning the promissory notes of the Branch-Bank, done upon threatened litigation. Smith, the holder of said note, threatened to attach the assets of the Branch-Bank at Charleston unless the president made some settlement of the notes held by him; but the facts in the case at bar do not present this condition. Dugan, who was held out by the bank as assistant cashier, authorized to do the necessary acts in the management and control of the bank, transferred the draft involved in this suit in a transaction that occurred daily in the business affairs of the bank. The evidence shows that on each day the balances due on clearings by the Citizens' Bank to other banks were settled by that bank. The method of settlement was, as a rule, to give a draft on the correspondent of the Citizens' Bank at Kansas City. The making settlement by the

Citizens' Bank to the First National Bank of the day's clearing was not an unusual transaction of the bank, and not unlike its daily transactions, except for the fact that it was not made until after banking hours, and that the payment was made in bills of exchange owned by the bank, instead of a draft on the correspondent at Kansas City. To say that the assistant cashier, Dugan, had power to issue a draft upon the bank at Kansas City for the balance due the First National Bank on the day's clearing, and yet would not have power to settle such balance by payment of money to the First National Bank or by transferring to the First National Bank negotiable instruments of the character of the one sued upon in this action, is an effort to make a distinction without a difference.

There is this further distinction between the facts of the case at bar and of the facts in the case of *Smith v. Lawson et al.*, supra. In this case the Citizens' Bank received the benefits of the transaction and retained those benefits, and in the answer of the Citizens' Bank and of its receiver it is admitted that the draft in this action was assigned on the 19th day of April, 1904, by the Citizens' Bank to the plaintiff for value, thereby admitting the authority of Dugan to assign the draft. We recognize that this admission made in the separate answer of the Citizens' Bank and its receiver is not binding upon the defendant, Forbes; but is to be considered in connection with the evidence in the case as an act of the bank and its representatives recognizing the authority of Dugan to act as he did act upon the day the draft was assigned to plaintiff. Our attention has also been called to the case of *Potter v. Merchants' Bank of Albany*, 28 N. Y. 641, 86 Am. Dec. 273, as supporting the theory of defendant that the First National Bank could obtain no title to the draft by the transfer made by Dugan. That was an action in the nature of trover brought by plaintiff, Potter, as receiver for the Bank of Medina, against the Merchants' Bank of Albany, for the conversion of a promissory note for \$3,000. The facts in that case which distinguish it from the case at bar are well stated in that part of the opinion which we quote: "It appeared on the trial that for 10 years prior to the 1st of June, 1861, the defendant had been the collecting agent of the Medina Bank; that the notes of the latter bank were sent to the former for collection, and when collected were credited on its books to the Bank of Medina, the latter drawing on it from time to time, and the drafts being charged against the Medina Bank, in account. On June 3, 1861, C. J. Beach, a clerk in the Medina Bank, whilst in charge of the bank, pursuant to the directions of John M. Kennan, the cashier, but without any authority from either the president or cashier so to do, inclosed the note in question to the Merchants' Bank of Albany, and directed it to be placed to the credit of the Medina Bank.

* * * The note was received by the defendant, but its cashier refused to enter the same for discount. He did, however, enter it for collection; and on the 5th wrote to the Medina Bank, acknowledging the receipt of the note, but stating that it had not been indorsed by the bank, complaining of it as a strange proceeding, and demanding authority to treat it as the property of the bank. No such authority was ever given." In that case the holder of the note was not a bona fide holder, and it was denied by the Bank of Medina that the person acting as assistant cashier had been given authority by either the president or the cashier of the bank to deliver the note to the holder thereof. The indorsement on the note was to the holder notice that the transaction was an unusual one, that there was something strange about the transaction, and the Merchants' Bank of Albany asked for authority from the Medina Bank to treat the note as its property which authority was not given. It was not shown that, in the transaction of the business of the bank it became necessary for Beach, acting in the capacity of general manager in the absence of the cashier, to discount the note to the Merchants' Bank of Albany, or for him to depart from the course that had been practiced by the bank for 10 years prior thereto in sending notes to said bank for collection only; whereas, in the case at bar, the plaintiff is the holder of the draft for value, having obtained it from the assistant cashier of the Citizens' Bank in a transaction that daily occurred between said banks, and received it without any notice whatever of Forbes' equities or of Dugan's lack of authority to make such transfer, and the bank itself, acting through its receiver, in its answer admits the authority of Dugan to make such transfer.

A careful review of the record discloses no error for which the case should be reversed, and the judgment of the lower court is affirmed.

WILLIAMS, C. J., and DUNN, TURNER, and KANE, JJ., concurring.

FIRST NAT. BANK OF SALLISAW v. BARBOUR.

(Supreme Court of Oklahoma. May 15, 1908.)
REPLEVIN—PLEADING—ANSWER.

Under the practice and procedure act of the state of Arkansas in force in the Indian Territory prior to statehood, all that was necessary, in order to enable the defendant in replevin to prove any defense he may have had, was to deny specifically all the allegations of the plaintiff's complaint.

(Syllabus by the Court.)

Appeal from the United States Court for the Central District of the Indian Territory, Sitting at Poteau; William H. H. Clayton, Judge.

Action by the First National Bank of Salli-

saw against D. P. Barbour. Judgment for defendant, and plaintiff appeals. Affirmed.

Fowler & Bolger and Malcolm E. Rosser, for appellant. Day & Buckley, for appellee.

KANE, J. This was an action in replevin brought by the appellant, plaintiff below, against the appellee, defendant below, to recover possession of certain personal property for the purpose of selling the same under a power of sale contained in a chattel mortgage executed by the defendant to the plaintiff. The complaint and affidavit in replevin were in the usual form. The answer, after specifically denying every material allegation of the complaint, proceeds as follows: "Defendant admits that he executed to plaintiff a mortgage November 1, 1902, as security for a note of even date therewith for \$320, but defendant alleges that he has paid said note in full, thereby releasing said mortgage. Defendant further alleges that said note was executed for money borrowed from said plaintiff, and that said plaintiff charged and collected thereon a usurious rate of interest, to wit, \$190 for two years, which said amount is more than by law permitted to be charged. Defendant, therefore, alleges that said mortgage has been discharged by reason of the payment of the indebtedness secured thereby; and, second, for the reason of said taking of usurious interest." A demurrer to the plea of usury was sustained, and that part of the answer cuts no further figure in the case.

At the trial, which was to a jury, the plaintiff introduced in evidence two promissory notes, one executed by the appellee individually, and one executed by him as surety for Allen Bell, and the chattel mortgage under which it claimed right of possession, and rested. The defendant introduced evidence tending to prove that before the commencement of this cause he had paid his individual note in the following manner: That he had given the plaintiff certain collateral notes to secure the payment of said personal note, and he had instructed the makers of the notes given as collateral to pay them at the First National Bank of Sallisaw, the appellant, and to tell the bank to apply the payments so made on his (the appellee's) personal note. Several of the makers of notes given as collateral testified that they paid their notes as instructed by the appellee, and informed the bank as to the application of such payments. There was further evidence to the effect that the bank, instead of following the instructions given in relation to applying payments on the personal note of appellee, applied the amounts paid on the collateral on the Bell note, on which he was surety. Appellee also testified that he was not to pay the Allen Bell note; that when Bell ran off in debt to the bank, the appellee was about to attach his property, as Bell owed him \$401; that defendant, appel-

lee, was about to get out an attachment, and so informed Mr. Sullivan, who had been cashier of the plaintiff bank, and that Mr. Sullivan advised him not to do it, because it would complicate matters, and that afterwards defendant had a talk with Mr. Hines, cashier of the bank, and told him that he intended to attach Bell, and that Mr. Hines told defendant if he did that the whole thing would be thrown into bankruptcy; that each one would receive a pro rata part, and that the bank would not get all of its debt, and that defendant would not get all of his debt; that Mr. Hines told defendant that if he would not bring attachment suit he would release defendant from the Allen Bell note for \$350, which he signed as surety, and that defendant then agreed not to attach, and did not bring any attachment suit, and that he never after considered that he owed the Bell note. The terms of the mortgage were broad enough to secure payment of both notes, and the payments made by the makers of the collateral notes, if applied on the personal note, would extinguish it; but the Allen Bell note would still remain unpaid, unless evidence was admissible, under the state of the pleadings, showing that the appellee had been absolved from its payment in the manner above set out.

After hearing the evidence the jury returned a verdict for the defendant, upon which judgment was duly entered. The appellant assigns eight reasons why it believes the judgment of the court below should be reversed. They may all, however, be epitomized in two, which may be briefly stated as follows: First. That under the state of the pleadings it was error to admit the evidence concerning the Bell note. Second. That there was not sufficient proof to justify the verdict.

In support of its first contention counsel cites the third paragraph of section 5033, Mansf. Dig. (Ind. T. Ann. St. 1899, § 3238), which reads: "The answer shall contain a statement of any new matter constituting a defense, counterclaim or set-off, in ordinary and concise language, without repetition"—and insists a proper construction of this provision makes the admission of the evidence complained of erroneous. We believe that all the evidence introduced was properly admissible, under the specific denial of the answer, without any further pleading. Mr. Cobbe, in his work on Replevin (section 755), states the rule thus: "In replevin all that is necessary, in order to enable defendant to prove any defense which he may have, is to deny all the allegations of the plaintiff's petition." In the same volume (section 751) is the following: "A general denial puts in issue every material allegation of the petition, and under it the defendant may give evidence of any special matter which amounts to a defense to the plaintiff's cause of action, as fraud in plaintiff's title, or possession as an officer under a writ by defendant." And,

again, the same work (section 1001): "In an action of replevin, any fact, which tends directly to disprove the right of possession in the plaintiff, may be shown under a general denial." The second paragraph of section 4298, Wilson's Rev. & Ann. St. 1903, is practically the same as section 5033, Mansf. Dig. (Ind. T. Ann. St. 1899, § 3238), cited by counsel for appellant. The Oklahoma statute reads: "The answer shall contain a statement of any new matter constituting a defense, counterclaim or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition." Burford, C. J., in *Payne v. McCormick Harvesting Machine Company*, 11 Okl. 318, 66 Pac. 287, in passing upon a question similar to the one now before us, says: "Under the general denial in replevin the defendant may make any defense, which will defeat the plaintiff's claim or right to possession as against the defendant, and under the Code great liberality is allowed to such defense." Mr. Chief Justice Burford, further discussing the question, says: "Under our Code the gist of the action of replevin is the wrongful detention by the defendant as against the plaintiff, and under a general denial the defendant may prove anything that will tend to show that he does not wrongfully detain the property as against the plaintiff. He may show that he does not wrongfully detain it, by showing that he rightfully detains it, or by showing that the plaintiff has no right to the possession. Great liberality is allowed the defense under the general denial."

In citing the foregoing authorities we are not unmindful that under the Code of Civil Procedure of Arkansas, which was in force in the Indian Territory at the time the pleadings were filed in this case, a "general denial" was not provided for, and would not have been sufficient to traverse the allegations of the complaint. But in this case the answer was drawn in accordance with the laws of Arkansas, and specifically denied every allegation of the complaint. This being so, the specific denial undoubtedly performed the same function in this case as a general denial does in like cases in states where such denials are provided for. It is difficult to understand, if under a general denial in such states the rule is: "In replevin all that is necessary, in order to enable defendant to prove any defense he may have, is to deny all the allegations in plaintiff's petition"—why the same rule is not applicable in Indian Territory, where a specific denial was necessary, and one was filed that put in issue each and every allegation of the complaint. There is no reason for a different rule merely because the statutes are dissimilar in the above particulars. The question in replevin is the right to possession of specific personal property, and under a pleading, whether general or specific, that puts in issue each and every allegation of the complaint, and denies the

right to possession of the plaintiff, any evidence that tends to show the right of possession in another for the purpose of defeating recovery should be admissible. We are therefore of the opinion that, under the practice and procedure act of the state of Arkansas in force in the Indian Territory prior to statehood, all that was necessary, in order to enable the defendant in replevin to prove any defense he may have had, was to deny specifically all the allegations of the plaintiff's complaint. Neither the Court of Appeals of Indian Territory nor the Supreme Court of Arkansas have passed squarely upon the question here involved, so we are at liberty to adopt the rule best supported by reason and authority, and also in harmony with the rule as we found it established by the Supreme Court of the Territory of Oklahoma prior to our admission as a state.

The cases cited by learned counsel for appellant, to the effect that payment and other matter going to defeat the notes was new matter, which should come from the defendant and be pleaded in order to make it admissible, are not in point in a case of this kind. This rule prevails in all the Code states with which we are familiar. Payment, accord, and satisfaction, and other such defenses to suits on promissory notes, suits on account and kindred cases, cannot be proved under a general denial in the other Code states any more than they can in Arkansas; yet such defenses may be proved in replevin cases, where the gist of the action is merely the right to possession of personal property, upon an answer which puts in issue all the material allegations of the complaint.

On the second ground of complaint we are convinced that the verdict of the jury is sufficiently supported by the evidence. If there is any evidence reasonably tending to support the verdict of a jury, the court will not disturb it. In this case the facts were all before the jury under proper instructions, and they found in favor of the defendant. "It is a settled rule of this court that, upon a question of preponderance of evidence, the verdict of a jury will not be set aside." *Hill v. Fellows*, 25 Ark. 11.

Let the judgment of the lower court be affirmed. All the Justices concurring.

GODFREY v. IOWA LAND & TRUST CO.
(Supreme Court of Oklahoma. May 20, 1908.)
INDIANS—CONVEYANCE OF ALLOTMENT—VALUITY.

A citizen of the Seminole Nation, not of Indian blood, after selecting his allotment and receiving his certificate of allotment from the chairman of the Commission to the Five Civilized Tribes, as provided for by the agreement of the 16th day of December, A. D. 1897, on the part of the Seminole Tribe of Indians, with the United States, ratified by an act of Congress of the 1st day of July, A. D. 1898 (30 Stat. 567, c. 542), after the removal of restrictions on the alienation of allotted land by the members of said tribe, by Act Cong. April 21,

1904 (33 Stat. 204, c. 1402), when no patent has been issued or delivered to such allottee or citizen, may execute a deed or conveyance to that part of his or her allotment not designated by him or her as his or her homestead.

(Syllabus by the Court.)

Error from the United States Court for the Western District of the Indian Territory, at Muskogee; Wm. R. Lawrence, Judge.

Action by T. T. Godfrey against the Iowa Land & Trust Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

On the 10th day of April, A. D. 1906, the plaintiff in error, as plaintiff in the court below, filed his first amended complaint against the defendant in error, the defendant in said court, seeking to have a certain deed declared a mortgage. Reference herein will be made to the parties as they appeared in the court below. Plaintiff, as a resident of the state of Kansas, alleged that the defendant was a corporation, organized under the laws in force in the Indian Territory, with its principal place of business at Muskogee, and for cause of action stated that, on April 29, 1905, he bought from one Robert James a certain described tract of land, situated in the Seminole Nation, Rebecca James, the wife of said grantor, joining with him in said deed, in executing and delivering a deed with covenants of general warranty conveying to plaintiff said land, which said deed was filed for record in the proper recording district wherein the land was situated, to wit, at Wewoka. A copy of said deed is attached to said complaint, and is in proper form, and contains full and complete covenants of warranty in fee simple. Said Robert James was an enrolled citizen of the Seminole Nation, not of Indian blood, and as such allottee received from the chairman of the Commission to the Five Civilized Tribes certificates of allotment, one bearing date of June 16, 1901, and the other June 28, 1902, describing the land in controversy. Said certificates were attached to said complaint, and identified as proper exhibits. He further alleges that, prior to the execution and delivery to him of said deed by the grantor, said Robert James conveyed said land to the defendant, the Iowa Land & Trust Company, by an instrument of writing in the shape and form of a deed, for the consideration of \$250, and that said instrument bears date of November 2, 1904, and was executed and delivered by said grantor to the said defendant for the purpose of securing a loan. Plaintiff attaches a copy of said deed to said complaint as a part thereof, and identified same as an exhibit, alleging that said deed was for the purpose of securing borrowed money, and being so understood at the time by all parties thereto, and was intended for the purpose of securing the payment of a note, evidencing a debt for such borrowed money, and that when the plaintiff became the purchaser of said land on April 29, 1905, he purchased the

same from said grantor with the understanding that said instrument, in favor of the defendants, was merely a mortgage; and in the settlement between the plaintiff and the said grantor, it was so agreed at the time, and a sufficient sum was reserved by the plaintiff out of the consideration for the payment of said land, to take up the said note held by the said defendant, in order to have canceled and set aside the deed held by it.

Plaintiff alleges that he has made an effort to settle with the defendant, and that defendant refused to settle for less than \$400, which is in excess of the mortgage debt; that he now offers to pay into court, as a tender to defendant, the principal and interest due on the aforesaid loan made by the defendant to Robert James. Plaintiff further alleges that the said Robert James, the grantor in plaintiff's deed, is a citizen of the Seminole Nation, not of Indian blood, and it is further alleged that no patent has been issued and delivered to him by the Principal Chief last elected by the Seminole Tribe, as provided in the Seminole agreement of December 16, 1897; that no patents have been delivered and executed, by said Principal Chief, to any of the citizens of the Seminole Nation, whether or not of Indian blood. Plaintiff further alleges that said Robert James, heretofore mentioned, has selected his homestead out of the land allotted to him in the Seminole Nation, and that the land described in defendant's complaint is no part of the homestead of Robert James. Plaintiff further alleged, that said note, evidencing the debt due by said Robert James, is now and was due and payable at the time this action was instituted, wherefore plaintiff prays that said deed or instrument or writing be declared in fact and in equity a mortgage, and, as such, foreclosed by proper decree, divesting the title out of the defendant, and vesting it in the plaintiff, being upon the payment of the amount of indebtedness due the defendant by said Robert James on said note, and if said relief cannot be granted, a commission be appointed to reconvey the title by deed to the plaintiff, and such other and general relief as it may be entitled to.

Thereafter, on the 24th day of April, 1906, the defendant demurred to said amended complaint, for the reason that the facts therein stated were not sufficient to constitute a cause of action; and thereafter, on the 26th day of June, 1906, said demurrer was by the court sustained, to which action at the time the plaintiff then and there excepted; and, defendant failing to plead further, a decree was therein rendered in favor of the defendant, dismissing plaintiff's amended complaint, and taxing all the costs against him, plaintiff at the time duly saving his exception to the action of the court. Thereafter the plaintiff duly prosecuted its appeal to the United States Court of Appeals of the Indian Territory, and the same is now properly before

this court, by virtue of the provisions of the enabling act, for determination.

Gibson & Ramsey, for plaintiff in error.
Thomas & De Meules, for defendant in error.

WILLIAMS, C. J. (after stating the facts as above). The question to be adjudicated in this case is whether or not a citizen of the Seminole Nation, not of Indian blood, after selecting his allotment and receiving his certificate of allotment from the chairman of the Commission to the Five Civilized Tribes, as provided for by the agreement of the 16th day of December, A. D. 1897, on the part of the Seminole Nation of Indians with the United States of America, ratified by an act of Congress, approved on the 1st day of July, 1898 (30 Stat. 567, c. 542; 1 Kappler's Indian Affairs, Laws, and Treaties [2d Ed.] p. 662), can make a valid sale, deed, or conveyance to that part of his or her allotment not selected as his or her homestead, after the removal of the restrictions on the alienation by the Indian appropriation act, approved April 21, 1904, although no patent had been issued or delivered to such allottee before he undertakes to alienate the same.

That we may properly understand the provisions of the Seminole treaty of 1897, it is important that we examine the treaty made and concluded at Washington, D. C., March 21, 1866, between the United States government and the Seminole Nation, and ratified on the 19th day of July, 1866. It is by virtue of this treaty that the Seminoles acquired the title or right to the property in controversy. Article 3 of said treaty (14 Stat. 72; 2 Kappler's Indian Affairs, Laws, and Treaties [2d Ed.] p. 911), provides as follows: "The United States having obtained, by grant of the Creek Nation, the westerly half of their lands, hereby grants to the Seminole Nation the portion thereof hereafter described which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole Nation are bounded and described as follows, to wit: * * * In consideration of said cession of two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted by the sum paid by the United States for Seminole lands under the stipulations above written. * * *"

Section 15 of an act of Congress, approved March 3, 1893 (27 Stat. 645, c. 209), in part is as follows: "The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokee, Creek, Choctaws, Chickasaws and Seminoles; and upon such allotment the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States." Said act further pro-

vides for the appointment of commissioners to enter into negotiations with the Five Civilized Tribes for the purpose of extinguishing their national and tribal titles to land. Section 16 of said act is in part as follows: "The President shall nominate, and by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee (or Creek) Nation, the Seminole Nation, for the purpose of extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severally among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a state or states of the Union which shall embrace the lands within said Indian Territory."

When we consider the foregoing excerpts from the act of March 3, 1893, light is shed upon the agreement, afterwards entered into on the 16th day of December, 1897, heretofore referred to. The said agreement in part provides as follows: "All lands belonging to the Seminole Tribe of Indians shall be divided into three grades, designated as the first, second, and third, * * * and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and fertility of the soil considered, giving to each the right to select his allotment so as to include any improvements thereon owned by him at the time, and each allottee shall have the sole right to occupancy of the land so allotted to him during the existence of the present tribal government and until the members of said tribe shall become citizens of the United States; * * * and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him." Obviously, upon the selection of his allotment and the receipt, by the allottee, of a certificate signed by the chairman of the Commission of the Five Civilized Tribes, the land described in said certificate was segregated from the common mass of Seminole land. It could not thereafter be allotted to any other citizen. The allottee could not be deprived of the same, either by the federal government, or the Indian tribes.

In the case of *Wirth v. Branson*, 98 U. S. 118, 25 L. Ed. 86, the court stated: "The rule is well settled by a long course of decisions that, where public lands have been

surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent for a particular lot or tract shall be regarded as the equitable owner thereof, and the land is no longer open to selections. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first selection or entry be vacated and set aside."

In the case of *Landes v. Brant*, 10 How. (U. S.) 372, 13 L. Ed. 449, the court says: "Cruise on Real Property (volume 3, pp. 510, 511) lays down the doctrine with great distinctness. He says: 'There is no rule better founded in law, reason, and conscience than this: That all the several acts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation.' For the purpose of this case (without proposing to apply the rule to every other) we may assume that the first act of Claymorgan was that of filing his title papers and claim with the recorder of land titles, according to the fourth section of the act of March 3, 1805. This was legally done, and the papers recorded. He claimed under the second section of the act of 1805, which was amended by the act of 1806, and again by the act of 1807. As already stated, by the fourth section of this last act, the decision of the board of commissioners, appointed to investigate such claims, is made final against the United States, and he was entitled to a patent. His claim was fully within the provisions of the acts of 1805 and 1807. Applying the doctrine of relation, and taking all the several parts and ceremonies necessary to complete the title together, 'as one act,' then the confirmation of 1811 and the patent of 1845 must be taken to relate to the first act—that of filing the claim in 1805. On this assumption intermediate conveyances made by the confirmee, or by the sheriff on his behalf, of a date after the first substantial act, are covered by the legal title, and pass that title to allenee. And on this ground the deed made by the sheriff to McNair is valid."

In the case of *Carroll v. Safford*, 3 How. 460, 11 L. Ed. 671, the court says: "But, independently of the force of usage, we think the construction is sustainable. When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held it for a final certificate, which could no more be canceled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee. It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, techni-

cally, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect it is considered as belonging to the realty. Now, why cannot such property be taxed by its proper denomination as 'real estate'? In the words of the statute, 'as lands owned by nonresidents.' And if the name of the owner could not be ascertained, the tract was required to be described by its boundaries, or in any particular name. We can ascertain, no doubt, that the construction given to this act by the authorities of Michigan, in regard to the taxation of land sold by the United States, whether patented or not, carried out the intention of the law-making power."

In the case of *Witherspoon v. Duncan*, 71 U. S. 210, 18 L. Ed. 342, the court says: "Arkansas covenanted to abstain from taxation of the public lands within her limits, and to refrain from legislation that should impede the federal government in disposing of them, or interfere with the regulation of Congress for the security of titles. It is clear that the government has not been hindered in selling them, nor Congress obstructed in securing titles; but it is claimed the contract has been violated, because these lands, when taxed, were owned by the United States. In no just sense can lands be said to be public lands after they have been entered at the land office, and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer, and is a void act. Accordingly to the well-known mode of proceeding at the land offices (established for the mutual convenience of buyer and seller), if the party is entitled by law to enter the land, the receiver gives him a certificate of entry reciting the facts, by means of which, in due time, he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title. As the patent emanates directly from the President, it necessarily happens that years elapse, before, in the regular course of business in the General Land Office, it can issue; and if the right to tax was in abeyance during this time, it would work a great hardship to the state, for the purchaser, as soon as he gets his certificate of entry, is protected in his proprietary interest, can take possession, and make lasting and valuable improvements, which it would be difficult to separate from the freehold for the purpose of taxation. * * * This question was fully considered by this court in

Carroll v. Safford, 3 How. (U. S.) 450, 11 L. Ed. 671, and the views we have presented only reaffirm the doctrines of that case. But it is insisted that there is a difference between a cash and a donation entry—that the one may be complete when the money is paid, but the other is not perfected until it is confirmed by the General Land Office, and the patent issued. That Congress has the entire control of the public lands, can dispose of them for money, or donate them to individuals or classes of persons, cannot be questioned. If the law on the subject is complied with, and the entry conforms to it, it is difficult to see why the right to tax does not attach as well to the donation as to the cash entry. In either case, when the entry is made and certificate given, the particular land is segregated from the mass of public lands, and becomes private property. In the one case, the entry is complete when the money is paid; in the other, when the required proofs are furnished. In neither can the patent be withheld if the original entry was lawful. In the case of *Lessee of French et ux. v. Spencer*, 21 How. (U. S.) 239, 16 L. Ed. 97, Mr. Justice Catron, speaking for the court, said: 'Whether the patent related back in support of Spencer's deed is now a question in this court.' It arose in the case of *Landes v. Brant*, 10 How. (U. S.) 372, 13 L. Ed. 440, where it was held that a patent, issued in 1845 'to Claymorgan and his heirs,' by which the heirs took the legal title, related back and inured to the protection of a title, founded on a sheriff's sale of Claymorgan's equitable interest, made in 1808. There, as here, the contest was between the grantee's heirs and the purchaser of the incipient title; the court holding that when the patent issued, it related to the inception of title, and must be taken, as between the parties to the suit, to bear date with the commencement of title."

In the case of *Doe ex dem. Mann et al. v. Wilson*, 23 How. (U. S.) 461, 16 L. Ed. 584, Mr. Justice Catron, speaking for the court, said: "By the treaty of October 27, 1832, made by the United States, through commissioners, with the Pottawatomie Tribe of Indians and the state of Indiana and Michigan Territory, said nation ceded to the United States their title and interest in and to their lands in the state of Indiana and Illinois, and the Michigan Territory south of Grand river. Many reservations were made in favor of Indian villagers, jointly and to individual Pottawatomies. The reservations are by sections, amounting probably to 100, lying in various parts of the ceded country. As to these, the Indian title remained as it stood before the treaty was made; and to complete the title as to the reserved lands the United States agreed that they would issue patents to the respective owners. One of these reservees was the chief Pet-chi-co, to whom was reserved two sections. The treaty also provides 'that the foregoing reservations shall be selected under the direction of the

President of the United States, after the land shall have been surveyed, and the boundaries shall correspond with the public surveys.' In February, 1833, by a deed in fee simple, Pet-chi-co conveyed to Alexis Coquillard and David H. Colerick, of the state of Indiana, 'all those sections of land lying in the state aforesaid, in the region of country or territory ceded by the treaty of 27th October, 1832.' The grantor covenants lawful authority to sell and convey the same, and he furthermore warrants the title against himself and his heirs. Under this deed the defendant holds possession. The lessors of the plaintiff took a deed from Pet-chi-co's heirs, dated 1855, on the same assumption that their ancestors' deed was void; having died in 1833, before the lands were surveyed, or the reserved sections selected. And on the trial below the court was asked to instruct the jury 'that Pet-chi-co held no interest, under the treaty in the lands in question, up to the time of his death, that was assignable; he having died before the location of the land, and before the patents issued.' This instruction the court refused to give; but, on the contrary, charged the jury that 'the description of the land in the deed from Pet-chi-co to Coquillard and Colerick, from Colerick to Coquillard, and from Coquillard to Wilson, are sufficient to identify the land, thereby intended to be conveyed, as the same two sections of land which are in controversy in this suit, and which are described in the patents which have been read in the evidence.' * * * The only question presented by the record that we felt ourselves called on to decide is whether Pet-chi-co's deed of February, 1833, vested his title in Coquillard and Colerick. The Pottawatomie Nation was the owner of the possessory right of the country ceded, and all the subjects of the nation were joint owners of it. The reservees took by the treaty, directly from the nation, the Indian title; and this was the right to occupy, use, and enjoy the lands, in common with the United States, until partition was made, in the manner prescribed. The treaty itself converted the reserved sections into individual property. The Indians as a nation reserved no interest in the territory ceded; but, as a part of the consideration for the cession, certain individuals of the nation had conferred on them portions of the land, to which the United States title was either added, or promised to be added, and it matters not which, for the purpose of this controversy for possession. The United States held the ultimate title, charged with the right of undisturbed occupancy and perpetual possession, in the Indian nation, with the exclusive power in the government of acquiring the right. *Johnson v. McIntosh*, 8 Wheat. (U. S.) 603, 5 L. Ed. 681; *Cornet v. Winton's Lessee*, 2 Yerg. (Tenn.) 147. Although the government alone can purchase lands from an Indian nation, it does not follow that, when the rights of the nation are extinguish-

ed, an individual of the nation, who takes as a private owner, cannot sell him interest. The Indian title is property and alienable, unless the treaty had prohibited its sale. *Cornet v. Winton's Lessee*, 2 Yerg. (Tenn.) 148; *Blair and Johnson v. Pathkiller's Lessee*, 2 Yerg. (Tenn.) 414. So far from this being the case in the instance before us, it is manifest that sales of the reserved sections were contemplated, as the lands ceded were forthwith to be surveyed, sold, and inhabited by white population, among whom the Indians could not remain. We hold that Pet-chi-co was a tenant in common with the United States, and could sell his reserved interest; and that when the United States selected the lands reserved to him, and made partition (of which the patent is conclusive evidence), his grantees took the interest he would have taken if living. In the case of *Crews et al. v. Burcham et al.*, 1 Black (U. S.) 357, 17 L. Ed. 91, the court said: 'Some expressions in the opinion delivered in the case of *Doe v. Wilson*, the first case that came before us arising out of this treaty, were the subject of observation by the learned counsel for the appellant in the argument, but which were founded on a misapprehension of their scope and purport.' It was supposed that the court had held that the reservee was a tenant in common with the United States after the treaty of cession, and until the surveys and patent. It will be seen, however, that the tenancy in common there mentioned referred to the right to occupy, use, and enjoy the lands in common with the government, and had no relation to the legal title."

In the case of *Crews v. Burcham*, 1 Black (U. S.) 352-358, 17 L. Ed. 91, the treaty under consideration by the court being that with the Pottawatomie tribe of October 27, 1832, by which the nation ceded all its lands in Illinois and other states, subject to certain regulations, the court said: "It is true that no title to the particular lands in question could rest in the reservee, or in his grantee, until the location by the President, and, perhaps, the issuing of the patent; but the obligation to make the selection as soon as the lands were surveyed, and to issue the patent, is absolute and imperative, and founded on a valuable and meritorious consideration. The lands reserved constituted a part of the compensation received by the Pottawatomies for the relinquishment of their right of occupancy to the government. The agreement was one which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee, or, in case he had parted with his interest, in favor of his grantees. And the obligation is not the less imperative and binding because entered into by the government. The equitable right, therefore, to the lands in the grantee of Beison, when selected, was perfect; and the only objection of any plausibility is the technical one as to vesting of the legal title."

Mr. Justice Field, in *Stark v. Starr*, 6 Wall. (U. S.) 418, 18 L. Ed. 925, says: "The right to patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentees, so far as it may be necessary to cut off intervening claimants. If the patent relates back to the inception of the right to it to cut off intervening claimants, with equal reason and justice it must relate back to estop the patentees from asserting title against his grantee under warranty deed made before the patent actually issued, and after his right to it had become absolute."

In the case of *Francis v. Francis*, 203 U. S. 238, 27 Sup. Ct. 129, 51 L. Ed. 167, Mr. Justice Harlan, speaking for the court, said: "The third article is in the following words: 'There shall be reserved for the use of each of the persons hereinafter mentioned, and their heirs, which persons are all Indians by descent, the following tracts of land, to be located at and near the Grand Traverse of the Flint river, in such manner as the President of the United States may direct.' It is very clear that, if a fee-simple estate was intended to be granted, the parties to the treaties were unfortunate in the choice of terms by which to give effect to that intention; and yet it is difficult to conceive that any other estate was in the contemplation of the parties at the time of its existence. Will, then, the third article warrant such a construction? It will be observed that the reservation is to the use of Mokitchenoqua and 'her heirs.' No limitation as to the time of holding, or restriction upon the right of alienation, is contained in the grant. The use of the word 'heirs' clearly implies that such an estate was granted as would, upon her death, descend to her legal representatives. Here, then, are all the essential elements of a fee-simple estate. This construction, we think, is justified by the words of the third article, and is strengthened by the fact that it corresponds, not only with the opinion given by the Attorney General of the United States to the Secretary of War (Land Laws, pt. 2, pp. 96, 97), but with the opinion of the Senate—a branch of the treaty-making power—which is certainly entitled to great consideration (3 Senate Doc. 1836, No. 197). Again, in the same case, the court said: 'The location of the lands became a duty, devolving on the President, of the treaty. This duty he could execute with an act of Congress, the treaty, when ratified, being the supreme law of the land, which the President was bound to see executed. It was impossible to describe the tract granted to any of the reserves in the treaty, as it is matter of history that none of the lands ceded had ever been surveyed. But locality is given to the grant by the terms of the treaty, with authority to locate afterwards by a survey making it definite. *Smith v. United States*, 10 Pet. (U. S.) 326, 9 L. Ed. 444. This authority being executed, the grant then be-

came as valid to the particular section designated by the President as though the description had been incorporated in the treaty itself. We are therefore of opinion that a fee simple passed to the reservee, Mokitchenoqua, by force of the treaty itself, and that the rights of the parties could in no wise be affected by the subsequent act of the President directing a patent to be issued." The court further says: "In *Dewey v. Campau*, 4 Mich. 565, 566, the court, interpreting the same treaty, said: 'A title in fee under this clause of the treaty passed, by this language, to the reservee.' The term 'reservation' was equivalent to an absolute grant. The title passed as effectually as if the grant had been executed. The title was conferred by the treaty. It was not, however, perfect until the location was made. The location was necessary to give it identity. The location was duly made, and thus the title to the land in controversy was consummated by giving identity to that which was before located."

In the case of *Jones v. Meehan*, 175 U. S. 4, 20 Sup. Ct. 2, 44 L. Ed. 51, the court said: "By article 9 of the treaty: 'Upon the urgent request of the Indians, parties to this treaty, there shall be set apart from the tract hereby ceded a reservation of six hundred and forty acres near the mouth of Thief river for the chief Moose Dung, and a like reservation of six hundred and forty acres for the chief Red Bear on the north side of Pembina river.' * * * Moose Dung selected as his reservation, under the ninth article of this treaty, 640 acres, a part of which was lot 1 in section 34, including the strip now in controversy; and he lived on that land at the mouth of Thief river, and made it his home, and had a log house, a garden, and a fish trap there. He died in 1872, before the lands were surveyed, and was succeeded, as chief, by his eldest son, who had been born at Red Lake in 1828, and who was known to the whites by the same name of Moose Dung or Monsimoh, and to the Indians as Mayskokonoyay, meaning 'The one that wears the red robes'; and, ever since the making of the treaty, his father and himself, in succession, sustained tribal relations with the Red Lake band of Chippewa Indians, and that band continued to be recognized as an Indian tribe by the government of the United States. * * * The clear result of this series of decisions is that when the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief of another member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property, the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of

the treaty or an act of Congress, have expressly or impliedly prohibited or restricted its alienation. * * * The title to the strip of land in controversy, having been granted by the United States to the elder chief Moose Dung by the treaty itself, and having descended, upon his death, by the laws, customs, and usages of the tribe, to his eldest son and successor, as chief, Moose Dung the younger, passed by the lease, executed by the latter in 1891, to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or of Congress, or of the executive departments. The constructions of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself. * * *

In the case of *Wallace v. Adams*, 143 Fed. 720, 74 C. C. A. 540, the United States Circuit Court of Appeals for the Eighth Circuit, in construing the Choctaw-Chickasaw agreements, containing provisions for the allotment of land in said nations therein, said: "The Commission, under the direction of the Secretary, is a special tribunal, vested with the power to hear and determine the claims of all parties to allotment in these lands and to execute its judgment by the issuance of the allotment certificates, which constitute conveyance of the right of the lands to the parties whom they decide are entitled to the property. * * * The allotment certificate, when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal, empowered to decide the question that a party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee." This case was affirmed by the Supreme Court of the United States. See *Wallace v. Adams*, 204 U. S. 419, 27 Sup. Ct. 363, 51 L. Ed. 547.

The case of *Quinney v. Denney*, 18 Wis. 485, was a case involving the right of the allottee to sell his allotment before patent was issued. That was an action in ejectment, and it appears that the land was filed on or taken in 1845, 15 years before the date of the patent. The court held that the law or treaty gave the allottee an equitable title. It said: "Now we are of the opinion that this act created or gave to the allottee an equitable estate or title in the land allotted to him, which could be sold and transferred by deed, and that when the patent subsequently issued to him it inured to the benefit of his grantee. We think that this position is abundantly sustained by the following authorities cited on the brief of the counsel for the appellant: *Strother v. Lucas*, 12 Pet. (U. S.) 410, 9 L. Ed. 1137; *Stoddard v. Chambers*, 2 How. (U. S.) 284, 11 L. Ed. 269; *Grignon v. Astor*, 2 How. (U. S.) 319, 11 L. Ed. 283; *Les Bols v. Bramell*, 4 How. (U. S.) 449, 11 L. Ed. 1051; *Marsh v. Brooks*, 8 How. (U. S.) 223, 12 L. Ed. 1056; *Landes v. Brant*, 10 How. (U. S.) 348, 13 L. Ed. 449; *United States v. Brooks*, 10 How.

(U. S.) 442, 13 L. Ed. 489; *French v. Spencer*, 21 How. (U. S.) 223, 16 L. Ed. 97; *Berthold v. McDonald*, 22 How. (U. S.) 334, 16 L. Ed. 318; *Doe v. Wilson*, 23 How. (U. S.) 458, 16 L. Ed. 584; *Crews v. Burcham*, 1 Black (U. S.) 352, 17 L. Ed. 91; *Chaillefoux v. Ducharme*, 4 Wis. 554."

The Supreme Court of the United States and other courts have uniformly held that the patent, issued to the purchaser by the government, is not a new acquisition of title. It is only a confirmation of the right which the patentee had before the patent was issued. *Cornelius v. Kessel*, 128 U. S. 456-463, 9 Sup. Ct. 122, 32 L. Ed. 482; *Stoddard v. Chambers*, 2 How. (U. S.) 284, 11 L. Ed. 269; *Bissell v. Penrose*, 8 How. (U. S.) 317, 12 L. Ed. 1095; *Shepley v. Cowan*, 91 U. S. 330-340, 23 L. Ed. 424; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 65-68, 16 Sup. Ct. 939, 41 L. Ed. 72; *Defenback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423; *Spless v. Neuberg*, 71 Wis. 279, 37 N. W. 417, 5 Am. St. Rep. 211; *Faull v. Cooke*, 19 Or. 455, 26 Pac. 662, 20 Am. St. Rep. 836; *Morrison v. Faulkner* (Tex. Civ. App.) 21 S. W. 984; *Rozell v. C. M. & L. Co.* (Ark.) 89 S. W. 469; *Frost v. Missionary Society*, 56 Mich. 62, 22 N. W. 203; *Jackson v. Ramsay*, 3 Cow. (N. Y.) 76, 15 Am. Dec. 242; 3 Washburn, Real Property (6th Ed.) § 2034.

In May, 1863, Congress passed an act, providing that in all cases where patents for public lands have been or may be hereafter issued in pursuance to any law of the United States, if a person who had died, or shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs of the devisees or assigns of such deceased as if the patent had been issued to the deceased patentee during life. Act May 20, 1836, c. 76, 5 Stat. 31.

In the case of *Oliver v. Forbes*, 17 Kan. 127, it was held that this act applied to the case of an Indian who had received his land under a treaty with the United States. After citing a number of cases referring to patent issued after the death of the patentee, the Kansas Supreme Court said: "If the patent is valid, it is so merely because it is in confirmation of other existing rights, and not because it created any new rights."

In the case of *Briggs v. Wash-puk-quah* (C. C.) 37 Fed. 135, the validity of a conveyance executed before patent was issued was involved, and Judge Foster said: "The right to the patent was absolute and complete, and the duty of the Secretary of the Interior to issue the patent was imperative."

In the case of *Porter v. Parker*, 68 Neb. 338, 94 N. W. 123, the court said (referring to Act Cong. Aug. 7, 1882, c. 434, 22 Stat. 342, which is as follows): "That upon the approval of the allotments provided for in the preceding sections by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare

that the United States does and will hold the land thus allotted for a period of twenty-five years in trust for the sole use and benefit of the Indian to whom the allotment shall have been made, or in case of his decease, of his heirs according to the laws of the state of Nebraska, and at the expiration of said period, the United States will convey the same by patent to said Indian or his heir as aforesaid, in fee discharged of said trust and free of all incumbrance and charge whatever, and if any conveyance shall be made of the land set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided that the law of descent and partition in force in the said state shall apply thereto after patents have been executed and delivered.' On the 29th day of December, 1884, a patent for 160 acres, or a quarter section, of such lands, reciting, in substance, the terms of the foregoing section of the statute, was issued to one Phillip Porter, a member of the tribe, in satisfaction of his right to participate in such allotment. At that time Porter was the head of a family, consisting, besides himself, of his wife, the defendant, Ne-da-wa Parker, and of a daughter. After the delivery of the patent Porter died intestate, leaving his wife and daughter surviving. Some time afterwards the daughter died, also intestate, and without issue. The allottee was the son of Daniel Porter, the plaintiff in this action. Since the death of her husband and daughter the defendant has remained in the exclusive possession of the land, claiming to be lawfully entitled thereto. The foregoing matters were submitted to the district court of Thurston county upon an agreed statement of facts, praying the judgment of the court whether the plaintiff or defendant has the better right in the premises. To review a judgment in favor of defendant the plaintiff prosecutes a petition in error in this court." The court further states: "In our opinion an allottee and patentee of lands in severalty, pursuant to the above-mentioned act of Congress, is seised of an equitable interest and estate in fee, which, upon his death, before the issuance of a final patent therefor by the United States, descends to his or her heirs at law, according to the laws of inheritance of this state."

The syllabus in the case of McCauley v. Tyndall, 68 Neb. 685, 94 N. W. 813, is as follows: "Under Act Cong. Aug. 8, 1882, c. 434, 22 Stat. 341, entitled 'An act to provide for the sale of a part of the reservation of the Omaha Tribe of Indians in Nebraska,' etc., the widow of an allottee, dying before the issuance of a final patent, and without issue, takes a life estate in the allotment to her husband, remainder to his father."

The right of a person who has located a valid land certificate upon vacant public land, and has caused such land to be surveyed, and the survey and certificate to be return-

ed to the General Land Office within the time prescribed by law, is a vested legal right, and is entitled to the protection of all the constitutional guaranties with which such rights are hedged. *Howard v. Perry*, 7 Tex. 259; *Hamilton v. Avery*, 20 Tex. 612; *Milam County v. Bateman*, 54 Tex. 153; *Gullett v. O'Connor*, 54 Tex. 408; *Snider v. Methvin*, 60 Tex. 487; *Jones v. Lee*, 86 Tex. 25, 22 S. W. 386, 1092; *Threadgill v. Bick-erstaff*, 87 Tex. 520, 29 S. W. 757; *Olcott v. Ferris* (Tex. Civ. App.) 24 S. W. 848; *Sherwood v. Fleming*, 25 Tex. Sup. 408; *Thompson v. Dumas*, 85 Fed. 517, 29 C. C. A. 312.

The lands of the Seminole Nation belong to the nation in its sovereign capacity, and not to its citizens as tenants in common. The lands and money of the Seminole Nation are public property and public moneys, and are not held in an individual ownership. *Stephens v. Cherokee Nation*, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041.

In the Cherokee Nation the land is held by virtue of a patent, issued by the federal government on the 1st day of December, 1838, pursuant to treaty stipulation, which provides as follows: "Therefore in the execution of the agreements and stipulations contained in the said several treaties, the United States have governed and granted unto the said Cherokee Nation the two tracts of land so surveyed and hereinbefore described, containing in the whole 14,374.135.14 acres, to have and to hold the same, together with all the rights, privileges and appurtenances thereunto belonging, to the said Cherokee Nation forever; subject however, to the rights of the United States to permit other tribes of red men to get salt on the salt plains of the Western Prairie, referred to in the second article of the treaty of December 1835," etc.

As to the Creek Nation, article 3 of treaty of February 14, 1833 (7 Stat. 417), provides: "The United States will grant a patent in fee simple, to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States, and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation and continue to occupy the country hereby assigned them"; and afterwards the patent was issued in accordance with this treaty stipulation.

As to the Choctaw Nation, article 2 of treaty of September 27, 1830 (7 Stat. 333), provides: "The United States under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi river, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it."

President Tyler in 1842 executed the pat-

ent, pursuant to the provisions of said treaty. The habendum clause of the same is as follows: "To have and to hold the same with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging as intended to be conveyed by the aforesaid article in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it, liable to no transfer or alienation except to the United States or with their consent."

By virtue of the treaty of 1837 (11 Stat. 573) the Chickasaws and Choctaws jointly held the Choctaw grant on the same terms that the Choctaws previously held it. By virtue of treaty of June 22, 1855, it was provided that a certain district in the Choctaw Nation should be occupied by the Chickasaws, and that the land included in both the Choctaw and Chickasaw district was to be held in common, so that each and every member of said tribes shall have an equal and undivided interest in the whole. Article 1 of said treaty is as follows: "And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw Tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: Provided, however, no part thereof shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indian and their heirs become extinct or abandon the same."

Whilst we hold that, in the case of the Seminole Nation, the land and moneys of that tribe are public property, and are not held in an individual ownership, it is not to be inferred that the same rule applies to all the other nations of the Five Civilized Tribes. Such question not being before us, the same is specifically reserved.

There can be no serious question of the authority of Congress to remove the restrictions upon the alienation of land of the allottees without the consent of the tribe. *Thomas v. Gay*, 169 U. S. 264-266, 18 Sup. Ct. 340, 42 L. Ed. 740; *Ward v. Race Horse*, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244; *Cherokee Tobacco Co.*, 11 Wall. (U. S.) 616, 20 L. Ed. 227. In section 15, supra, of the act of Congress of March 3, 1893, wherein the Congress consents to the allotment of the lands in severalty not exceeding 160 acres of land to any one individual within the limits of the country occupied by the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations, it was carrying out the settled policy theretofore existing on the part of the general government toward the Indian tribes. In the various treaties made in 1866 between the United States government and the Five Civilized Tribes it is apparent that it was contemplated that these lands should be ultimately allotted in severalty. And said sec-

tion 15 was evidently inserted with the view that the Indian tribes, upon their own initiative, if they so elected, might proceed with such allotment, and that such allottees would, by virtue of section 6, c. 119, 24 Stat. at Large, 390, supra, by the completion thereof, and the issuing and delivering of patents, become citizens of the United States.

In the succeeding section, which is section 16 of said act, Congress also contemplated the initiation of such movement on the part of the federal government. In other words, the United States government, by an act of Congress of March 3, 1893, said to the members of the Five Civilized Tribes: "It is our policy to extinguish the Indian title in your country, and, allotment in severalty being necessary to accomplish this, we consent that you may proceed with the allotment, but, at the same time recognizing the fact that there are grave doubts of your acting upon such suggestions, commissioners on the part of the general government shall be appointed to negotiate with you looking to that end, in order to bring about the ultimate creation of a state or states of the Union, which shall embrace the lands comprising your territory." And as a result of that negotiation, the treaty of the 16th day of December, 1897, was consummated, providing for the classification of the lands and the division of the same. As was said by the court in the case of *Witherspoon v. Duncan*, supra, it necessarily happens, in consummating the machinery of allotment, and the issuance of patents for the same in the reasonable expedition of such business, that years may elapse before the same finally issue.

Further, it must have been intended by the words "that each allottee shall have the sole right of occupancy of the land so allotted to him during the existence of the present tribal government" to exclude the tribal authorities, under their tribal authority, from attempting to deprive such allottee of the individual use thereof. In other words, it was the purpose of Congress to bring to an end public ownership, and it was perfectly natural to insert a provision that would exclude, during the continuance of the tribal government, the tribal authorities from doing anything that would continue such possession and use of such allotment. It is further provided that each allottee shall have the sole right of occupancy of the land so allotted to him until the members of said tribe shall become citizens of the United States. Under section 6, c. 119 (24 Stat. 390), supra, the allottee would not become a citizen of the United States until the patent was issued to him. Said section is as follows: "That upon the completion of said allotments and the patenting of said lands to said allottee, each and every member of the respective bands or tribes of Indians to whom the allotment shall be made, shall have the benefit of and be subject to the laws, both civil and criminal, in the state or territory in which they reside; and no state

or territory shall pass a law denying any such Indian within its jurisdiction the equal protection of the law, and every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act or under any law of the territory, and every Indian born within the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared a citizen of the United States and entitled to all the rights, privileges and immunities of such citizens, whether said tribe has been or not, by birth or otherwise, a member of any tribe of Indians within the United States, without in any manner affecting the right of such Indian or tribe to other property."

Afterwards Congress, by Act March 3, 1901, c. 868, 31 Stat. 1447, provided: "That section 6 of chapter 119, of the U. S. Statutes at Large, No. 24, page 390, is hereby amended as follows, to wit: After the words 'civilized life' in line 13 of said section 6, insert the words 'and every Indian in the Indian Territory.'" And, later, Congress provided by Act April 21, 1904, c. 1402, 33 Stat. 204, as follows: "And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who were not of Indian blood, except minors, and, except as to homesteads, are hereby removed, and all the restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe upon application of the United States Indian agent at the Union agency in charge of the Five Civilized Tribes, if said agent is satisfied, upon full investigation of each individual case, that the removal of said restrictions is for the best interest of said allottee." Why did Congress include the Seminole Nation within the provisions of this act, unless it would have had the effect to render lands alienable in said nation?

With the act of March 3, 1893, for the allotment and division of the lands in severalty among the Indians with the view of the ultimate creation of a state, this act, removing restrictions as to alienation, accords. Just as the general government, by donation and homestead acts, has laid the predicate for the establishment and building of homes within other states erected out of the territories, in the country of the Five Civilized Tribes, where no public domain existed for settlement by the noncitizens therein, the necessity arose for the removal of restrictions on alienation that the Indian might have opportunity to sell and convey to his noncitizen neighbor and home builder, such a course being to the mutual advantage of both races, to bring about individual ownership, erect a

state and industrially and commercially develop the same. And with like purpose it is provided in the treaty of December 16, 1897, as follows: "The town site of Wewoka shall be controlled and disposed of according to the provisions of an act of the General Council of the Seminole Nation, approved April 23, 1897, relative thereto; and upon the extinguishment of the tribal government deeds of conveyance shall issue to owners of lots as herein provided for allottees; and all lots remaining unsold at that time may be sold in such manner as may be prescribed by the Secretary of the Interior."

It certainly would not be contended that when a lot of the Wewoka town site was sold to the purchaser, and the consideration therefor had been paid, and the purchaser had gone into possession, and a certificate for the purchase price had been issued by the proper officer of the Seminole Nation, such purchaser would not have had an equitable estate in fee in said lot. This construction is in accord with a uniform rule laid down by the Supreme Court of the United States. But if it were a question of first impression, to make any other ruling would be contrary to sound reason. For it states that upon the extinguishment of the tribal government these "conveyances shall issue to owners of lots as herein provided for allottees and all lots remaining at that time may be sold in such manner as may be prescribed by the Secretary of the Interior."

An admission is therein contained that the purchaser of said lot was the owner thereof. How did he get to be the owner? By purchasing and paying for the same? Suppose that said treaty had also contained a provision that such purchaser of lot should not alienate or incumber the same in any way until conveyance or patent had been executed by the proper tribal authorities, and afterwards that prohibition as to alienation or incumbrance had been repealed, would any one have the hardihood to contend that such lot would not then and there become alienable? A similar question was passed on by the Supreme Court of the United States in the case of *Barney v. Dolph*, 97 U. S. 656, 24 L. Ed. 1063. Chief Justice Waite, delivering the opinion for the court, said: "The only question within our jurisdiction presented by this record is whether, after a husband and wife had perfected their right to a patent for lands in Oregon, under Donation Act Sept. 27, 1850, c. 76, 9 Stat. 496, and after the amendment of July 17, 1854 (10 Stat. 306, c. 85), they could, before receiving the patent, sell and convey the lands so as to cut off the rights of the children or heirs of the husband or wife, in case of his or her death before the patent was actually issued. This depends upon the effect to be given the original act, when construed in connection with the amendment. The original act, after providing for a grant to the husband and wife of 640 acres of land, one-half to the husband and one-half to the wife

in her own right, declared that: 'In all cases where such married persons have complied with the provisions of this [the] act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon, or since, and either shall have died before patent issued, the survivor and children or heirs of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament, duly and properly executed according to the laws of Oregon'; and then, 'that all future contracts by any person or persons entitled to the benefits of this act, for the sale of the land to which he or they may be entitled under this act before he or they shall have received their patent therefor, shall be void.' The amendment of 1854 repealed this prohibition of sales.

"The point to be decided is not whether, before the amendment, such a conveyance could have been made, or whether, if the conveyance had not been made, the children or heirs of a deceased husband or wife would take by descent or purchase, or whether the grant from the United States was one which took effect from the time of the passage of the act, or a subsequent entry and settlement; but whether after the amendment the husband and wife held by such a title that, before patent, but after their right to one had become absolute, they could sell and convey, so as to vest in the purchaser either a legal or equitable estate in fee simple—legal, if the title had already passed out of the United States by virtue of the act of Congress and a full compliance with its provisions; equitable, if the patent was needed to perfect the grant. The question is one of legislative intent, to be ascertained by examining the language which Congress has used, and applying it to the subject-matter of the legislation. The prohibition of sales, although contained in section 4, applied to all persons entitled to the benefit of the act, and its repeal was, under the circumstances, equivalent to an express grant of power to sell. The prohibitions were of the sale, before patent, of the land to which the settler was entitled under the act. The repeal, therefore, operated, under the circumstances, the same as a grant of power to sell the land, even though a patent had not issued. This, in the absence of anything to the contrary, implied the power to convey all the government had parted with. When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued. We so decided in *Stark v. Starr*, supra. The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with the duty. An authorized sale of a settler, therefore, after his right to a patent had been fully secured, was, as to the government, a transfer of the ownership of the land."

It is clear that under the provisions of the

treaty of the 16th day of December, 1897, when a member of the Seminole Tribe selected his allotment and the selection and designation of his homestead, the same being segregated from the common mass of the Seminole land, after the issuance of the certificate to him therefor, his right thereto became absolute and indefeasible; that by the terms of the treaty he was to have the sole right of occupancy during the existence of the tribal government, the tribal authorities thereby being excluded from continuing any further public occupancy so far as said allotment was concerned, and it being contemplated by said treaty that a patent should be issued to the allottee immediately on the expiration of the tribal government, it naturally followed that such member of the Seminole Tribe would then and there become a citizen of the United States. It was further, then, the intention of Congress to restrict the alienation of all of said allotment until the expiration of the tribal government, by the insertion of the following clause in said treaty agreement, to wit: "All contracts for sale, disposition or incumbrance or any part of any allotment made prior to the date of patent shall be void." In fine, it was provided that, during the existence of the tribal government, each allottee shall have the sole right of occupancy of his allotment, and until the members of the tribe shall become citizens of the United States. Then follows the restrictions of the alienation until the patent shall be issued. When all such restrictions on alienation were removed, what prevented the allottee herein from executing a valid conveyance?

Further, Congress, in section 16, c. 1876, entitled "An act to provide for the final disposition of the Five Civilized Tribes in Indian Territory, and for other purposes," approved April 26, 1906, provides that: "Conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to the removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to the issuance and recording and delivery of patent deed; but this shall not be held construed to affect the validity or invalidity of such conveyance except as hereinbefore provided." When we consider this provision, in connection with the act of April 21, 1904, removing all restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, and except as to homesteads, in the light of *Barney v. Dolph*, supra, and the other authorities heretofore cited, unquestionably the allottee herein could convey all of his allotment, except that portion designated by him as his homestead.

In the case of *Pickering v. Lomax*, 145 U. S. 310, 12 Sup. Ct. 860, 36 L. Ed. 716, it was held that the consent of the Secretary of the Interior was effective, though given after the

execution of the deed. In that case the patent of the Indian contained a stipulation, authorized by treaty, that the land should not be conveyed to any person whatever without permission of the President of the United States. A deed was made to the Indian, however, August 2, 1858, which was approved by the President January 21, 1871, nearly 13 years thereafter; and it was held that the approval related back of the time of the execution of the deed, and made it valid as to that deed, regardless of the claim of any intervening parties. In the case of *Lykins v. McGrath*, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485, it is held that the consent of the Secretary of the Interior to a conveyance by one holding under a patent, containing a restrictive stipulation, may be given after the execution of the deed, and, when given, is retroactive in its effect, and relates back to the date of the conveyance, regardless of the claim of intervening parties, whose alleged rights accrued subsequent to the date of the conveyance. What was the intention of Congress, when it removed restrictions from alienation of allottees not of Indian blood, as to their surplus allotment in the Seminole country? If the construction contended for by the defendant in error is correct, that act of Congress, removing restrictions as to allottees in the Seminole Nation, was without effect whatever, because at the time the tribal government had not terminated, nor has it yet in all respects. We accordingly conclude that the herein allottee, Robert James, a member of the Seminole Tribe, but not of Indian blood, after selecting his allotment, and designating his homestead, and receiving his certificate of such allotment from the chairman of the Commission to the Five Civilized Tribes, as provided for in the agreement of December 16, 1897, became the equitable owner of the same, vested with an indefeasible title therein, and that the duty or obligation to issue a patent therefor was imperative, and not discretionary, with the tribe or government, and could make a binding sale, deed, or conveyance on that part of his allotment not selected as a homestead, after the removal of the restrictions or alienation by the Indian appropriation act, approved April 21, 1904, although no patent had been issued or delivered to said allottee before he undertook to alienate the same.

The other question raised in this record is whether or not, where an instrument, appearing on its face as a deed in the form of a warranty, is confessed by the demurrer to have been intended as a mortgage, the owner of the land subject to the mortgage may in equity have said instrument declared to be a mortgage, and under such have the right to redeem the property. This is well settled under the authorities. See *Pomeroy's Eq. Juris.* §§ 1192-1196; *White v. Henry et al.*, 13 Ark. 112; *Wells v. Morrow*, 38 Ala. 125; 4 Mayfield's Dig. Ala. p. 200.

The judgment of the lower court is revers-

ed and remanded, with instructions to overrule defendant's demurrer, and proceed in accordance with this opinion. All the Justices concur.

(12 Ariz. 106)

COPPER BELLE MINING CO. et al. v. COSTELLO.

(Supreme Court of Arizona. May 26, 1908.)

PLEADING — ANSWER — NECESSITY — REPLY — ADMISSIONS.

Though a pleading filed by defendants may, as to a party made a defendant on their motion, be deemed a cross-complaint, it is, as to plaintiff, not a cross-complaint, but an answer, setting up as against plaintiff matters of defense. Such matters, by Rev. St. 1901, par. 1357, are regarded as denied by plaintiff unless expressly admitted, and are not to be taken as confessed, under paragraph 1359, because not denied.

On motion for rehearing. Motion denied. For former opinion, see 95 Pac. 94.

PER CURIAM. The appellant urges as one of the grounds for the granting of a rehearing herein that the court "did not take into consideration the admission by appellee, Costello, of all of the material allegations of the answer and cross-complaint of the Copper Belle Mining Company of West Virginia and the Copper Belle Mining Company of Arizona as to the invalidity of the note and the mortgage for \$15,000," claiming that, as none of these allegations were denied by the plaintiff, Costello, under paragraph 1359 of the Revised Statutes of Arizona of 1901 they must be taken as confessed.

While the pleading referred to may, as to the defendant Gleason (who was made a party on the motion of the defendant companies), be deemed a cross-complaint, it was, as to the plaintiff, Costello, not a cross-complaint, but an answer, setting up as against the plaintiff matters of defense, and such matters, by paragraph 1357 of the Revised Statutes of 1901, are regarded as denied by the plaintiff without further action on his part.

The motion for a rehearing is denied.

DOAN, J., not sitting.

DEITZ v. STEPHENSON et al.

(Supreme Court of Oregon. May 12, 1908.)

1. SPECIFIC PERFORMANCE — CONTRACTS ENFORCEABLE — CONTRACT FOR PERSONAL SERVICES.

A contract between plaintiff and defendant recited that plaintiff had agreed to purchase from defendant a fourth interest in hotel property for a specified sum, and bound defendant to procure for plaintiff the position of manager of the hotel at a specified compensation, provided defendant obtained control of all the stock of the corporation owning the hotel, and, should he fail to get control, a new corporation should be formed, of which plaintiff should have a fourth of the stock and defendant three fourths. Held, that the contract did not create a partnership in the hotel business and created only a personal obligation on the part of defendant to

sell a fourth interest, and plaintiff, on being removed from the position of manager, could not, in a suit for the specific performance of the contract, compel his restoration to such position.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 206-210.]

2. SAME—CONDITIONAL CONTRACTS.

The specific performance of a conditional contract will not be decreed, unless the condition has been performed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 181.]

3. SAME—CONTRACT FOR SALE OF CORPORATE STOCK—ENFORCEMENT.

Equity may compel specific performance of a contract to sell corporate stock, where the value of the stock is not easily ascertainable, or where the stock is not readily obtainable elsewhere, or where there is some reasonable cause for the buyer requiring a delivery of the stock contracted for; but where the stock contracted for is easily obtained in the market, and there are no particular reasons why the buyer should have the particular stock, he is left to his action for damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 203.]

4. SAME.

Before specific performance of an agreement to take or deliver corporate stock may be decreed, it is necessary that the agreement should not involve any breach of trust, nor include the performance by either party of obligations the performance of which equity cannot practically enforce.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 203.]

5. SAME.

Unless equity can decree specific performance of the whole contract, it will not interfere to enforce any part of it, and specific performance will not be enforced unless the remedy is mutual.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 9-11.]

6. CONTRACTS—CONSTRUCTION—MUTUALITY OF OBLIGATIONS.

A contract for the sale of corporate stock, which binds the buyer to furnish to the seller the personal services of himself and wife, involves a correlative duty on the part of the seller to employ the buyer and his wife, so that there is a mutuality of obligations.

7. SPECIFIC PERFORMANCE — CONTRACTS ENFORCEABLE—MUTUALITY OF REMEDY.

A contract for the sale of corporate stock, which binds the buyer to furnish to the seller the personal services of himself and wife, and which binds the seller to employ the buyer and his wife, cannot be specifically enforced at the suit of the buyer to compel the delivery of the stock contracted for, since the seller cannot maintain a suit to compel the specific performance of the buyer's agreement to render the personal services of himself and wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 9-11.]

8. SAME.

A contract gave a buyer an option to purchase, within a specified time, corporate stock for a fixed price on payment of a part of the price in cash and on the payment of the balance within a specified time; the seller to retain the stock as security for the payment of the balance. The buyer made a written offer to pay the cash part of the price for the stock. He did not show that he was able at that time, or at any time since, to pay such part of the price, and he did not pay such part into court. *Held*, that he was not entitled to compel specific performance of the contract by compelling the seller to deliver to him the stock, at least in the absence

of a tender or a readiness and willingness to pay the balance of the price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 286-298.]

9. SAME.

A contract for the purchase of stock in a corporation owning a hotel stipulated that the buyer should be employed as the manager of the hotel at a fixed salary, and that in case the hotel made a profit he should be entitled to have one-fourth thereof credited on the balance due on the stock contracted for. He was removed from his position as manager, and brought a suit to specifically enforce the contract by requiring his restoration to the position of manager and for the transfer and delivery to him of the corporate stock. There was no allegation that any profits had accrued or were due, nor was there any claim made for damages, and he made no tender of performance by alleging his willingness and ability to pay any balance that might be found due after applying profits to the liquidation of the debt. *Held*, that the court was without authority to enter a decree providing for the appointment of a referee to take an accounting of damages and of the earnings and profits of the hotel, and for the application of the same on the stock purchased, and the payment of the balance, if any, to the buyer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 412-419.]

Appeal from Circuit Court, Multnomah County; Alfred F. Sears, Judge.

Suit by A. J. Deltz against H. L. Stephenson and another. From a decree for plaintiff, defendants appeal. Reversed, and suit dismissed.

This is a suit to enforce the specific performance of the following contract: "This agreement made and entered into this 7th day of November, A. D. 1904, by and between H. L. Stephenson, party of the first part, and A. J. Deltz, party of the second part, witnesseth that: Whereas, the party of the second part has this day agreed to take a one-fourth interest in the property and contents of the Scott Hotel, located on the corner of Seventh and Ankeny streets, in the city of Portland, for four thousand dollars (\$4,000.00) paying herewith seventeen hundred and fifty dollars (\$1,750.00), the balance to be paid as follows: The said second party and his wife are to take charge of the hotel at a salary of \$125.00 per month, \$60.00 of which amount is to be retained by said second party to meet his current expenses, and the balance is to be applied on the purchase price of the said fourth interest in the furnishings and property in said hotel. If an adjustment or settlement is made between the stockholders of the Scott Hotel Company so that the first party gets control of all the stock of said corporation, then the second party is to have one-fourth of the stock of said corporation, fully paid and nonassessable upon the completion of the payment of the \$4,000.00 herein provided for. But should the stockholders of said Scott Hotel Company be unable to adjust their matters, a new corporation is to be organized for \$16,000.00, and the second party is to have one-fourth of the stock and the first party herein is to have the other three-fourths.

Said second party is to pay for said one-fourth interest as herein provided. If a new corporation is organized, all of said property in said hotel is to be turned over to the said corporation by the said first party, it being understood and agreed that the said first party is to protect the fourth interest of said second party from debts and liabilities of the Scott Hotel Company. It is further agreed that in case the hotel does not meet its current expenses, the said \$65 of salary that is to be applied on the purchase price of the stock is to be applied and contributed towards meeting the deficiency in expenses, and in case the hotel makes a profit the second party's profit, which is one-fourth of the total profits, in addition to the \$65 is to go to liquidate the balance of the purchase until the same is fully paid. It is further agreed that the second party shall have the right to purchase an additional one-fourth interest in said company at any time within sixty days from the date of this agreement for \$4,000.00, \$2,000.00 cash, and the balance on or before six months, the same to be secured by the stock of the corporation; and in case the said second party desires to purchase at any time after the sixty days and prior to six months he may do so by paying \$4,500.00. It is further agreed that in case the said parties hereunto or the corporation they shall hereafter form, shall sell out their interest in the Scott Hotel Company, the second party herein shall be entitled to whatever profits arise upon the said one-fourth interest in the stock. It is further agreed that said property shall not be sold for less than \$17,000.00, and that upon such sale the second party is entitled to one-fourth of the profits in addition to whatever amount he has paid upon the purchase price of his one-fourth interest. In witness whereof, the said parties to this agreement have hereunto set their hands and seals, in duplicate, the day and year first above written. H. L. Stephenson. [Seal.] A. J. Deitz. [Seal.]

After alleging the incorporation of the defendant Scott Hotel Company and the making of the contract, plaintiff avers: That on January 7, 1905, Stephenson extended the option therein given by the following writing: "Portland, Oreg., Jan. 7, 1905. I hereby agree to extend the option given A. J. Dietz for one-half interest in Hotel Scott for thirty days from above date, terms as per original agreement. H. L. Stephenson." That on the date of the signing of the contract, and in pursuance thereof, he paid Stephenson \$1,750; that thereupon Stephenson and the Scott Hotel Company put plaintiff in charge of said hotel, and that he and his wife managed it until February 11, 1905, when Stephenson wrongfully entered and by force and violence dispossessed them and took charge and possession of the property, books, and assets of the business, against the will and protest of plaintiff. That between November 7, 1904, and February 5, 1905, Stephenson caus-

ed to be made such adjustments and settlements between the stockholders of the defendant company that he obtained full and absolute control and management thereof. That each month plaintiff has applied \$65 of his salary on the purchase price of this property. That on February 6, 1905, plaintiff elected to purchase the additional one-fourth interest in defendant corporation, and tendered to Stephenson \$2,000 in payment of the first installment of the purchase price; but that Stephenson has refused to sell or transfer to plaintiff any of the stock of the company, and has repudiated his contract, and the plaintiff has, at all times, fully done and performed all of the covenants and conditions of the said agreement and the supplementary extension thereof to be by him done and performed. That the Scott Hotel Company was fully informed and knew of the making of the said contract and consented thereto and to the making of the payments set forth by plaintiff, and joined defendant Stephenson in the partial performance alleged. That the interest, which the company has or claims to have in the hotel or hotel business and lease, is inferior and subordinate to plaintiff's rights under said agreement, and that defendant Stephenson is so recklessly, carelessly, and badly managing the hotel and hotel business that the same is rapidly deteriorating in value, and, if continued, will inflict great and irreparable loss and damage upon plaintiff, and destroy his rights under the agreement. A decree is asked requiring Stephenson to return to plaintiff and his wife the charge and management of the hotel, and to transfer and deliver to plaintiff one-fourth of the capital stock of defendant corporation; that a receiver be appointed to conduct the business pending the suit; and that defendants be enjoined from taking charge thereof and from interfering or meddling therewith.

The corporation demurred to the complaint upon general grounds, which being overruled defendants answered separately. Stephenson, after denying all the averments of the complaint, excepting the incorporation of the company, for an affirmative defense alleges, in effect, that prior to November 7, 1904, defendant company had been conducting an hotel in the city of Portland, known as the "Scott Hotel," under a lease, and that it owned the fixtures and had purchased, on the installment plan, furniture used therein; that about November 1st the corporation being financially involved, and he being a large creditor of, and stockholder in, the corporation, and a guarantor for the payment of the rent, to protect himself he entered into possession of the hotel, secured a new lease of the premises in his own name, and conducted the business for the interest of himself and the corporation; that relying upon plaintiff's representations alleged to have been made to defendant, to the effect that he was a competent and experienced hotel man, a competent and

skillful bookkeeper, and that he was sober, honest, and industrious, defendant made, with plaintiff, the contract set forth; that these representations were false, and that plaintiff has been dissipated and intemperate, negligent, and dishonest in his management of the hotel; that he did not keep true or correct accounts and misappropriated the funds received by him from the business and converted them to his own use; that prior to the alleged tender, defendant notified plaintiff that, on account of the latter's incompetency, dishonesty, and misappropriation of funds, he would not further comply with the original contract, or with the supplementary agreement, and would not sell, transfer, or deliver to plaintiff any stock of the corporation; that thereupon he notified plaintiff that on account of his conduct he would discharge him from the management of the hotel, and upon an accounting of the money received by plaintiff, as manager, he (defendant) would repay plaintiff the \$1,750 received and his salary for the time he served as such manager; that defendants, acting together, discharged plaintiff and employed another manager to conduct the hotel for them; that plaintiff received between \$4,000 and \$5,000 while acting as manager of the hotel, but has accounted for no more than \$2,000. He prays, first, for a dismissal of the complaint, and, second, for the annulment of the contract, and for an accounting between plaintiff and defendant, and that defendant have judgment for all moneys unaccounted for after crediting plaintiff with the sum of \$1,750 received by defendant from plaintiff. The corporation in its answer by general denial controverts all the complaint, excepting its own incorporation, and for its first affirmative defense alleges, in effect, that plaintiff was its employé and violated its instructions and did not faithfully and diligently serve the company, as manager, and for that reason on February 11th discharged him from its employment. For its second defense, it alleges misrepresentation and fraud of plaintiff in procuring employment as manager to the same effect as alleged by defendant Stephenson, and for that reason, also, it discharged him from its service. And as a third defense, it alleges, in effect, that, at the time plaintiff was discharged from its employ, he had a large amount of money belonging to the corporation, the exact amount of which it is unable to state, for the reason that plaintiff has not kept true and correct accounts of the cash received and disbursed by him; that plaintiff has failed and refused to pay the same over to it. It prays, first, that the complaint be dismissed, and, second, for an accounting. By his reply to the answer of Stephenson, plaintiff denies all of the affirmative matter therein, except that plaintiff was ejected from the hotel and deprived of the management thereof, and he denies all the new matter of the answer of the corporation, and affirmatively alleges that the

rights of the Scott Hotel Company in said hotel are subordinate and inferior to the claims and ownership of Stephenson, and that, since the making of the agreement, it had no control over or management of the hotel.

After a large amount of testimony had been taken, findings were made, and, based thereon, a decree was entered in plaintiff's favor, to the general effect: That the contract be specifically enforced, so far as may be practicable for plaintiff's benefit, but it was not deemed practicable to put him and his wife back into the possession of the hotel and hotel business. An accounting, however, was ordered to ascertain plaintiff's damages resulting from his being ousted and the refusal of defendants to allow him to continue in charge and possession, and that, when ascertained, the amount thereof be applied upon the balance due Stephenson for the one-fourth of the capital stock of the hotel company, first in said agreement mentioned. That plaintiff recover one-fourth of the profits earned by or properly belonging to the one-fourth of the capital stock first purchased, and also profits on the second one-fourth of the capital stock, under the option from February 6, 1905, the date of the tender. That after the ascertainment of such damages and profits, plaintiff have 40 days in which to tender payment to Stephenson; such portion, if any, above the amount so allowed, to complete the payments for such capital stock according to the contract. That thereupon Stephenson shall specifically perform the contract by delivering to plaintiff one-half of the capital stock of the corporation. And that Stephenson shall be held trustee of plaintiff's rights in the stock. From this decree each of defendants have appealed.

J. M. Long and G. G. Gammons, for appellants. Thos. N. Strong, for respondent.

SLATER, C. (after stating the facts as above). This suit, it seems, was brought upon the theory that, by the legal effect of the contract, plaintiff had bought from defendant Stephenson a one-fourth interest in the furniture, fixtures, and business of the Hotel Scott, in the city of Portland, and that Stephenson was the owner of the remaining three-fourths; that having been invested by the latter with the possession thereof, as manager, and afterwards deprived of that possession by him, in violation of the contract, plaintiff is entitled in equity to be restored to that possession, and to be protected in the management of the business against any interference therewith by Stephenson or the corporation, to that extent specifically enforcing the contract, and thereby enabling plaintiff to perform his part of the contract, and by his labor pay for the property he bought. This could not possibly be done except upon the allegation and proof by plaintiff that by the terms of the con-

tract Dietz and Stephenson had agreed to become partners in the business of conducting the hotel, and that the subsequent acts of the latter were in fraud of his rights. High on Injunction (4th Ed.) § 1330. But there is no averment of the complaint that such contractual relationship existed between the parties, neither was it expressly or impliedly created by the terms of the agreement. As we interpret the instrument on which the suit is based, it creates no more than a personal obligation on the part of Stephenson to sell, transfer, and deliver to Dietz one-fourth of the capital stock of the Scott Hotel Company for an agreed price, and to procure for him the position of manager thereof, provided the former obtains control of all the stock of the corporation; but, should he fail to get control, then a new corporation is to be formed with a capital of \$16,000, Dietz to have one-fourth of the stock, and Stephenson three-fourths, and the latter guarantees that all of the property in the hotel shall be turned over to such new corporation freed and discharged of any debts or liabilities of the Scott Hotel Company. From this view it results that Dietz did not become invested with any title to any part of the hotel or hotel business or any right to the continued possession thereof, as against the corporation; but he occupied the position of an employé of the corporation, and was subject to its direction and control and liable to be discharged by it at its pleasure. *Christensen v. Borax Co.*, 26 Or. 302, 38 Pac. 127.

The lower court declined to enforce specifically the contract to the extent of restoring plaintiff to the possession and management of the hotel, or to enjoin defendants from interfering therewith because of the impracticability of enforcing such a decree, and in any event this conclusion was correct; but it did decree a transfer and delivery of one-half of the capital stock by Stephenson upon certain express terms and conditions. The only question then to be determined is whether Stephenson is in equity bound to make delivery of the stock at all, and, if so, when and upon what terms.

As to the one-fourth first purchased, it was to be delivered only in the event that Stephenson "gets control of all the stock of said corporation," and upon "completion of the payment of the \$4,000 herein specified for"; that is, by taking charge of the hotel, managing it, and applying \$65 per month of the salary of himself upon the balance of the purchase price due. This is a conditional contract, and the rule is well settled that specific performance will not be decreed unless such condition has occurred or has been performed. 26 Ency. of Law (2d Ed.) 41. The first of these conditions is admitted to have been accomplished. That a contract for the sale of shares of private corporation may, under certain circumstances, be the subject of equitable jurisdiction for its specific per-

formance, is well established. This occurs where the value of the stock is not easily ascertainable, or the stock is not to be obtained readily elsewhere, or there is some particular and reasonable cause for the vendees requiring the stock contracted to be delivered; but if the stock contracted to be sold is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages. 1 Cook, Stock & Stockholders, § 338. And in order that specific performance of an agreement to take or deliver shares of stock in a company may be decreed, it is necessary that the agreement should not involve any breach of trust (Frye on Spec. Perf. [2d Am. Ed.] § 388), nor include the performance by either party of obligations, the performance of which a court cannot practically enforce (1 Cook, Stock & Stockholders, 462, note). It was held, in *Ross v. Union Pac. Ry. Co.*, 1 Woolw. 26, Fed. Cas. No. 12,080, by Mr. Justice Miller, that unless the court can decree specific performance of the whole contract it will not interfere to enforce any part of it. And in *Peto v. Brighton, etc., Ry. Co.*, 1 H. & M. 468, it was held that an equity court has no jurisdiction to decree the specific performance of a contract calling for the delivery of shares of stock, the consideration for which on the part of plaintiff is the execution of certain works which the court is unable to superintend. Here it is urged by the defense that the part performance by plaintiff involves a breach of trust and confidence by him, and, if so, that would destroy any right in the plaintiff to have specific performance, if any ever existed, by the defendant. Most of the testimony in the record was taken on this issue, but it is not necessary that we should examine into it to determine the issue on that point, for, assuming that a specific performance of the contract might be decreed by a court of equity, if this contract called for only the sale of shares of stock for a money consideration, yet we find that there is joined with that an obligation on the part of plaintiff to furnish the personal services of himself and wife in the management of the hotel at a salary of \$125 per month, of which \$65 was to be applied on the purchase price of the stock. This obligation necessarily involves a correlative one resting on the latter to employ, or to secure, plaintiff and his wife employment by the corporation in that capacity for at least a sufficient length of time to enable plaintiff to liquidate his liability for this balance of the purchase price of this stock. Here is mutuality of obligation, but is there also mutuality of remedy? Specific performance will not be enforced against one party if it cannot be so enforced by the other. The remedy must be mutual. *Whiteaker v. Vanschoelack*, 5 Or. 113; *Barrett v. Schleich*, 37 Or. 613, 62 Pac. 792; 2 Beach Mod. Eq. Jur. 585; *Pomeroy*, Spec.

Perf. §§ 162-3. But "contracts for personal services, where the acts stipulated for require special knowledge, skill, ability, experience, or the exercise of judgment, discretion, integrity, and the like personal qualities on the part of employes, or where the services are confidential, in short, wherever the full performance, according to the spirit of the agreement, rests in the individual will of the contracting party, courts of equity have no direct and efficient means of affirmatively compelling a specific performance." Pomeroy, Spec. Perf. § 310.

By agreement of the parties the contractual obligation of the plaintiff that "he and his wife are to take charge of the hotel" means to personally supervise and manage it. This requires the possession of experience, personal skill, and the exercise of judgment, and involves integrity and the relationship of trust and confidence. And it is not susceptible of specific enforcement by a court of equity. It has been alleged by defendant Stephenson, and established by his testimony, that the controlling cause on his part for entering into the contract was the necessity of securing a competent, experienced, and honest manager to conduct the hotel, and was not merely a desire on his part to dispose of his stock. This becomes, then, a material consideration of the sale, and having no power to compel plaintiff to specifically perform that part of his contract according to the intent of the parties, in favor of defendant, a court of equity should not enforce it in other respects against the latter. Nor is the mere offer to perform or tender of performance of personal services, the performance of which could not be compelled in equity, sufficient to relieve the case of the lack of mutuality as to remedy. *Cooper v. Pena*, 21 Cal. 403; *Alworth v. Seymour*, 42 Minn. 526, 44 N. W. 1030; *Anson v. Townsend*, 73 Cal. 415, 15 Pac. 49; *Los Angeles, etc., Co. v. Occidental Oil Co.*, 144 Cal. 528, 78 Pac. 25.

As to the second one-fourth of the stock agreed to be sold by Stephenson for \$4,000, plaintiff is not bound to purchase at all by the contract, but had an option to take within 60 days (which he says was extended) upon payment of \$2,000, and the balance on or before six months, the same to be secured by the stock of the corporation, and, in case he desired to purchase after the 60 days and prior to six months, he might do so by paying \$4,500. He alleged he made a tender of \$2,000 on February 7, 1905, and submits in proof thereof an offer in writing, dated February 7, 1905, to pay that amount. There is no proof or allegation to the effect that at the time he made the written tender he was able to pay in accordance with its terms, nor that at all or any times since he has been ready, able, and willing to perform, which is essential to a right to specific performance. *McCourt v. Johns*, 33 Or. 561, 53 Pac. 601. Nor has he paid into court the amount of

such tender. Moreover, plaintiff would not be entitled to an immediate delivery, if all such had been strictly done and complied with, for, by the terms of the contract, the stock was to be held by the vendor as a security for the payment of the balance of the purchase price, and there is no pretense of a tender or offer or a readiness and willingness to pay the balance. Until that is done, plaintiff is in no position to demand a delivery of the stock.

It seems that because the contract included a provision that, in case the hotel makes a profit, the second party would be entitled to one-fourth thereof to be credited, together with \$65 per month of plaintiff's salary, upon the balance due on the stock, the court assumed that there may have been profits, together with damages which plaintiff was supposed to have suffered by his dismissal, sufficient to liquidate his indebtedness to defendant, and on that basis the decree provided for the appointment of a referee, to take an accounting of damages and of the earnings and profits of the hotel, and if any such were found to be applied on this stock purchase, and the balance, if any, to be paid by plaintiff in 40 days. But all this is mere speculation. There is no basis for it in the pleadings. There is no allegation that any profits have accrued or are due, nor is there any claim made therein for damages, and, if there were, plaintiff makes no tender of performance in his complaint by alleging his willingness and ability to pay any balance that may be found due after applying profits to the liquidation of his debt. The record contains no issues in the pleadings or facts to sustain the decree. *Clarno v. Grayson*, 30 Or. 111-143, 46 Pac. 426.

For these reasons the decree should be reversed, and the suit dismissed.

STATE v. HUIME.

(Supreme Court of Oregon. May 19, 1908.)

1. LICENSES—REGULATION OF OCCUPATIONS—STATE'S POWER.

While all lawful occupations, professions, and trades are subject to reasonable regulation by the state as to the time, place, or manner of enjoyment, and property is held subject to the rule that it cannot be used so as to injure others, the state cannot, under any pretended exercise of its police power, prohibit persons from pursuing such callings.

2. SAME.

Any business, the pursuit of which may be prohibited by the state, as an exercise of police power, may be licensed, if not malum in se, and the reasonableness of the license fee cannot be questioned, though so great as to amount almost to inhibition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 4.]

3. FISH—CAPTURE—REGULATION—STATE'S POWER—"FERE NATURE."

Migratory fish in navigable waters of a state, like game within its borders, are classed as animals fere naturæ, the title to which, so far as it is susceptible to being asserted before possession is obtained, is held by the state, in its

sovereign capacity, in trust for all its citizens, and, as an incident of the assumed ownership, the state may protect the species from extinction by exhaustive methods of capture.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2748.]

4. SAME—LICENSING CANNING OF SALMON—CONSTITUTIONALITY OF STATUTE.

The state being invested with title to animals *feræ naturæ*, they cannot be lawfully captured without the state's express or implied permission, and hence Act Feb. 19, 1907, Gen. Laws 1907, pp. 100–103, 107, c. 55, §§ 1, 2, 11, making it unlawful to engage in the business of canning salmon without obtaining a license and paying a prescribed fee, is a valid exercise of legislative power.

Appeal from Circuit Court, Curry County; J. W. Hamilton, Judge.

R. D. Hume was convicted of canning salmon without a license, and he appeals. Affirmed.

W. C. Hale, for appellant. A. M. Crawford, Atty. Gen., and I. H. Van Winkle, Asst. Atty. Gen., for the State.

MOORE, J. The defendant was convicted of the crime of canning salmon without first having obtained a license therefor, alleged to have been committed in Curry county July 18, 1907. He appeals from the judgment which followed, assigning as error the action of the court in overruling a demurrer to the information, interposed on the ground that the facts stated therein do not constitute the commission of a crime. As the validity of the law, which is alleged to have been violated, is the chief question to be considered, it is unnecessary to set forth a copy of the pleading which charges the perpetration of the offense in the language of the statute.

The act of February 19, 1907 (Gen. Laws Or. 1907, p. 100, c. 55), the efficacy of which is challenged, provides, in effect, that it shall be unlawful for any person to engage in the business of canning salmon, within the state of Oregon, without first having obtained a license therefor. Section 1. Any person engaged in this state in the business of canning fresh salmon in hermetically sealed tins is required to pay a license fee, varying in amount from \$100 to \$1,500, depending upon the number of cases of such fish which the canner packed during the year preceding the season for which a license is required. Section 2. Any person violating the provisions of the act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined, etc. Section 11. The foregoing synopsis is thought to contain all the causes of the statute that are material, combating which it is contended by defendant's counsel that the act in question, not having stipulated for any control of salmon canneries, is not a police regulation; that the clause, requiring canners of such fish to pay certain sums of money, as a condition precedent to the right to pursue a lawful business, is not a license, but a means adopted to raise a

revenue, making the tax unequal in its operation, violative of the organic law of the state, thereby rendering that part of the statute void, and demonstrating that persons engaged in canning salmon are not obliged to comply therewith, and hence an error was committed in overruling the demurrer.

If the canning of fresh salmon be considered as the exercise of a common right which may be enjoyed by all citizens of the state without permission from any superior, it is probable that the exactions demanded for the alleged privilege are so much in excess of the necessary sums to cover the cost of issuing licenses and to defray the incidental expense attending the regulation of the business as to disclose a legislative intent to impose a tax on an industry, and not the burdening of it with a license, and for that reason the statute may be void in this particular because it violates the Constitution of the state, as claimed. Thus in *Ellis v. Frazier*, 38 Or. 462, 63 Pac. 642, 53 L. R. A. 454, it was held that an act requiring a yearly payment of \$1.25 on every bicycle, as a condition precedent to the right to use it on the public roads, and setting aside a certain part of each payment, to create a particular fund to be employed in constructing, maintaining, and repairing the highways and for other purposes, was a statute providing for the payment of a tax, and therefore invalid as a pretended exercise of the police power. The decision in that case is based on the principle that the ordinary use by a person of a bicycle could not be classed as an occupation; that the act then under consideration did not attempt to regulate the use of such vehicles; and that the sum thus demanded was so much in excess of the cost of issuing the license as conclusively to manifest a purpose on the part of the legislative assembly to raise a revenue. So, too, in *Beser v. Umatilla County*, 48 Or. 328, 86 Pac. 595, it was ruled that a law imposing a burden of 20 cents per head on sheep owned by nonresidents who brought them within the state for pasturage, and further prescribing a payment of 5 cents per head for each county through which they might be driven, was a means of raising a revenue, and therefore violative of the Constitution, because the tax was unequal. The careless riding of a bicycle might endanger travelers on the highway, to protect whom the state could undoubtedly regulate the manner of the use of such carriages. Sheep are liable to contagious diseases, the dissemination of which may result in great damage to persons engaged in caring for, or raising, such flocks; and, to prevent injury from that source, the state unquestionably possesses power to cause sheep to be inspected, and if they are found to be infected, to make such disposition of them as will preclude the contamination from spreading and thus becoming a menace to other flocks.

All occupations, professions, and trades

that may be legally pursued are necessarily subject to such reasonable regulations as the state may impose, in respect to the time, place, or manner of enjoyment, in order to promote the greatest good to the greatest number of its citizens. It is generally conceded, though controverted by eminent authority, that the right of a person to lands which he holds in any manner is qualified, and known in law as an estate, while the absolute right of property therein is vested in the state, which may subject the premises to taxation and to the right of eminent domain. Tiedeman's Police Power, § 115. This author, at section 135 of the same work, intimates that all personal property is the product of some man's labor, and, however the title thereto may have been legally acquired, the interest in such property is a vested right which is not held by any favor of the state. This declaration, when applied to animals *feræ naturæ*, is probably broader than warranted, as we shall hereafter attempt to show. It may be stated as a general principle that all property in a civilized community is held subject to the rule that it cannot be used in such a manner as to injure others, and when this elementary proposition is violated, the state in exercising its police power can correct the evil. As a deduction from the postulates asserted, it necessarily follows that while the state may regulate all legitimate occupations, trades, etc., it cannot, under any pretended exercise of its police power, prohibit persons from pursuing such callings, for if the prosecution of a single lawful industry could be interdicted, when not violative of the rights of others, the transaction of all business could be suspended, and stagnation and starvation would ensue, affecting all persons who were compelled to remain in the territory. Any business, however, the pursuit of which may be prohibited by the state, as an exercise of police power, may be licensed, if not *malum in se*, and though the sum of money demanded for the privilege may be so great as to amount almost to inhibition, yet it is difficult to understand how the citizen who is engaged in such enterprise can legally question the amount of the exaction.

It is a generally recognized principle that migratory fish in the navigable waters of a state, like game within its borders, are classed as animals *feræ naturæ*, the title to which, so far as that claim is capable of being asserted before possession is obtained, is held by the state, in its sovereign capacity in trust for all its citizens; and as an incident of the assumed ownership, the legislative assembly may enact such laws as tend to protect the species from injury by human means and from extinction by exhaustive methods of capture. 13 Am. & Eng. Ency. Law (2d Ed.) 556; 7 Cur. Law, 1659; 19 Cyc. 988; Freund, Police Power, § 419; Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; Magner v. People, 97 Ill.

320; People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; State v. Snowman, 94 Me. 99, 46 Atl. 815, 50 L. R. A. 544, 80 Am. St. Rep. 380; State v. Rodman, 58 Minn. 393, 59 N. W. 1098; State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199; Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793. "The individual," says Mr. Justice Hadley in *Smith v. State*, 155 Ind. 611, 58 N. E. 1044, 51 L. R. A. 404, "has no natural right to take game, or to acquire property in it, and all the right he possesses or can possess in this respect is granted him by the state." The state being thus invested with the title to animals *feræ naturæ*, they cannot be lawfully captured by any person without the express or implied permission of the state. The unrestricted taking, from navigable streams, of fish that are valuable for food, usually causes their extermination, to prevent which, and to afford time and opportunity for an increase of the species, laws have been passed limiting the time and manner, or temporarily prohibiting, the catching of them, which enactments have been upheld as legitimate exercises of the police power employed by a state to protect the welfare of all its citizens. Tiedeman, State & Fed. Control, § 124. No person has an absolute property in migratory fish, when swimming in the navigable waters of a state, and hence a statute prohibiting the taking of them does not transgress any constitutional provision for the right to fish is at best only a privilege which the state may grant or withhold at its pleasure. Id. § 151. "The police power," says a text-writer, "is the power to restrain common rights of liberty or property. When it is sought to exercise rights which are not common or fundamental, still more when special privileges are asked, the state may grant the required permit or license upon such conditions as it pleases, without observing the limitations which otherwise hedge about the exercise of the police power. The restrictions upon the exercise of corporate rights afford the most conspicuous illustration of this; others are found in fish and game laws, and others in cases of qualified property." Freund, Police Power, § 24.

We think it conclusively appears, from the authorities thus adverted to, that the title to fish taken from navigable streams is held by favor of the state (*State v. Schuman*, 36 Or. 16, 58 Pac. 661, 47 L. R. A. 153, 78 Am. St. Rep. 754), and that no person has a right to acquire such property in any manner he pleases, as is intimated by a learned author (*Tiedeman's Police Power*, § 135). The taking of salmon by any means could be prohibited for a reasonable time, at least, in order to permit the number of such fish to be augmented by a propagation of the species, or the state might lawfully demand such a sum of money for the privilege of pursuing any branch of the business as would be equivalent to prohibition. As illustrating this prin-

ciple, a text-writer, referring to the sale of intoxicating drinks, says: "By making the license fee or tax sufficiently high, even the system of granting licenses as a matter of right may be used as a means of restricting the liquor traffic." Freund, Police Power, § 206. Fish must be caught before they can be canned, and any legislation that tends to restrict the canning of salmon necessarily limits the number of such fish that will be taken, for the chief demand for salmon is for canning purposes, and a statute that circumscribes the demand necessarily diminishes the supply.

We believe the act under consideration is valid, and, this being so, no error was committed in overruling the demurrer.

Other errors are assigned, but, deeming them unimportant, the judgment is affirmed.

STATE v. LUPER.

(Supreme Court of Oregon. May 19, 1908.)

1. WITNESSES—COMPETENCY—HUSBAND AND WIFE.

B. & C. Comp. § 1401, making, in criminal actions, a husband or wife a competent witness for or against the other, except that he or she cannot be allowed or compelled to testify against the other without the consent of both, does not prevent a former wife from testifying against her husband in a trial for perjury committed by him in the action in which they were divorced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 180.]

2. SAME.

The common-law rule that one cannot, either during or after marriage, disclose confidential communications between him and his spouse during marriage, does not affect his competency as a witness against the other in a criminal action, excepting such communications; and in a trial for perjury committed by accused in an action wherein he obtained a divorce on the ground of desertion, his former wife could testify as to the location of the family dwelling, her coming to the state and return to another state, and that she did not desert accused.

3. CRIMINAL LAW—EVIDENCE—DECLARATIONS BY THIRD PARTIES.

In a trial for perjury committed by accused in an action wherein he obtained a divorce on the ground of desertion, he could not show admissions or declarations by the former wife as to her desertion of accused; she not being a party, and her statement not being *res gestæ*.

4. WITNESSES—IMPEACHMENT—INCONSISTENT STATEMENTS.

In a trial for perjury committed in a divorce action, declarations by accused's divorced wife could be proved only to impeach her under B. & C. Comp. § 853, providing for the impeachment of a witness by inconsistent statements, and after the laying of a foundation therefor.

5. DIVORCE—DESERTION—ACTS NOT CONSTITUTING.

If defendant established a matrimonial domicile, so long as his wife remained there she did not desert him, however much he may have been absent, unless he changed the family abode and requested her to remove with him thereto, and she willfully refused to follow him, and their separation would not be desertion on her part if he consented to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 138.]

6. SAME.

That on defendant's return home from a hospital his wife told him he need not come home for her to wait on him, that she would not do it, that all he cared for her was to make her trouble, and that he might as well go back to the hospital and stay there, and he returned to work outside, the state does not show that she deserted him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 138.]

7. PERJURY—INFORMATION—SUFFICIENCY.

Under B. & C. Comp. § 507, making "willful" desertion a ground for divorce, an information charging perjury committed in verifying a complaint for divorce alleging a "desertion" is sufficient where the complaint showed that what defendant in the divorce action did was willful.

8. SAME—"FACTS."

An information for perjury charging that accused swore to "facts" stated in a complaint is not defective as charging the verification of the statements only; the term "facts" as so used meaning "matter" or "statements."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2638, 2639.]

9. SAME.

Under B. & C. Comp. § 1321, making it unnecessary for an indictment for perjury to set forth the pleadings, etc., with which the alleged false oath was connected, etc., an information charging that accused swore that all the matters and facts stated in a complaint were true is not insufficient for failing to set out the verification to the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 81.]

10. SAME—"PERJURY."

Under B. & C. Comp. § 82, requiring every pleading to be verified to the effect that the party believes it to be true, and under section 1875, making it perjury for one of whom an oath is required by law to willfully swear falsely respecting any matter concerning which the oath is required, a verification of a complaint by a plaintiff stating that the complaint was true as he verily believed was perjury, if willfully false.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5305, 5310; vol. 8, p. 7751.]

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

T. J. Luper was convicted of perjury, and he appeals. Affirmed.

See 91 Pac. 444.

Defendant was indicted for perjury. A former judgment of conviction was reversed upon appeal to this court, and the cause remanded for retrial. 91 Pac. 444. Upon the second trial defendant was again convicted, and from a judgment thereon this appeal was taken. The information charges: "That on the 3d of July, 1906, the said T. J. Luper, for the purpose of obtaining a divorce from his then wife, Lizzie R. Luper, commenced a suit in the circuit court of the state of Oregon for Marion county, in department No. 2, by filing a duly verified complaint therein, wherein it is alleged in substance, among other things, that Lizzie R. Luper was the lawful wife of said defendant, T. J. Luper, and that on the — day of December, 1904, the said Lizzie R. Luper, without any cause or provocation therefor, and against

the will and consent of the said T. J. Luper, deserted him, the said T. J. Luper, and did ever since said date continue to desert the said T. J. Luper, and praying therein for a decree of said court dissolving the bonds of matrimony then existing between defendant and said Lizzie R. Luper. The said T. J. Luper, on the 3d day of July, 1906, in the county of Marion, state of Oregon, then and there being, did then and there appear in person before Carey F. Martin, a notary public of and for the state of Oregon, to take his corporal oath before said notary public, and was then and there in due manner sworn by said notary public as such, and upon his oath so taken by said notary public did then and there willfully, knowingly, feloniously, and corruptly depose and swear before said notary public that all the matters and facts set forth and alleged in said complaint were true"—and further alleges the official capacity and authority of the notary and the filing of the complaint in the circuit court of the state of Oregon for Marion county. That he obtained a decree of divorce therein, and alleges that the matter so sworn was false, and showing the materiality and necessity therefor in said divorce proceeding.

Martin L. Pipes, W. H. Holmes, and Carey F. Martin, for appellant. A. M. Crawford, Atty. Gen., John H. McNary, Dist. Atty., and A. M. Cannon, for the State.

EAKIN, J. (after stating the facts as above). It is first claimed that the court erred in admitting the testimony of Lizzie R. Luper as a witness on behalf of the state, she having been the wife of the defendant at the time of the transaction testified to. As it is conceded by the record that the witness was not the wife of the defendant at the time of the trial, appellant cannot rely upon section 1401, B. & C. Comp., which provides that in criminal actions the husband and wife shall be competent witnesses for or against each other, but neither shall be compelled or allowed to testify against the other without the consent of both. B. & C. Comp. § 722, provides that all persons of intelligence are competent witnesses except as otherwise provided in this chapter, and section 724, Id., provides the exceptions. By subdivision 1 thereof it is provided that neither the husband nor the wife can be examined during the marriage or afterward as to any communications made by one to the other during the marriage without the consent of the other, and this is but a repetition of the common law relating to that matter. It is held, however, in *State v. McGrath*, 35 Or. 109, 57 Pac. 321, and *State v. Luper* (Or.) 91 Pac. 444, that this section has no application in criminal trials, and that the Criminal Code is complete within itself as to the competency as a witness of either the husband or the wife against the other, which contains no provision as to privileged communications, section 1401, *supra*, being the

only provision upon that subject, and the question of the competency of their evidence must be determined by the common law. The preservation of the sacredness and confidence of the marriage relation is a matter of public policy, and the disclosure during the marriage or afterward by either the husband or wife of confidential communications between them during the marriage is prohibited under the common law. This does not affect the competency of either the husband or the wife as a witness for or against the other in a criminal action. They may testify as to any matter of which they have knowledge, except communications between them during the marriage. 23 Am. & Eng. Ency. Law, 93. The material evidence given by the witness related to no communication by one to the other, but she testified only as to the dwelling, the coming to Oregon and her return to Arkansas, and that she did not desert the defendant. The bill of exceptions states that when Mrs. Luper was sworn as a witness defendant "objected to said Lizzie R. Luper being allowed to testify at the trial of this criminal action because she had been the wife of the defendant at the time of the occurrences to which she proposed to testify." No objection was made to any specific evidence offered or question asked. It was only a general objection to the competency of the witness. The objection impliedly concedes that the witness was not, at the time of the trial, the wife of the defendant, and therefore she was not precluded by section 1401, *supra*, from being a witness. She was competent to testify as to any matter within her knowledge, except communications had between them during the marriage; and the objection was properly overruled.

Exception was taken to the ruling of the court in refusing to permit Mrs. Robinson to testify on behalf of defendant to the admissions or declarations of Mrs. Luper in the month of April, 1906, as to her desertion of the defendant. The general rule is that declarations of third persons not parties to the suit are not admissible in evidence for the purpose of furnishing substantive proof of the matter in issue. 15 Am. & Eng. Ency. Law, 812. There are several exceptions to this rule; but so far as this case is concerned statements of Mrs. Luper could be competent as substantive proof of a matter in issue only in case she were a party to the suit, or in case the statement were *res gestæ*, but neither of these conditions exists here. It is suggested in defendant's brief that this was the point upon which the case was reversed on the former appeal; but not so. There defendant sought to prove by his own evidence statements of the wife made to him of her intention as characterizing her acts, and the only question raised was whether such statements were within the privilege of confidential communications. There, too, the statements were *res gestæ*; while here the evidence offered was of statements by the

wife made to a third party and only hearsay, and they can be proved only for the purpose of impeachment, under B. & C. Comp. § 853, and after a foundation therefor has been laid in the usual manner. The objection was properly sustained.

Exception was taken at the trial to the following instruction given by the court: "If you find that the defendant established the matrimonial domicile or family home of himself and his wife and son at Rogers, Ark., then I instruct you that so long as the wife remained at that home she could not be guilty of deserting the defendant, however much the defendant himself may have been absent from home, unless the defendant changed the family abode and requested his wife to remove with him thereto, and she willfully, without his consent, refused to follow him to such new domicile. The husband, being the head of the family under the law has the right to fix the family home, and the wife has the right to stay at that family home until the husband changes the family home and requests her to accompany him to that home, and until he does so she cannot be guilty of desertion if she remains at the family home. Further, although these parties, man and wife, may have separated, yet, if the defendant here consented to it and acquiesced in it, that would not be desertion on the part of the wife." Although there might be cases where the wife would be guilty of desertion even though she remained in the family home (14 Cyc. 613) yet the instruction correctly states the law as applicable to the facts in this case. Defendant testifies that having been in a hospital, while recovering from an injury, he returned home December, 1904, and he says: "When I got into the house she was busy getting dinner. I spoke to my wife, and she turned around and says: 'I thought you were in the hospital.' I says: 'Very well, I was; but I got a leave of absence to come home because I could not hear from you.' She says: 'You don't need to come here for me to wait on. I will not do it.' She says: 'All you care for is to make me trouble. You might as well go back to the hospital and stay there.' So I returned back to my work at Oklahoma." These are the only words or conduct mentioned as constituting the desertion, and there is nothing contained in them that discloses a willful termination of the marriage relation, or an exclusion of defendant from the home for that purpose; and while she remained in the home which he had established, and from which he had not been excluded, there was no desertion by her. We find no error in the instruction.

It is argued by the defendant that the information does not charge a crime, in that it discloses that the complaint for the divorce, the verification of which is the perjury charged, does not allege that the desertion was willful; but the portion of the complaint quoted above from the information states

the facts, which are sufficient to show that what she did was willful, and only the facts in a civil pleading should be stated. In *Ogilvie v. Ogilvie*, 37 Or. 171, 61 Pac. 627, this court has defined "willful" as used in B. & C. Comp. § 507, which provides that "willful desertion" for the period of one year shall be a ground for divorce. In that case Mr. Chief Justice Wolverton says: "An intentional desertion is willful, within the meaning of the term as defined by the statute." To the same effect is *Sisemore v. Sisemore*, 17 Or. 542, 21 Pac. 820. And it is defined by B. & C. Comp. § 2176, as implying merely a purpose or willingness to do the act; and as it appears from the facts alleged that the acts were willful it is sufficient. The complaint may have been vulnerable to a demurrer or to a motion to make definite, but without such an attack the ultimate facts alleged are sufficient after judgment, and, if false, a verification thereof may constitute perjury. In the brief there are several minor criticisms of the information, namely: "That he swore to the facts as set forth in the complaint;" that facts mean truths, therefore, he swore only to the true statements. But this construction cannot be sustained. The term "facts" is used thus in the pleading in the sense of "matter" or "statements." Webster's Dictionary gives this as one of its meanings, viz., "A thing supposed or asserted to be done," and as an illustration it quotes: "History abounds with false facts." Other objections to the information are answered by referring to B. & C. Comp. § 1321, which provides that it is sufficient "to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court, or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed." This answers the objection that the information does not set out the verification to the complaint. It does state that he "did then and there willfully, knowingly, feloniously, and corruptly depose and swear before the said notary public that all the matters and facts set forth in the said complaint were true"; and we think the information fulfills the requirements of this section. *State v. Spencer*, 6 Or. 152; *State v. Woolridge*, 45 Or. 389, 78 Pac. 333; *State v. Jewett*, 48 Or. 577, 85 Pac. 994.

Objection is made to the affidavit offered in evidence as constituting the oath alleged to have been false, for the reason that defendant thereby swore only that he believed that his wife had deserted him, etc. The verification of the complaint, omitting the jurat, is in the following words: "State of

Oregon, County of Marion—ss.: I, T. J. Luper, being first duly sworn, say that I am the plaintiff in the within entitled cause; and that the foregoing complaint therein is true as I verily believe. T. J. Luper." B. & C. Comp. § 82, provides that: "Every pleading shall be * * * verified by the party, * * * to the effect that he believes it to be true. The verification must be made by the affidavit of the party," etc. The statute under which the information was drawn (B. & C. Comp. § 1875) provides that: "If any person authorized by any law of this state to take an oath or affirmation, or of whom an oath or affirmation shall be required by such law, shall willfully swear or affirm falsely in regard to any matter or thing concerning which such oath or affirmation is authorized or required, such person shall be deemed guilty of perjury." The verification to a pleading provided for in section 82, supra, is clearly an oath authorized by law within the meaning of section 1875, supra, and the form of the verification in this case above quoted is in the form contemplated by section 82, supra, and, if willfully false, the making of it constituted perjury, and whether it was willfully false was a question for the jury under the evidence.

We find no error in the rulings of the lower court, and the judgment is affirmed.

ABRAHAM v. MILLER.

MILLER v. ABRAHAM.

(Supreme Court of Oregon. May 26. 1908.)

1. JUDGMENT—EQUITABLE RELIEF—WANT OF SERVICE OF PROCESS.

Equity has jurisdiction to grant relief against a judgment taken by default on a false return of service of process.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 250, 255.]

2. SAME.

Equity will not grant relief against a default judgment on a false return of service of process except on clear, satisfactory, and convincing proof of a want of service of process by the officer making the return, which return is prima facie evidence of the facts recited therein.

3. PROCESS—SERVICE—RETURN.

The summons and complaint served on defendant correctly gave his name as "Albert A." The return of service of the summons showed personal service on defendant, and recited that service was made "on the within-named defendant, Alfred A." *Held*, that the name "Alfred" instead of "Albert" in the return was a mere clerical error, and did not mislead defendant.

4. JUDGMENT—EQUITABLE RELIEF—WANT OF SERVICE—EVIDENCE—SUFFICIENCY.

In a suit to set aside a default judgment on a return of service of summons, evidence *held* not to show that the return was false, or that there was in fact no service essential to give the court jurisdiction to grant relief.

5. APPEAL — REVIEW — HARMLESS ERROR—AMENDMENT OF PROCESS.

Where the return of service of process when amended was no stronger than it was before, the allowance of the amendment was not erroneous.

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action at law by B. E. Miller against Albert Abraham and suit in equity by Albert Abraham against B. E. Miller to set aside a judgment for plaintiff in the action at law. After judgment in the action at law an order was entered allowing amendment of return of service of summons, and Albert Abraham appeals. Decree dismissing the bill in suit in equity, and Albert Abraham appeals. Affirmed on both appeals.

On May 9, 1902, B. E. Miller filed his complaint in Multnomah county in an action against Albert Abraham to recover a sum of money on an account. Summons directed to Albert Abraham, the defendant, was issued and delivered to the sheriff on that day for service, and on the 16th the same was filed in the cause with the following return indorsed thereon: "State of Oregon, County of Multnomah—ss.: I, William Frazier, sheriff of said state and county, do hereby certify that I served the within summons within said state and county, on the 9th day of May, 1902, on the within named defendant, Alfred Abraham, by personally delivering a copy thereof prepared and certified to by me, as sheriff, together with a copy of the complaint, prepared and certified to by S. C. Spencer, attorney for plaintiff, to said Alfred Abraham. Wm. Frazier, Sheriff of Multnomah County, State of Oregon, by Penumbra Kelly, Deputy." No appearance was made by defendant, and on June 6, 1902, judgment by default was entered for the amount demanded. Afterwards, and on October 25, 1906, Abraham instituted this suit to enjoin the issuance of execution, and to set aside and cancel the judgment, alleging, in substance, that prior to service of the summons he settled the matter in controversy with Miller, who, it is averred, agreed that service should not be made and that the action be dismissed; that thereafter and on the same day he met the deputy sheriff, who informed Abraham that he desired to serve a complaint and summons in the action brought against him by Miller, but that before any service was made Abraham informed the deputy that the case had been settled and compromised, and it had been agreed that there should be no service of summons and complaint in the action, and requested the deputy, before making such service, to verify the same by making inquiry of Miller, to which, it is alleged, the deputy agreed, and that he (Abraham) understood no service was to be made; that a return was made to the effect that the summons and complaint were served on one Alfred Abraham on May 9, 1902, but that in fact no service was made; that at the time he was, and ever since has been, a resident of Douglas county, and had no knowledge of the making of the return of service of the summons or entry of the judg-

ment until about August 1, 1906, when a transcript was filed in Douglas county; that defendant threatens to cause execution to issue against plaintiff's property; and that he has a meritorious defense to the action. The answer denies all the material allegations of the complaint, excepting the commencement of the action at law, and that Kelly, the deputy sheriff, met the plaintiff herein and informed him that he desired to make service upon him of a complaint and summons in that action, all of which is expressly admitted, with the additional admission that service thereof was made upon the defendant therein in Multnomah county by Kelly, as deputy sheriff. The making of the return, the entry of the judgment, and that an attempt is being made to collect the judgment are also admitted. After the taking of the testimony findings were made and a decree was entered dismissing the complaint, from which plaintiff appeals.

Albert Abraham, in pro. per. W. E. Farrell, for respondent.

SLATER, C. (after stating the facts as above). There are two appeals to be considered—one from an action at law upon the motion of plaintiff therein granting leave to the sheriff to amend his return to conform to the alleged facts by changing the name of "Alfred Abraham" to "Albert Abraham," and the other from the decree dismissing the complaint in the equity suit. But the consideration of the latter will be sufficient to determine the whole controversy.

It has been established by this court in *Huntington v. Crouter*, 33 Or. 408, 54 Pac. 208, 72 Am. St. Rep. 726, that a court of equity has jurisdiction to grant relief against a judgment taken by default upon a false return of service where there was in fact no service, but that it should not exercise such jurisdiction except upon clear, satisfactory, and convincing proof of a lack of service of process by the officer making the return of service, which return must always be prima facie evidence of the material facts recited therein. The return of the officer on the summons in the action recited that the summons was served "on the within-named defendant, Alfred Abraham," etc. The true name of the defendant is Albert Abraham, which correctly appeared in the summons and in the complaint. The first question is what probative force, if any, has such a return. If the return had recited that service was made "on the within-named defendant" without further identification, it would be sufficient when the name of the defendant is correctly set forth in the summons (*Gate City Abstract Co. v. Post*, 55 Neb. 742, 76 N. W. 471), but in the return under consideration there has been added the misnomer "Alfred Abraham." Does this destroy what would otherwise be a good return? We think not. The words "the within-named defend-

ant" serve to identify the person erroneously designated as "Alfred Abraham" with "Albert Abraham," the true defendant named in the summons. If the summons was served upon defendant, as certified by the deputy sheriff, it contained his true name, and it was therefore a good service, and the defendant was thereby in no way misled. In such case there was nothing to mislead him; for the summons being correct on its face, he had proper and legal notice, and the court acquired jurisdiction of the action. The certificate shows personal service on the defendant. The spelling of the name "Alfred" instead of "Albert" is a mere clerical error. *Sandwich Mfg. Co. v. Earl*, 56 Minn. 390, 57 N. W. 938; *Veasey v. Brigman*, 93 Ala. 548, 9 South. 728, 13 L. B. A. 541; *Dunn v. Hughes* (Tex. Civ. App.) 36 S. W. 1084. The real question, then, is whether, within the rule announced in *Huntington v. Crouter*, supra, there is sufficiently clear and convincing proof of the absence of service to overcome the prima facie case made by the return.

The plaintiff testifies that he was never served with summons, although he admits that on the 12th day of May, shortly after the complaint was filed, he was in Portland and met Penumbra Kelly, the deputy sheriff, in the Abbington Building, who informed him that he had some papers to serve upon him. Whereupon plaintiff inquired if it was in the Miller case, and, being informed that it was, he requested that no service be made, explaining that an agreement to settle the case had been made with Dr. Miller, the plaintiff in the action, and that it was understood between them that no service should be made. After assuring the officer that he intended to remain in the city for some time so that service could be made if his statements as to the settlement were not true, he asked the officer not to make the service and to verify the matters stated by inquiry of Miller. This, he testifies, Kelly agreed to do, and put the papers back into his pocket. The date of this transaction is fixed by the witness as May 12th. Penumbra Kelly testifies that he was deputy sheriff at that time, and had received for service the summons and complaint in the action; that he knew Abraham personally, and remembers having met him in the Abbington Building as testified by Abraham; that it was about 10 o'clock in the morning, but he does not remember the day of the month on which it occurred, nor any conversation that he may have had with him, but he does remember that he was looking for Abraham to deliver this copy of summons and complaint to him, and that he came there for that particular purpose and found him. While he does not remember that he then handed to Abraham the papers that he went there to serve, yet in explanation of his inability to recall what was said and done at that time he says: "I could not, I would not be positive about that. I cannot say positively out of the thousands of papers I have serv-

ed that I have always actually put the papers into the hands of the defendant. I know sometimes I have not done that. I have had to throw them into the house or leave them in spite of the protests, but I remember having met you there under the circumstances under which this testimony has stated. As to the balance of it, it is a perfect blank to me." But he produces a sheriff's memorandum book kept by himself while he was a deputy, and which contains an entry made by him of the title of the action of *Miller v. Abraham*, the date of the receipt of the process as May 9, 1902, the service thereof on the same date upon Alfred Abraham. Kelly testifies that when he left a copy of a summons and complaint with a defendant it was his practice immediately to make a memorandum to that effect in this note book, which was kept in the sheriff's office for that purpose, and when the book was filled it was filed away for safe-keeping; that he made a memorandum of service when the service had been made and not before, and that he could remember of but one instance, which occurred in his early experience as an officer, that when he started out to serve a man, met him, had a conversation with him, and then did not serve him; that on that occasion he was instructed that he should never, under any circumstances, bring the papers back. If he failed to make service, he understood that he rendered himself liable in damages. He testifies, however, that it was the plaintiff herein, and not some other person named Alfred Abraham, whom he met on the occasion when he went to serve the papers, and that he would not have made the memorandum if he had not made the service, but that he cannot testify that such was the fact except from the contents thereof. How he came to write "Alfred" instead of "Albert" he is unable to explain, except that it was a clerical error. Now it is admitted by plaintiff that there is some evidence that some person designated as "Alfred Abraham" was served, but he contends that there is no evidence that "Albert Abraham" was served. But we think it cannot be doubted that the evidence establishes the identity of the person of Albert Abraham, the defendant in the action, with "Alfred Abraham" named in the return; and it follows that, if there was service upon any one, the plaintiff must have been the person served, as indicated by the return.

In the case of *Starkweather v. Morgan*, 15 Kan. 274, Mr. Justice Brewer, delivering the opinion of the court, held that the testimony of one witness, wife of her codefendant, corroborated to some extent by the testimony of her husband, is not enough adverse testimony to the return of the sheriff, which, if not conclusive, is the strongest kind of evidence to warrant the annulment of the judgment. In *Randall v. Collins*, 58 Tex. 231, the officer

by whom the service purports to have been made testified twice, 8 and 9 years after the transaction. At first he could not recollect any such service, and because he kept memorandum of his official acts, and had no memorandum of this, and further because by agreement with his principal—an agreement which he acted on—he was not to execute process in that part of the county, he did not believe that the process was served. Subsequently, however, his memory having been refreshed, he changed his opinion, and admitted having some recollection of having served some process on Collins. The sheriff, his principal, testified to the same agreement, and further that he required his deputies to report their official acts to him, and he kept a record of all such acts in a book, but found no record of such service. But it was held that such evidence, while it caused some doubt or suspicion on the question of service, yet it was not sufficient as against the return. It is there said that "it is not like an ordinary issue of fact, to be determined by a mere preponderance of testimony," citing the case of *Driver v. Cobb*, 1 Tenn. Ch. 490, which holds that one witness alone will not suffice to successfully impeach a return. In the case now under consideration, while the testimony may create a doubt or suspicion as to the fact of service, yet there is not that certainty of conviction required to justify the setting aside of the judgment. Pending the trial of the equity suit, and based upon this showing, the lower court upon motion of plaintiff in the law action permitted an amendment of the return to accord with the fact shown. There certainly could have been no error on that account; for, as we have shown, the return when amended was no stronger in its legal effect than it was before, and the case is finally resolved to the important question whether there was in fact service upon Albert Abraham. This issue we have determined against the plaintiff herein. The disagreement between the date of service as shown by the return as having taken place on the 9th, while plaintiff testifies that it was on the 12th when he met Kelly and had the conversation with him, we have treated as unimportant, as the fact of the meeting and the object of the officer's seeking out Abraham is admitted, and the only important inquiry is what took place between them at that time.

As to the alleged settlement plaintiff has also failed to make out a clear case. While he testifies that an agreement to that end was made, he is flatly contradicted by Miller and by Spencer, who was the former's attorney in the action at law, and there being no corroborating evidence, plaintiff must necessarily fail.

It follows that the decree in the one case and the judgment in the other should be affirmed.

READY v. SCHMITH.

(Supreme Court of Oregon. May 28, 1908.)

1. SPECIFIC PERFORMANCE—EVIDENCE OF PART PERFORMANCE—CONTRACT TO CONVEY LAND.

Evidence in a suit for specific performance of a parol contract to convey real estate considered, and held to show part performance of the agreement sufficient to take the case out of the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 120-139.]

2. FENCES — PARTITION FENCE — RIGHTS AND LIABILITIES OF OWNERS.

B. & C. Comp. §§ 4351-4353, provide that if any person neglects to keep up a partition fence or the part thereof which he ought to maintain, and upon proper notice refuses to renew it, the party interested may make the necessary repairs, and thereupon recover the value of the improvement in an action against the delinquent. Held, that an owner of land may secure an interest in a fence separating his land from that of another by the payment of one-half of the value of the fence without the execution of a deed, and a person whose duty it is to maintain a part of a partition fence can be compelled to pay for the making of his share of the necessary repairs, and an action can be maintained against him even in the absence of an express covenant to make the repairs.

3. COVENANTS — COVENANTS RUNNING WITH THE LAND—COVENANTS IMPOSING EXPENSE — MAINTENANCE OF PARTNERSHIP FENCE.

If a half-interest in a partnership fence is transferred to one of adjoining landowners, but the other adjoining landowner and the grantor stipulated for himself, his heirs and assigns, to make the necessary repairs, such covenant would probably run with the land, and could be enforced by the party entitled to the performance.

4. SPECIFIC PERFORMANCE — PROCEEDINGS — CONDITIONS PRECEDENT—TENDER OF CONSIDERATION.

Plaintiff agreed to transfer to defendant, an adjoining landowner, one-half interest in a fence on the line between them. Defendant agreed in consideration for such transfer to transfer to plaintiff an acre of land. Held, in the absence of an agreement to transfer an interest in the fence by deed, that plaintiff could bring suit for the specific performance of defendant's agreement to transfer the acre of land without tendering to defendant a deed of the interest in the fence.

5. APPEAL—OBJECTIONS NOT TAKEN IN LOWER COURT—OBJECTIONS TO PLEADINGS.

An allegation in a reply denying "each and every material allegation of the new matter set up in defendant's answer except so far as the same agrees with the allegation of the complaint," although objectionable as an attempt on the part of plaintiff to determine what facts are material, must be objected to in the trial court or the objections cannot be considered on appeal, as under B. & C. Comp. § 72, only objections which involve the jurisdiction of the court, or that the complaint does not state a cause of action, can be considered on appeal if objection is not made in the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1226-1246.]

Appeal from Circuit Court, Wallowa County; T. H. Crawford, Judge.

Suit by J. B. Ready against Henry Schmith for specific performance of a contract to convey real property. Decree for plaintiff, and defendant appeals. Modified and affirmed.

This is a suit by J. B. Ready against Henry Schmith to enforce the specific performance

of a parol contract to convey real property. The facts are that the defendant is the owner of lot 1, section 4, township 5 N., range 45 E. W. M., in Wallowa county, and the plaintiff owns 40 acres of land which joins such lot on the south. The parties hereto, about October 1, 1904, made an oral agreement whereby the defendant, in consideration of securing a half interest in a fence owned by the plaintiff, stipulated to convey to the latter a tract of land 20 rods east and west, and 8 rods north and south, from the southwest corner of such lot, and to execute to him a deed therefor when the premises should be released from the lien of a mortgage. The fence mentioned is built on the north boundary of the plaintiff's land, and extends east thereof and nearly across a 40-acre tract which lies immediately south of other lands owned by the defendant. That part of the fence extending east of the plaintiff's premises is slightly deflected to the south. It was agreed that the maintenance of the fence should be equally borne by the parties. The plaintiff was permitted to take possession of the land specified, upon which he erected a barn and made other improvements. He also constructed across his land another fence a short distance south of, but parallel with, his north boundary. The defendant joined his fences to such boundary fence, a part of which he reset. The mortgage specified having been discharged, the defendant was requested to execute a deed of the land agreed to be conveyed, but he refused to comply therewith, whereupon this suit was instituted, the complaint stating the facts in substance as hereinbefore detailed. The answer admits the making of the contract and avers, in effect, that the plaintiff stipulated to execute to the defendant a deed to a half-interest in the fence; that he would move the east part of it north to the defendant's boundary and keep half of the entire line in repair; that the defendant has been ready, able, and willing to perform his part of the agreement, but the plaintiff failed to move such part of the fence or to maintain any of it, and to compel the defendant to bear the entire expense of making the repairs the plaintiff built a fence just south of the boundary; and that he also failed to tender to the defendant any written evidence of a transfer of the title to a half interest in such fence. The reply denies the material allegations of new matter in the answer, upon which issues the cause was tried, resulting in a decree as prayed for in the complaint, and the defendant appeals.

O. M. Corkins, for appellant. J. A. Burleigh, for respondent.

MOORE, J. (after stating the facts as above). The testimony shows that the second fence built by the plaintiff forms, with the fence on his north boundary, a lane nearly identical with an old trail which extends across his premises, and that he had permit-

ted his neighbors to drive their cattle along such path. The plaintiff, referring to the reason assigned by the defendant for his refusal to convey the premises agreed upon, testified as follows: "Because I put up a fence and made a lane and let stock go through, and because I didn't shut up the trail and allow nobody to go through there, he would not make the deed." This witness further testified that nothing was ever said about his resetting the fence, or in relation to his executing a deed to a half interest therein, that no demand was ever made upon him to make such a deed, that by oral agreement he delivered a half interest in the fence to the defendant, who took possession thereof and thereafter used it, that he intended to give the defendant a half interest in the entire fence, and also stated: "Under the terms we were both to keep up the fence." Frank Ready, the plaintiff's son, in speaking of the reason given by Schmith for repudiating his agreement, testified that the defendant told the plaintiff he would not convey the land specified, because the latter had permitted people to go back and forth with their stock along the trail across his premises, that if a deed should be made he feared the plaintiff would remove the boundary fence, and that the defendant did not request any writing to evidence a transfer thereof. The defendant, in speaking of the terms of the agreement, testified as follows: "I says to Mr. Ready, 'I will let you have an acre of ground if you will let me have a half interest in this fence.' He says, 'All right; I'll do that.' I says, 'There is part of that fence I want swung back to keep your stock from getting into my field and mine from getting into yours,' and he didn't give me any answer, and that's the way it stood ever since." In referring to a conversation this witness had with the plaintiff he further said: "He asked me if I had made a deed for this acre of ground. I says, 'No.' He says, 'Why didn't you?' I says, 'Mr. Ready, I want to know first what I am going to get for my acre of ground before I make out a deed.' He says, 'You can have this fence.' 'Well,' I says, 'I want it drawn up in writing in regard to this fence.'" The defendant on cross-examination was asked in reference to his agreement with the plaintiff the following question: "Now, as I understand your direct testimony, when you had this conversation where you staked out the ground to him, in that conversation there was nothing said about a writing of any kind from him to you? That was afterwards?"—to which the witness replied: "I don't think he talked about any writing at all. He might have. I would not say we did. Just went to work and staked off the ground and measured it, and I think we had our minds made up about that. I don't know exactly whether we did or not." A careful examination of the testimony given at the trial leaves no doubt in our minds as to the

validity of the contract to convey the land particularly described, or as to the plaintiff's part performance of the terms of the parol agreement sufficient in equity to take the case out of the statute of frauds; and the only question to be determined is whether or not a deed of the specified interest in the fence should have been tendered to the defendant as a condition precedent to the right to maintain this suit.

Our statute provides, in effect, that whenever a boundary fence of another's land is used by an adjacent owner as a part of his inclosing fence such bordering proprietor must pay the former one-half of the value of the appropriated part. B. & C. Comp. § 4351. If any party neglect to keep up such partition fence, or the part thereof which he ought to maintain, and upon proper notice refuses to renew it (Id. § 4352), the party interested may make the necessary repairs, and thereupon recover, in an action against the delinquent, the value of the improvements thus made. Id. § 4353. It will thus be seen from an inspection of the law referred to that, though a partition fence may be treated by the owner thereof as a fixture, an interest therein can be secured in the manner indicated by the payment of one-half of the value of the fence, and evidently without the execution of a deed for that purpose. It will also be observed that the party whose duty it is to maintain a part of a partition fence can be compelled to pay for the making of his share of the necessary repairs in case he fails or refuses to perform his obligation in this respect, and that an action can manifestly be maintained for that purpose, even in the absence of an express covenant to make the repairs. In the cases thus supposed the right of action is based on the statute. The plaintiff's agreement to maintain his part of the fence could undoubtedly be enforced in an action to recover his share of making the necessary repairs, if he fails or refuses to keep or perform this part of his contract, the terms of which would afford the measure of the remedy. If a half interest in the fence had been transferred to the defendant by a deed in which the plaintiff stipulated for himself, his heirs and assigns, to make the necessary repairs, such covenant would probably run with the land, and could be enforced by the party entitled to the performance. *Brown v. Sou. Pac. Ry. Co.*, 36 Or. 128, 58 Pac. 1104, 47 L. R. A. 406, 78 Am. St. Rep. 761. A deed of that character would have been more efficacious than the oral transfer and acceptance thereof; for a parallel fence having been built, the lane thus formed could be opened to the public as a highway, and by the conveying of plaintiff's land to another person the latter might abandon all interest in the boundary fence, and thus possibly impose upon the defendant the entire expense of keeping up the repairs. The consequences thus assumed, however, were not anticipated by the parties, who never agreed that a deed of the specified interest in the fence should

be executed. The plaintiff, therefore, was not obliged to tender to the defendant a sealed instrument evidencing a transfer of such interest in the fence as a condition precedent to the right to maintain this suit.

It is maintained by defendant's counsel that the pleadings admit that the plaintiff was to move a part of the fence north to the boundary line, and, as the testimony shows that he has not performed this part of his agreement, an error was committed in decreeing a specific performance of the parol contract. The answer alleges that the plaintiff was to move a part of the fence as stated. The reply applicable to this averment is as follows: "Denies each and every material allegation of the new matter set up in defendant's answer, except so far as the same agrees with the allegations of the complaint." In *Kabat v. Moore*, 48 Or. 191, 85 Pac. 506, referring to B. & C. Comp. § 77, as amended (Laws 1903, p. 205), Mr. Chief Justice Bean criticises such form of pleading by saying: "It may be doubted whether, under this statute, a reply merely denying each and every 'material' allegation of the answer is a good denial, for a plaintiff ought not to assume to himself to determine what facts are material, and thus render a conviction for perjury for a false verification difficult or impossible." The Supreme Court of this state is organized to correct errors committed by the trial courts to which exceptions have been duly reserved. In the presentation of causes questions necessarily arise, which, owing to the haste incident to a trial, must be determined after only a moment's consideration. If the action of a court in such respects is challenged, its conclusions can be reviewed at leisure on appeal, and a precedent may thus be established for future government; but unless the legal principle is called to the attention of the trial court by objection and exception, its action is not subject to re-examination, excepting only in cases involving its jurisdiction and that the complaint does not state facts sufficient to constitute a cause of action. B. & C. Comp. § 72. The notice of the court appears never to have been attracted to the defect in the reply, and as such imperfection might have been waived, and does not come within the exception specified in the statute, no error was committed as alleged.

Believing that the testimony fully warrants a specific performance of the terms of the parol agreement, the defendant is required within 30 days from the entry of the mandate herein in the lower court to execute to the plaintiff a bargain and sale deed to the acre of land particularly described in the complaint, transferring a title to the premises free from all incumbrances made or permitted by him; the deed to recite that it is given in consideration of a transfer by the plaintiff to the defendant of an undivided half of the entire fence specified, and also pursuant to the plaintiff's agreement to maintain and repair his share of the fence, which latter

stipulation is only personal, and not a covenant running with the land. If the defendant fails or refuses to execute the deed within the time specified, this order is to operate as and for the conveyance. With this modification the decree is affirmed.

WHEELER COUNTY v. KEETON et al.

(Supreme Court of Oregon. May 26, 1908.)

TAXATION—SHERIFFS—BOND—DEFAULT AS TAX COLLECTOR—SURETIES' LIABILITY.

B. & C. Comp. § 2528, requires a sheriff to give an official bond with resident sureties. Section 3093 makes him ex officio tax collector. Hill's Ann. Laws, § 2794, required a sheriff before collecting taxes to execute an additional bond, and after the Supreme Court decided that such additional bond was not cumulative to the sheriff's official bond, and that the sureties on the official bond were not liable for his failure to pay over money collected as taxes, the statute was amended so as to require him, as now provided by B. & C. Comp. § 3094, to give a bond as tax collector, signed by a surety company or other sureties approved by the county court, and so as to make such bond additional and cumulative to the general bond to which resort may be had on his default as tax collector, "if the additional bond be unenforceable or insufficient." Held, that recourse against the sureties on the general bond for a sheriff's default as tax collector is limited to cases in which an additional bond is unenforceable or insufficient, releasing them from such liability where no such bond has been required or given.

Appeal from Circuit Court, Wheeler County; W. L. Bradshaw, Judge.

Action by Wheeler county, Or., against P. L. Keeton and others. From a judgment for defendants, excepting Keeton, plaintiff appeals. Affirmed.

This is an action by Wheeler county against P. L. Keeton, its former sheriff, and the sureties on his official undertaking, to recover money received by him for taxes, and which sums he retained. The complaint states the jurisdictional facts entitling the plaintiff to institute the action, and alleges in effect that in June, 1902, Keeton was duly elected sheriff of Wheeler county, Or., to serve for a term of two years from the first Monday in July then next following; that he accepted the trust, filed the required oath of office, and duly executed to plaintiff his official bond, setting forth a copy thereof, from which it appears that the codefendants' names are subscribed thereto; that by virtue of the office Keeton was also the duly qualified and acting tax collector for that county; that during the term specified he, as sheriff and tax collector, received from sundry persons, in payment of taxes, money belonging to the plaintiff, amounting to \$1,024.82, for which no account was made; and that he never executed any other bond than that hereinbefore mentioned, nor did the county court of that county ever require him to deliver a bond for the faithful performance of his duties as tax collector, or determine the amount of an undertaking for that purpose.

Judgment is demanded for the amount of the defalcation with interest from July 4, 1904. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was sustained as to all the defendants, except Keeton, and the plaintiff declining further to plead, judgment was rendered against it for the costs and disbursements of the action, and it appeals.

B. S. Huntington, for appellant. W. H. Wilson and H. H. Hendricks, for respondents.

MOORE, J. (after stating the facts as above). The question to be considered is whether or not an action can be maintained against the sureties on a sheriff's official undertaking to recover moneys received by that officer as taxes, and for which he failed to account, when no bond was required of or given by him as tax collector. As the inquiry involves the construction of a statute, it is thought proper to call attention to the law applicable in this state to the election and qualification of a sheriff and his duties as tax collector.

General elections are held on the first Monday in June biennially. Const. Or. art. 2, § 14. The qualified voters of each county are authorized to elect, at the time thus designated, a sheriff, who shall hold his office for the term of two years. B. & C. Comp. § 2524. The sheriff is required to give an official undertaking in the sum of \$10,000, with adequate sureties to be approved by the county court, the form of the bond being prescribed. Id. § 2528. The sheriff of each county is the tax collector thereof. Id. § 3093. Before entering upon his duty as tax collector the sheriff shall give a bond, signed by some responsible surety company, or some responsible surety or sureties, as approved by the county court, conditioned for the faithful performance of his duties as such tax collector, in such amount as the county court shall direct, and such bond, if signed by a surety company, shall be paid for by the county court. Such bond shall be additional and cumulative to the general bond given by the sheriff, to which resort may be had in case of failure or default of his duties as tax collector, if the bond described in this section be unenforceable or insufficient. Id. § 3094.

In *Columbia County v. Massie*, 31 Or. 292, 48 Pac. 694, in construing a statute then in force, containing the following clause: "Provided, the sheriff, before entering on the duties of collection of taxes, shall execute an additional bond in such sum as the county court of the county may direct" (Hill's Ann. Laws, § 2794)—it was held that the special bond thus required was not cumulative to the sheriff's official undertaking, and that the sureties on the latter obligation were not liable for a failure of that officer to pay over to the county money which he had collected as taxes. After that decision was rendered the clause of the statute last mentioned was

amended so as to read as hereinbefore quoted. B. & C. Comp. § 3094. It is argued by plaintiff's counsel that the legislative assembly, governed by the decision adverted to, amended the statute in the particulars specified, the effect of which changed the form of the sheriff's official undertaking as originally prescribed (Id. § 2528) by impliedly incorporating therein a condition in substance that the sureties will be responsible for all moneys that the sheriff may receive as or collect for taxes; that Keeton's codefendants are charged with notice of the change in the law, and when they subscribed their names to his official undertaking they knew they were incurring a liability for which they would be obliged to respond, if he failed to account for money which he received as taxes; and that as Keeton, for the faithful performance of his duties as tax collector, never gave a bond, it is unenforceable, and in consequence thereof resort may immediately be had to the official undertaking, and such being the case, an error was committed in sustaining the demurrer. We do not think the legal principles thus insisted upon were contemplated by the amendment of the statute (B. & C. Comp. § 3094) as hereinbefore set forth, a perusal of which, in our opinion, leads to the conclusion that it is incumbent upon the county court first to determine the amount of the bond which the sheriff shall give as tax collector, and to direct that such an undertaking be given, in complying with which requirement the sureties on such bond voluntarily assume a primary liability for any default of their principal in failing to pay over, according to law, all moneys that he may have received for taxes. If, however, the sheriff's bond for the faithful performance of his duties as tax collector is unenforceable or insufficient for any reason, resort may then be had to the general bond given by the sheriff for any failure on his part properly to account for all moneys which he received as taxes, thereby disclosing that the legal liability of the sureties on the sheriff's official undertaking is only secondary.

It will be remembered that the amended statute under consideration, in referring to the undertaking given to secure the repayment of all moneys collected or received as taxes, contains the following provision: "Such bond shall be additional and cumulative to the general bond given by the sheriff, to which resort may be had in case of failure or default of his duties as tax collector, if the bond described in this section be unenforceable or insufficient." By eliminating from the part of the statute thus quoted the clause "if the bond described in this section be unenforceable or insufficient" the remainder of the language would seem necessarily to induce the determination that resort might immediately be had to the official bond given by the sheriff in case of failure or default of his duties as tax collector. The retention of such clause, however, makes it

quite evident, we think, from an inspection of the entire utterance, that recourse cannot be had to the sureties on the sheriff's official undertaking for any default of that officer properly to account for and pay over all moneys received by him as taxes, unless, as tax collector, he executes a bond which for any reason may be determined to be unenforceable, or prove to be insufficient. "The duties of a sheriff as such," says Mr. Justice Bean, in *Columbia County v. Massie*, 31 Or. 292, 296, 48 Pac. 694, 695, "are more or less directly connected with the administration of justice, and have no relation whatever to the collection of the public revenues. They relate to the execution of the orders, judgments, and processes of the courts, the arrest and detention of persons charged with crime, the preservation of the public peace, the service of papers, and the like." It is the faithful performance of the duties thus enumerated, and the payment, according to law, of all moneys collected or received by the sheriff on account of judgments, decrees, orders, etc., that the sureties on his official undertaking guaranty. These sureties must be residents of the county and have the qualifications of bail upon arrest (B. & C. Comp. § 2528), while a surety company may become responsible for the faithful performance of the duties of the sheriff as tax collector. *Id.* § 3094. As the sureties on the general undertaking are required to be residents of the county, they undoubtedly, without any consideration for the liability assumed, become responsible for the faithful performance of the sheriff's official duties, and for that reason a statute imposing burdens upon them should be construed according to its evident import.

Giving to that part of section 3094, *supra*, hereinbefore quoted, the interpretation indicated, we think the language used manifests a legislative intent to limit a recourse to the sureties on the sheriff's general bond for any failure or default of his duties as tax collector to cases in which the bond given to guaranty the performance of such duties is unenforceable or insufficient, which necessarily implies that a bond for that purpose must have been given before it could be determined that the conditions of the undertaking were unenforceable, or ascertained that the sureties thereon were insufficient. The sheriff never having executed a bond as tax collector, the sureties on his official undertaking are not liable for any failure or default of their principal to account for and pay over money received by him as taxes.

No error having been committed in sustaining the demurrer, it follows that the judgment is affirmed.

Action by Wheeler county, Or., against P. L. Keeton and others. From the judgment, the county appeals. Affirmed.

B. S. Huntington, for appellant. W. H. Wilson and H. H. Hendricks, for respondents.

MOORE, J. This is an action by Wheeler county against P. L. Keeton, its former sheriff, and the sureties on his official bond, to recover \$1,707.97, which sum was received by him as taxes during a term of office, commencing on the first Monday in July, 1904, and for which money he failed to account. The facts involved herein are the same as stated in a case entitled as above, in which an opinion was this day handed down (95 Pac. 819), except that there is a difference as to the parties codefendants, amount of money in controversy, and term of the sheriff's office.

As the conclusion reached in the case mentioned is controlling herein, it follows that the judgment is affirmed.

ROSS v. GOLD RIDGE MINING CO. (Supreme Court of Idaho. April 30, 1908.)

1. ATTACHMENT—GROUNDS OF.

The statute provides in what actions an attachment may issue, and if the complaint discloses that the action is not such, and an attachment is issued, then it was improperly issued, and upon proper motion will be dissolved.

2. SAME—DISSOLUTION—GROUNDS OF—FAILURE OF COMPLAINT TO STATE CAUSE OF ACTION.

A motion to dissolve, however, will not be turned into a demurrer. If the complaint fails to state a cause of action because the facts pleaded are defectively stated, and it appears from the complaint that a cause of action can be stayed by amendment under the ordinary rules governing amendments, then on the hearing of the motion to dissolve the amendment will be considered as having been made.

3. SAME.

If, however, the complaint states no cause of action, then a motion to dissolve the attachment on the ground that the complaint fails to state facts sufficient to constitute a cause of action will be considered and sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 783.]

4. SAME—AFFIDAVITS—AVERMENTS.

An affidavit for attachment should set forth the statutory requirements either in the language of the statute or in language of substantially the same purport or meaning.

5. SAME.

Where the statute provides for filing an affidavit for a writ of attachment, and specifies what the affidavit shall contain, it is not necessary to allege any other facts than those specified in the statute.

6. SAME—AVERMENTS OF INDEBTEDNESS—MATURITY.

It is not necessary in an affidavit for an attachment to allege in unequivocal language that the debt is due. It is sufficient to allege that the defendant is indebted to the plaintiff in the sum of — dollars over and above all legal set-offs or counterclaims.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 280.]

WHEELER COUNTY v. KEETON et al.
(Supreme Court of Oregon. May 26, 1908.)

Appeal from Circuit Court, Wheeler County; W. L. Bradshaw, Judge.

7. SAME.

An affidavit for attachment which alleges that the defendant is indebted to the plaintiff in the sum of \$1,750 over and above all legal set-offs and counterclaims upon an express contract for the direct payment of money is sufficient to show that the debt is due, and that it is founded upon an express contract for the direct payment of money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 275.]

8. SAME—GROUNDS OF—CONTRACT FOR DIRECT PAYMENT OF MONEY.

A contract which provides, "and we further agree that after the 1st day of September, 1906, to place the said 25,000 shares of Gold Ridge mining stock for O. B. Ross at five cents a share clear to him, and if he so desires, the said 25,000 shares of stock will be placed before any other Gold Ridge mining stock is sold," is a contract for the direct payment of money, and authorizes an attachment in an action brought thereon for failure to place or sell said stock according to the terms of said agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 16.]

9. SAME—"DIRECT PAYMENT."

The words "direct payment," as used in Rev. St. 1887, § 4303, means absolute, unconditional, free from intervening agencies or conditions.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2073.]

10. SAME—UNDERTAKING—AMOUNT OF PENALTY.

An undertaking for attachment which contains all the provisions and conditions required by the statute is sufficient, and the mere fact that it does not provide a penalty equal to the claim sued for does not render such undertaking void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 361.]

11. SAME—DISCRETION OF CLERK.

The statute providing for an undertaking for attachment, fixing the minimum penalty at \$200, and the maximum, the amount of the claim sued for, vests a discretion in the clerk as to the amount of the bond to be required; but a failure of the clerk to require an undertaking, when the amount sued for is in excess of \$200, equal to the amount sued for, is not a ground for dissolving the attachment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 362.]

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; W. W. Woods, Judge.

Action by O. B. Ross against the Gold Ridge Mining Company, in which action an attachment issued. From an order dissolving the attachment, plaintiff appeals. Reversed.

R. E. McFarland, for appellant. McClear & Burgan, for respondent.

STEWART, J. This is an appeal from an order dissolving an attachment. It is alleged in the complaint that the appellant and respondent entered into an agreement whereby and under the terms of which the respondent agreed that if plaintiff would take 25,000 shares of the treasury stock of the respondent corporation and pay therefor two cents a share the respondent would at any time after the 1st day of September, 1906, place said 25,000 shares of stock for plaintiff

at five cents a share clear to him; that thereupon plaintiff paid to said defendant the sum of \$500 for said 25,000 shares of treasury stock, and defendant executed and delivered to the plaintiff the following written agreement, to wit: "Coeur d'Alene, Idaho, July 17, 1906. We, the undersigned, do this day and date sell, transfer, and deliver to O. B. Ross twenty-five thousand (25,000) shares of the Gold Ridge Mining Company treasury stock at two cents a share cash in hand paid. And we further agree that after the first day of September, 1906, to place the said 25,000 shares of Gold Ridge mining stock for O. B. Ross at five cents a share clear to him, and, if he so desires, the said 25,000 shares of stock will be placed before any other Gold Ridge stock is sold. Gold Ridge Mining Company, by D. Davis, General Manager." At the time of filing the complaint the plaintiff filed an affidavit and undertaking for a writ of attachment. The affidavit set forth in substance the same facts alleged in the complaint, and contained a copy of the agreement sued upon and set forth in the complaint. Thereafter the respondent moved the court for an order dissolving the attachment upon the following grounds: "(1) That the complaint in said action does not state facts sufficient to constitute a cause of action against said defendant; (2) that the affidavit for attachment filed in said action was and is defective and insufficient in this, that it does not state that the indebtedness mentioned in said affidavit was due at the time of the execution or filing of said affidavit or at the beginning of said action or due at all; (3) that the undertaking on attachment filed in said action is insufficient, and not such an undertaking as is required by the laws of the state of Idaho; (4) that the contract declared upon in the complaint and stated in the affidavit of attachment is not a contract for the direct payment of money." The court sustained the motion.

The appeal presents three questions for review: (1) Does the complaint state facts sufficient to constitute a cause of action against defendant? (2) Was the affidavit sufficient to authorize the issuance of the writ? (3) Was the undertaking in conformity to law?

Rev. St. 1887, § 4302 provides that "the plaintiff at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached * * * in the following cases: (1) In an action upon a judgment or upon contract, express or implied, for the direct payment of money." The statute thus provides that an attachment may issue in an action upon a judgment or upon a contract, express or implied, for the direct payment of money. If the complaint discloses that it is not such an action, and an attachment is issued, then it was improperly issued, and upon proper motion will be dissolved. A motion to dissolve, however,

cannot be turned into a demurrer. If the complaint fails to state a cause of action because the facts are defectively stated, and it appears from the complaint that a cause of action can be stated by amendment, under the ordinary rules governing amendments, then, on the hearing of the motion to dissolve, the amendment will be considered as having been made. *Kohler v. Agassiz*, 90 Cal. 9, 33 Pac. 741; *Hathaway v. Davis*, 33 Cal. 161; *Hammond v. Starr*, 79 Cal. 556, 21 Pac. 971; *Hale Bros. v. Milliken*, 142 Cal. 134, 75 Pac. 653. If, however, the complaint states no cause of action, then the motion to dissolve on the ground that the complaint fails to state facts sufficient to constitute a cause of action may be considered and sustained. In this case the action seems to be based upon a written contract, and, if the facts alleged are not sufficient to state a cause of action, it is apparent from the complaint itself that it can be amended by proper allegations so as to state facts sufficient to constitute a cause of action.

The second and fourth grounds of the motion go to the sufficiency of the affidavit for the attachment, and will be considered together. The respondent contends that the instrument sued upon shows upon its face that the indebtedness, if any, is not due; and, second, that the said instrument is not a contract for the direct payment of money. Under the first ground counsel contend that it is necessary to allege in the affidavit in unequivocal language that the debt is due, and cites in support of this contention *Kerns v. McAulay*, 8 Idaho, 558, 69 Pac. 539, and *Gatward v. Wheeler*, 10 Idaho, 66, 77 Pac. 23. In the former case the court had under consideration the sufficiency of an affidavit for attachment, in which case the affidavit stated "that defendants are indebted to plaintiff in the sum of \$43,995.72, with interest, less the sum of \$19,950.56." In considering the sufficiency of this allegation the court in that case said: "That is not equivalent to, and does not mean that the indebtedness is the former amount, less the latter, over and above all legal set-offs or counterclaims." The court, further discussing the sufficiency of the affidavit in that case, holds that the affidavit for a writ of attachment must set forth all of the statutory requirements either in the language of the statutes or in language of substantially the same purport or meaning, and then follows this statement: "Said statute in terms does not require the affidavit to state that the indebtedness is due, but by necessary implication it clearly requires it. In *Gatward v. Wheeler* this court quotes the above from *Kerns v. McAulay*, supra, and then says: "And we think the affidavit should state in unequivocal language that the debt is due before the writ should issue. It certainly cannot be said that under the terms of the statute a writ of attachment can legally issue until the debt is due, and, this being true, it was evidently the

intention of the Legislature that such fact should be shown by the affidavit." The statute, however, specifies just what the affidavit for attachment must contain, and if the affidavit sets forth the statutory requirements it is sufficient. Rev. St. 1887, § 4303, provides that the clerk must issue the writ of attachment upon receiving an affidavit by or on behalf of the plaintiff, setting forth, first, that the defendant is indebted to the plaintiff, specifying the amount of such indebtedness, and whether upon a contract for the direct payment of money. In this case the affidavit for attachment recites as follows: "That said defendant, Gold Ridge Mining Company, a corporation, is indebted to plaintiff in the sum of \$1,750 over and above all legal set-offs and counterclaims upon an express contract for the direct payment of money, to wit, on an agreement made and entered into by and between plaintiff and defendant on the 17th day of July, 1906, at Kootenai county, state of Idaho, whereby defendant agreed that if plaintiff would purchase \$25,000 shares of treasury stock in Gold Ridge Mining Company at two cents a share it would, after the 1st day of September, 1906, place said \$25,000 shares of treasury stock for said plaintiff at five cents a share clear to him, and that plaintiff paid the sum of \$500 to defendant and received said shares, and to evidence said agreement the said defendant executed and delivered to plaintiff a written agreement in words and figures following, to wit." Then follows the agreement set forth above. It will be seen from this language that the affidavit specifically and clearly sets forth that the defendant is indebted to plaintiff in the sum of \$1,750 over and above all legal set-offs and counterclaims upon an express contract for the direct payment of money. This is sufficient, and meets every requirement of the statute. It alleges that the defendant was indebted to the plaintiff at the time the affidavit was made, and that such indebtedness is upon an express contract for the direct payment of money. The statute does not require, either by express terms or by implication, that the affidavit shall contain an allegation that the "debt is due." Where the statute provides for filing an affidavit for a writ of attachment, and specifies what the affidavit shall contain, it is not necessary to allege any other facts than those specified in the statute. In other words, it is not necessary to allege the facts required to be stated in the complaint in order to maintain an action in the affidavit, unless the statute requires such facts to be stated. The fact that the complaint does not show the debt is due may be a ground for demurrer; but the fact that such allegation is not contained in the affidavit is not a ground for dissolving the attachment issued in said action. We think the language used by this court in *Kerns v. McAulay*, supra, states the rule correctly, as follows: "The affidavit for a writ of attach-

ment must set forth all of the statutory requirements either in the language of the statute or in language of substantially the same purport or meaning"—and any language used in that opinion to the contrary, as well as in the case of *Gatward v. Wheeler*, is disapproved and overruled.

Is the agreement a contract for the direct payment of money? An examination of this instrument discloses that the defendant agreed that after the 1st day of September, 1906, it would place the stock sold to the plaintiff at five cents a share clear to him. The parties evidently intended by this contract that after September 1, 1906, the defendant would resell for plaintiff the stock sold to him at five cents a share clear; that is, the plaintiff having purchased the stock at two cents a share, the defendant would resell the same for seven cents a share. The words "to place said 25,000 shares" evidently was intended by the parties to mean "to resell." If this be a correct construction of this contract, then the defendant does agree to resell said stock for plaintiff after the 1st day of September, 1906, and there arises out of said contract an implied obligation that the defendant will pay to the plaintiff the amount received therefor. Under this contract the measure of damages is fixed, the defendant agreeing to sell said stock for five cents a share clear. If the defendant fails to perform its part of said contract, that is, fails to sell said stock at the price fixed by the contract, then the contract itself fixes the damages at five cents a share clear. The case of *Dunn v. Mackey*, 80 Cal. 104, 22 Pac. 64, is very much like the case under consideration. In that case the defendant agreed in writing to sell certain land belonging to the plaintiff within a specified time, and to realize therefor the sum of \$12,500. He failed to sell, and plaintiff sued for damages. In the agreement in that case there was a provision that the defendant would account for the proceeds of the sale of said premises. This provision is not contained in the contract in this case; but it must be conceded that the contract to pay over is implied, and arises out of the contract to sell. If the respondent is obligated to sell, he is obligated to account for and pay over to the appellant the amount realized from such sale. So we think that the principle of law involved in this case is the same as that involved in the case of *Dunn v. Mackey*, supra. In that case the court quotes with approval from *Hathaway v. Davis*, 33 Cal. 161, as follows: "There is certainly no reason why an attachment should be allowed in an action upon a promissory note which is not equally persuasive in the present case. The plaintiff can swear to the amount due with equal accuracy, and his right to recover is as clear, and his claim upon the law for the advantages of this remedy no less reasonable and just. True the contract does not specify the precise amount to be paid, but it points directly to the in-

strument or record which does, which is all that is required. To read 'direct' as the opposite to 'collateral' would be to create a distinction of very doubtful foundation, and certainly opposed to the general policy of the act. To so read it would be to exempt all collateral contracts from the operation of the act. Indorsers, guarantors, sureties, and all others who undertake to pay or become responsible for the debts of another could not be reached by attachment; and yet there can be no good reason why they should be excepted. We are of the opinion that the Legislature intended no such distinction." The court further in the opinion says: "There can be no doubt that the defendant bound himself to realize and pay to the plaintiff within one year a certain and fixed sum of money. The fact that he was, if possible, to realize the money by a sale of property to some one else, does not affect the question, as he bound himself unqualifiedly to account for and pay over that sum of money at the end of the year, or before, if he made a sale of the property." So in the case at bar the respondent obligates itself to sell for the appellant 25,000 shares of stock after the 1st day of September, 1906, at five cents a share clear to him, and thereby obligated itself to pay to the appellant the amount realized therefor. This case comes clearly within the principle laid down in the case of *Dunn v. Hathaway*, supra. In the case of *Hale Bros. v. Milliken*, 142 Cal. 134, 75 Pac. 653, the court quotes from *Wade on Attachments*, § 23, and says: "The author shows that there is no necessary objection that the damages are unliquidated; that the meaning intended to be conveyed by these terms is merely that the amount plaintiff is entitled to recover shall be ascertained or ascertainable by reference to the contract, and proof of what was done under it; that the standard by which defendant's liability is to be measured shall be furnished by the contract, and not left open to mere speculation or vague conjecture." The contract set forth in the affidavit clearly shows that the respondent agreed to sell and pay over to the plaintiff an amount equal to five cents a share on the stock sold. While the contract does not say in so many words that respondent will pay appellant seven cents a share for the 25,000 shares of stock, yet it does say that respondent will sell said 25,000 shares of stock for five cents clear (or seven cents), and a failure to sell as agreed works a breach of said contract, and the damages are fixed by the contract at five cents per share. It is a contract for the direct payment of money. There are no intervening agencies or conditions. It is absolute and unconditional. The words "direct payment," as applied to payments, and as used in the statute, clearly mean absolute, unconditional, free from intervening agencies or conditions. The time is certain, the amount is certain, and the persons are certain, absolute, unconditional, and fixed by

the contract itself. The time is fixed as after September 1, 1906. The amount is five cents a share. The persons are respondent and the appellant. It might be argued, however, that the time is not absolute or certain by reason of the fact that it is not fixed definitely as to the particular time after September 1st. In all such contracts where the time is not specifically fixed a reasonable time is allowed for performance, and in this case no doubt the defendant would have a reasonable time after September 1st to make such sale, and the reasonableness of such time would depend upon the circumstances; but the time by the contract is fixed. It must terminate and happen within a reasonable time after September 1, 1906. In the case of *Armstrong v. Slick*, 83 Pac. 775, this court held that the contract of an indorser of a promissory note or a guarantor of a bill of exchange is a contract for the direct payment of money, and that an attachment might issue against the property of such indorser or guarantor. So in this case the facts alleged in the affidavit show the contract to be for the direct payment of money, and it was sufficient to authorize the issuing of an attachment. *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *De Leonis v. Etchepare*, 120 Cal. 407, 52 Pac. 718; *Flagg v. Dare*, 107 Cal. 482, 40 Pac. 804.

The appellant contends that in the argument of the case below the respondent argued that the undertaking on attachment was insufficient, for the reason that the sum specified therein as a penalty was insufficient under the case of *Willman v. Friedman*, 3 Idaho, 734, 35 Pac. 37. While the court in that case had under consideration the sufficiency of an undertaking, the court, however, did not decide that to authorize the issuing of a writ of attachment a bond in excess of \$200 should be required. The opinion of the court was merely a recommendation to the clerk upon issuing a writ as to exacting a bond, that is, that the statute "invests the clerk with a discretion in fixing the amount of the undertaking to a minimum of \$200, and a maximum the amount of the claim sued for"; but the court did not hold or intimate that because the clerk did not require a bond in excess of \$200 or equal to the claim sued for that the attachment was not authorized or improperly issued or should be discharged. In other words, as long as the undertaking provides the conditions required by the statute, the mere fact that it does not provide a penalty equal to the claim sued for is not a ground for discharging the attachment. Had the Legislature intended that to authorize an attachment a bond should be given for a specific sum, it would have so provided.

The order dissolving the attachment is reversed; costs awarded to appellant.

AILSHIE, C. J., and SULLIVAN, J., concur.

ZIMMERMAN v. BRADFORD-KENNEDY CO.

(Supreme Court of Idaho. April 29, 1908.)

1. PROCESS—SIGNATURE—PROBATE COURT—CLERK.

Under the provisions of section 3844, Rev. St. 1887, the probate judge may appoint a clerk of his court or act as clerk of his own court, and the clerk may properly sign and issue a summons, and such act is purely a ministerial act, and a summons signed thus, "O. J. Bandelin, Probate Judge, By Robt. S. McCrea, Clerk," is a sufficient compliance with the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Process, § 40.]

2. APPEAL—OBJECTION BELOW—PROCESS—RETURN—DEFECTS.

A return to a summons which has been served on a foreign corporation, which shows the material, ultimate facts necessary to be shown as proof of due service on the corporation, will support a default judgment where the question of defects in the return is raised for the first time on appeal from the judgment, although the return might have been in some particular so defective as to have subjected it on return day to a motion to quash the service on the grounds of such defective return.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1190-1204.]

3. COURTS—COURTS OF INFERIOR JURISDICTION—CIVIL JURISDICTION OF PROBATE COURTS—TIME OF ENTRY OF JUDGMENT.

Where a defendant failed to appear in a probate court at the hour fixed for appearance in the summons, and the court entered the defendant's default after the expiration of one hour after the time fixed for appearance, and failed to make an order postponing the case, and three days thereafter heard the proofs submitted by plaintiff and entered judgment, the action of the court, though irregular, will not oust it of jurisdiction, nor will it render such judgment void for want of jurisdiction under section 4701, Rev. St. 1887.

4. JUSTICES OF THE PEACE—APPEAL—TRIAL ANEW—ISSUES NOT PRESENTED—RIGHT TO TRY.

Where a defendant fails to appear and answer or raise any issue of fact in a justice or probate court, and appeals from a judgment entered by default to the district court on questions of both law and fact, he will not be allowed to file an answer in the district court and raise an issue of fact for the first time. A trial de novo, as provided for by section 4840, Rev. St. 1887, implies and signifies the trying anew of an issue that has been previously tried. Where no issue has been previously raised, there is no issue to try anew.

(Syllabus by the Court.)

Appeal from District Court, Bonner County; W. W. Woods, Judge.

Action in the probate court by Stanley Zimmerman against the Bradford-Kennedy Company for debt. Judgment by default for plaintiff, and defendant appealed to the district court, where judgment was again entered for plaintiff, and defendant appeals. Affirmed.

Edwin McBee, for appellant. E. W. Wheelan, for respondent.

AILSHIE, C. J. This action was commenced in the probate court of Bonner county by filing the complaint therein on June 7, 1907. On the same day the summons was

issued and signed: "O. J. Bandelin, Probate Judge, By Robt. S. McCrea, Clerk." The summons was made returnable June 12th, at 4 o'clock p. m., and was returned on that date and filed with the clerk. Annexed to the summons was an affidavit of service on the defendant, which affidavit showed that the affiant was constable of Sandpoint precinct in Bonner county, and that the defendant, the Bradford-Kennedy Company, is and was a foreign corporation doing business in the county of Bonner, state of Idaho, with its principal place of business at Sagle, in Bonner county, and that the defendant corporation had no designated agent within the county of Bonner upon whom service of process could be made, and that it had not complied with the laws of Idaho requiring the filing with the clerk a designation of an agent upon whom service could be made, etc. The affidavit further showed that the affiant served the defendant corporation by delivering to and leaving with Ignatz Well, the county auditor of Bonner county, at his office in the city of Sandpoint, a true copy of the summons attached to a copy of the complaint in the action. The defendant failed to appear, and, after waiting the statutory time of one hour after the time set for trial, the plaintiff caused the defendant's default to be entered for failure to appear. No further action was taken in the case until June 15th. On the latter date the plaintiff introduced his proofs and took judgment against the defendant in accordance with the prayer of the complaint. The defendant corporation appealed from the judgment to the district court on questions of both law and fact. When the case was called in the district court, the defendant, through its attorney, moved the court for a dismissal of the action on the grounds following: "That said pretended judgment of the probate court is void for the reasons: (1) That said summons is void for the reason that the same was not signed by the probate judge; (2) that it appears from the summons and the pretended return thereto that the court did not acquire jurisdiction of the person of the defendant; (3) that said pretended judgment was not entered on the 12th day of June, 1907, the return day mentioned in the summons, and no order of continuance was made from said day until the 15th day of June, 1907, the time when said pretended judgment was entered; and (4) that on the said 15th day of June, 1907, the court had no jurisdiction of the defendant and no jurisdiction to hear and try said action." After a hearing was had on this motion, the same was denied by the district court, and thereupon defendant, through its counsel, appears to have made a motion, orally, in open court, for leave to file an answer to the complaint. This motion was denied by the court. Judgment was thereupon entered in the district court against the defendant company for the same amount as had been previously entered

in the probate court. This appeal is from the judgment.

Appellant's first contention is that no valid summons was issued against the defendant for the reason that the summons was neither signed by the probate judge nor the clerk of the probate court, and that as a matter of fact it should have been signed by the probate judge, and that the manner in which it was signed and issued amounted to no summons at all. This contention is based chiefly upon the provisions of the act of February 2, 1905 (Sess. Laws 1905, p. 29), which provides that all the proceedings in probate courts and the process, etc., shall be the same as in justices' courts. No contention is made in this action that the summons does not comply with the statutes in all other respects. Section 3844, Rev. St. 1887, provides for a clerk of the probate court, and authorizes the judge of that court to act as clerk of his own court, or to appoint some other person to act as clerk of such court. This section of the Revised Statutes must be read in connection with the act of February 2, 1905, *supra*. A justice of the peace has no clerk. The statute makes no provision for a clerk of the justice court. It therefore devolves upon the justice of the peace to perform all the ministerial acts in connection with that court, as well as the judicial acts. On the contrary, a probate court is provided with a clerk. The issuance of a summons is purely a ministerial act, and its issuance is clearly within the province of the duties of the clerk of that court. It is true that this summons is not signed by the probate judge, but it is signed by the clerk. The fact that he signs the probate judge's name by himself as clerk does not invalidate the summons. He could have signed his own name as clerk of the probate court, and that would have been sufficient. A summons issued from a probate court should be signed by the clerk, if a clerk of that court has been appointed; but, if the probate judge is acting as *ex officio* clerk of his own court, he may then sign it himself, and it will not be important whether he designate himself as judge or as *ex officio* clerk. There is no merit in this objection.

The return in this case was sufficient to give the probate court jurisdiction to enter a judgment against the defendant. It showed that the defendant was a foreign corporation, and that it was doing business in Bonner county, and that it had its principal place of business in Bonner county. It also showed that the defendant had failed to comply with the laws of this state in designating an agent upon whom service of process might be had, and that service had been made on the county auditor. It is true the return was not as complete as it might have been. Any uncertainty or ambiguity, however, on the return, should have been taken advantage of by a motion to quash, and cannot be availed of on appeal after default. *Parke v. Ward-*

ner, 2 Idaho (Hasb.) 285, 13 Pac. 172. Whatever defect, uncertainty, or ambiguity may have existed in the return, it was not of so serious a nature as to render the service and return void.

Complaint is made by appellant against the judgment on the ground that the return day was June 12th; whereas, the proofs were not taken and judgment was not entered until June 15th. Appellant relies on section 4701 of the Revised Statutes of 1887, which provides that: "Unless postponed as provided in this chapter, or unless transferred to another court, the trial of the action must commence at the expiration of one hour from the time specified in the summons for the appearance of defendant, and the trial must be continued, without adjournment for more than twenty-four hours at any one time, until all the issues therein are disposed of." The objection that is made here is that the case was not postponed from the 12th to the 15th, and that the court therefore lost jurisdiction. This was, at most, an irregularity which did not go to the jurisdiction of the court. In other words, the fact that proofs are not made or judgment entered on the return day named in the summons does not, *ipso facto*, oust the court of jurisdiction. By that act alone the court does not lose jurisdiction of the action. A different question might arise if judgment should not be entered at the proper time, and the defendant should appear before the proofs were finally made and a judgment entered, and make inquiry as to the condition of the case or the date on which judgment would be entered, and should be misled or deceived on account thereof. No such condition arises, however, in this case, and, under the facts of the case as disclosed by the record, we are satisfied that the court did not lose jurisdiction.

The last point urged by appellant is that since it had appealed on questions of both law and fact, and the court denied its motion going to the jurisdiction, it should have allowed an answer to be filed. Appellant contends that, under section 4840, Rev. St. 1887, it was entitled to a trial *de novo*. If the defendant failed to appear and answer in the probate court and failed to raise any issue in that court, we are unable to see whereby it had any issue of fact to try anew in the district court. It certainly had no right to frame an issue in that court. It did not see fit to join issue in the probate court or raise any issue of fact there. It had no right to appeal to the district court and there, for the first time, make answer and raise an issue of fact. A trial *de novo* implies the trying anew of an issue that has been previously tried. In *re McVey's Estate* (Idaho) 93 Pac. 32; *So. Pac. Co. v. Superior Court*, 59 Cal. 471; *Paul v. Armstrong*, 1 Nev. 96; *Martin v. Dist. Court*, 13 Nev. 90; *Myrick v. Superior Court*, 68 Cal. 98, 8 Pac. 648.

No error appearing in the record, the judgment of the district court will be affirmed, and it is so ordered. Costs in favor of the respondent.

SULLIVAN and STEWART, JJ., concur.

NAYLOR & NORLIN v. LEWISTON & S. E. ELECTRIC RY. CO. et al.

(Supreme Court of Idaho. May 6, 1908.)

1. APPEAL—SUPERSEDEAS OR STAY OF PROCEEDINGS—"MONEY JUDGMENT"—DECREE OF MECHANIC'S LIEN FORECLOSURE.

A judgment and decree foreclosing a mechanic's or laborer's lien and directing the sale of the property on which the lien is claimed is not a money judgment within the meaning of section 4810, Rev. St. 1887, which provides that on an appeal from a judgment directing the payment of money, in order to stay proceedings on the judgment appealed from, the appellant must give a bond in "double the amount named in the judgment or order appealed from."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2235-2240.]

For other definitions, see Words and Phrases, vol. 5, p. 4566.]

2. SAME.

On an appeal from a judgment and decree foreclosing a mechanic's or laborer's lien, in order to stay further proceedings for the collection of the judgment appealed from, it is necessary that the amount of the stay bond to cover waste and the use and occupation of the premises directed to be sold be fixed by the trial judge, and such a supersedeas bond is properly given under the provisions of section 4813, Rev. St. 1887.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2235-2240.]

3. SAME.

The closing sentence of section 4813, Rev. St. 1887, which provides that in cases of a mortgage foreclosure a supersedeas bond shall cover any deficiency that may arise on the sale of the property, does not apply to judgments and decrees foreclosing mechanics' and laborers' liens, and in the latter case a supersedeas bond is not required to cover any deficiency that may arise from the sale of the property.

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by Naylor & Norlin against the Lewiston & Southeastern Electric Railway Company and others to foreclose a laborer's lien. Judgment for plaintiff, and from an order fixing the amount of the supersedeas bond to be given by defendants on appeal from the judgment plaintiff appeals. Affirmed.

Charles L. McDonald, for appellant. Johnson & Stooky and A. A. Fraser, for respondents.

AULSHIE, C. J. This was an action to foreclose a laborer's lien on a railway grade and right of way for labor performed and material furnished in grading and other work on the defendant's right of way. Judgment was entered in favor of the plaintiff for the principal sum of \$3,124.70 and \$250

as attorney's fees and costs of the action. Defendants took an appeal from the judgment and an order denying a motion for a new trial, and gave the usual appeal bond, and, desiring to have a stay of proceedings on the judgment, applied to the trial judge for an order fixing the amount of the supersedeas or stay bond that would be required. The trial judge, acting under the assumption that the bond required in such case should be fixed in accordance with section 4813, Rev. St. 1887, made an order fixing the bond in the sum of \$1,000, and required that such bond be "conditioned that said defendants will pay for any waste they commit or suffer to be committed on said lands, and will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof, pursuant to the judgment or order of the Supreme Court." The plaintiff objected and excepted to this order, and insisted that he was entitled to a bond in double the amount of the judgment, as provided by section 4810, Rev. St. 1887. The latter section fixes the amount of stay bonds on appeals from money judgments at "double the amount named in the judgment or order" appealed from. A bill of exceptions was settled, and the plaintiff took an appeal from the order of the district judge fixing the stay bond at the sum of \$1,000. The plaintiff and appellant in this case insists that a judgment foreclosing a mechanic's lien is in truth and in fact a money judgment, and the execution thereof cannot be stayed in any other manner than by giving a bond in double the amount of the judgment appealed from. In the second place he contends that, if it be held that such a judgment is not a money judgment, then, under the last sentence of section 4813, supra, the bond should have been conditioned for the payment of any deficiency arising upon the sale of the property covered by the lien. Section 4813 is as follows: "If the judgment or order appealed from direct the sale or delivery of possession of real property the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency."

Taking up appellant's first contention, we find that the Supreme Court of California, in passing upon statutes identical with our own in reference to supersedeas and stay bonds, has held that a judgment foreclosing a mechanic's or laborer's lien is not a money judgment within the meaning of section 942 of the Code of Civil Procedure of California, which corresponds to section 4810 of the Revised Statutes of 1887 of this state. *Central Lumber & Mfg. Co. v. Center*, 107 Cal. 193, 40 Pac. 334; *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383; *Olsen v. W. H. Birch & Co.*, 1 Cal. App. 99, 81 Pac. 656. We think the construction placed on these statutes by the California court is the correct view of the law. Another thing that is worthy of consideration in this connection, the lien law at section 14 (*Sess. Laws 1890*, p. 150), contains a specific provision to the effect that nothing contained in the lien law shall impair the right of any person entitled to a lien to maintain a personal action to recover the debt against an individual or company liable therefor. On the contrary, the lien statute authorizes the allowance of attorney's fees for foreclosure of the lien, together with expenses of preferring the lien claim. In an action for a personal or money judgment no such costs could be recovered, and no judgment could be had for any such costs and expenses. Again, it has been held that in the foreclosure of liens under these statutes the parties are not, as a matter of right, entitled to a jury trial. *Idaho & Or. L. I. Co. v. Bradbury*, 132 U. S. 509, 10 Sup. Ct. 177, 33 L. Ed. 433; *Id.*, 2 Idaho (Hasb.) 239, 10 Pac. 620; *Christensen v. Hollingsworth*, 6 Idaho, 87, 53 Pac. 211, 96 Am. St. Rep. 256. The action has therefore been treated as a suit in equity. It is very apparent that constructive service might be had for the purpose of foreclosure and sale of the property on which the lien exists, but such a service would not authorize any personal or money judgment against the defendant. We conclude, therefore, that a stay bond on an appeal of this kind is provided for by section 4813, supra, and that the amount of such bond must be fixed by the district judge.

The only remaining question for us to determine is whether or not such a bond comes within the provision of the last sentence in that section which provides that, "when the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency." If the foregoing proviso applies to a stay bond on appeal from an order of foreclosure of a mechanic's lien, then the trial judge erred in not fixing the amount of the bond to include any deficiency judgment the plaintiff might have. The lien statute at section 11 (*Sess. Laws 1890*, p. 149) provides a method for the collection of any balance that may be due a lien claimant after the sale of the property

and the security has been exhausted. That section of the statute closes with this language: "And each claimant shall be entitled to execution for any balance due him after such distribution; such execution to be issued by the clerk of the court upon demand, at the return of the sheriff or other officer making the sale, showing such balance due." This statute was written evidently on the theory that in the foreclosure of a lien the court must necessarily ascertain and determine the amount due and enter his decree accordingly, and that upon the sheriff or other officer making return of the amount realized from the sale and the balance due under the execution and order of sale all that will be necessary for the collection of the balance will be for the clerk to issue an execution for that sum. The result, however, is that the plaintiff is entitled to collect any balance remaining due after sale of the property, and that for such purpose he is entitled to a general execution against the defendant. The only question to be determined, therefore, is as to whether the statute will cover such a deficiency when in fact by its terms it only provides for a stay bond to secure a deficiency where the "judgment is for the sale of mortgaged premises." Our examination of the statute convinces us that it was not the intention of the Legislature to include judgments foreclosing mechanics' liens within the provisions of this latter sentence of section 4813, and that in such cases it is not necessary for the stay bond to cover any deficiency. On first impression it seems unjust that a plaintiff who has obtained a judgment should not, upon the staying of his execution, have a bond to cover any deficiency; but upon reflection it will be observed that there is a very material difference between a mortgage lien and a mechanic's lien. The first is given by contract, and in many instances the debt secured may be practically as much as the value of the property, and in most all instances considerable time elapses before the maturing of the debt, in which case there is ample opportunity for property to depreciate in value. On the other hand, the mechanic's or laborer's lien is involuntary on the part of the property owner, and arises by operation of law as an incident to the original contract. In every instance of a lien, however, the debt and obligation for which the lien is given is only so much as has been incurred in the creation or improvement of the property itself, and the whole sum has gone to enhance the value of the property on which the lien is claimed. The time allowed for preferring the lien claim is so short that there is but little opportunity for the property to so depreciate in value that it will not sell in the market for an amount equal to the claim for labor or material or both that has been furnished. Whatever may have been the reason for not requiring a stay bond to cover any deficiency in case of foreclosure of a mechanic's lien, it is clear to us that the stat-

ute does not in terms or by implication include such cases.

We conclude, therefore, that the order of the trial court in fixing the stay bond was clearly within the purview of section 4813, Rev. St. 1887, and that it must be affirmed, and it is so ordered; costs in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

ALLEN et al. v. PHOENIX ASSUR. CO.

(Supreme Court of Idaho. May 6, 1908.)

1. INSURANCE—FIRE INSURANCE—ACCEPTANCE OF APPLICATION—EFFECT—ESTOPPEL.

Where an insurance company accepts an application for insurance and acts upon it, and writes a policy based upon the information contained therein, it is bound by such application and information, and cannot avoid the effect of the same upon the ground that it is a rule of the company not to receive or accept applications.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1028.]

2. SAME.

Where an insurance company receives an application for insurance, and writes and delivers a policy by reason thereof, and does not advise the insured that it does not receive applications, or that the application was defective or insufficient, the company will not be permitted to repudiate or disregard the application or the effect thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1028.]

3. SAME—WAIVER OF MATTERS OF FORM OR COMPLETENESS OF ANSWER.

The issuance of a policy of insurance upon a written application is a waiver of all matters of form or completeness of answer to all questions contained in said application.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1028.]

4. SAME—RIGHT TO PRESUME POLICY IN ACCORD WITH APPLICATION.

An insured, receiving a policy of insurance in response to a written application therefor, in which questions are asked and answers given, has a right to presume that the policy is in accord with the application, and that the answers and disclosures made in the application are sufficient to authorize the company to issue the policy, and the applicant is not required to return the policy because of conditions in it which might seem in conflict with the application.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1028.]

5. SAME—FALSE STATEMENTS IN APPLICATION BY AGENT.

An agent of an insurance company who solicits insurance, takes the application, receives the premium and delivers the policy, for these purposes at least, is the agent of the company, with full power to act with reference thereto; and if he writes down false statements after he has been truthfully informed, and after personal inspection of the premises, the information and knowledge of such agent will be imputed to the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 999.]

6. SAME.

Where an agent has authority to receive an application for insurance, and has filled in the same and forwarded it to the company, who has accepted the same and issued a policy thereon and received the premium therefor, the com-

pany will be estopped from denying the sufficiency of the answers to questions in the application.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1041-1070.]

7. SAME—ESTOPPEL TO DENY AGENCY.

An insurance company which accepts an application from one acting as soliciting agent, and receives the premium for the policy through said agent, and writes a policy by reason of such application and the payment of such premium, thereby makes such person its agent for the purpose of receiving applications for insurance, and is bound by the acts of such agent, and his knowledge, while acting within the scope of his said authority, is the knowledge of the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 966-974.]

8. SAME—WAIVER.

A provision in a policy that "in any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company," is waived by the company accepting an application from one who is not authorized in writing as the agent, and writing and delivering a policy upon said application and receiving and retaining the premium therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1041-1070.]

9. SAME.

Where a policy of insurance is delivered and accepted by the insured, it thereby becomes a contract between the parties, but its terms and conditions may be waived and modified by the application and the acts of the parties with reference thereto.

10. SAME—CONTRACT OF INSURANCE—APPLICATION.

Where an application for insurance contains certain answers to questions propounded and the omission to answer other questions, and the policy is written, based upon that application, which is the only information the insurer has, such application becomes a part of the contract of insurance, and the insurer is bound by the provisions and conditions of such application to the same extent and with like effect as the insured by the terms and conditions of the policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 308.]

11. SAME—KNOWLEDGE OF ADJUSTER OF BREACH OF CONDITIONS PRECEDENT.

Whatever knowledge an adjuster obtains within the scope of his authority as adjuster with reference to a breach of conditions precedent will be imputed to the company, and the recognition of the company of the validity of the contract of insurance after such knowledge is obtained, and a retention of the premium without offer to return it, amounts to a waiver of said breach of conditions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1041-1070.]

12. SAME—INDORSEMENT OF WAIVER.

A provision in a policy of insurance to the effect that a waiver, to be effectual, must be indorsed in writing by an agent who has the authority to do so, is for the benefit of the insurer, and, like other conditions, may be waived or changed by the company.

13. EVIDENCE—PAROL EVIDENCE AFFECTING WRITINGS—INSURANCE POLICY.

Oral testimony may be introduced to prove a waiver of a condition in an insurance policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2146.]

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by George L. Allen and another, co-partners, against the Phoenix Assurance Company, on a fire policy. Judgment for plaintiffs, and from it and an order denying a new trial defendant appeals. Affirmed.

See 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. (N. S.) 903.

James E. Babb, for appellant. Daniel Needham, for respondents.

STEWART, J. This case was before this court upon appeal from an order sustaining a nonsuit, and is reported in 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. (N. S.) 903. Upon reversal the cause was tried to a jury, and a verdict returned for the plaintiffs. The respondent moved for a new trial, which was denied, and this appeal is from the order denying the new trial and from the judgment.

Many of the questions presented by the record were fully discussed and decided in the former opinion, which is the law of this case, and it can serve no purpose to discuss such questions again. The record shows that the respondents made application to one C. D. Thomas for insurance upon the property involved. Thomas was agent of the Svea Insurance Company, but was not agent for the appellant company. Thomas testifies that he took the respondents' application on a Svea insurance blank, signed by the respondents, and the answers to the questions contained therein were filled in by him upon information received from the insured. After the respondents had signed the application he returned to his office about 60 miles distant, filled in the answers to the questions, and forwarded the application to John Moore, a regularly appointed agent of the appellant. Moore and Thomas had an arrangement by which upon any risk sent Moore by Thomas the commissions would be divided equally. Upon receipt of the application Moore wrote the policy involved in this case and transmitted the same to respondents. Moore had no knowledge or information whatever with reference to the risk, except such as he received from the application and the letter of Thomas transmitting the same. The application and the letter of Thomas were the causes which led to said policy being written. Omitting such parts of the application as are not material, it is as follows: "Insurance is wanted on the following described property by Sanders & Allen for the term of 12 months, from the 27th day of August, 1901, to the 27th day of August, 1902: \$250.00 frame building, two-story, shingle roof, occupied as flourmill; \$500.00 on 35 horse power Cooper engine and 50 horse power Cooper boiler contained in said building; \$1,250.00 on machinery contained in said building, situated at Melrose, Idaho. Mail policy to C. D. Thomas at Nez Perce P. O. Question 17: What is your title to ground? Answer: Donated to mill. Question 18: Is property mortgaged? How much? [Signed] Sanders & Allen, Assured." Ques-

tions propounded to the agent were then answered, and the answers signed by C. D. Thomas, agent. Mr. Moore testified as follows: "I received a letter from Thomas about as follows: 'Inclosed find application of Sanders & Allen for insurance on a flour-mill, which I consider a very good risk, and it is situated upon homestead or donation property.' I think he informed me that, and I think I informed the company, instead of a deed it was a homestead, but I am not positive. This is as near as I can recollect about it, and as to any incumbrance upon the property I have no recollection. There was nothing in the letter that the homestead had been proved up on, only that it was a homestead. I didn't communicate any information to the company that was not received from Thomas, and I think if the company will look over their files they will find a letter from me. I write my policy according to my own ideas. I am not governed by the application." Mr. Thomas testified: "I looked over the mill thoroughly, and I could not say that Allen had told me there was any incumbrance on it. He may have told me. He may not. I could not say. I don't remember." Mr. Allen testified as follows: "I told him [meaning Thomas] there was a mortgage on the property of \$300. We talked along quite a little in regard to it when he was taking the application, and he took it down, asking questions, I don't know what all. He asked me all there was on the application, and I answered them just exactly how it was in regard to the homestead, and in regard to the mortgage and everything, just as near as I knew how." There was in fact a chattel mortgage covering a part of the property insured, given to one J. P. Vollmer, to secure the payment of a note of \$300 executed January 23, 1901. The policy of insurance was assigned to Mr. Vollmer as collateral security for the note of \$300. Mr. Moore testified that: "The application you showed me is not a form of application of the Phoenix Assurance Company. In a general way the Phoenix Company did not have any. I never used any. If he had sent me a general statement of the condition of matters connected with it, it would have been just the same. I had no application forms for the Phoenix Assurance Company."

This policy of insurance was written and delivered on the 27th day of August, 1901. The property was destroyed by fire on the 23d day of April, 1902. After the fire one McKowen, an adjuster acting for the appellant company, came to adjust the loss, and after looking over the loss the witness Allen testifies with reference to a conversation with said McKowen as follows: "He says it is a total loss with the exception of the engine and boiler. He asked me for the policy, and I told him I did not have the policy; that it was down at Vollmer's. We owed him a note of \$300, and it had come due, and we went down to get an extension of time on the note for a month or six weeks,

and we told him that we had no place to keep the policy, and to show him that we meant business we left the policy with him as collateral. We met McKowen down there the next day, and he barely passed the time of day—didn't seem to care whether he done that or not—and he says, 'I am just over to the bank now to see that policy.' And he went over to the bank, and pretty soon came back and says, 'I've looked the policy over and found you have assigned it.' He says, 'I've got no more business to do with you,' or words to that effect. We saw Mr. McKowen a time or two next day or the same day, and didn't have much talk with him in regard to the matter, and the next morning when we went to go away he shook hands with us, bid us good-bye, and hoped we would get our money all right, and says, 'As you have put it in the hands of an attorney, you will have to look to the company from this on.' He says, 'Lawing is all right, but a little money is sometimes better,' and that is the last talk I remember of having with Mr. McKowen." W. L. Thompson, cashier of the First National Bank of Lewiston, testified, among other things, as follows: "I remember a Mr. J. H. McKowen, an insurance adjuster for the defendant company, calling on me at Lewiston after the fire. At the time he called, I stated to him that we had made a mistake in taking an assignment of the policy, not having sent the same to the Moscow agent for approval; that our mistake was not discovered until after the fire had been reported. I also stated to him that we held this policy as collateral for a loan, and realized that we had no claim under the policy as assigned. I asked him if he would protect us, or try to protect us, to the amount of our interests when he adjusted the loss. This he promised to do. After this he called on me and made a statement to the effect that he would be willing to adjust the loss on a basis of about the amount of our loan, and suggested that I use my influence with Sanders & Allen to accept the same." As premium on this insurance the respondents paid to C. D. Thomas for appellants \$110, the insurance for one year from August 27, 1901, to August 27, 1902. No part of this premium was ever returned to the respondents.

The plaintiffs placed the adjustment of their loss in the hands of Daniel Needham, an attorney. He wrote to the head office, and afterwards corresponded with Butler and Hewitt, the company's general agents at San Francisco, and also with J. H. McKowen, the adjuster at Spokane. This correspondence took place after the fire, and after the adjuster had learned that the plaintiffs were not the unconditional owners of the real property, and that a chattel mortgage existed against the personal property covered by said policy. Butler and Hewitt wrote Mr. Needham on June 10th: "We have written to McKowen on the subject mention-

ed by you, and upon getting his reply will be in a better position to write you again." And on July 1st the same parties wrote Mr. Needham as follows: "We beg to say that the adjustment continues in the hands of Mr. J. H. McKowen of Spokane, and we think it would be better for you to address him on the subject, as we have no additional data from him as to the standing of the loss claimed at this time." On July 16th McKowen wrote Needham, among other things, as follows: "But my practice always has been to try to do the right thing, and, if it can be shown that it would be absolutely right to present some reasonable proposition to the company for disposing of this unpleasant matter, I will be glad to hear from you."

The policy of insurance, among other things, contains the following conditions: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditionally a sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage." Also: "In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company." And: "No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as, by the terms of this policy, may be the subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provision or condition, unless such waiver, if any, shall be written upon or attached hereto in order to show any privilege or permission affecting the insurance under this policy exist or be claimed by the insured to be valid only when countersigned by the duly authorized agent of said company at Moscow, Idaho. Countersigned at Moscow, this 27th day of August, 1901. John Moore, Agent, I. D. Irving, Manager."

The appellant assigns 18 errors, many of which were decided upon the former appeal of this case. Counsel for appellant, however, upon this appeal, contends very earnestly and forcibly that, by accepting the policy of insurance with the provisions therein as to title and incumbrances, the respondents warranted such conditions to be true; and, inasmuch as the respondents were not the owners in fee and unconditionally of the real property, and because there was an incumbrance upon the property insured, there was a breach of the conditions precedent which rendered the policy void. In answer to this the respondents contend that there was a waiver of these conditions by the acceptance of the application and the writing of the

policy with full information that the plaintiffs were not the unconditional owners in fee of said property, and with knowledge that the same was incumbered, and by the acts of the company in negotiating a settlement and adjustment of said loss.

In answer to the question of waiver appellant contends that there can be no waiver of any of the conditions contained in said policy, except such as by the terms of the policy may be the subject of agreement indorsed or added thereto; and as to such provisions and conditions such officer or agent shall not have such power, unless such waiver shall be written upon or attached to the policy. It may be conceded that it was the general rule of the appellant company not to require or accept applications for insurance, and that it wrote and delivered its policies upon the inspection and judgment of its agent, without requiring any written application therefor. In this case, however, it appears that the respondents applied to Thomas, a person engaged in the insurance business, for a policy upon the property involved; that Thomas was unable to write such policy, but took from the respondents an application therefor. This application was forwarded to Mr. Moore, a legal agent of the appellant in the state of Idaho. Mr. Moore was not acquainted with respondents or the property sought to be insured, but, in response to the application, he writes a policy and transmits the same to the respondents. This policy in most particulars follows the statements found in the application. It was the only information which Mr. Moore possessed upon which he was able to write the policy in question. The application states the specific amount of insurance desired on the building and its description, the amount of insurance desired on the engine and its description, and the amount of insurance desired on the machinery. The policy followed this description particularly; also the location of the property. This application was retained by the company, the policy written and delivered by reason of it, and the insured never advised that the company did not receive applications, or that the application was defective or insufficient. If it were the rule of the company in all cases to not require or accept applications, it would have been only fair and just that the company, after having received the application, return the same to the applicants and inform them of that fact. This the company or its agent did not do.

The contention that the company never accepts written applications does not impress this court with much force, in view of the acts of the company in this case and the following provision in the policy: "If an application, survey, plan, or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured." If an application is never taken, why this provision? If the application is

taken, then it becomes a warranty. If a warranty, then it becomes a part of the contract. If a part of the contract, then the conditions in the policy must be construed with the conditions in the application, and effect given to both, if possible. In this case the company writes the policy with an application before it, which states that the insured does not own in fee simple the title to the ground upon which the building is situated, and also that the insured makes no statement or warranty whatever as to incumbrances.

Taking the application, then, in connection with the policy, we find two questions in the application, to wit: "What is your title to ground?" was answered as follows: "Donated to mill." Question: "Is the property mortgaged? How much?" to which no answer was made. The application was received and acted upon in this condition. If these answers were insufficient to fully advise the company so that it could write an insurance policy or accept the risk, it was the duty of the company to require such questions to be fully and satisfactorily answered before the policy was written or delivered. *Dunbar v. Phoenix Insurance Co.*, 72 Wis. 492, 40 N. W. 386. The issue of a policy upon an application is a waiver of all matters of sufficiency of form or disclosures called for by the questions. 19 Cyc. 790, and the authorities there cited.

The respondents, when they received the policy from the appellants on a written application containing certain questions, had a right to presume that the policy was in accord with the application, and that the answers and disclosures made in the application were sufficient to bring them the insurance desired, and they were not required to return the policy because of conditions in it which might seem to be in conflict with the application. *McElroy v. British American Assurance Co.*, 94 Fed. 990, 36 C. C. A. 615. After writing the policy, based upon an application containing inquiries to which answer has been made by the applicant, the company will not be permitted to claim that the conditions in the policy conflict with the answers in the application, and thereby work a breach of the conditions of said policy. An insurance company, with knowledge of the then existing breach of a condition precedent, cannot accept the premium and issue a policy pretending to insure, but which would be avoided after a loss by reliance upon such a breach of condition, as to do so would be to perpetrate a fraud upon the insured. 19 Cyc. 790; *Davis v. Phoenix Insurance Co.*, 111 Cal. 409, 43 Pac. 1115.

Mr. Moore, the legally appointed agent of the appellant company, was informed by this application that the respondents were not the owners in fee of said property, and, as to incumbrances, that they made no representation with reference thereto; and the record fully discloses that Mr. Thomas, who received said application, was fully advised

by the respondents both as to title and incumbrances. The authorities as we understand them fully sustain the proposition that the company will be estopped from asserting the invalidity of its policy because of violations of conditions precedent, if such alleged violations were known by the company at the time of its issue. *McElroy v. British American Assurance Co.*, 94 Fed. 990, 36 C. C. A. 615; *Mesterman v. Insurance Co.*, 5 Wash. 524, 32 Pac. 458, 34 Am. St. Rep. 877; *Wood on Insurance*, § 406; *Beebe v. Insurance Co.*, 93 Mich. 514, 53 N. W. 818, 18 L. R. A. 481, 82 Am. St. Rep. 519; *Wood v. Insurance Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; *Robbins v. Insurance Co.*, 149 N. Y. 477, 44 N. E. 159; 3 Cooley, *Briefs on Insurance*, p. 2524.

Appellant, however, contends that any knowledge obtained or possessed by Thomas cannot be imputed to the appellant, for the reason that Thomas was not its agent in effecting the insurance. We understand the rule of law, however, to be that the acceptance and approval by the company of the acts of another in behalf of the company constitute a recognized agency. In this case Thomas took the application. He wrote the answers to the questions in relation to the risk upon the information obtained from respondents. He transmitted the application to the agent of the appellant. He received the premium and paid it over to the company. He received one-half of the commissions, and the company ratified his acts by accepting said application and the information contained therein. "Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted under a mistaken conclusion. He is estopped to take refuge in such a defense." *Bronson's Ex'r v. Chappell*, 12 Wall. (U. S.) 681, 20 L. Ed. 436; *Lamberton v. Insurance Co.*, 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222; *Abraham v. Insurance Co.* (C. C.) 40 Fed. 717; *McElroy v. British American Assurance Co.*, 94 Fed. 990, 36 C. C. A. 615. "An agent who solicits the insurance, takes the application, receives the premium, and delivers the policy, may, in our opinion, by his conduct or acts, bind his company by way of waiver of a forfeiture on account of additional insurance, in the absence of knowledge upon the part of the assured that his powers in this respect had been restricted. This being so, it follows that the knowledge of the agent under such circumstances is to be im-

puted to the company." *McElroy v. British American Assurance Co.*, 94 Fed. 990, 36 C. C. A. 615; *Insurance Co. v. Spiers*, 87 Ky. 285, 8 S. W. 453.

The case of *Insurance Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557, involved the identical question contended for here, and the court says: "The company did make him (Beals) its solicitor, and it must be presumed that he was given full power to take applications and give such information to the company as he might obtain either from the applicant or from other sources. For this purpose, at least, he was the agent of the company with full power; and if he wrote down false statements after he had been truthfully informed by the applicant, and after a personal inspection of the premises, the assured should not suffer for his misrepresentations. * * * We are of the opinion that after the defendant had received the premium of the plaintiff and issued him a policy that it was estopped from denying the truth of the statement filled in by its own agent in the application of plaintiff. The knowledge that Beals possessed was, for the purposes of this action, the knowledge of the company. He was acting as its agent, and it was his special duty to ascertain the actual facts about the risk, as the company made him its agent for that purpose. * * * The current of the later authorities seems to be that the agent who takes the application and obtains the policy must be regarded for those purposes as having full power to act for and bind the company, and after having received money from the insured it cannot be heard to say that the statements in the application were false when there was no fraud or attempt to deceive and misrepresent on the part of the assured."

So we think, in this case, by accepting the application from Thomas and receiving the premium for the policy from the respondents through Thomas, the company thereby made Thomas its agent for the purpose of receiving applications for insurance, and is bound by his acts, and that his knowledge of the risk must be imputed to the company. The acts of Thomas clearly establish the fact that he was the agent of the company in accepting the application of the respondents for insurance, and that his knowledge of the condition of the risk is the knowledge of the company. *Fidelity & Casualty Co. v. Egbert* 55 U. S. App. 200, 28 C. C. A. 281, 84 Fed. 410; *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222, 20 L. Ed. 617; *Pitney v. Insurance Co.*, 65 N. Y. 6; *Giddings v. Insurance Co.*, 90 Mo. 272, 2 S. W. 139; *Germania Insurance Co. v. Wingfield*, 57 S. W. 456, 22 Ky. Law Rep. 455; *Manchester Assurance Co. v. Dowell*, 80 S. W. 207, 25 Ky. Law Rep. 2240; *Continental Insurance Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; 22 Cyc. 1427; *Gibson v. German-American Town Mut. Ins. Co.*, 85 Mo. App. 41; *Beal v. Park Fire Insurance Co.*,

16 Wis. 257, 82 Am. Dec. 719; *Gish v. Insurance Co. N. A.*, 16 Okl. 59, 87 Pac. 869.

Counsel for appellant, however, argues that to recognize Thomas as the agent of the appellant would do violence to the conditions of the policy. The argument of counsel, however, overlooks the fact that the company intended, and did, in fact, waive these conditions by accepting an application from one who was not authorized in writing as the agent, and writing and delivering a policy upon said application, and receiving and retaining the premium therefor. Such acts constitute a waiver of these provisions, and estop the company from contending that such conditions have been violated. *Wood v. Insurance Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; *Robbins v. Insurance Co.*, 149 N. Y. 477, 44 N. E. 159; *Insurance Co. v. Earle*, 33 Mich. 144; *Insurance Co. v. Spiers*, 87 Ky. 285, 8 S. W. 453; *Insurance Co. v. Warttemberg*, 79 Fed. 245, 24 C. C. A. 547; *McElroy v. British American Assurance Co.*, 94 Fed. 990, 36 C. C. A. 615. But counsel for appellant contends that if the terms and conditions of the policy were satisfactory to the plaintiffs, and they accepted it, there was a contract between the parties, but only according to the language of the policy; and that if the terms and conditions were not satisfactory to the plaintiffs, and they did not accept it, there was no contract of insurance. If, however, they accepted the policy, they accepted it entire, and could not accept a part and reject the balance. This contention may be conceded, but the terms of the contract are not to be determined by the policy alone; but the application may be considered, where an application is taken, as well as oral testimony received. If an application is made, and contains certain answers to questions therein propounded and the omission to answer other questions, and the policy is written, based upon that application, and is the only information the insurer has, it becomes a part of the contract, and the insurer is bound by the provisions and conditions of such application to the same extent and with the same effect as is the insured by the terms and conditions of the policy; and in determining what the contract is between the parties the application will be examined in connection with the policy, and the conditions and the provisions of both construed together.

But there is other and further evidence of a waiver of the conditions in said policy after the fire occurred in the efforts to adjust said loss, and the correspondence in relation thereto. Up to the time this action was instituted the appellant herein treated the policy as a legal contract, and continued in an effort to compromise and adjust the loss. Not only that, but after the company discovered, as it now claims, that the policy was void from its inception, it at no time offered to return the premium received therefor. Even after this suit was instituted the company did not

bring into court or tender to the respondents the premium. We do not believe that an insurance company should be permitted to retain the premium received for a valid contract of insurance, and at the same time repudiate said contract and maintain that the same was not a contract of insurance. If the policy did not insure the respondents, and the appellant was under no obligation to pay the respondents for any loss, then the company received and retained the premium without rendering any consideration therefor. Even though it be conceded that the contract of insurance was invalid by reason of a breach of conditions precedent, yet it was the duty of the company, upon its discovering said breach, in order to maintain its position that there was no contract, to have returned the premium received therefor. *Clement on Fire Insurance*, 428, and the authorities there cited. *McKowen* was the adjuster, and as such had authority to adjust and settle the loss. To adjust an unliquidated claim is to determine what is due; to settle; ascertain. To adjust a loss is to ascertain and determine. *Machine Co. v. Brower*, 88 Iowa, 607, 55 N. W. 537; *Warder v. Robertson*, 75 Iowa, 585, 39 N. W. 905; *Stevens v. Insurance Co.*, 69 Iowa, 658, 29 N. W. 769; *Brown v. Insurance Co.*, 74 Iowa, 428, 38 N. W. 135, 7 Am. St. Rep. 495; *Searle v. Insurance Co.*, 152 Mass. 263, 25 N. E. 290; *Insurance Co. v. Dowdall*, 159 Ill. 179, 42 N. E. 606; *Insurance Co. v. Hayden's Adm'r*, 90 Ky. 39, 13 S. W. 585; *Schlesinger v. Columbian Fire Insurance Co.*, 37 App. Div. 531, 56 N. Y. Supp. 37; 1 Am. & Eng. Enc. (2d Ed.) 641; *Ruthven v. American Fire Insurance Co.*, 102 Iowa, 550, 71 N. W. 574. Whatever knowledge *McKowen* obtained within the scope of his authority in adjusting the loss as to a breach of conditions precedent was the knowledge of the company, and the knowledge thus obtained that the plaintiffs were not the unconditional owners in fee of the property, and that such property was incumbered, will be imputed to the company, and a recognition on its part of the validity of the contract of insurance after such knowledge is obtained, and a retention of the premium without offer to return it, amounts to a waiver of such breach of condition.

It is also claimed by counsel for respondents that under the provisions of the policy a waiver to be effectual must be indorsed in writing upon the policy by an agent who had the authority to do so, and, as the waiver was not so indorsed in this case, none can be shown. This provision was inserted in the policy by the company as one of many conditions required by the company, and, like any other condition, can be waived or changed by the company and the insured. *McElroy v. British American Assurance Co.*, 94 Fed. 990, 36 C. C. A. 615. As was said in the case of *Lamberton v. Insurance Co.*, 39 Minn. 120, 39 N. W. 76, 1 L. R. A. 222: "A contracting party cannot so tie his own

hands, so restrict his own legal capacity for future action, that he has not the power, even with the assent of the other party, to bind or obligate himself by his further action or agreement contrary to the terms of the written contract." In the case of *Farnum v. Phoenix Insurance Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 283, the court says: "It is also well settled that an insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, or that its contracts or waivers must be in writing, that it cannot by its own agents make an oral contract or an oral waiver not forbidden by the statute of frauds." *Robinson v. Berkey*, 100 Iowa, 136, 69 N. W. 484, 62 Am. St. Rep. 549; *Peterson v. Machine Co.*, 97 Iowa, 148, 66 N. W. 96, 59 Am. St. Rep. 399; *Osborne & Co. v. Backer*, 81 Iowa, 375, 47 N. W. 70; *Reiner v. Insurance Co.*, 74 Wis. 89, 42 N. W. 208; *Dick v. Insurance Co.*, 92 Wis. 146, 65 N. W. 742; *Insurance Co. v. Earle*, 33 Mich. 143; *Berry v. Insurance Co.*, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; *Insurance Co. v. Bowdre*, 67 Miss. 620, 7 South. 596, 19 Am. St. Rep. 826. We think this doctrine is supported, not only by the authorities, but by reason. If a company can waive the conditions in a written policy as to the warranties, it would seem to follow that it could also waive a condition requiring such waiver to be indorsed upon the policy in writing. This provision as to requiring a waiver to be indorsed on the policy in writing is a condition for the benefit of the company, and we think there can be no doubt that a party to a contract may waive a stipulation or condition made in its favor. *Ruthven v. American Fire Insurance Co.*, 102 Iowa, 550, 71 N. W. 574; *Orient Insurance Co. v. McKnight*, 197 Ill. 190, 64 N. E. 339; *Benjamin v. Palatine Insurance Co.*, 80 App. Div. 260, 80 N. Y. Supp. 256; *Thompson v. Trader's Insurance Co.*, 169 Mo. 12, 63 S. W. 880; *Clement on Fire Insurance*, 416; *Home Mut. Ins. Co. v. Nichols* (Tex. Civ. App.) 72 S. W. 440.

The case of *Iverson v. Metropolitan Life Insurance Co.* (Cal.) 91 Pac. 609, and many cases cited and relied upon by appellant, are clearly distinguishable from the case under consideration. In that case the applicant made a false answer. In the case at bar such is not the case. In that case the soliciting agent knew the answer was false, and that the answer covered up such falsity, and gave no information to the company that it was false. The very reverse is true in this case. In that case the answer was full and complete. In this case one answer is meaningless and the other inquiry not answered. In that case the company acted on the truth of the answer. In this case the company knew the questions were not answered. In that case the applicant warranted that, if any answer be false, the policy would be void. Not so here. The company wrote the policy with full information before it. In that case the

court held that mere knowledge of the agent would not bind the company and did not amount to a waiver. Here we have knowledge and acts of the company clearly showing the waiver. In that case to have sustained the contention of waiver would have been a fraud upon the company. In this case to repudiate the acts constituting a waiver would be a fraud upon the insured. This class of cases is clearly distinguishable, both upon the facts and principle, from the case at bar. The discussion herein necessarily includes the right to introduce oral testimony to prove a waiver. *Insurance Co. v. Norwood*, 69 Fed. 71, 16 C. C. A. 136; *Association v. Wickman*, 141 U. S. 564, 12 Sup. Ct. 84, 35 L. Ed. 860; *Insurance Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557; *Pechner v. Insurance Co.*, 65 N. Y. 195.

We have carefully considered this case, and believe that this discussion disposes of all questions presented by the appeal, except such as were considered and finally decided in the former appeal in this case.

We find no error in the record, and the judgment is affirmed; costs awarded to respondents.

AILSHIE, C. J., concurs. SULLIVAN, J., did not sit at the hearing.

HAMILTON v. SMART, Judge.

(Supreme Court of Kansas. May 9, 1908.)

MANDAMUS — WHEN PROPER — OTHER ADEQUATE REMEDY.

Mandamus not lying when an effective remedy may be had in a proceeding in error, it will not lie against a district judge to correct any error in refusing a change of venue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 9.]

Original mandamus proceeding by Mary Alice Hamilton against C. A. Smart. Writ denied.

W. J. Costigan and Gamble & Taylor, for plaintiff. F. M. Harris, for defendant.

PER CURIAM. In an action brought by Mary Alice Hamilton against the city of Ottawa she moved for a change of venue upon the ground that the district judge was disqualified by reason of being a resident and a taxpayer of the city. The motion was denied, and thereupon the plaintiff applied to this court for a writ of mandamus to compel that court to grant a change of venue. She insists that the district court committed error in denying her application for a change of venue. It is plausibly argued by counsel for defendant that ownership of property and residence within a city does not constitute such an interest as disqualifies a judge; but, however that may be, if an error was committed in refusing a change of venue, it may be corrected in an ordinary appellate proceeding. The extraordinary remedy of

mandamus cannot be employed, when an effective remedy may be had in a proceeding in error. *Mason v. Grubel*, 64 Kan. 835, 68 Pac. 600.

The writ will be denied.

WILKS v. DE HART.

(Supreme Court of Kansas. May 9, 1908.)

TAXATION — TAX DEEDS — ASSIGNMENT OF COUNTY'S INTEREST—AMOUNT.

A tax deed is void on its face where it shows that the county's interest has been assigned for 37 cents less than the amount necessary to redeem.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1514.]

Error from District Court, Clark County; Gordon L. Finley, Judge.

Action between J. E. Wilks and C. E. De Hart. From the judgment, Wilks brings error. Affirmed.

L. M. Day, for plaintiff in error. Francis Price, for defendant in error.

PER CURIAM. The court rightly held the tax deed void on its face. The interest of the county was assigned for 37 cents less than the amount necessary to redeem. The statute authorizes an assignment for the amount necessary to redeem, and limits the authority of the officers. They had no authority to assign for a less sum. *Noble v. Cain*, 22 Kan. 493; *Douglass v. Lowell*, 60 Kan. 239, 56 Pac. 13; *Manker v. Peck*, 71 Kan. 865, 81 Pac. 171. There was no error in refusing to permit the county treasurer to explain that he made an error in computation. If such evidence were admissible for any purpose, which is doubtful, it would only emphasize the fact that the assignment was made for a sum less than the law authorized.

Judgment affirmed.

RUSH v. LEWIS AND CLARK COUNTY et al.

(Supreme Court of Montana. May 25, 1908.)

1. TAXATION—TAX SALE—DEEDS—CONSTRUCTION—RECITALS.

Where a statute prohibits a county from becoming a competitive bidder at a tax sale, a statement in a deed conveying land sold for taxes to a county that the land was offered for sale "in accordance with law," being merely the statement of a conclusion of law, can impart no validity to a deed, in the face of plain recitals therein to the effect that the property was sold at public auction, at which the county was a bidder.

2. SAME.

Where a county becomes a purchaser of property at a tax sale because there are no cash purchasers, the certificate of sale, as well as the deed, should show that there was no purchaser in good faith for the property on the first day the property was offered for sale, and that when the property was thereafter offered, there was no purchaser in good faith for the same, and that the whole amount of the property assessed was struck off to the county as a purchaser, and

should otherwise truthfully state the facts; and hence a tax deed to a county, which did not set out the facts showing why the sale was made to the county, and not to an individual purchaser, was insufficient, though it recited the matters required by law to be recited in a tax deed to an individual.

On rehearing. Affirmed.

For former opinion, see 93 Pac. 943.

McConnell & McConnell, Albert J. Galen, Atty. Gen., and E. M. Hall, Asst. Atty. Gen., for appellants. Massena Bullard and Edward Horský, for respondent.

WINSTON, District Judge. A rehearing was granted herein, on the appellants' motion upon the questions: What significance, if any, should be given to the recitals in the tax deeds touching the method by which the county of Lewis and Clark obtained title to the lands in controversy? Are these recitals surplusage or not?

Counsel for appellants contend that the deeds do not affirmatively show that the county was a competitive bidder, because they show that the county took all the lands for the taxes; and the statement in the deeds "that at said auction Lewis and Clark county was the bidder who was willing to take the least quantity or smallest portion of said land and pay the taxes," etc., as well as the statement that the land "was by said county treasurer aforesaid, on the 25th day of January, 1901, in accordance with law, to pay said taxes, charges and costs delinquent as aforesaid, offered at public auction in front of the county treasurer's office," show affirmatively that there was no other bidder for said lands, and therefore no competitive bidding; and that the recitals in the deeds as to the method by which the county of Lewis and Clark obtained title to the lands in controversy are not necessary to the validity of the deeds, and should be treated as surplusage. Appellants further contend that the presumptions "that official duty has been regularly performed" and "that the law has been obeyed" prevail, until they are overcome by competent evidence, and that there is nothing in the deeds to overcome these presumptions. We cannot sustain this contention, in the light of the recitals in the deeds. The statement in the deeds that the land was offered "in accordance with law" is merely a statement of a conclusion of law, and can impart no validity to the deeds, especially in the face of the plain recitals in the deeds to the effect that the property was sold at public auction, and the county of Lewis and Clark was a bidder at such auction.

It is contended by appellants that, so long as a tax deed to a county recites the matters required by law to be recited in a tax deed to an individual, and does not affirmatively show that the statute, in respect to the county as a bidder, was not complied with, it is a valid deed. But, as has been heretofore said, the deeds in question show that the statute was

not complied with. While the statute provides no set form of deed for either a cash purchaser or a county, it is apparent that it was the intention of the Legislature that, in the case of both the cash purchaser and the county, the truth of the transaction should be shown. As was said in the case of *Dyke v. Whyte*, 17 Colo. 296, 29 Pac. 128: "The difference between the rights and privileges of a cash purchaser and the duties of the treasurer, as a bidder for the county at a tax sale under the statute, is quite manifest. The treasurer is authorized to sell for cash only so much of each parcel of land as shall be sufficient to pay the taxes and charges thereon, including all costs and penalties; but when it shall become the treasurer's duty to bid off any parcel of land for the county, he is authorized to bid off the whole parcel for the amount of the taxes, interests, and costs thereon. The cash purchaser may buy the first time the land is offered for sale; but the treasurer cannot lawfully bid off the property for the county on the first day it is offered. The land must be offered without any bidder on the first day, and re-offered on the succeeding day or days without any bidder therefor, and until the treasurer becomes satisfied that the same cannot be sold at such sale, before it can be lawfully bid off by the treasurer for the county. The statute will not uphold a county in taking the whole of any parcel of land for the non-payment of the delinquent taxes thereon, except in a case where, after allowing full opportunity to cash purchasers, the amount of the taxes and other charges cannot be realized. A cash purchaser may be satisfied to take a part of the land for the amount of the taxes and charges. The law does not wantonly allow the whole of a debtor's estate to be sacrificed when a part may suffice. * * * The form prescribed for cash purchases was doubtless deemed a sufficient and appropriate guide, to be substantially followed as far as its terms are applicable to the county as a bidder, and to be varied only so far as may be necessary to show the truth of the transaction in substance. If such deed were to contain recitals showing that the terms of the statute, in respect to the county as a bidder or otherwise, were not complied with, it would not be a valid deed."

The provisions of our Code respecting the sale of property for delinquent taxes are very general in their terms, and apply primarily to sales to cash purchasers; but, as said above by the Colorado court, they were doubtless deemed sufficient, by the Legislature, to furnish a guide in case property should be struck off to the county, and it was no doubt taken for granted that in such cases the treasurer would so vary the form of the certificate and deed as to make them state the facts as they actually existed. So, where a county becomes the purchaser of property at a tax sale because there are no cash purchasers, the certificate of sale, as well as the

deed, should show that there was no purchaser in good faith for the property on the first day that the property was offered for sale, and that, when the property was thereafter offered for sale, there was no purchaser in good faith for the same, and that the whole amount of the property assessed was struck off to the county as a purchaser, and should otherwise truthfully state the facts.

For the reasons set forth in the former opinion of the court, and for the reasons herein stated, we adhere to our former decision.

BRANTLY, C. J., and HOLLOWAY, J.,
concur.

HELENA WATERWORKS CO. v. SETTLES, Treasurer.

(Supreme Court of Montana. May 18, 1908.)

TAXATION—WATER RIGHTS—PLACE OF TAXATION—STATUTES—"PROPERTY"—"REAL ESTATE"—"PERSONAL PROPERTY"—"IMPROVEMENTS"—"WATER RIGHT."

A "water right" is the legal right to the use of any unappropriated water of any natural stream, water course, or source of supply, and exists only in contemplation of law, and is for purposes of taxation "personal property," within Const. art. 12, § 17, and Pol. Code, 1895, §§ 16, 3680, defining "property" as including money, franchises, and other things capable of private ownership, and defining "real estate" as including the possession or ownership of land, mines, minerals, and quarries, and "improvements" as including all buildings, structures, etc., and "personal property" as including everything which is the subject of ownership, not included within real estate or improvements, so that under section 3716, providing that the personal property and franchises of water companies must be assessed in the district where the principal works are located, a water company owning a water right without the limits of a school district and conveying water by pipe lines into the district, where it is distributed to the inhabitants thereof, is properly assessed in the district; that being the place of business and principal works of the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 420.]

For other definitions, see Words and Phrases, vol. 4, pp. 3454, 3459; vol. 8, pp. 7682, 7683; vol. 6, pp. 5346, 5358; vol. 8, p. 7753; vol. 6, pp. 5693, 5728; vol. 8, pp. 7768, 7770; vol. 7, p. 5937; vol. 8, pp. 7778, 7779; vol. 8, p. 7415.]

Appeal from District Court, Lewis and Clark County; Thos. C. Bach, Judge.

Action by the Helena Waterworks Company against W. M. G. Settles, treasurer of Lewis and Clark county. From a judgment against plaintiff rendered after sustaining a general demurrer to the complaint, it appeals. Affirmed.

M. S. Gunn, for appellant. Albert J. Galen, Atty. Gen., and E. M. Hall, Asst. Atty. Gen., for respondent.

HOLLOWAY, J. This action was brought by the Helena Waterworks Company to recover certain money paid under protest to the county treasurer of Lewis and Clark

county for taxes assessed upon property of the company for the year 1906. The water company is the owner of a water right of 550 inches in Ten-Mile creek. The water is diverted from the creek at a point without the limits of school district No. 1, and then conveyed by pipe lines into the city of Helena and into school district No. 1, where it is distributed to the city and its inhabitants for use; in other words, the company owns and operates a waterworks system in the city of Helena by bringing this water from Ten-Mile creek into the city and distributing it for use. For the year 1906 this water right was assessed as property of the company subject to taxation within school district No. 1. Relief was sought from the board of equalization, but the relief refused, and the taxes paid under protest. To a complaint setting forth these facts much more in detail a general demurrer was interposed by the county and sustained by the court, and plaintiff, electing to stand upon its complaint, suffered judgment to be taken against it, and from that judgment this appeal is prosecuted.

Only one question is presented for determination, viz.: Was plaintiff's water right "property" subject to taxation within school district No. 1 for the year 1906? It appears that school district No. 1 includes all of the city of Helena and some additional territory. In our view of the case this question is to be resolved by reference to our Political Code. We need not enter into any discussion of the particular characteristics of a water right, or determine whether a water right of the character of this one under consideration is an easement in gross, or otherwise an incorporeal hereditament; for while our Political Code of 1895 in section 16 gives general definitions of the terms "property," "real property," and "personal property," the same Code, by section 3680, classifies every species of property for the purpose of taxation, and we are limited by this classification in determining how this property should be assessed. Section 3680 above provides that the term "property" shall include moneys, credits, bonds, stocks, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership, and this is the definition given in the Constitution. Article 12, § 17. The same section of the Code provides that "real estate" shall include the possession or ownership of, or claim or right to, land; also mines, minerals, and quarries; also all timber belonging to individuals or corporations growing or being on lands of the United States, and all rights and privileges appertaining thereto. The term "improvements" includes all buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land. "Personal property" includes everything which is subject to ownership and not included within the meaning of "real estate" or "improvements." We are furnished here this classification which com-

prehends every species of property, and by process of elimination we may readily ascertain within which of the classes the particular property under consideration falls.

In this state a water right is the legal right "to the use of any unappropriated water of any natural stream, water course, spring, dry coulee, or other natural source of supply, and of any running water flowing in the streams, rivers, canyons, and ravines of this state." Necessarily this right is a wholly intangible thing, a mere creature of the mind, which exists only in contemplation of law. It is not a right or claim to land; neither is it the possession or ownership of land. It cannot be comprehended within the meaning of mines, minerals, quarries, or timber belonging to private owners and growing on public land, or a right or privilege appertaining thereto. Neither can it come within the meaning of the term "improvements." It must of necessity, therefore, for the purposes of taxation, be personal property belonging to this corporation, whose place of business and principal works are in the city of Helena and within school district No. 1. This being so, it was properly assessed as property subject to taxation within school district No. 1; for section 3716 of the Political Code provides: "The personal property and franchises of gas and water companies must be listed and assessed in the county, town or district where the principal works are located."

The judgment is affirmed.

Affirmed.

BRANTLY, C. J., and WINSTON, District Judge, concur.

(87 Mont. 231)

LINDSAY v. KROEGER et al.

(Supreme Court of Montana. May 18, 1908.)

1. CONTRACTS—FRAUD—DEFENSE—AVAILABILITY.

A contract admittedly valid on its face cannot be avoided by a party thereto on the ground of fraud, except by allegation and proof of facts showing that he was misled, to his prejudice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 424.]

2. TRIAL—EVIDENCE—INSTRUCTIONS.

Where, in an action for breach of contract to convey real estate, the evidence showed that defendant employed a broker to procure a purchaser, that the broker procured plaintiff, who contracted to purchase the premises, that throughout the purchaser dealt with the broker as the agent of defendant, and tendered all payments to him as such, the court properly charged that plaintiff did not authorize the broker to act as her agent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

3. SAME.

Where, in an action for breach of contract to convey real estate, the only triable issue presented by the pleadings was whether defendant signed the contract with a full understanding of its terms, or whether he signed it relying on false representations of the facts, and it appeared that the contract was signed by both parties, the refusal to charge that a proposal may be revoked at any time before its acceptance is

communicated to the proposer, but not afterwards, was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587-596.]

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Action by Cora L. Lindsay against Lavina R. Kroeger and another. From a judgment for plaintiff against defendant Henry C. Kroeger, he appeals. Affirmed.

Mackel & Meyer, for appellant. Maury & Hogevoel and John Lindsay, for respondents.

BRANTLY, C. J. This action was brought to recover damages for a breach by the defendants, husband and wife, of a contract alleged to have been made by them to convey to plaintiff certain real estate situate in Silver Bow county, described as lot numbered 28, in block numbered 2, in Columbia addition to the city of Butte. Defendants owned the property jointly. It appears that some time early in the year 1906 Henry C. Kroeger had listed it for sale with C. S. Passmore, doing business under the name of Passmore & Co., to be sold at the price of \$6,000, the defendants to pay a stipulated commission of five per cent. On March 24, 1906, John Lindsay, the husband of plaintiff, having noticed that the property was for sale, made to Passmore, on plaintiff's behalf, an offer for it of \$5,750, \$2,000 to be paid in cash, and the balance, with interest at 8 per cent. per annum, to be paid on or before the expiration of 60 days from the completion of the contract, the deed to be put in escrow with Passmore for delivery upon full payment. He further agreed that the plaintiff would take a transfer of the policy of insurance then covering the buildings upon the lot, and pay a pro rata proportion of the premium. Possession of the property was to be given on or before April 1st. This offer was communicated to defendant Lavina R. Kroeger, her husband then being out of the city, and was accepted by her. To bind the agreement a payment of \$100 was thereupon made to Passmore, who was, under his contract with defendants, authorized to receive and receipt for payment. On March 27th, Henry C. Kroeger, having returned to the city, went to the office of Passmore & Co., and, after being told of the terms of sale and after consulting with his wife by telephone, signed a deed to the property and an escrow agreement, the substance of which has been stated above. It was then understood that Passmore would take the deed and agreement to the home of defendants that evening for signature by the wife, whereupon Passmore was to keep them until final payment. He went to the home of the defendants, tendered to Lavina R. Kroeger the \$100 already paid, and requested her to sign the deed and the agreement. She refused to sign, insisting that the whole amount of \$2,000 should first be paid her. On the following day the defendants went to the office of Passmore & Co., as

Passmore supposed, for the purpose of attaching the signature of Lavina R. Kroeger and receiving the \$2,000 payment. The wife asked to see the deed, and, upon getting possession of it, refused to give it up and took it away. In the meantime plaintiff, through her husband, had made the cash payment of \$2,000, and plaintiff had signed the agreement. This amount, less his commissions, Passmore that day offered to the defendants, who refused to receive it. The deed had not been acknowledged by Henry C. Kroeger. At this time there was a warm controversy between Passmore and Lavina R. Kroeger as to whether she had authorized him, Passmore, to sell upon the conditions named in the agreement, or whether the whole purchase price of \$5,750 was to be paid in cash. She insisted that it was all to be paid in cash, and assigned his failure to produce the whole amount of the purchase price as her reason for not completing the arrangement. The altercation resulted in an action afterwards by her against Passmore for false imprisonment. *Kroeger v. Passmore*, 36 Mont. —, 93 Pac. 805. Henry C. Kroeger did not at that time question the fact that he had signed the deed and escrow agreement with a full understanding of the terms of the contract as stated by Passmore. A few days afterwards Henry C. Kroeger notified John Lindsay that he and his wife would complete the contract if plaintiff would agree to pay \$6,000, but, in case she did not, they would consider the negotiations at an end. This offer was declined; Lindsay stating at the time that he would hold him responsible upon his agreement. Within a few days, and long before the expiration of the 60 days allowed for the deferred payment, plaintiff paid or offered to defendants the full amount of \$5,750, but defendants refused to accept the money or to execute or deliver the deed or deliver the possession of the property. The issue made by the complaint, answer, and reply, so far as reference to them is now pertinent, is whether, upon learning the terms of sale tentatively agreed upon by Passmore and plaintiff Henry C. Kroeger consulted his wife and signed the deed and agreement upon ascertaining that the arrangement was satisfactory to her, or whether he signed relying upon the false representation by Passmore that Mrs. Kroeger fully approved the agreement, whereas, in fact, she had insisted from the first that she would not agree to a sale for a less price than \$6,000 except for cash. This issue gave rise to the only real controversy at the trial. At the close of plaintiff's case, defendants each interposed a motion for nonsuit, on the ground that the plaintiff had failed to show a contract of sale. The motion was sustained, and the action dismissed as to the wife, but denied as to the husband. The trial resulted in a verdict and judgment against the defendant Henry C. Kroeger for \$250 and costs. He has appealed from the judgment and an order denying him a new trial.

The denial of the motion for nonsuit as to appellant was clearly correct. No question was made that he had signed the deed and the escrow agreement, and was bound by his contract thus evidenced, but for the alleged false statement made to him by Passmore. The evidence tended to show, besides, that plaintiff had complied with all of the conditions of the contract on her part, had made the cash payment, and had thereafter tendered the full amount of the price agreed upon, with interest. The amount of the insurance premium which she had agreed to pay was also tendered. Under this state of the case the burden rested upon the appellant to show facts justifying his refusal or failure to comply with his agreement. A contract admittedly valid on its face cannot be avoided by a party to it on the ground of fraud or misrepresentation, except by allegation and proof of facts showing that he had been misled, to his prejudice.

Contention is made that it is apparent from the evidence that, at the time the deed and agreement were signed by appellant, Passmore was acting as agent for the plaintiff, and that appellant was prejudiced by the giving of the following paragraph of the charge: "No evidence has been introduced in this case that Mrs. Cora L. Lindsay ever authorized C. S. Passmore to act as her agent, and you will find that issue against the defendant Henry C. Kroeger." There is no merit in this contention. Passmore was employed by appellant. The evidence tends to show throughout that the plaintiff dealt with him as the agent of appellant, and made or tendered all payments to him as such. There is no controversy but that he had authority to receive payment. Whatever importance should have attached to the fact that during some part of the proceedings Passmore acted for the plaintiff, had there been any evidence tending to establish the fact, since there was in fact no evidence tending to establish it, it was clearly right for the court to say so to the jury, thus clearing the issue which the jury actually had to try.

It is also contended that the court erred in refusing to submit the following instruction: "You are further instructed that a proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards. Accordingly you are instructed that, if you find from the evidence that the defendants revoked the proposal before the plaintiff unqualifiedly and absolutely accepted the same, then your verdict must be in favor of the defendants." It is doubtful whether, under the act of the Tenth legislative assembly (Laws 1907, p. 65, c. 34), relating to the method of procedure to be observed in the settlement of instructions and the record to be made in order to have particular paragraphs of them properly presented to this court for review, the record in this case requires notice of this assignment. Yet, assuming, without deciding, that it does,

we fail to see wherein the appellant has suffered prejudice by the court's action. The instruction was not applicable to any issue involved in the case. The theory of the trial court was that the only triable issue presented by the pleadings was whether the appellant signed with a full understanding of the agreement made with his wife, or whether he signed it relying upon the false representations of the facts made by Passmore. The writing on the face was a valid agreement. It was signed by both the plaintiff and appellant. This indicated conclusively its acceptance by each of them upon the terms expressed in it. After signature by both, the original proposal of appellant and his wife to sell upon the terms offered by them was no longer a proposal open to acceptance or rejection, but became merged into the contract and passed beyond revocation.

Several other errors are assigned and argued in the briefs, but none of them are of sufficient merit to demand special notice.

Upon the theory of the case adopted by the parties and the trial court, there was ample evidence to support the finding of the jury upon the issue submitted to them. Whether as a matter of law, since it was understood by the parties that Kroeger and his wife jointly owned the property and the offer was to purchase from them both, the contract was a completed contract by the signature of Kroeger alone, binding upon him without the signature of his wife, is a question which was not submitted to the court below, and has not been submitted to this court. We have therefore considered it unnecessary to discuss or decide it.

The judgment and order appealed from are affirmed.

Affirmed.

HOLLOWAY and SMITH, JJ., concur.

(37 Mont. 302)

STATE ex rel. CITY OF BUTTE v. DISTRICT COURT OF SECOND JUDICIAL DISTRICT et al.

(Supreme Court of Montana. May 18, 1908.)

1. MUNICIPAL CORPORATIONS—POLICE POWER—ORDINANCES—VAGRANCY.

Under the express provisions of Pol. Code 1895, § 4800, par. 34, as amended by Laws 1897, p. 206, city and town councils have power to define vagrancy by ordinance, and to punish the same.

2. CRIMINAL LAW—COMPLAINT—SUFFICIENCY.

Pol. Code 1895, § 4911, before amendment, read: "The police court has concurrent jurisdiction with the justice of the peace of the following public offenses committed within the county: * * * (4) Of proceedings respecting vagrants, lewd or disorderly persons. (5) The police judge shall have the same jurisdiction as is now conferred by law upon the justices of the peace in addition to the jurisdiction herein conferred. Such offenses must be prosecuted in the name of the state of Montana." As amended by Laws 1903, c. 16, p. 27, the section reads: " * * * (4) Of proceedings respecting vagrants, lewd or disorderly persons. Such of-

fenses must be prosecuted in the name of the state of Montana"—paragraph 5 being eliminated. *Held*, that the words, "such offenses must be prosecuted in the name of the state of Montana," are not limited to proceedings respecting vagrants, etc., but refer to all of those offenses as defined by the state law and therein enumerated, of which the police court has concurrent jurisdiction with justices of the peace.

3. MUNICIPAL CORPORATIONS—CONCURRENT AND CONFLICTING EXERCISE OF POWER BY STATE AND MUNICIPALITY.

An act may be made a penal offense under the statutes of a state, and further penalties may be imposed for its commission or omission, by municipal ordinances, where the power to enact and enforce the ordinance is vested in the municipality.

4. SAME.

Const. art. 8, § 24, provides that the legislative assembly shall have power to provide for creating such police and municipal courts, etc., for cities and towns as may be deemed necessary, who shall have jurisdiction in all cases arising under the ordinances of such cities and towns, etc. Section 27 provides that the style of all process shall be "The State of Montana," and all prosecutions shall be conducted in the name and by the authority of the same. Pol. Code 1895, § 4800, par. 34, as amended by Laws 1897, p. 206, provides that city and town councils have power to define vagrancy, and to restrain and punish vagrants, etc. Section 4910 reads: "A police court is established in each city or town," etc. Section 4911, as amended by Laws 1903, c. 16, p. 27, provides that the police court has concurrent jurisdiction with the justice of the peace of the following public offenses committed within the county: " * * *

(4) Of proceedings respecting vagrants, etc. Such offenses must be prosecuted in the name of the state of Montana." Section 4912, par. 1, provides that the police court has exclusive jurisdiction of all proceedings for the violation of any ordinance of the city or town, which must be prosecuted in the name of the city or town. Pen. Code 1895, § 1155, defines vagrancy, and provides a punishment therefor. *Held* that while an offense such as vagrancy, defined and made punishable by the Code, and not by ordinance, though the city may have power to define and punish the same, must be prosecuted under the Code and in the name of the state, yet, where the offense of vagrancy is defined and made punishable by a city ordinance, the police court of the city has exclusive jurisdiction of all proceedings for the violation of such ordinance, and prosecutions thereunder must be conducted in the name of the city, though the police court also has concurrent jurisdiction with the justices' courts to punish vagrancy as a crime against the state, and such prosecutions must be conducted in the name of the state.

Application by the state, on the relation of the city of Butte, for a writ of supervisory control to the district court of the Second judicial district and Hon. Michael Donlan, a judge thereof. Order of district court annulled and set aside.

H. S. Booth and Wm. E. Carroll, for relator. Mackel & Meyer, for respondents.

SMITH, J. This cause is before the court upon application for a writ of supervisory control. It appears from the relator's petition, and the return of the respondents to an order to show cause heretofore issued, that the city council of the city of Butte has heretofore by ordinance defined the offense of vagrancy and provided a punishment therefor.

On April 4, 1908, a complaint was filed before A. J. McGowan, police magistrate of the city of Butte, charging one Barney Rabinowitz with the offense of vagrancy as defined by the ordinance. The defendant was found guilty, and sentenced to pay a fine of \$100, and to be confined in the city jail until such fine was paid or otherwise satisfied. The action was prosecuted in the name of the city of Butte. Thereafter said Rabinowitz was released from custody upon the hearing of a writ of habeas corpus issued by the Honorable Michael Donlan, one of the judges of the district court of Silver Bow county. This court is asked to set aside and annul the latter order.

It is contended by the respondents that Rabinowitz was properly released from custody, for the reason that the charge against him could not be prosecuted under the city ordinance, but should have been made under the state law and in the name of the state of Montana. This is the main contention, although other questions incidentally arise, and all will be considered together. We are of opinion that the district court and the judge thereof were in error in discharging Rabinowitz. The power to define and punish vagrancy is expressly given to cities and towns by paragraph 34 of section 4800 of the Political Code of 1895, as amended by Laws 1897, p. 206, which provides that city and town councils have power "to define vagrancy, and to restrain and punish vagrants, mendicants and persons guilty of disorderly conduct." Section 1155 of the Penal Code of 1895 also defines vagrancy, and provides as a punishment therefor imprisonment in the county jail not exceeding 90 days. The definition of the offense of vagrancy found in the city ordinance is somewhat more comprehensive than the definition of the crime found in the Code, but, so far as the complaint against Rabinowitz is concerned, the charging part embraces those elements of the offense common to both the Code and the ordinance definitions. Section 24 of article 8 of the Constitution of the state reads as follows: "The legislative assembly shall have power to provide for creating such police and municipal courts and magistrates for cities and towns as may be deemed necessary from time to time, who shall have jurisdiction in all cases arising under the ordinances of such cities and towns, respectively; such police magistrates may also be constituted ex officio justices of the peace for their respective counties." Section 4910 of the Political Code of 1895 reads as follows: "A police court is established in each city or town, which court must always be open, except upon nonjudicial days, and upon such days it must transact criminal business only." Section 4911, Pol. Code 1895, before amendment, read as follows: "The police court has concurrent jurisdiction with the justice of the peace of the following public offenses committed within the county: (1) Petit larceny. (2) Assault

and battery. * * * (3) Breaches of the peace, riots, affrays. * * * (4) Of proceedings respecting vagrants, lewd or disorderly persons. (5) The police judge shall have the same jurisdiction as is now conferred by law upon the justices of the peace in addition to the jurisdiction herein conferred. Such offenses must be prosecuted in the name of the state of Montana." The legislative assembly of 1903 amended section 4911, so that the same now reads as follows: "The police court has concurrent jurisdiction with the justice of the peace of the following public offenses committed within the county: (1) Petit larceny. (2) Assault and battery. * * * (3) Breaches of the peace, riots, affrays. * * * (4) Of proceedings respecting vagrants, lewd or disorderly persons. Such offenses must be prosecuted in the name of the state of Montana." Laws 1903, c. 16, p. 27. Paragraph 1 of section 4912 of the Political Code of 1895 reads thus: "The police court also has exclusive jurisdiction: (1) Of all proceedings for the violation of any ordinance of the city or town, both civil and criminal, which must be prosecuted in the name of the city or town." Section 27 of article 8 of the Constitution provides: "The style of all process shall be 'The State of Montana,' and all prosecutions shall be conducted in the name and by the authority of the same."

The first contention of the respondents is that in the amendment to section 4911 of the Political Code of 1895 as found in Sess. Laws 1903, p. 27, the words, "such offenses must be prosecuted in the name of the state of Montana," relate only to proceedings respecting vagrants and lewd and disorderly persons, mentioned in subsection 4, of which section the sentence last quoted appears, in the amendment, to be a part. There is no merit in this position. In the original Code provision this sentence appeared in a separate paragraph following the five numbered paragraphs, while in the amended law this arrangement was not followed. There is no significance in this, however. The words, "such offenses must be prosecuted in the name of the state of Montana," manifestly refer to all of those offenses as defined by the state law and therein enumerated, of which the police court has concurrent jurisdiction with justices of the peace. The words "public offenses," found in the first sentence of section 4911, also refer to those public offenses immediately thereafter enumerated, and, when a police court is engaged in the trial of a person for such an offense, it is exercising its concurrent jurisdiction, and such prosecution must be in the name of the state. That is to say, all prosecutions for offenses not brought under a city ordinance must be had in the name of the state. It follows, of course, that an offense defined and made punishable by the Code, and not defined and made punishable by ordinance, although

the city may have power and authority to define and punish the same, must be prosecuted under the Code and in the name of the state.

Crimes are divided into felonies and misdemeanors. Pen. Code 1895, § 16. Generally every felony is punishable either by death or imprisonment in the state prison, and every misdemeanor by fine or imprisonment in the county jail. Pen. Code 1895, §§ 18, 19. The case of *Helena v. Kent*, 32 Mont. 279, 80 Pac. 258, was an action to recover a penalty for the violation of a municipal ordinance. The defendant was charged with failure to remove ice and snow from the sidewalk in front of the premises occupied by him, as he was required to do by a city ordinance. The case is somewhat analogous to the one at bar. Paragraph 33 of section 4800 of the Political Code of 1895 confers upon cities and towns the power to define and abate nuisances, and to impose fines upon persons guilty of creating, continuing, or suffering a nuisance to exist on premises which they occupy or control. Paragraph 7 of the same section confers upon cities and towns the power to regulate the use of sidewalks, and to require the owners of premises adjoining to keep the same free from snow or other obstruction. An ordinance of the city of Helena provided that the occupant of premises who failed to remove snow and ice from the sidewalk in front of the same should be deemed guilty of committing a nuisance, and, upon conviction, should be fined. The defendant Kent was convicted of violating the provisions of this ordinance, and appealed. This court said: "It is further contended that this is a criminal action, and should be prosecuted in the name of the state. The statute provides that all proceedings for the violation of any ordinance of a city must be prosecuted in the name of the city. Pol. Code 1895, § 4912. The Constitution provides: 'The style of all process shall be "The State of Montana,"' and all prosecutions shall be conducted in the name and by the authority of the same. Section 27, art. 8. The article of the Constitution in which the above section is found vests and defines the judicial power of the state, creates a court of impeachment, a Supreme Court, district courts, and justices' courts. No other court is created by the Constitution, although power is vested in the Legislature by the Constitution to create 'other inferior courts * * * in any incorporated city or town.' The justices' courts and the district courts as trial courts, and the Supreme Court as appellate court, are by the Constitution vested with full authority to hear and finally determine all criminal actions. Police and municipal courts are not created by the Constitution. Power is conferred by it upon the legislative assembly to provide for creating such courts, which 'shall have jurisdiction in all cases arising under the ordinances of such cities,' and 'may also be constituted ex officio justices of the

peace,' etc. The Constitution itself thus creates by name and vests with authority all courts necessary to enforce obedience of all laws of the state. The offense here complained of is neither a felony nor a misdemeanor under the laws of the state, nor is it so denominated under the ordinance. It is not a violation of any state law. The action is one to recover a penalty for the violation of a municipal ordinance relative to the maintenance of a nuisance. From all this it seems manifest that the constitutional requirement, 'all prosecutions shall be conducted in the name and by the authority of the state of Montana,' contemplates such criminal actions as shall be instituted and prosecuted before the tribunals provided for in that article of the Constitution for violations of the statutes of the state." The case at bar is different from the *Kent* case, in that vagrancy is a misdemeanor under the Code and also an offense under the ordinance. However, an act may be made a penal offense under the statutes of a state, and further penalties may be imposed for its commission or omission by municipal ordinance. *McQuillan, Municipal Ordinances*, § 500. Where the power to enact and enforce the ordinance is vested in the municipality, as is the case with the ordinance we have considered, we think the great weight of authority is to the effect that the power may be exercised, and we adopt that rule.

We hold, therefore, that the city of Butte had express authority from the state to define vagrancy by ordinance and to punish the same, that the police court of said city has exclusive jurisdiction of all proceedings for the violation of such ordinance, and that prosecutions thereunder must be conducted in the name of the city. The police court also has concurrent jurisdiction with the justices' courts to punish vagrancy as a crime against the state, and such prosecutions must be instituted and conducted in the name of the state of Montana.

The order of the district court of Silver Bow county, discharging Rabinowitz from custody, is annulled and set aside. Let the judgment of the police court be enforced.

BRANTLY, C. J., and HOLLOWAY, J., concur.

STATE ex rel. BUTTE LAND & INVESTMENT CO. v. DISTRICT COURT OF SECOND JUDICIAL DISTRICT OF SILVER BOW COUNTY et al.

(Supreme Court of Montana. May 18, 1908.)

PROHIBITION—REFERENCE.

A writ of supervisory control will not be granted where the district court, in an action in which plaintiff claims commissions and that a long account is involved, has ordered a reference at request of plaintiff, and has refused to vacate its order therefor, and defendant, in obedience to the subpoena of the referee, but under protest, has produced its books, and plaintiff is pro-

ceeding to examine them, it appearing that some sort of accounts exist on the books with reference to plaintiff's transactions with defendant, and that plaintiff had previously examined them with the consent of defendant, it not appearing there can be any further damage to defendant, the books being pertinent and material, if plaintiff's interpretation of his contract is correct, and this though the court had not directly passed on the question of the existence of a contract making the taking of an account necessary; any remedy being by appeal, as would be the case had the court proceeded with the trial itself, and, in its discretion as to order of proof, allowed plaintiff to put in his whole case, defendant being first required to produce its books before trial of the question of contract.

Application by the state, on the relation of the Butte Land & Investment Company, for writ of supervisory control against the district court of the second judicial district in and for the county of Silver Bow, and the Honorable George M. Bourquin, a judge thereof, and C. N. Davidson, referee. Petition denied.

McBride & McBride, for relator. L. P. Forestell and I. A. Cohen, for respondents.

SMITH, J. This is an application for a writ of supervisory control. The court has heretofore issued an order directing the respondents to show cause why the prayer of the relator should not be granted.

It appears from the relator's petition that on the 27th day of September, 1907, one Paul Rossier filed in the district court of the Second judicial district his complaint against relator as defendant, wherein it was alleged, in substance, that Rossier had been employed by the defendant, under a contract, by the terms of which he was entitled to receive a fixed compensation per month, and, in addition thereto, certain commissions on sales and loans made by the defendant company; that the company was indebted to him under said contract in the sum of several thousand dollars, the exact amount of which was unknown to him; that it was agreed that the company should keep a correct account of the transactions between the parties, which it did; that the plaintiff kept no account; that the plaintiff had demanded of the defendant an account of the transactions between them, which demand had been refused; that the commission accounts were contained in the books of the defendant, and were in the custody and under the control of the defendant, and that he had no access thereto and could not determine the amount to which he was entitled; that the determination of that account would involve the examination of a long and complicated account. He therefore prayed that an accounting be had to ascertain the amount due him under the terms of his contract, and that he have and recover of the defendant a judgment for the amount so found due. The defendant answered, denying generally all of the allegations of the complaint. On the 7th day of March, 1908, the district court of Silver Bow county, the Honorable

George M. Bourquin, J., presiding, made an order appointing C. N. Davidson, Esq., a referee to hear evidence and report to the court his findings of fact and conclusions of law. On April 23, 1908, the relator appeared specially before the referee, and filed certain objections to the appointment of that officer and to his jurisdiction in the premises, which objections were overruled by the referee. On the 30th day of April, 1908, the relator moved the district court for an order vacating the order of reference, urging as reasons therefor, among others, that it did not appear on the face of the records and files in the case that the trial of any issue of fact required the examination of a long account or any account on either side, and that the order was not justified under the pleadings in the case or any decision or finding made by the court in the case. In support of this latter motion, the relator filed the affidavit of S. V. Kemper, one of its officers, which affidavit contained, among other allegations, the following: "That during a portion of the years 1905 and 1906 the said Rossier was employed by the Butte Land & Investment Company and the terms of the contract under which he was acting were reduced to writing, and each month during the period of time when the said Rossier was employed by the said Butte Land & Investment Company he received a full and complete statement of his account with the company, and at all times had full and complete access to all the books of the company, and fully consented to, approved, and accepted all the monthly accounts submitted to him from time to time during the period of time covered by his term of employment; that at no time has the said Rossier been denied access to the books of the corporation, but he has at all times been given every statement requested, and has at all times been offered and tendered access to the books of the corporation, either by himself or by any expert chosen by himself, and at no time has any occasion arisen for any accounting or any dispute between the plaintiff and defendant, otherwise than upon the construction to be given to the said written contract." The plaintiff Rossier filed his affidavit, in which he sets forth that, upon a hearing before the referee, certain books of the defendant company were brought before the referee, but only a part of said books were brought, and that the books which were material upon the hearing of an accounting in the case were not brought and had not been furnished by the defendant; that, after the case was referred to Mr. Davidson, the matter was continued from time to time for hearing before said referee at the request and for the convenience of the defendant's attorneys, and the same was finally set for hearing on the 28th day of April, 1908; that the hearing was taken up before the referee on the 28th day of April, 1908, and was adjourned to the 29th, when

the taking of said account was resumed and the hearing adjourned to the 30th of April, 1908.

In the petition of the relator we find the following allegation: "That under protest, but in obedience to said subpoena issued by the referee, your petitioner has produced said books, papers, and memoranda, and plaintiff is proceeding to examine the same against the protest of your petitioner." The district court denied the motion to vacate the order of reference. It is contended in this court that the district court had no authority to order a reference in the case without first determining whether or not a contract existed between Rossler and the Butte Land & Investment Company, making the taking of an account necessary, as alleged in the complaint, and that the order made by the court was therefore an arbitrary exercise of power, and should be vacated. Section 1130 of the Code of Civil Procedure of 1895 provides: "A reference may be ordered upon the agreement of the parties, filed with the clerk or entered in the minutes: (1) To try any or all the issues in an action or proceeding, whether of fact or law, and to report a finding and judgment thereon. (2) To ascertain a fact necessary to enable the court to determine an action or proceeding." Section 1131, same Code, provides: "When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases: (1) When the trial of an issue of fact requires the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein. (2) When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect." The respondents have filed a motion to quash the order to show cause and to dismiss the petition. Upon the record as made by the relator we fail to see how any of its constitutional rights will be lost or jeopardized if this court refuses to set aside the order of reference. It appears that some sort of accounts exist on the books of the relator with reference to Rossier's transactions with the corporation, that Rossier has heretofore examined the same at the invitation of the officers of the corporation, and that some at least of the books and accounts have been produced and examined before the referee. What additional damage, then, may the relator suffer that can be prevented by this court? Another thing, the district court had authority, without reference, to proceed with the trial of the case upon the issues made by the pleadings. That court in its discretion might first have tried the question of the existence of and interpretation to be put upon the contract, or might have allowed the plaintiff to put in his entire case, first requiring the defendant to pro-

duce its books and accounts. These matters all relate to the order of proof. Suppose the district court erred in its interpretation of the contract and the defendant had been compelled to produce its books after such error. These are all matters that may occur in any case and must be corrected, if at all, on appeal. No claim is made that the respondent is required to produce books or accounts not pertinent and material to the inquiry, if plaintiff's interpretation of the contract is correct. We do not feel that this is a case where the supervisory jurisdiction of this court should be exercised.

The motion to quash the order to show cause is granted; and the relator's petition is dismissed.

Dismissed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

STATE ex rel. ROBINSON v. CLEMENTS,
Judge.

(Supreme Court of Montana. May 18, 1908.)

1. EXECUTION—STAY—TERMS—DISCRETION OF COURT—STATUTORY PROVISIONS.

Under Code Civ. Proc. 1895, § 1175, providing that, when notice of intention to move for new trial is given, the judge may, on terms, stay proceedings until the motion is disposed of, a stay can only be granted on an application supported by facts sufficient to move judicial discretion, and it was error to grant a stay where no facts were shown by a defendant against whom a money judgment was recovered, as to whether it was or ever had been the owner of any unincumbered real estate or other property whatsoever, and the fact that it had been the practice in that jurisdiction for many years to grant a stay of execution on ex parte application of the moving party pending motion for new trial without requiring security was immaterial.

2. EVIDENCE—JUDICIAL NOTICE.

A court cannot take judicial notice of the solvency of a litigant or the condition of his property; and hence it was error to grant, without requiring security, a stay of execution pending a motion for a new trial, on the ground that the court would take judicial notice that defendant, against whom a money judgment was recovered, was a corporation possessed of a large amount of property.

Hearing on amended petition. Peremptory writ directing defendant to vacate and set aside the order granting the stay ordered issued.

For former opinion, see 94 Pac. 837.

BRANTLY, C. J. Availing himself of the suggestion made in the opinion of this court in the disposition of the original application in this cause (37 Mont. —, 94 Pac. 837), and the permission therein granted, the relator on April 11th filed an amended petition, in which, in addition to the facts alleged in the original petition, appears the following statement: "And that prior to the time said order last mentioned was made no fact or facts whatsoever were shown or brought to the knowledge of, nor was any showing whatsoever made to, the said district court or the said judge

thereof, as to whether the said defendant in said action then was, or ever had been or is, the owner of any unincumbered real estate, or of any other unincumbered property whatsoever; nor was any statement or any showing whatsoever made to said judge, other than the mere verbal request of said defendant's counsel, for a stay of execution for a period of 45 days from the date of said application, in which to prepare, serve, and file a bill of exceptions on motion for new trial; and pursuant to said request, and with no statement or showing, other than said verbal request for said order staying execution, the said order staying execution was made as aforesaid." The defendant thereafter filed an answer, in which it is alleged, in substance, that it has been the practice in this jurisdiction for many years to grant stay of execution upon ex parte application of the moving party pending motion for new trial, without requiring security; that on February 21, 1908, when the application for a stay was made in the case of Robinson, by his Guardian, etc., v. Helena Light & Power Co., and counsel for relator protested that a bond or other security should be required, the defendant informed them that, if they had any reason for asking a bond, defendant would take it into consideration; that counsel refused to give any reason, insisting that the defendant should not grant a stay without imposing some kind of terms; and that, taking judicial notice of the fact that the Helena Power & Light Company is a large concern, possessed of a large amount of property and engaged in serving the public of the city of Helena, the defendant, exercising judicial discretion, granted the stay without security, leaving it to relator's counsel to apply for security at any time, and to show cause why it should be required. Upon this answer the question was submitted to this court whether a peremptory writ should issue.

Under the construction of section 1175 of the Code of Civil Procedure of 1895, declared on the former hearing to be the proper one, the defendant could not, under the circumstances, grant a stay, for he had nothing before him on the application addressed to his judicial discretion to justify taking away from the plaintiff the right to have execution under section 1210 of the Code of Civil Procedure of 1895. A course of practice founded upon a mistaken construction of a statute cannot have the force of law, no matter how long it has continued, unless there be a reasonable doubt as to the meaning of the particular provision upon which the practice is founded. Contemporaneous construction cannot abrogate a plain provision of law, or fritter away its obvious sense. *State ex rel. Haire v. Rice*, 33 Mont. 300, 83 Pac. 874. The duty did not rest upon the successful party to furnish the facts necessary to move the defendant's discretion. He was entitled to his execution, in the absence of a stay, and the stay could be granted only upon an appli-

cation, supported by facts sufficient to move judicial discretion. Again, a court or judge cannot take judicial notice of the solvency of a litigant or the condition of his or its property. This is not among the things which a court or judge must judicially know. Code Civ. Proc. 1895, § 3150. The fact that the Helena Light & Power Company is a great concern serving the public of the city of Helena puts it upon no other footing than that occupied by a natural person, and the ability of a private person to respond to an execution cannot be known to the court or judge except upon facts known from proceedings already had in the case, or ascertained by the hearing of evidence in the usual way.

It is ordered that a peremptory writ issue directing the defendant to vacate and set aside the order granting the stay.

HOLLOWAY and SMITH, JJ., concur.

PHILLIPS et al. v. HAMILTON.

(Supreme Court of Wyoming. May 25, 1908.)

1. MINES AND MINERALS—LEASES—CONSTRUCTION OF OIL LEASE—DUTY TO PROSECUTE WORK—REASONABLE DILIGENCE.

Plaintiff leased land to defendant for the purpose of boring for oil and gas; the lease being for 10 years and so long thereafter as the oil or gas was found in paying quantities, the lessor to receive a certain per cent. of any oil or gas found and so much per year for the gas from each well drilled, and the lessee to commence operations within one year therefrom. The lessee drilled the well on the land within a year thereafter to the depth of 460 feet, and, no gas being found in commercial quantities, the well was cased, and he moved the rigging to an adjoining tract, where some drilling was done, and, some four months after drilling the first well, the lessee returned with a portable rig and cleaned out the well and then removed the rig, and some seven months thereafter selected another site on plaintiff's land for drilling a well, and had begun to erect a derrick, when plaintiff for the first time objected to the lessee's performance under the lease and revoked the lease by written notice, on the ground that the lessee had failed to commence operations within a year as required by the lease, and at the trial contended that the lease required the lessee to commence operations within a year and continue without cessation until the land was fully developed, or the absence of oil was shown. *Held* that, while the lease contained an implied covenant that the lessee would prosecute the work of development with reasonable diligence, he was not obliged to continue it without intermission, and under the circumstances there was no lack of good faith or diligence by the lessee in developing the land.

2. CONTRACTS — CONSTRUCTION — DUTY OF COURT.

It is not the duty of the court to make contracts for parties, but to interpret the language they have used and construe the contract they have entered into according to established legal principles.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 723, 730.]

3. ABANDONMENT—WHAT CONSTITUTES.

"Abandonment" is the relinquishment or surrender of rights or property by one person to another, and includes both the intention to aban-

don and the external act by which the intention is carried out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abandonment, §§ 1-6.

For other definitions, see Words and Phrases, vol. 1, pp. 4, 13; vol. 8, p. 7559.]

4. MINES AND MINERALS—CONTRACTS—LEASES —OPERATION OF OIL LEASES — ABANDON- MENT.

In determining whether one has abandoned his property or rights, the intention is the paramount object of inquiry, as there can be no abandonment without an intention to do so, and where plaintiff leased certain land to defendant for the purpose of boring for oil and gas, operations to be commenced within a year, and operations were begun within that time and the well drilled, and some seven months after drilling the first well the lessee returned to erect another rig and drill another well when plaintiff revoked the lease, there was no intention by the lessee to abandon the lease.

Error to District Court, Converse County; Richard H. Scott, Judge.

Action by William F. Hamilton against J. Bevan Phillips, trustee, and another, to enjoin defendants from drilling an oil well on certain lands. Decree for plaintiff granting the injunction, and defendants bring error. Reversed and remanded for new trial.

W. R. Stoll, for plaintiffs in error. F. H. Harvey, for defendant in error.

BEARD, J. This action was commenced by the defendant in error, Hamilton, against the plaintiffs in error, in the district court of Converse county, to enjoin the plaintiffs in error from drilling for oil and gas upon certain described lands and to exclude plaintiffs in error therefrom. The case was tried to the court resulting in a general finding and judgment in favor of Hamilton, who was adjudged to be entitled to the exclusive possession of the premises, and enjoining the plaintiffs in error from further drilling for oil or gas on said lands, or from otherwise trespassing thereon. From that judgment plaintiffs in error bring the case here on error.

The material facts of the case are not in dispute, and are as follows: On August 4, 1902, Hamilton leased to J. Bevan Phillips, trustee, one of the plaintiffs in error, his heirs and assigns, the real estate in controversy, consisting of about 360 acres, for the "sole and only purpose of boring, mining, and excavating for petroleum or carbon oil and gas and piping oil and gas" on the premises. The consideration expressed in the lease is \$1 and the stipulations, rents, and covenants therein contained to be paid, kept, and performed by the lessee. The lease is for the term of 10 years and so long thereafter as oil or gas shall continue to be found thereon in paying quantities; the lessee to deliver to the lessor one-eighth of the oil, and to pay \$100 per year for the gas from each gas well drilled on the premises, the product from which is marketed and used off the premises, and said payments to be made on each well within one year after commencing to use the gas there-

from and yearly thereafter while gas from said well is so used. A failure of the lessee to make any one of said payments when due, or within six months thereafter, the lessor serving written notice by mail or otherwise on the lessee demanding said deferred payment may declare this lease null and void, as to the well or wells upon which pay has been neglected, and no longer binding on either party thereto; the lessor to have the right to use the premises for tillage or grazing purposes, except such parts as are necessary for such mining and piping purposes and right of way, the lessee to have the right to remove any machinery, buildings, or fixtures placed on the premises by him, and to sublet, and the lessee to commence mining operations within one year from the execution of the lease. About October 6, 1902, the lessee went upon the premises with a portable drilling rig and commenced drilling, and during that month drilled a well to the depth of about 406 feet, when some gas was found, but not in commercial quantity. The well was then cased, and the drilling rig removed to an adjoining property. A pipe was laid from the well to this adjoining property, and the gas was there used for drilling by the lessee for some time during the fall of 1902. In February or March, 1903, the lessee returned to the premises with a portable rig and cleaned out the well, replaced the casing, and then moved the rig off, leaving the casing in the well. About October 15, 1903, the lessee selected a site for another well, and hauled and placed on the land some timbers for a standard derrick. December 14, 1903, Hamilton mailed to Phillips the following notice (omitting date, address, and signature): "You are hereby notified that in view of the fact that you have failed to comply with the terms of the oil-land lease executed by me to you on the 4th day of August, 1902, in this, that one year has elapsed since the execution of said lease and you have not commenced mining operations on the land designated therein, I hereby rescind and cancel the same." On December 24, 1903, Phillips assigned the lease to his co-plaintiff in error, Douglas Oil Fields, a corporation, which at the time of the assignment had knowledge of the attempted cancellation of the lease by the notice of December 14th. On March 26, 1904, Douglas Oil Fields moved a drilling rig onto the premises, and commenced drilling the second well, and continued drilling until about April 28, 1904, when they had the well sunk to the depth of about 368 feet and had put in 360 feet of eight-inch casing, and were preparing to sink it deeper, when they were stopped from further work on the premises by the temporary injunction in this case, which was issued May 27, 1904. The leased lands are situated in an undeveloped field supposed to contain oil and gas; but it does not appear that there were any wells in the vicinity producing either in commercial or paying quantities, or that the leased lands were being drained of either by wells on ad-

jacent lands. It is admitted by the lessor in his testimony that the notice of December 14th was the only notice given to the lessee or his assigns that he claimed a forfeiture or cancellation of the lease, until about the time of the commencement of this action when he locked the gates on the premises and forbade the lessee from entering the premises or doing further work thereon.

The contentions of the lessor are that by the terms of the lease the lessee was under obligation to commence operations for oil and gas upon the premises within one year from the execution of the lease and to continue such operations diligently and in good faith until the oil or gas thereunder had been fully developed, or it had been effectually demonstrated that oil and gas was not to be found thereunder in commercial quantities, and that any cessation of such prospecting would work a forfeiture of the lease and authorize its cancellation. It is alleged that, after the lessee had bored one well on the land which did not produce oil or gas in commercial quantities, he abandoned operations on the land, and that thereafter, on December 14, 1903, the lessor notified the lessee that he elected to rescind and cancel the lease, and he claims that all rights of the lessee and his assigns under the lease have been forfeited. The lease contains no express covenant or stipulation for diligence in the matter of exploration, or any requirement as to the amount of work to be done or the number of wells to be drilled within any stated period of time or at all. But it is admitted in argument—and we think rightly so—that the lease does contain an implied covenant that the work of prospecting and development should continue, after the expiration of the year within which the lessee was to commence operation, with reasonable diligence. It is evident that the purpose of the lease was to explore the premises, and, if oil or gas was found therein in paying quantities, to produce and market the same for the mutual benefit of both parties. Such being the case, it was the duty of the lessee, under the implied covenant contained in the lease, to proceed with reasonable diligence to prospect and develop the premises, having due regard to his own interest and those of the lessor. It was likewise the duty of the lessor to allow a reasonable time to the lessee to do so before he could claim a forfeiture, or right to cancel the lease, if he had any such right under the terms of the contract. The contention of counsel for the lessor that any cessation of work or the temporary removal of the drilling machinery from the land would work a forfeiture of the lease cannot be sustained. The lease contains no such express provision, and the implied covenant requires reasonable diligence only. No doubt, the parties might have so stipulated in their contract; but they did not do so, and it is not the duty of the court to make contracts for the parties, but to interpret the

language they have used and to construe the contract they have entered into according to established legal principles. We think the proper construction of the contract under consideration is that, by the express terms of the contract, the lessee was required to commence operations on the land within one year from the execution of the lease, and, by the implied covenant, to continue such operations with reasonable diligence thereafter.

Counsel for the lessor seems to confuse the rights of a lessor to a cancellation of a lease because it has been forfeited by the lessee by a breach of some covenant which the lessee is bound to perform, with the rights of a lessor upon abandonment by the lessee, and it is urged that, after boring the first well, the lessee abandoned the premises, and thereupon the lease was terminated. "Abandonment is the relinquishment or surrender of rights or property by one person to another. It includes both the intention to abandon and the external act by which the intention is carried into effect." 1 Enc. Law, 1. "In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry, for there can be no abandonment without the intention to abandon." 1 Cyc. 5. In the present case, the claim that the lease was forfeited by abandonment is wholly without support in the evidence, as it clearly appears that there was no such intention on the part of the lessee or his assigns, but, on the contrary, that such was not the intention, and they did in fact return and were at work on the land when this suit was commenced. A lessee may, however, forfeit his rights under a lease by a breach of some covenant which he is required to keep or perform, which breach may occur either intentionally or unintentionally on his part, or through his neglect or inability to keep or perform the same. The breach of the contract which it is here claimed worked a forfeiture of the lease and entitled the lessor to its cancellation is the alleged failure of the lessee to keep and perform the implied covenant to diligently continue the work of exploration for oil and gas. It is at least doubtful if a breach of such an implied covenant would warrant the court in decreeing a forfeiture when the lease does not expressly so provide, and when it does provide that the lease may be forfeited in whole or in part for another cause therein specifically stated. Law Relating to Oil and Gas, by Thornton, §§ 153, 157, and cases cited in notes. However, we deem it unnecessary to decide that question, as we are satisfied that the evidence in this case is insufficient to sustain the claim that there was such a failure to diligently continue the work of prospecting and development as would warrant a cancellation of the lease for that reason. In the case of Brewster v. Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213, in considering what constitutes reason-

able diligence in such cases, Judge Van Devanter said: "The large expense incident to the work of exploration and development, and the fact that the lessee must bear the loss if the operations are not successful, requires that he proceed with due regard to his own interests as well as those of the lessor. * * * Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, such as the quantity of oil and gas capable of being produced from the premises, as indicated by prior exploration and development, the local market or demand therefor or the means of transporting them to market, the extent and results of the operations, if any, on adjacent lands, the character of the natural reservoir—whether such as to permit the drainage of a large area by each well—and the usages of the business. Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required."

In the case before us, the work that was being done, not only on the leased land, but in the vicinity, was in the nature of prospecting. The lessee commenced operations within the time required by the lease, and he and his assigns, within less than one year from the time they were required to commence work, had drilled two wells to considerable depth, and at the time suit was commenced were at work and had made preparations to sink the second well to a much greater depth, and, as shown by the evidence, had expended within that time for machinery and materials and for labor upon the premises over \$5,000. It also appears from the testimony of the lessor that, except the notice of December 14th he made no complaint or objection to the work that was being done, nor did he have any conversation with them on the subject. We think that, under a proper construction of the contract, the evidence in this case is insufficient to show a lack of good faith on the part of the lessee or his assigns, or a failure to exercise reasonable diligence in the work of prospecting and drilling for oil and gas on the leased premises, and that the district court erred in awarding the exclusive possession of the premises to the defendant in error and in enjoining the plaintiffs in error from further operations under the lease.

For the reasons above stated the judgment of the district court is reversed, and the cause remanded to the district court for a new trial or such further proceedings as are deemed proper not inconsistent with this opinion.

Reversed.

POTTER, C. J., and CARPENTER, District Judge, concur. Hon. CHARLES E. CARPENTER, Judge of the Second Judicial District, sat in the place of SCOTT, J., who, as district judge, had presided at the trial below.

95 P.—54

DOUGLAS OIL FIELDS v. HAMILTON.

(Supreme Court of Wyoming. May 25, 1908.)

Error to District Court, Converse County; Richard H. Scott, Judge.

Bill by the Douglas Oil Fields, a corporation, against William F. Hamilton, to restrain defendant from interfering with complainant in drilling for oil on land leased from defendant. The trial court dissolved a temporary injunction and entered a decree canceling the lease, and complainant brings error. Reversed and remanded for new trial.

W. R. Stoll, for plaintiff in error. F. H. Harvey, for defendant in error.

PER CURIAM. This case and case No. 537 (Douglas Oil Fields and J. Bevan Phillips, Trustee, v. William F. Hamilton, 95 Pac. 846) involve the same questions and were tried together upon the same evidence. It is the converse of case No. 537, being an application by plaintiff in error for an injunction to restrain the defendant in error from interfering with plaintiff in error in drilling for oil and gas on the leased premises. The district court found generally for the defendant, dissolved the temporary injunction which had been issued in the case, and entered a decree canceling the lease. From that judgment plaintiff brings error.

It is conceded by counsel that the decision in one of the cases necessarily disposes of the other. The judgment of the district court in case No. 537 having been this day reversed, it follows that the judgment in this case must also be reversed. For the reasons stated in the opinion in case No. 537, the judgment of the district court is reversed, and the cause remanded for a new trial, or for such other proceedings as may be deemed proper.

Reversed.

WHITING et al. v. STRAUP et al.

(Supreme Court of Wyoming. May 25, 1908.)

1. MINES AND MINERALS—LOCATION OF CLAIM—OIL AND GAS CLAIM—DISCOVERY—NECESSITY—TIME OF DISCOVERY.

A discovery of minerals within the limits of the claim is essential to a valid location of a mining claim on the public domain, whether it be a lode or placer claim, but such discovery need not, in the absence of intervening rights, precede the other acts of location; and if made prior to any intervening rights, though subsequent to marking out the boundaries and recording the claim, the location, if otherwise good, will be validated from the date of discovery.

2. SAME—EXTENT OF PLACER CLAIM.

A placer claim is limited to 20 acres for each individual locator, and the aggregate that may be located as one claim by an association of persons is limited to 160 acres, but when more than 20 acres is located as one claim, one discovery is sufficient for the entire claim, and, if location, the legal right of possession follows.

3. SAME — LOCATION AND DISCOVERY BY AGENT.

One need not locate a mining claim in person, but a location may be made by an agent, even without the knowledge of the principal, if there is a local rule authorizing it, or a subsequent ratification, and where one had entered on land and performed the acts necessary for a valid location of a placer oil claim, except making a discovery of minerals, but before any discovery thereon sold a part of it to plaintiffs, and abandoned the other part, and thereafter entered defendants' employment for the purpose of locating placer oil mining claims, and entered on the same land as agent for defendants, and completed a valid location for defendants thereon by making a discovery, such discovery inured to defendants' benefit; and the fact that defendants' agent making the location had previously made a location on it for himself, except discovery, and had conveyed what interest he had in the claim to plaintiffs before entering defendants' employment, did not affect their right to the benefit of his discovery and location.

4. SAME—TRANSFER OF CLAIMS—ESTOPPEL.

Even if the person making the discovery for defendants was estopped, by reason of his conveyance, in denying the validity of his former location, his employment by defendants to make the discovery and location on the same claim did not bring them into privity with him, so as to estop them by his conveyance, there being no evidence of fraud by defendants; nor does the fact that such person was a stockholder in the company to which the claim was conveyed estop the company from claiming the benefit of his discovery.

5. SAME—REQUISITES OF LOCATION — POSSESSION—NATURE.

Though a valid location is necessary to vest the right of possession in a claimant to land under the mining laws, possession without location is good as against a mere intruder; but generally mere naked possession will not avail against a valid location peaceably made, and such possession confers no right, as against a bona fide prospector who enters peaceably on the land, to acquire title thereto as a mining claim, and one who seeks, in good faith, to make the location, is entitled to exclusive possession of the land for a reasonable time to complete his location, or for the time allowed by mining customs or by statute, but such possession must be actual, and followed by diligent exploration of the claim, with the intention of making a location.

6. SAME.

Where, after acquiring claim to mining land by conveyance, the only actual work done by plaintiffs was the digging of a hole to show their claim of possession, and for the purpose of erecting a drilling machine, but not as a mining exploration, and they did not take the drilling machine on the premises for more than a year after digging the hole, but had guarded the claim to see that no one entered thereon for purposes of location, and in the meantime defendants entered upon the land, and made a valid discovery and location, plaintiffs were not in such actual possession of the land as to entitle them to the claim as against defendants.

Error to District Court, Converse County; Richard H. Scott, Judge.

Action by X. Whiting and another against Erastus Straup and others to enjoin defendants from trespassing or drilling an oil well on certain land. Judgment for defendants, dissolving a temporary injunction, and plaintiffs bring error. Affirmed.

See 90 Pac. 445.

W. R. Stoll, for plaintiffs in error. F. H. Harvey and Burke & Clark, for defendants in error.

POTTER, C. J. This action was commenced in the district court of Converse county October 24, 1903, by the plaintiffs in error, J. Bevan Phillips and X. Whiting against the defendants in error, Erastus Straup, Moses Bjur, and the La Prele Oil Company. The object of the suit is to enjoin the defendants from trespassing, and particularly from driving or sinking an oil or gas well upon a 40-acre tract of land in the county aforesaid, described as the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 3, in township 32 N., range 73 W. The contest is between rival claimants of the land, as oil and gas placer mining ground on the public domain, the legal title being the United States. The plaintiffs claim under an oil placer mining location, covering the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of said section, alleged to have been made June 14, 1890, by the defendant Erastus Straup and three associates, and the plaintiffs allege that, as a part of that claim, the tract in controversy had been transferred to them by mesne conveyances; that they had taken possession thereof, and were in possession, actively engaged in working and developing the same, at the time of the entrance thereon by the defendants and the trespasses complained of. On the ground that the mining location aforesaid was neither preceded nor followed by a discovery, by the locators thereof or their grantees, of oil, gas, or other mineral within the limits of the claim, its validity is denied by the defendants, and they rest their right to possession upon a discovery of gas upon the tract in controversy, and its location, as a part of an oil and gas placer mining location, in October, 1903, when, as they allege, the tract was vacant and unoccupied public land of the United States, the right to such possession being alleged to have vested in the La Prele Oil Company, one of the defendants, as the successor in interest of the persons for whom such discovery and location were made. Upon the trial the district court found generally for the defendants, and that the temporary restraining order against them, which had been granted at the commencement of the suit, should be dissolved, and a judgment was entered in favor of the defendants for costs, and ordering that the possession of the premises in controversy do vest in the defendants Moses Bjur and the La Prele Oil Company. The judgment is here complained of on error.

It is admitted in the pleadings that, previous to June 14, 1890, the land here involved was vacant and unoccupied public land of the United States; that on said date, in connection with the adjoining north 40 acres, under the description of the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of said section 3, it was staked and marked as an oil placer mining claim by Straup and his said associates; that the

proper notices were posted thereon, and a location certificate recorded; and that said claim was designated as "Gusher No. 2." It seems to be conceded, as it must be upon the evidence, that at the time of locating said claim there had been no discovery, within its limits, of oil, gas, or other mineral authorizing the location of a placer mining claim, and, further, that no such discovery had occurred up to the time that the tract in controversy was conveyed to the plaintiffs, nor thereafter, until some time in the fall of 1903, when gas was discovered upon the north 40 of the claim (the part not transferred to plaintiffs) by Straup, while engaged in drilling a well thereon for and under the direction of the defendant Bijur. On November 18, 1899, the locators of the Gusher No. 2 claim conveyed the premises covered thereby, viz., the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of said section 3, together with other premises, by quitclaim deed, to Erastus Straup & Co., describing the premises conveyed by legal subdivisions, and referring to the same as "oil placer mining ground as located, surveyed, recorded and held by said parties of the first part." By a similar conveyance, Erastus Straup & Co., on September 24, 1901, conveyed the premises so located, together with other lands therein described, to Erastus Straup, reciting that the lands described were covered by oil placer mining claims. On August 16, 1902, Erastus Straup conveyed, by quitclaim deed, to J. Bevan Phillips, one of the plaintiffs, the tract here in controversy, designating it, in addition to its usual description, as "oil placer mining ground located, surveyed, recorded and held by said party of the first part." On August 18, 1902, by a like conveyance and description, said Phillips conveyed an undivided one-half interest in and to the premises in controversy to X. Whiting, his coplaintiff. It will be observed that the premises thus conveyed to the plaintiffs is the south 40 of the 80 acres embraced in the oil placer claim aforesaid. On December 28, 1899, an affidavit of Erastus Straup and another was filed and recorded in the office of the county clerk of Converse county, to the effect that the necessary annual assessment work for the year 1899 had been performed upon various tracts of land, consisting of 8,430 acres, more or less, therein referred to generally, as oil placer mining claims, and described by legal subdivisions, in which was included the land in controversy. In describing the lands they were not separated into distinct claims, nor was any claim designated by name. A similar affidavit of said Straup was filed for the years 1900, 1901, and 1902, each one describing several hundred acres, including the land in controversy. In January, 1903, the La Prele Oil Company was incorporated under the laws of this state, with the defendant Moses Bijur as one of the incorporators, and Straup was named in the certificate as one of the seven trustees for the first year, and it appears that he became a stockholder of

the company. Under the date of May 5, 1903, a written contract was entered into between the defendants Straup and Bijur, whereby the former, in consideration of \$100 per month, to be paid him as salary and expenses, agreed to look after, direct, manage, and attend any work, labor or interest the said Bijur might require of him, and to devote his best energy and ability in safeguarding and advancing the interest of said Bijur, and to devote all his time during such employment for said Bijur's benefit. The latter is a merchant, residing in New York City, and Straup is an oil and gas driller, and, at the time of trial, had been engaged in that occupation between seven and eight years, in Converse county. They appear to have contemplated by their contract the performance of services by Straup in Converse county in prospecting and developing oil and gas lands or claims in the interest of and as directed by Bijur. It is admitted that Bijur was the agent of eight other persons named in the answers, for whom he acted in directing the work to be done by Straup under said contract of employment.

It appears that some time in July, 1903, under Bijur's instructions, Straup went upon the N. E. $\frac{1}{4}$ of section 3 aforesaid, the same being the north half of the land previously marked, designated, and recorded as "Gusher No. 2," and drilled a well of considerable depth thereon, resulting in striking a good flow of gas, the well being located near the southeast corner of said tract. Thereafter, also at Bijur's direction, on or about October 13, 1903, he moved the drilling machinery upon the premises here in controversy, and proceeded to drill an oil or gas well thereon, at a point about 150 feet south from the well above mentioned, and thereby, October 22, 1903, discovered gas at a depth of about 480 feet. It is admitted in the pleadings that in drilling this last-mentioned well, and thereby striking gas, Straup acted for and represented Bijur and the eight persons whose names are set out in the answer, whom Bijur represented as agent. For and on behalf of the eight persons aforesaid, and in their names, a placer mining claim was located by Straup, acting by the direction of Bijur and as his employé, embracing, as a part of the claim so located, the land here in controversy, and it is admitted that the La Prele Oil Company is the successor in interest of said parties, though it is denied that it or they thereby acquired any interest in the land as against the plaintiffs. The fact that Straup's discovery of gas on the land in 1903 was made by him while employed by and representing Bijur, and through the latter those he represented, was alleged in the answers filed in the case, and admitted by the replies, but that admission does not stand alone. A leading contention of the plaintiffs was and is that, as they held a conveyance by Straup describing the premises as oil placer mining ground, located, held, and recorded by him, he and the defendants are

estopped from questioning the validity of his original location, or the right of plaintiffs to the possession of the land conveyed. The petition alleged, in substance, in that connection that in January, 1903, the said Straup induced the defendant Bijur to become associated with him, for the purpose of jumping the said claim, and thereby deprive the plaintiffs of the same, and to better carry out that purpose, they, with others, organized the defendant corporation, the La Prele Oil Company; and, further, that Straup, acting for himself and as the agent of the other defendants, with a large force of employés, during the temporary absence of plaintiffs and their employés from the claim, surreptitiously, secretly, and fraudulently carried upon the same a portable drilling rig, and commenced to drill an oil and gas well thereon, for the purpose of driving the same to gas or oil, which he did continue to do, and of depriving the plaintiffs of all use of their said land. The allegation that Straup acted for himself, as well as agent, is probably eliminated, as the effect of the admission in the reply that he acted for and represented the other parties named in the answer; but the averment remains for whatever it may be worth that his act was surreptitious, secret, and fraudulent.

The petition alleged that, through said Straup, the original locators of the claim located in 1899, claimed by the plaintiffs as the source of their title, and their respective grantees, were in continuous and exclusive possession of the claim, while they held the same, respectively, and that the plaintiffs went into possession of the tract in controversy upon receiving the conveyance thereof, and that, from and after August 18, 1902, they immediately proceeded to work upon the claim for the purpose of developing the oil and gas which was underneath its surface; that their possession was open, exclusive, and notorious; and that the land was not vacant and unappropriated when the defendants entered upon the same in October, 1903. The defendants by their separate answers denied the allegations as to the possession of the plaintiffs and their grantors. The plaintiffs base their right to recover, and their contention that the findings and judgment are erroneous, upon three principal propositions: First. That the claim located in 1899, though previously lacking a discovery, was validated, in that respect, by the discovery upon the north 40-acre tract embraced in the claim, through the well drilled thereon by or under the supervision of Straup, as aforesaid, which discovery it is claimed inured equally to the benefit of the south 40-acre tract that had been conveyed to plaintiffs, so as to perfect the title of the latter thereto. Second. That the plaintiffs were in actual possession of the 40-acre tract in controversy, working and exploring the same for oil and gas, and it was therefore not open to exploration or location as a placer mining claim, by others intruding upon their possession without their consent. Third. That

Straup and the other defendants, including those for whom it is admitted he acted in making the discovery and location under which the defendants claim, were and are estopped, by his deed to the plaintiff Phillips, from claiming the premises or any right therein as against the plaintiffs.

Before proceeding to a discussion of the questions involved in these propositions, it will be well to state the effect of the evidence touching the actual possession of the land in controversy. There is very little, if any, conflict in the evidence concerning that matter. Counsel for plaintiffs in error has stated in his brief the facts as to their possession as strongly as the evidence will justify, and we quote what is there said:

"The land herein involved is in immediate vicinity of and adjoining other lands owned by the company represented by the said Phillips and his two brothers. A county road runs a little northeast and southwest near the center of the 40 acres in question. At all times involved in this case work was being done on the claim in which the plaintiffs in error were interested in the vicinity of this particular tract of 40 acres, and Phillips and his two brothers, also officers of the company they represented, and the employés of the said company, were passing to and fro along this county road two and three times a week, and sometimes oftener, and from the time the deed was given to Phillips, the said three brothers, and their employés doing work in that vicinity, were constantly watching the land in question, looking over it, and going over it, not only along the county road, but over the land itself. In November, 1902, J. Bevan Phillips set a man, Morris, to work digging a hole south of the county road, and near the southeast corner of the subdivision in question, the hole being 10 feet deep and 6x4 feet in lateral dimensions. Plaintiffs in error, assuming that Straup's affidavit, made on December 30, 1902, showing that development had been done covering the land in question for the year ending December 31, 1902, did not consider that they were required to do any assessment work for the year 1902; but, for the purpose of showing their possession of the claim, and to prepare for the better setting of their drilling machine at a subsequent date, had this hole dug. The man digging the hole did not work at it continuously, but worked at it during parts of several days in the month of November, 1902, the value of his work being computed at about seven or eight dollars. There was no fence put around this 40-acre strip, nor were any buildings erected on the same by plaintiffs in error, nor was it the custom of prospectors in that field, or of defendants in error, or of plaintiffs in error, to fence each claim, or to fence at all the claims which were located; but on October 21, 1903, the land was surveyed at the request of plaintiff in error Whiting, and the boundary line

between the north 40 and the south 40 of Gusher No. 2 was distinctly pointed out by the surveyor, who had, about two weeks previous thereto, surveyed the same at the request of defendants in error Straup and Bijur, both of whom were present, and both of whom knew the said boundary line, though probably this survey was made as early as June 28, 1903. Nothing further was done by plaintiffs in error or on their behalf, except to watch the land to keep it free from entry by any prospectors, and especially by defendants in error; and their employes, who were working, under the supervision of Phillips and his two brothers, in the immediate vicinity, were instructed to keep a strict watch over the land in question. Other than doing these things and constantly watching the land themselves in going over it along the county road, nothing was done in the way of work by the plaintiffs in error until December 16, 1903, at which time plaintiffs in error moved a portable drilling rig upon the 40 in question, and commenced drilling a well at the hole. This well was dug down a distance of 185 feet, at an expenditure of \$400. At this distance the work was stopped on December 24th to enable the drill to be taken off, for the purpose of enabling assessment work to be done on adjoining claims for the year 1903. On January 5, 1903, the plaintiff in error Phillips left for Europe, making his brother Arthur his agent, in the meantime, to look after the claim in question, and under his supervision, in the absence of his brother, the work of watching the land to prevent its being occupied by what is known as 'claim jumpers' was carried on, and in September, 1903, a man by the name of Greenwood was employed to work upon and look after the Mitcham and Ravensbury claims located by the said Phillips and others, and adjoining the claim in question, as well as to look after the claim in question, during which time arrangements were being made to bring a portable machine upon the land, and to drill with the same at the hole in question, the said Phillips and his brothers not deeming that they had a right to use the machine, which belonged to the company they represented, and which was being used in drilling upon the company's lands, without permission of the company, which had to be obtained from London, and, as soon as this permission was obtained, the machine was brought upon the land at the time above stated. The particular reason why Greenwood was instructed to watch these claims was because notices of filing upon many claims in the immediate locality, including the claim in question, were being made by defendants in error, and Greenwood was instructed particularly to watch the lines of the Mitcham and Ravensbury claims and of the claim involved in this case."

The moving upon the premises of the drilling machine by the plaintiffs in error December 16, 1903, and the drilling therewith,

occurred after the drilling of the well on the premises for Bijur by Straup, and after the commencement of this action. There is no evidence that, prior to his conveyance to Phillips, Straup or either of his co-claimants of the claim located in 1899 as Gusher No. 2 had been in the actual possession or occupancy of the ground covered thereby. Though his assessment affidavit stated that work had been done on the land embraced in that claim, the locality and character of such work were not shown. In going upon the north 40 of the claim in 1903, and drilling the well thereon, as well as upon the south 40, Straup testified that he went thereon and did, or rather superintended, the work for Mr. Bijur and at his direction, and not for himself, and that is corroborated by the testimony of Bijur, and does not seem to be contradicted. According to their testimony such work was not done for the La Prele Oil Company, but the intention was at the time, so Bijur says, to organize a separate company, but subsequently the claim that was located was conveyed to the La Prele Company. Straup knew, when he was engaged in drilling the second well, that it was on the 40 conveyed by him to Phillips, and it may be that Bijur also knew that fact. Straup and Bijur both knew, however, that there had been no previous discovery on the Gusher claim, and that the plaintiffs were not actually occupying or working the ground. Aside from the fact of the knowledge of Straup, and possibly of Bijur, of the previous attempt to locate and appropriate the premises, and the fact that they entered thereon under the circumstances mentioned, from which their purpose might be inferred, there is no reasonable support in the evidence of the averments of the petition as to a collusive arrangement between them to deprive the plaintiffs of the land in controversy. We think the fact must be regarded as established upon the evidence that, in all that Straup did in connection with drilling the wells aforesaid, and locating the claim or claims based upon the discovery or discoveries thereby made, he acted as the employe and under the instruction of Bijur, and not for himself. Neither does the evidence sustain the averment that the entrance of the defendants upon the premises in controversy was secret or surreptitious, at least in the sense that it occurred in a manner calculated to mislead or take advantage of one actually occupying and exploring the same, or as distinguished from an act done openly and without concealment.

Lands containing petroleum or other mineral oils, or a deposit of natural gas, may be located as placer claims under the mining laws. Act Feb. 11, 1897, c. 216, 29 Stat. 526 (2 U. S. Comp. St. 1901, p. 1434); 27 Cyc. 558. It is well settled that, whether it be a lode or placer claim, a discovery of mineral within the limits of the claim is essential to a valid location of a mining claim

on the public domain. Though such a location must rest upon discovery, and will not be complete until the discovery is made, it is not required, in the absence of intervening rights, that discovery shall precede the other acts of location. If made prior to any intervening rights, though subsequent to marking the boundaries and recording the claim, the location, if otherwise good, will be validated at least from the date of discovery. 1 Snyder on Mines, § 354; 1 Lindley on Mines (2d Ed.) § 330; 27 Cyc. 556; Mining Co. v. Tunnel Co., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501. It is said in Snyder on Mines, at the section cited, that the location in such case will be good from the date of discovery, "and generally from the first act towards claim and appropriation—this by relation." In Nevada-Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673, Circuit Judge Ross said in the opinion: "To constitute a prior discovery, which will support a location on public ground as an oil placer claim under the mining laws, the locator must have actually discovered oil within the limits of his claim. Mere surface indications of the existence of oil therein, however strong, are not sufficient, nor is the existence of oil upon adjoining lands."

A placer claim is limited to 20 acres for each individual locator, and the aggregate that may be located as one claim by an association of persons is limited to 160 acres. When more than 20 acres is located as one claim, it is now settled that one discovery is sufficient for the entire claim. 27 Cyc. 559. Upon a valid location a legal right of possession follows. It is conceded that there was no discovery upon the Gusher claim, located in 1899, nor on the land covered thereby, until the discovery that was made upon the north 40-acre tract in September, 1903, by means of the well drilled thereon under the circumstances above stated. Waiving the question whether that discovery might have been held to validate the Gusher claim, not only as to the 40 upon which it was made, but also as to the 40 that had been conveyed to Phillips, if Straup had made it in his own interest for the benefit of such claim, which question we expressly refrain from deciding, the facts are that in entering upon the land at the time stated in 1903, in drilling the well and making the discovery, Straup acted, not for himself, but as the employé and agent of Bijur and the other parties whom the latter represented.

Now, it is not required that a party shall act in person in locating a mining claim, but he may act by an agent; and a location may even be made by an agent without the knowledge of the principal, if there is a local rule authorizing it, or otherwise there may be antecedent authority or subsequent ratification. 1 Lindley on Mines, § 331. And it is said that when a location is made by one in the name of others, the persons in whose names it is made become vested with the

legal title to the claim. *Id.* Not only was Straup acting for and in the interest of Bijur, but it appears that at or about the time of the discovery Bijur was present, and personally directed his acts. We cannot conceive that under the circumstances Straup could have appropriated to his own benefit the work performed by him at the expense and under the direction of his employer, so as to validate his own previous location, which without a discovery was not valid. The plaintiffs are not in any better situation. The discovery on the north 40 was made by strangers to the claim that had been located in 1899, and in the interest of another claim antagonistic thereto. We are aware of no reason why it was not competent for Straup to abandon that part of his previous location not conveyed to Phillips, or to consent to others entering upon and exploring the same in their own interest. The fact that Straup did the work or superintended it for the other parties did not constitute him the discoverer in any other capacity than that in which he was employed and acted. His work, and his possession in the meantime, amounted in legal effect to the work and possession of those whom he represented. It is clear, therefore, that the discovery upon the north 40 cannot be regarded as having validated the previous location under which the plaintiffs claimed. That being true, the plaintiffs were not holding the premises in controversy under a valid location, and if they had any right to the land, it was because they were in such actual possession thereof as to prevent others from making a valid location thereon, or because the defendants were estopped from challenging the validity of the previous location as against them.

Taking up first the question of estoppel, if it be conceded that Straup would be estopped, by reason of his conveyance, from denying the validity of the former location, that would not estop the other defendants. The possession was not awarded to him, nor was he found by the trial court to be entitled to possession. It was found, and so adjudged, that the right to possession had vested in the other defendants, who had filed a separate answer. In Straup's separate answer he practically disclaimed any interest, and alleged that his acts were performed as the paid employé of Bijur, and that the La Prele Oil Company was entitled to possession as the successor in interest of the locators. The company and Bijur were not claiming under Straup, nor under the location of 1899, nor any previous location made or held by Straup in his own interest. They were not in privity with him as to such previous location. If they knew anything about it, they knew that there had not been a discovery to support that location, and that the land was therefore vacant and unappropriated, except so far as it might be in the actual possession of some one. The employ-

ment of Straup to do the work of exploration, discovery, and location for another claim did not bring Bijur and those whom he represented into privity with him, so as to render them bound or estopped by his former acts or conveyance. We find no evidence of fraud in the conduct of the defendants. We think it cannot be held that because Straup had once assumed to make a location of the land without having made a discovery such as would justify or validate it, and to have conveyed the premises or a part thereof as a placer claim, he could not in good faith be engaged by others as an agent or employé to enter for them into peaceable possession of the premises so conveyed, and at their expense, in their names and behalf, explore the same for mineral and make a valid location thereon as against those claiming under his conveyance. The doctrine of estoppel does not go that far. Neither does the fact that Straup was a stockholder of the La Prele Oil Company, to whom the claim located in 1903, covering the premises in controversy, had been conveyed by the locators, estop that company from claiming the premises or questioning the right of the plaintiffs thereto. The company did not acquire any right or privilege from Straup, nor was he one of the locators of the claim conveyed to it; and there is nothing in the evidence upon which it could be held that the company had entered into a conclusive or fraudulent agreement with Straup for the purpose of assisting him to regain the property conveyed to Phillips through a new location, and thereby avoid the effect of his conveyance. Straup acquired no new interest, but by his acts as agent for others lost whatever interest in the Gusher claim he had previously retained.

This brings us to a consideration of the question whether the predecessors in interest of the defendant company were prevented, by the facts as to the possession of the plaintiffs, from peaceably entering upon the premises in controversy through their representatives Bijur and Straup, or otherwise, and exploring the same for the purpose of making a location under the mining laws. Although a valid location is necessary to vest the legal right of possession in a claimant to land under the mining laws, yet possession without location is good as against a mere intruder. As a general rule, the mere naked possession will not avail against a valid location peaceably made; and hence it confers no right against a bona fide prospector, who enters upon the land peaceably for the purpose of acquiring title thereto as a mining claim. It is well settled, also, that the right to make a location cannot be based upon a trespass. 27 Cyc. 560, and cases cited. But, owing to the necessity of a discovery upon which to base the location of a mining claim, and the policy of the law to avoid breaches of the peace through conflicts between rival prospectors, the rule has been enunciated and

may be regarded as well settled that where one seeks in good faith to make a location, he is entitled to exclusive possession of the land sought to be located for a reasonable time to complete his location, or for such time as may be allowed by the customs or rules of miners, or the statutes of the state or territory. 27 Cyc. 559; 1 Snyder on Mines, §§ 233-235; 1 Lindley on Mines (2d Ed.) § 219. To be available for the purpose aforesaid, however, the possession, where that is alone relied on, must be actual, and connected with active, diligent work of exploration, with the bona fide intention, if mineral is found, to make a location. 1 Snyder on Mines, § 236; Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; New England & Coalinga Oil Co. v. Congdon (Cal.) 92 Pac. 180; 1 Lindley on Mines (2d Ed.) §§ 216-219. In Miller v. Chrisman, supra, after stating that a discovery might follow the other acts of location, and thus make the location good as against all the world, saving those whose bona fide rights have intervened, the court said: "One who thus in good faith makes his location, remains in possession, and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession." And in New Eng. & Coalinga Oil Co. v. Congdon, supra, it was said: "But, where the alleged locator has not made a discovery, and has not retained possession for the purpose of prosecuting work looking to a discovery, his mere posting of notice and marking the boundaries upon the ground will not serve to exclude others, who may peaceably enter upon the land which he is not actually working or occupying."

Tested by the above rules, it is clear that at the time the predecessors in interest of the defendant company, through their agents Bijur and Straup, entered upon the land, erected the drilling machinery thereon, and thereby made the discovery of gas, the plaintiffs were not maintaining, and for some time at least had not maintained, such a possession as, unaided by a valid location, would exclude other bona fide locators or prospectors. They were neither in the actual possession nor occupancy of the land, nor engaged in prospecting or exploring the same for mineral. Although they acquired whatever rights they had, under the conveyances aforesaid, in August, 1902, the only actual work done by them upon the premises was the digging the hole above mentioned in November of that year, which confessedly was not expected to uncover a deposit of oil or other mineral, but was intended chiefly, as it seems, to show their claim of possession, and also to serve as preliminary to the erection of a drilling machine. But, whatever the reason for the delay, more than a year elapsed after digging the hole before they took a machine upon the premises and commenced the actual

work of exploration, and, in the meantime, the parties under whom the defendants claim had peaceably gone upon the land, and made their discovery and location; and when they went upon the land, it is conceded, and indeed alleged by the plaintiffs, that the latter and their employes were absent therefrom.

Neither the fact that, in going to and fro between other lands or places, the plaintiffs frequently crossed the land by traveling along the county road thereon, nor that they watched the land to see that it was not interfered with by others, is entitled to much consideration as showing actual possession of an incomplete mining claim. As said in *Mining Co. v. Tunnel Co.*, 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501, the principal thought of the chapter of the federal statutes concerning the location of mining claims is the exploration and appropriation of mineral. Merely watching a tract of land or an intended claim for a considerable time as in this case to see that it is not intruded upon by others, without the performance of any work calculated to assist in its exploration or development, will not conduce, materially, to either the discovery or appropriation of mineral. In the case of *New Eng. & Coalinga Oil Co. v. Congdon*, supra, it appeared that a watchman had been employed by a party to watch the land in controversy, as well as others, which is the situation here, and it was held insufficient to show actual possession, and the trial court was held to have been justified in concluding that there had not been actual possession, but merely a pretense of occupation, without any intention of actually proceeding to development for mineral oils.

For the reasons above stated we are of the opinion that the plaintiffs failed to show a right to the premises as against the defendant the La Prele Oil Company, or a right to an injunction as prayed for, and that the district court properly found against them. The fact that Bijur, as well as the La Prele Oil Company, was adjudged to be entitled to possession is not material so far as the plaintiffs are concerned, and it does not appear that Bijur claims adversely to or independently of the company. The judgment will be affirmed.

Affirmed.

BEARD, J., and CARPENTER, District Judge, concur. Hon. CHARLES E. CARPENTER, Judge of the Second Judicial District, sat in the place of SCOTT, J., who, as district judge, had presided at the trial below.

PHILLIPS et al. v. BRILL et al.

(Supreme Court of Wyoming. May 25, 1908.)

1. MINES AND MINERALS—PUBLIC MINERAL LANDS—ACTIONS TO ESTABLISH RIGHTS.

In an adverse suit to determine the ownership of an oil placer mining claim, the parties

stand upon their own rights, and must recover on the strength of their own claims; and if neither party establishes a right to possession, a judgment to that effect must be made.

2. SAME—LOCATION AND ACQUISITION—PLACER CLAIMS—DISCOVERY.

An oil placer mining claim will not be invalidated by the fact that the discovery shaft or well bisects the boundary line of a claim and is partly on the claim and partly on another.

3. SAME—LOCATION OF DISCOVERY.

In an action to establish an oil placer mining claim, the fact that one-half of the diameter of the well is on the claim was a sufficient showing of discovery within the claim; and it may not be inferred that the well deviated away from the claim in its descent, in the absence of evidence to the contrary.

4. SAME—POSSESSION—RIGHT TO POSSESSION.

Where defendants entered upon vacant and unappropriated land, and performed all acts necessary for the location of an oil placer mining claim, except discovery, by staking the land, putting up notice, and recording the claim, they had a right to take actual possession, and continue therein for a reasonable time, while exploring the land for the purpose of discovery; and the acts of location would indicate, not only the extent of the surface intended to be appropriated, but the extent of such possession, and the locators would be protected against the forcible, fraudulent, or surreptitious intrusion of others; and a delay in taking possession would not affect the rights of the locators, if at the commencement of their possession the rights of others had not intervened.

5. SAME—LOCATION—SUFFICIENCY—LOCATION BY TRESPASS.

It is a general rule that a mining location, to be valid, must be good when made, and that a right cannot be initiated by a trespass.

6. SAME—PRIOR LOCATION.

Where defendants entered upon unappropriated land, and performed all the acts necessary for the location of an oil placer mining claim, except discovery, by staking the land, putting up notice, and recording the claim, while they were in actual possession, plaintiffs could not claim the land so held by defendants, and it was immaterial that the discovery under which defendants claimed was on the boundary line of their claim, and they had also claimed title to another claim on the strength of the same well, since the only question was whether defendants' location and possession was prior to that of plaintiffs.

Error to District Court, Converse County; Richard H. Scott, Judge.

Action by Phillip M. Brill and others against Lawrence C. Phillips and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded for new trial.

See 90 Pac. 443.

W. R. Stoll, for plaintiffs in error. F. H. Harvey and Burke & Clark, for defendants in error.

POTTER, C. J. This is an adverse mining suit, involving the right of possession to lots 5 and 6, in section 2, otherwise described as the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section, in township 32 N., range 73 W., situated in Converse county, this state. The defendants in error, having filed in the United States land office an adverse claim against the application of the plaintiffs in error for a patent to the premises in controversy as an oil placer mining claim, brought this suit in support of

such adverse to recover possession of the premises, damages for the alleged wrongful detention of the same, and expenses incurred in supporting the adverse claim. The district court found that the defendants in error, plaintiffs below, were entitled to possession, and entered judgment awarding the same to them. The case comes here on error.

It is assigned as error that the findings, decision, and judgment are not sustained by sufficient evidence, and are contrary to law, and on that ground that the court erred in overruling the motion of the defendants for a new trial. To avoid confusion the parties will be referred to hereafter by their title, respectively, in the district court, the defendants in error as plaintiffs, and the plaintiffs in error as defendants. The plaintiffs, eight in number, claim the premises under a location on October 29, 1903, embracing the same as a part of an oil and gas placer mining claim, designated as the "La Prele No. 2." The defendants, four in number, claim under a location of the premises on February 10, 1903, as an oil placer mining claim named the "Ravensbury." The plaintiffs allege in their petition, in addition to the other facts usually alleged in an action of this kind, that on or about November 1, 1903, the defendants wrongfully entered upon the premises here in controversy, and have ever since wrongfully withheld possession of the same from the plaintiffs.

It appears that there are recognized indications of oil throughout the particular section of country where this land is situated, and that, previous to February 10, 1903, some of the defendants, for themselves, or a company in which they were interested, had discovered gas in wells drilled by them upon other lands in the neighborhood, one of such wells being about half a mile, and another about three-quarters of a mile from the land in contest. On the date last mentioned the Ravensbury claim was staked by the defendants, and a discovery and location notice posted thereon, and within the proper time a certificate of location was recorded, but without previously making an actual discovery of either oil or gas within the limits of the claim. They continued to keep the land more or less under their observation to see that it was free from intruders, and in June arranged for an employé to perform some work upon it, in connection with an adjoining claim, also located by them, known as the "Mitcham"; and in August and September of the same year (1903) the party so employed worked upon the land at intervals, digging a hole 10 or 11 feet deep, and clearing off some of the sage brush. He was observed at work upon the premises on September 8th, and also between the 16th and 18th of that month, by the agent who made the location for the plaintiffs, and who was then engaged in drilling for them upon neighboring ground. It is stated in the evidence on the part of the defendants that the above work was done as

preliminary or preparatory to erecting a drilling machine, and to demonstrate the character of the soil beneath the surface. On the 29th day of October, 1903—the most explicit testimony fixing the time as "on or about" that date, though it seems to be accepted or understood by counsel as the correct date—the defendants moved upon the premises a portable drilling machine, and commenced to drill a well upon the boundary line between their two adjoining claims, the Ravensbury and Mitcham. They continued drilling until, on December 2, 1903, a showing of gas was found at a depth of 502 feet. Expecting a larger flow upon drilling deeper, they suspended operations for a time, for the purpose of securing necessary appliances with which to close the well, should it be found expedient to do so. The drilling was again proceeded with in the following February, and at the depth of about 540 feet a large flow of gas was discovered. Thereupon the well was cased and closed, and the drilling machine taken off the premises. The well thus drilled was bisected by the dividing line between the two claims aforesaid located by the defendants, the north line of the Ravensbury being the south line of the Mitcham. At the surface the well was about 15 inches in diameter, and 8 inches at the depth where gas was discovered.

It appears that, prior to the location under which the plaintiffs now claim, and probably in September, 1903, they, or at least their agent and representative, had caused the location of 800 acres of land in a group of claims known as the "Ethelton" claims, each claim being given a separate number, one of which embraced the land covered by the Ravensbury and Mitcham claims, but the plaintiffs do not in this case rest any right upon the Ethelton locations. After the making of such locations, and before the location upon which their present claim is based, plaintiffs were notified in writing by the defendants, by a notice, dated October 23, 1903, to the effect that the defendants claimed exclusive and undisturbed possession of the land here in controversy, which was properly described and stated to be known and recorded as the "Ravensbury" oil placer mining claim, located February 10, 1903, and that the plaintiffs were required not to trespass thereon or interfere in any way with the defendants or their peaceable possession and working of said claim. On the 13th day of October, 1903, the plaintiffs, through their agent, went upon the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 3, said township and range, which is the 40-acre tract adjoining the Ravensbury claim on the west, and proceeded to drill thereon, near the northwest corner thereof, an oil or gas well, and on the 22d day of that month discovered gas. Based upon that discovery, the claim known as "La Prele No. 2" was located for the plaintiffs on October 29th, the said claim including the 40-acre tract upon which the discovery last aforesaid was

made, together with the land covered by the Ravensbury claim and here in controversy, and another 40 lying immediately north of the east 40 of the Ravensbury, and being the east 40 of the Mitcham claim, as we understand the situation of the latter claim. The location of plaintiffs was so made by staking the boundaries or corners of the claim, and putting up a discovery stake and location notice on the claim; and a certificate of location was recorded within the required time.

No special findings were made, and therefore the record itself fails to disclose the particular ground of the decision and judgment, but counsel agree in their briefs that the trial court held that the discovery in the well drilled by the defendants upon the boundary line between their two claims, the Mitcham and Ravensbury, could inure to the benefit of but one; and that, since they had claimed, upon the trial of the case involving the Mitcham, that such discovery perfected that claim, they had thereby elected to hold the Mitcham claim upon that discovery, and it would be applied to that, and denied to the Ravensbury. Taking this admission by counsel as showing the point upon which the case here was decided, we would be justified in concluding that the court either disregarded the question as to the effect of the possession of defendants upon the location of plaintiffs, or found that such possession was sufficient to enable them, as against the plaintiffs, to validate the Ravensbury by discovery, in case the discovery in question could be credited to that claim. Irrespective of the effect of the discovery well for the purpose of validating or ultimately obtaining title to both claims, the character of the possession by defendants of the premises in controversy, at the time the plaintiffs made their alleged location, is a vital question in the case; for upon its determination depends the validity of the location of plaintiffs, and this is an adverse suit in which the parties, respectively, stand upon their own rights, and if neither of the parties should establish a right to possession, a finding and judgment to that effect would be required.

We take it to be conceded that, if no adverse intervening rights had been acquired, the discovery by defendants would be sufficient to validate at least one of their locations, but it is insisted, on behalf of the adverse claimants, the plaintiffs, that it could validate only one, and that it should be applied to the Mitcham, for the reason that on the trial of a case involving that claim, which apparently immediately preceded the trial of the present case on the same day, the defendants had claimed the discovery to have perfected the location of the Mitcham claim. There is no showing that the judgment in the other case was rendered before the trial of the case at bar, and we suppose that it was not. The record discloses nothing with reference to the other case, except that on the cross-examination of Arthur W. Phillips, one

of the defendants, he admitted having testified on the trial of the Mitcham adverse that the discovery well perfected the Mitcham claim. The application of the discovery would therefore be made to depend upon the accident of the precedence in the time of taking evidence in the two cases, since the witness aforesaid, as well as the other defendants, also claimed that the discovery perfected the Ravensbury claim. It is difficult to perceive in this an election as to either claim on the part of the defendants, or any reason for holding that they had made an election. It is apparent that they expected to maintain a right to both claims upon the same well, and that until the cases were decided, and they were tried to the court without a jury, there was no selection or choice between the two claims, and, further, that the choice was the act of the court, and not of the defendants. At least, if the defendants at any time, upon learning that they would be permitted to hold but one claim, expressed a preference as to either, the fact is not disclosed or in any way indicated by the record. It appears in the testimony that both claims were located the same day, but it does not appear which one was first staked, if there was any difference in the time.

The case involving the Mitcham claim is not before us, nor does it appear that the case has been brought to this court. Except that it is referred to as the "Mitcham adverse," there is no information in the record concerning it. We do not know who the parties to the case were, nor whether it was of such a character and so disposed of as to place the defendants in a position to obtain title to the claim, and it is therefore purely a matter of conjecture in this case whether or not they will or can secure title to it. It is doubtful, therefore, to say the least, whether the condition of the case is such as to permit this court to dispose of it upon the theory that the defendants have already secured a title, or an adjudged right to the title, to another claim upon the same discovery well, even if that fact would control the decision, especially as it is probable, if not apparent, that when the case was tried and submitted, the right to the other claim had not been determined. Should the principle be conceded that the same discovery well would authorize a single location only, the one to which the discovery would be credited ought not to depend, it seems to us, solely upon the fact that the testimony in one case preceded the other, or the arbitrary act of the court. It occurs to us that the more correct practice, at least in the absence of an election, would be to ascertain which location was first, and thus adopt a rule that might be uniform and applicable to any similar case. Therefore, if the reason for the decision of the trial court in the case at bar is correctly understood by counsel, we would hesitate to approve the principle upon which the discovery was applied as between the two locations. Hence it is to be seriously

doubted, upon that consideration alone, whether the question as to the right to validate the two locations, by sinking the one well upon the common boundary line, is a material inquiry in the present condition of the case.

It is clear, however, that there had been no selection between the two claims at the time the case at bar was tried and submitted. In the meantime the defendants were holding the Ravensbury, and claiming a completion of its location by the discovery well in question, which was situated partly on that claim. Aside from the disputed question as to the right to make two locations upon the discovery in the one place upon the common boundary line, the fact that the well is only partly on the Ravensbury would be immaterial, if in fact it resulted in a discovery within the limits of the claim. That is to say, eliminating the question of two locations, a claim within which the requisite deposit is discovered will not be rendered invalid by the mere fact that the discovery shaft, or the well as in this case, is only partly upon the claim and partly upon another. *Healey v. Rupp*, 28 Colo. 102, 63 Pac. 319; *Larkin v. Upton*, 144 U. S. 19, 12 Sup. Ct. 614, 36 L. Ed. 330. Therefore the defendants might have made a valid location of the Ravensbury through the discovery aforesaid, assuming that the point of discovery was within the limits of the claim. All that the record discloses as to the precise point of discovery is the surface situation of the well. In the absence of anything to the contrary, we think the fact that one-half the diameter of the well at its surface is on the claim is sufficient showing of discovery within the claim. Although it was argued that the well may not have followed a straight line in its descent, and that its course may have deviated from such line and away from these premises, there is not the slightest evidence to indicate such a condition, and we are not, therefore, at liberty to infer that it exists.

It is not disputed that when the defendants undertook to locate the Ravensbury claim, in February, 1903, the land was vacant and unappropriated and a part of the public domain. At that time they performed all the necessary acts of location, except that of making discovery. The surrounding indications were unquestionably sufficient to justify them in prospecting the premises with the expectation of finding oil or gas underneath the surface. Having staked the ground, put up the usual notice, and recorded the claim, the defendants had the right to take actual possession, and continue in such possession, at least for a reasonable time, while diligently at work thereon exploring the ground for the purpose of discovery. The previous acts of location would indicate, not only the extent of surface intended to be appropriated, but the extent of such possession, and the locators would be protected against the forcible, fraudulent, surreptitious, or clandestine entries or intrusions of others. The rule upon this sub-

ject is discussed in the case of *Whiting et al. v. Straup et al.* (this day decided) 95 Pac. 849, and the authorities are there cited. A delay in taking the necessary possession, to prevent a valid location by intruders, would not alter the situation, provided that at the commencement of such possession there were no intervening rights. Regardless of the sufficiency of the acts of defendants, prior to taking the drilling machine upon the premises, to constitute such a possession as would prevent a location of the ground by others, it is beyond controversy that, from the time they went on the ground with the machine, they had actual possession, and proceeded diligently with the work of exploration until a discovery was made. Indeed the petition alleges them to be in possession, and designates the commencement thereof as on or about November 1, 1903.

It is undisputed, also, that in so taking possession the purpose of the defendants was to prospect and develop the Ravensbury claim as much as the Mitcham, and the well was in fact drilled partly upon the former claim. From the time of such possession, therefore, they were actually prospecting the claim under such circumstances that, upon making discovery in the well being drilled, it might complete and validate it. It follows that, if such possession began before the plaintiffs made their location, the ground was not vacant and unoccupied, and that location would not have been valid. It is a general rule that a mining location, to be valid, must be good when made, and that a right cannot be initiated by a trespass. While the defendants were in actual possession as aforesaid, it was not competent for the plaintiffs, upon their discovery made upon adjoining ground to project their location over the premises so held by defendants. *Weed v. Snook*, 144 Cal. 439, 77 Pac. 1023. And it would then be immaterial, so far as the rights of plaintiffs are concerned, whether the discovery of the defendants can be employed to obtain title to both their claims. That question is equally immaterial if the location of plaintiffs preceded in point of time the taking possession by defendants; for in that event the location of plaintiffs would have precedence. Upon the above-supposed facts as to possession this would not be a case of prior locators of a claim, invalid for some reason, relying upon constructive possession, and not actually engaged in diligently perfecting their location. In such a case a different rule might apply to a subsequent location. It seems to be uncertain whether the court disregarded entirely the question of possession on the part of the defendants, or decided the case upon the theory that they were in possession when the plaintiffs located their claim, but had lost their right upon being awarded the Mitcham claim. The evidence is not clear as to which act preceded the other in point of time—the taking of possession by defendants, or the

location of the claim of plaintiffs—both having occurred the same day, October 29, 1903, leaving out of consideration the acts of possession on the part of the defendants preceding that date; and it ought to be first passed upon by a trial court.

If the contention be correct that the discovery of defendants is capable of supporting a single location only, and that it should be credited to the Mitcham, and not the Ravensbury, and if it should appear that the location of plaintiffs was invalid because made over the rightful possession of defendants, then neither of the parties would have the right of possession, and that would have to be the finding and judgment. The conclusion seems to us unavoidable that the trial court may have adjudged the right of possession in the plaintiffs, notwithstanding that they may have attempted a location when the land was not open thereto; and for that reason the case ought, in our opinion, to be remanded for new trial.

It is not necessary, therefore, to consider the question, chiefly and ably argued, whether the discovery well upon the boundary line between the two claims of defendants, assuming it to have demonstrated the presence of gas underneath the surface of each claim, would be sufficient discovery to authorize or validate both locations. This much may be said. The question in relation to placer claims does not seem to have arisen in any reported case. In reference to lode claims the text-writers do not agree upon the question. Lindley states the proposition, adopting the syllabus of a decision of the Land Department, that a discovery is not susceptible of subdivision for the purpose of two locations having a common end line that bisects the discovery shaft. Snyder, on the other hand, says that two locations may be made upon one discovery, a portion of the vein being found within the limits of each claim, and he states his reason for thinking that to be the correct principle. 1 Lindley on Mines (2d Ed.) § 337; 1 Snyder on Mines, §§ 351, 356. The following are the only cases appearing to touch the question: Larkin v. Upton, 144 U. S. 19, 12 Sup. Ct. 614, 36 L. Ed. 330; Poplar Creek Consolidated Quartz Mine, 16 Land Dec. Dep. Int. 1; McKinstry v. Clark, 4 Mont. 393, 1 Pac. 759; Upton v. Larkin, 7 Mont. 449, 17 Pac. 728; Reynolds v. Pascoe, 24 Utah, 219, 66 Pac. 1064; Healey v. Rupp, 28 Colo. 102, 63 Pac. 319; 21 Morr. Min. Rep. 117. The case of Reynolds v. Pascoe did not involve a discovery on a common boundary line, and merely holds in this connection that it is not permissible for a party to locate two or more claims over the same discovery point. In Healey v. Rupp there was a shaft partly on each of two adjoining claims, but it does not appear that the two claims had been located upon or depended upon the discovery in the same shaft.

For the reasons above stated the judgment will be reversed, and the cause remanded for new trial.

BEARD, J., and CARPENTER, District Judge, concur. Hon. CHARLES E. CARPENTER, judge of the Second judicial district, sat in the place of SCOTT, J., who, as district judge, had presided at the trial below.

MACKAY v. DEVER, City Clerk.

(Supreme Court of Washington. May 25, 1908.)

APPEAL—DISMISSAL, GROUNDS OF—REVIEW UNNECESSARY OR INEFFECTUAL.

An appeal from a judgment dismissing an action to restrain a city clerk from proceeding to hold a primary election under the primary election law (Laws 1907, p. 457, c. 209) and incurring the expense incident thereto, on the ground that the law is unconstitutional, will be dismissed, where the election against which the injunction is sought has already been held, or else never can be held, and the expense has been incurred, or will not be incurred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3122.]

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by Gordon Mackay against J. R. Dever, as clerk of the city of Olympia. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

Gordon Mackay, in pro. per. John D. Atkinson, Atty. Gen., J. B. Knickerbocker, Asst. Atty. Gen., George R. Bigelow, and William W. Manier, for respondent.

RUDKIN, J. This action was instituted by the plaintiff, as a taxpayer of the city of Olympia, to restrain the city clerk from incurring expense at a primary election to be held on the 19th day of November, 1907, under the act of March 15, 1907, entitled "An act relating to, regulating and providing for the nomination of candidates for public office in the state of Washington and providing penalties for the violation thereof, and declaring an emergency" (Laws 1907, p. 457, c. 209), for the reason that said act is unconstitutional and void. From a judgment denying a temporary injunction and dismissing the action, the present appeal is prosecuted.

The election against which the injunction is sought has already been held, or can never be held, the expense of the election has been incurred, or will not be incurred, and this court cannot restrain or undo what has already been done. To all intents and purposes there has been a cessation of the controversy. No effectual judgment can be rendered, and under such circumstances it has been the uniform practice of this court to dismiss the appeal. *State ex rel. Colner v. Wickersham*, 16 Wash. 161, 47 Pac. 421; *Hice v. Orr*, 16 Wash. 163, 47 Pac. 424; *State ex rel. Daniels v. Prosser*, 16 Wash. 608, 48 Pac. 262; *State ex rel. Land v. Christopher*, 32 Wash. 59, 72 Pac. 709; *Holppa v. Aberdeen*, 34 Wash. 554, 76 Pac. 79. See, also, *People v. Clark*, 70 N. Y. 518; *Matter of Manning*, 139 N. Y. 446, 34

N. E. 931; *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293.

In *People v. Clark*, supra, the court said: "This action was commenced to restrain certain persons from proceeding to incorporate the village of North Tarrytown under the general act of the Legislature authorizing the incorporation of villages. The persons made defendants are those who signed the notice required and the officers of the town who would be inspectors of the election. A temporary injunction was obtained, which was dissolved, and the election was held, and a majority of votes determined in favor of the incorporation, and the proceedings for such incorporation have been perfected, village officers chosen, and the corporation is in operation. By a supplemental complaint these facts were set up, and judgment demanded that all these acts be declared null and void. The grounds of the action are that the statute was not complied with, and that the statute itself is unconstitutional. We do not deem it necessary to determine whether the action is maintainable as originally commenced. As it appeared upon the trial, and is presented to us upon appeal, no effectual judgment can be rendered in it. The acts sought to be restrained have been consummated, and from a project to incorporate a village the village has become incorporated. The defendants are not necessary or proper parties to the action upon the facts disclosed at the trial. The village itself, or the trustees who are now exercising the franchise, are the necessary parties to the action, and an injunction restraining the defendants would have no practical effect upon the corporation. We do not deem it proper, therefore, to express an opinion upon the points presented, involving the validity of the statute or the regularity of the proceedings under it, for the reason that a decision could not be made effectual by a judgment." So, in this case, if the election has been held and the expense incurred, the respondent is not a necessary or proper party to the action, and no effectual judgment can be rendered.

In *Matter of Manning*, supra, the court said: "The appeal does not now present an actual litigation, but an abstract question. The practice of this court has been to refuse to entertain appeals when it is plain that nothing can be accomplished by the decision. The inspectors and clerks selected for the election of April last cannot be appointed. There is no office to fill, and there are no duties for them to perform. To require now that their names be published would be to do a vain thing, and this court has uniformly dismissed the appeal when, from lapse of time, no decision could be made that would have any practical effect upon the controversy or the parties. It is said that the same question must arise in the appointment of inspectors and clerks to serve at the general

election to be held in the state in November next. We have no judicial knowledge that the peculiar conditions which produced this controversy still exist, and even if we had it would scarcely be proper to construe the statute for the appointment of these officers in advance of any action of the appointing power. If the spirit of the statute was not carried out, either in the selection of the inspectors or the publication of their names in the present case, we cannot assume that the same course will be pursued by both parties again. The demands of actual practical litigation are too pressing to permit the examination or discussion of academic questions, such as this case in its present situation presents."

In *Mills v. Green*, supra, the court said: "In the case at bar, the whole object of the bill was to secure a right to vote at the election to be held, as the bill alleged, on the third Tuesday of August, 1895, of delegates to the constitutional convention of South Carolina. Before this appeal was taken by the plaintiff from the decree of the Circuit Court of Appeals dismissing his bill that date had passed; and before the entry of the appeal in this court the convention had assembled, pursuant to the statute of South Carolina of 1894, by which the convention had been called. 21 St. at Large S. C. pp. 802, 803. The election of the delegates and the assembling of the convention are public matters, to be taken notice of by the court, without formal plea or proof. The lower courts of the United States, and this court, on appeal from their decisions, take judicial notice of the Constitution and public laws of each state of the Union. * * * Taking judicial notice of the Constitution and laws of the state, this court must take judicial notice of the days of public general elections of members of the Legislature, or of a convention to revise the fundamental law of the state, as well as of the times of the commencement of the sitting of those bodies and of the dates when their acts take effect. * * * It is obvious, therefore, that, even if the bill could properly be held to present a case within the jurisdiction of the Circuit Court, no relief within the scope of the bill could now be granted."

It has been suggested that the question is a recurring one, and will arise again; but, in the language of the Court of Appeals of New York, "the demands of actual practical litigation are too pressing to permit the examination or discussion of academic questions, such as this case in its present situation presents."

The appeal must therefore be dismissed, and it is so ordered.

HADLEY, C. J., and ROOT, FULLERTON, MOUNT, CROW, and DUNBAR, JJ., concur.

In re CITY OF SEATTLE.

(Supreme Court of Washington. May 23, 1908.)

On petition for modification of opinion. Granted.

For former opinion, see 94 Pac. 1075.

PER CURIAM. The respondent, the city of Seattle, petitioned for a modification of the opinion of this court heretofore filed in the above-entitled cause. The petition was treated as in the nature of one for rehearing, and appellants were directed to answer it. After answers were filed the court duly considered the matter as presented by both the petition and answers, and arrived at the conclusion that the requested modification should be granted. The chief reasons urged against it in the answers relate to the alleged inexpediency of entering the condemnation judgment upon any of the verdicts which were returned, for the reason that they were based upon values estimated at a time when property valuations were very high. Such a consideration might be urged on any appeal as a ground for vacating a judgment and retrying the whole case in the light of later developments; but it manifestly could not be so treated by the court.

The objection made to the original opinion is that language employed therein has the effect to declare the entire condemnation judgment void. The following words appear in the opinion, to wit: "The condemnation judgment being void, the assessment based thereon is also void, and should have been set aside." The petition asks the above to be modified, so as to read as follows: "That portion of the condemnation judgment entered by reason of the so-called 'Moore Agreement and Ordinance' being void, the assessment based thereon is also void, and should have been set aside." The petition also asks that the closing paragraph of the opinion be modified by inserting after the word "void," in the first sentence, the words "part of the," making the whole sentence read as follows: "For the reasons first assigned, however, the assessment will have to be set aside, because of the void part of the judgment in the condemnation proceeding."

It is therefore ordered that the modification of the original opinion shall be, and is hereby, made as above indicated.

RYAN v. NORTH ALASKA SALMON CO.
(S. F. 4568.)

(Supreme Court of California. April 28, 1908.)

1. COURTS—ACTIONS—TRANSITORY ACTIONS—WHAT LAW GOVERNS.

Where an action is transitory in its nature, a right or liability imposed by the statute of another state or of the United States may in proper cases be asserted and enforced in California, but such an action will be entertained only for the purpose and upon the terms permitted by the lex loci.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 13, Courts, § 14.]

2. EVIDENCE—JUDICIAL NOTICE—DEATH—ACTION UNDER LAWS OF OTHER JURISDICTION.

At common law there was no right of action for an injury causing death, and, as the courts do not take judicial notice of the laws of foreign jurisdictions, plaintiff, in an action for an injury occurring in the territory of Alaska and resulting in death, must plead and prove the law of that territory to show that in that forum there existed the right of action sued upon, and that the action is brought by the person in whom, under the laws of the foreign jurisdiction, the right is vested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 51.]

3. APPEAL—REVIEW—HARMLESS ERROR—PLEADING—AMENDMENT.

In an action for a death resulting from an injury occurring in Alaska, though the court may have erred in sustaining a demurrer to the complaint without leave to amend, on the ground that the complaint was silent as to the laws of Alaska relating to the right of action, in the absence of proof that the laws of that territory were different than those of California, yet where plaintiff did not ask leave to amend, and does not contend on appeal that an amendment would have obviated the difficulty, the error was not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4089-4109.]

4. SAME—DISCRETION OF COURT.

The action of the trial court in granting or denying leave to amend a complaint after the sustaining of a demurrer thereto will not be interfered with on appeal unless an abuse of discretion is shown by the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3825-3833.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Death action by Mary J. Ryan against the North Alaska Salmon Company. Judgment of dismissal, and plaintiff appeals. Affirmed.

Frank Schilling, for appellant. C. H. Wilson, for respondent.

McFARLAND, J. The complaint charged that Orion F. Ryan met his death in the territory of Alaska through the negligence of the defendant company by which he was employed. Plaintiff sues to recover damages for the death so occasioned, not as the personal representative, but as his mother and sole surviving heir. Code Civ. Proc. § 377. The complaint was silent as to the laws of the territory of Alaska, and defendant's general demurrer for lack of facts was sustained by the court without leave to amend, and the action was accordingly dismissed.

The demurrer was properly sustained. Where the action as here is transitory in its nature, a right or liability imposed by the statute of another state or of the United States, may in proper cases be asserted and enforced in this state. Such may be taken to be the settled rule since the case of *Dennick v. Railway*, 103 U. S. 11, 26 L. Ed. 439. But the courts of this state will only entertain such an action for the purpose and upon the terms permitted by the lex loci. In other words, the right to prosecute this action in California is permissible only if permissible under

the laws of Alaska, and only upon such terms as the laws of Alaska prescribe. And as at common law there was no right of action for an injury causing death, and as the courts of this state do not take judicial notice of the laws of foreign states, it is necessary for the plaintiff to plead and prove such law. Thus it is said in *Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118, quoting from *Liverpool Co. v. Phenix Ins. Co.*, 129 U. S. 445, 9 Sup. Ct. 469, 32 L. Ed. 788: "The law of Great Britain since the Declaration of Independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved." "There being no right of action at common law for an injury causing death, the plaintiff in such an action must specifically aver and prove that the laws of the state where the injury occurred permit such an action." 8 Am. & Eng. Ency. of Law, 880; 13 Cyc. 345.

But it is equally well settled that, not only must the law of the foreign state be pleaded to show that in that forum there existed the right of action sued upon, but also it must be pleaded to show that the action is brought by the person in whom, under the laws of the foreign jurisdiction, the right of action is vested, and this because, as is said in *Dennick v. Railway*, supra, where this subject is considered, the court which renders the judgment can only do so by virtue of the foreign statute. Generally that power is given to the personal representative of the deceased. The laws of this state are broader in this respect, and confer the same right upon the heirs or next of kin of the deceased. But the right conferred by our statute can be exercised only where the cause of action has arisen within the jurisdiction of this state, and not in cases such as this, where the measure of the right and the form of procedure are those dictated by a foreign statute. It would follow, therefore, that if the right to prosecute an action such as this is limited by the laws of the territory of Alaska to the personal representative of the deceased alone, such personal representative only could prosecute the action in this state. In the briefs of counsel for respondent the laws of the territory of Alaska are set forth, and it is made to appear that it is the personal representative only who may maintain such an action, and the existence of this law is urged upon this court as a reason in justification of the trial court's ruling dismissing the action. But neither the trial court nor this court takes judicial notice of those laws, and the presentation of them in the brief of counsel cannot be considered the equivalent of a presentation of them in evidence. So far, then, as this court can judicially know, it may be that the laws of the territory of Alaska will permit the prosecution of an action in the form here adopted and countenanced by the Code of this state.

In this view it may be said that technically the trial court fell into error in ordering the action dismissed. But, upon the other hand, plaintiff and appellant did not ask leave to amend, probably for the reason that, in the situation of the law, she could not successfully amend. And upon this appeal her counsel does not contend that by any amendment he could have obviated the difficulty. The most that can be said, then, as to appellant's rights, is that the irregularity was one without injury, and that an appellate court will in every such case sustain the action of the court below, whatever course it may take, unless it is made to appear by the record that there has been an abuse of discretion. *Stewart v. Douglass*, 148 Cal. 512, 83 Pac. 699.

The judgment appealed from is therefore affirmed.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.

153 Cal. 387

PEOPLE v. SIEMSEN. (Cr. 1,417.)

(Supreme Court of California. April 27, 1908.)

1. INDICTMENT AND INFORMATION—PRELIMINARY PROCEEDINGS—COMMITMENT—ORDER—NECESSITY.

Under Pen. Code, § 809, requiring the filing of an information within 30 days after a defendant has been examined and committed, as provided in section 872, and section 872 providing that if it appears from the examination that a public offense has been committed, and there is sufficient cause to believe defendant guilty, the magistrate must make or indorse on the complaint an order signed by him holding defendant to answer the charge, the making of such order, signed by the magistrate, is a prerequisite to the valid filing of an information.

2. CRIMINAL LAW—APPEAL—REVIEW—QUESTIONS OF FACT.

On motion to set aside an information, because filed before the order had been signed by the magistrate holding defendant to answer the charge, whether the order was signed before or after the filing of the information is a question of fact to be determined by the trial court, and, if there is a substantial conflict of evidence on the point, the conclusion of that court must stand on appeal.

3. EVIDENCE—PRESUMPTIONS.

The presumptions raised by Code Civ. Proc. § 1963, subd. 15, that an official duty has been regularly performed, and by subdivision 23 that a writing is truly dated, while disputable, are in themselves evidence, and will support a finding made in accordance with them, though there be evidence to the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 105, 109.]

4. CRIMINAL LAW—CONFESSIONS—VOLUNTARY CHARACTER.

A confession, to be admissible, must be free and voluntary; that is, it must not be obtained by any sort of threats or violence, nor by any direct or implied promises, however slight, nor by the exertion of any improper influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1175-1184.]

5. SAME—DETERMINATION OF QUESTION OF ADMISSIBILITY.

Whether a confession is free and voluntary is a preliminary question addressed to the trial

court, and a considerable measure of discretion must be allowed that court in determining it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1219-1221.]

6. SAME.

Defendant, on being brought before the police captain, was asked if he had heard of the confession of his alleged accomplice, to which he replied that he had, and the police captain read the same to him. Defendant stated that parts of it were not true, and specified an entirely unimportant detail. The police captain then brought in the accomplice, and reread the confession in the presence of both. Defendant stated that he preferred to consult a lawyer before making any statement. To this the police officers made no reply, and did not send for an attorney. The police captain turned to the accomplice and said, "Is this true?" to which he replied, "Yes," and, looking at defendant, said, "You know it is true." Defendant hesitated, but finally admitted that it was true, and at the police captain's suggestion signed his name to a statement that the confession was true. While defendant had, up to that time, been kept in close confinement, he had been placed alone at his own request, and had not been subjected to any indignity or unkind treatment. He had been allowed to communicate with his wife, and would, if he had desired, have been allowed to see counsel. *Held*, that the confession was properly admitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1163-1174, 1203-1206.]

7. SAME—CORROBORATION—ADMISSIBILITY OF EVIDENCE.

On a trial for murder, evidence to show that shortly after the murder defendant and his accomplice had purchased various articles was admissible, where all the items proved corresponded more or less closely with the amounts which, according to the confession of defendant's accomplice, assented to by him, had been paid by them out of the money taken by them, as tending to corroborate the confession in that particular, irrespective of whether, before evidence of the possession of money can be admitted, a foundation must be made by showing that prior to the offense defendant was without funds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1124-1138, 1222-1226.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

John Siemsen was convicted of murder in the first degree, and, from the judgment of death pronounced on the verdict and an order denying a new trial, he appeals. Affirmed.

A. P. Wheelan and J. J. Greeley, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and William H. Langdon, Dist. Atty., for the People.

SLOSS, J. John Siemsen and Louis Dabner were, by information filed in the superior court of the city and county of San Francisco, charged with the murder of M. Munekata. Upon a separate trial, Siemsen was found guilty of murder in the first degree, and he appeals from the judgment of death pronounced pursuant to the verdict, and from an order denying his motion for a new trial.

1. Upon being arraigned, the defendant moved to set aside the information. His motion was denied, and this ruling is now assigned as error. The ground of motion was

that before the filing of the information the defendant had not been legally committed by a magistrate, or, more specifically stated, that the information was filed "before any commitment, deposition, or other record showing that said defendant had a preliminary examination had been returned or filed, and that no order of commitment was indorsed upon an alleged paper purporting to be a complaint." Section 809 of the Penal Code provides for the filing of an information within 30 days after a defendant "has been examined and committed, as provided in section 872 of this Code." Section 872 directs that "if it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the complaint an order, signed by him," holding the accused to answer the charge. It seems to be settled by the decisions of this court that the making of such order, signed by the magistrate, is a prerequisite to the valid filing of an information. *Ex parte Branigan*, 19 Cal. 183; *People v. Wilson*, 93 Cal. 377, 28 Pac. 1061. In so far as the section "provides that the order shall be indorsed upon the deposition, the statute may be regarded as directory; but it is essential that it should be reduced to writing, and entered either upon the official docket of the magistrate or upon the complaint or depositions." *People v. Wilson*, *supra*. See, also, *People v. Wallace*, 94 Cal. 497, 29 Pac. 950. It appears that the information was filed on the 3d day of December, 1906. The complaint which formed the basis of the preliminary examination was produced at the hearing of the motion to set aside the information. Indorsed upon this complaint was a written order, signed by the magistrate, holding the defendants to answer. This order was, on its face, in full compliance with section 872, and bore date of the 1st day of December, 1906, two days prior to the filing of the information. To overthrow the apparent regularity of the proceedings, the defendant called as a witness his counsel, J. J. Greeley, who testified that the information had been filed in the superior court at about five minutes before 10 o'clock, on the morning of December 3d, and that at that time the "commitment," or order holding the defendant to answer, had not been signed; that he had seen the complaint in the police court at about 10:30 o'clock on the same morning; and that the signature of the magistrate had not then been affixed to it. E. P. Shortall, a police judge, who had presided over the preliminary examination, testified that he had no independent recollection of the time when he signed the order, but thought he had signed it on the afternoon of December 1st. "The only thing that calls it to my memory is the date on it." Whether the order holding defendant to answer was signed before or after the filing of the information was a question of fact to be determined by the trial court; and,

if there was a substantial conflict of evidence on the point, the conclusion of that court must stand here. We think there was such a conflict. It is true that the testimony of Mr. Greeley was positive, while Judge Shortall expressed only a belief that he had signed the paper on December 1st, and based this belief on the fact that it bore that date. But the court, in determining whether or not to accept Mr. Greeley's testimony, had a right to consider the presumptions raised by law. One of these is that "official duty has been regularly performed"; another that "a writing is truly dated." Code Civ. Proc. § 1963, subds. 15, 23. These presumptions, while disputable, are in themselves evidence (Code Civ. Proc. § 2061, subd. 2; *People v. Milner*, 122 Cal. 171, 54 Pac. 833; *Sarraille v. Calmon*, 142 Cal. 651, 76 Pac. 497; *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712; *Moore v. Gould* [Cal.] 91 Pac. 616), and will support a finding made in accordance with them, even though there be evidence to the contrary. It was for the trial judge to determine whether Mr. Greeley's testimony was sufficiently convincing to overcome the presumptions (a) that the district attorney had properly performed his duty by withholding the filing of an information until after an order was signed by the magistrate; and (b) that the order dated the 1st day of December had been signed on that day.

2. The prosecution offered evidence tending to show the following state of facts: M. Munekata was the manager and A. Sasaki the cashier of the Kimmon Ginko Bank, located at 1588 O'Farrell street, in the city of San Francisco. The banking premises contained a private room, separated from the main business office of the bank by a partition of wood and glass. On October 2, 1906, Siemsen entered the bank, made some inquiries of the cashier in the main office, and visited the manager Munekata in the private office. At a few minutes before noon on the 3d of October all of the employes and officers of the bank, with the exception of Munekata and Sasaki, went out for lunch, leaving Munekata in the private office, and Sasaki in the business office. About \$2,000 in gold and several hundred dollars in silver were piled in boxes on a table beside the bank counter. At about half-past 12 one of the clerks returned and found Munekata and Sasaki unconscious and covered with blood. All of the money, with the exception of a few cents, had disappeared. On the floor was a piece of gas pipe wrapped in paper. Siemsen and Dabner had been seen coming out of the bank at about 5 or 10 minutes past 12 o'clock. The injured men were removed to the emergency hospital, where Munekata died within two hours. He had sustained an extensive fracture of the skull, which, with the resultant hemorrhage of the brain, was the cause of his death. Sasaki's skull was also fractured, but he finally recovered, and was a witness at the trial. The injuries were such as might have

been caused by the piece of pipe found on the floor. They could not have been self-inflicted. Siemsen was arrested on November 3d, and taken to the O'Farrell street police station, where his name was placed on the "detinue book," so-called. He was placed in a cell, but no charge was made against him. On the following day he was taken to the Bush street police station, and placed in a cell with a guard outside to watch him. At his own request, he was confined alone. The public was not permitted to visit him, and the police captain in charge of the station testified that, if an effort had been made, he would not have allowed anyone to communicate with him. "At no time," says this witness, "did he make a request for an attorney to be sent for. If he had asked for a lawyer, I certainly would have complied with his request." He was not threatened or abused in any way, in fact, as stated by the same witness, he was shown more consideration than "an ordinary prisoner." He was allowed to communicate with his wife by telephone.

On the day of the alleged confession Police Captain Duke sent for Siemsen. The chief of police and a detective were present. Capt. Duke said: "Siemsen, I suppose you have heard the boys outside calling out, 'Extra papers! All about the confession of Dabner'"; and he said: "Yes; I have heard it." Prior to that time Siemsen had refused to make any statement unless he received a promise that he would not be hanged, and the police officers had refused to make any promise whatever. The alleged confession of Dabner had been reduced to writing and Duke read it to Siemsen. Siemsen stated that parts of it were not true, and, on being asked what parts were not correct, specified an entirely unimportant detail. Duke then brought the codefendant Dabner and his father into the room and reread the confession in the presence of both defendants. Siemsen stated that he preferred to consult a lawyer before making any statement. The police officers made no reply to this, and did not send for an attorney. Duke turned to Dabner and said, "Dabner, is this true?" and Dabner said, "Yes; it is true"; and, looking at Siemsen, he said: "Jack, you know it is true." Siemsen hesitated for a few seconds, and finally said, "Well, that is the goods, that is true," or words to that effect, and shook hands with the chief of police and with Duke, and thereupon, at Duke's suggestion, signed his name "John Siemsen" to the statement under the words, "This statement is correct throughout," which Duke had first written. Capt. Duke testified that he did not hold out any inducement to Siemsen with reference to what he might state and made no promise of leniency, and made no threats, used no force, and did not put him in any fear. Chief of Police Dinan gave substantially the same testimony as Capt. Duke. He also testified that, after the signing of the confession, newspaper men were admitted, and that in their pres-

ence Siemsen stated that the confession was true, and that it was free and voluntary. Upon this showing, the confession was admitted in evidence over defendant's objection. It was in substance as follows: That on the morning of October 3d Siemsen and Dabner left their home together, having planned on the preceding day to rob the Japanese bank. They waited around the bank until they saw the clerks go away, and then went in. Siemsen stopped at the main or front office, and told the Japanese there (Sasaki) that he wanted to see the manager. Siemsen and Dabner went back to the manager's office, and Siemsen struck the manager over the head with a gas pipe which Dabner had wrapped up in a piece of paper. Then Dabner, following out the plan theretofore agreed on by Siemsen and himself, called the other Japanese back to the rear office. When he came back Siemsen struck him over the head several times, and he fell. He then started to get up and Dabner struck him on the head with the pipe and he fell again. The defendants went through the till and got about \$2,200, partly in silver and partly in gold, which they put in a hand satchel. They then went to a place where they had left a horse and buggy in waiting and drove to the stable where they kept the horse and buggy. The satchel containing the money was concealed in a sack of oats. In the evening Dabner took it to the room occupied by Siemsen and himself, and counted it. They subsequently spent various sums of this money for clothing and jewelry; the expenditures being stated by Dabner in detail. The objection to the admission of this confession, and of the statements of Siemsen regarding it, was put upon the ground that the prosecution had failed to establish that the confession was free and voluntary on Siemsen's part, and that, on the contrary, the preliminary proof showed that it was made under duress. The objection was overruled and appellant excepted.

Upon the preliminary showing, which we have set forth with some fullness, it cannot be said as matter of law that the trial court erred in admitting in evidence the confession of Dabner, together with the statements of Siemsen regarding it. Undoubtedly the rule is elementary, even in the absence of constitutional provisions protecting persons accused of crime, that "a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." 3 Russell on Crimes (6th Ed.) 478. As was said by this court in *People v. Miller*, 135 Cal. 69, 67 Pac. 13: "Before any confession of a defendant can be offered in evidence, it must be shown by the prosecution that it was voluntary, and made without any previous inducement or by reason of any intimidation or threat." The slightest pressure, whether by way of inducement to confess, or threat if

confession is withheld, is sufficient to require the exclusion of the confession. Thus the confession is not admissible, if made in response to a statement by one in authority to the prisoner that "it will be better for him" to make a full disclosure (*People v. Barric*, 49 Cal. 343), or to tell all he knows (*People v. Thompson*, 84 Cal. 598, 24 Pac. 384), or if called forth by a statement of the sheriff that he would do all he could for the prisoner (*People v. Gonzales*, 136 Cal. 666, 69 Pac. 487). But whether a confession is free and voluntary is a preliminary question addressed to the trial court and to be determined by it (*People v. Miller*, supra), and a considerable measure of discretion must be allowed that court in determining it. "The admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion." *Hopt v. Utah*, 110 U. S. 574, 583, 4 Sup. Ct. 202, 207, 28 L. Ed. 262.

The testimony above recited shows on the part of the officers no express utterance amounting to either a threat or an inducement. The claim is that Siemsen was placed in circumstances which necessarily operated to take from his actions the free and voluntary character which is required by the rule under consideration. Those circumstances are that he was in custody, charged, or to be charged, with a serious crime, and that he was made aware that his co-suspect had made a confession implicating him. It is established law that the mere fact that the confession was made to a police officer, while the accused was under arrest, does not necessarily render the confession involuntary. *Hopt v. Utah*, supra; *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568; *People v. Devine*, 46 Cal. 46; *People v. Miller*, supra; *People v. Walker*, 140 Cal. 156, 73 Pac. 831. Nor do we think the mere fact that the accused was informed, in the presence of his alleged accomplice, that the latter had confessed, requires the holding that the ensuing confession of this defendant was involuntary. It does not appear that he was, in any way, made to believe that his situation would be better if he confessed, or that it would be worse if he declined to speak. It may well be that a suspect, informed that a co-suspect has confessed, may feel impelled to speak for fear that silence on his part would give rise to inferences against him. Such fear might well be enough to take away from his resulting confession the voluntary character requisite to its admissibility. But it is also possible that he may fully understand that he is not called upon to say anything and that his silence could not be used against him. Here,

as was stated by the police officers, the defendant, apparently knowing his rights, declined to say anything without first consulting counsel. Subsequently, without any pressure or suasion, other than a second reading of Dabner's confession, having been brought to bear on him, he decided to admit the truth of Dabner's statement. It cannot be said that the trial court was not justified in finding that this decision on Siemsen's part was voluntary, uninfluenced by either fear or hope induced by word or act of any of the officers. While the defendant had, up to that time, been kept in close confinement, he had been placed alone at his own request, and had not been subjected to any indignity or unkind treatment. He had been allowed to communicate with his wife, and would, if he had desired, have been allowed to see counsel. In this respect the case differs essentially from the Sweat Box Case, 80 Miss. 592, 32 South. 9, 92 Am. St. Rep. 607, and State v. McCullum, 18 Wash. 394, 51 Pac. 1044, relied on by appellant. In each of these cases it was held that a confession induced by means of keeping the prisoner in a dark cell, or "sweat box," under circumstances leading him to believe that he would be kept there until he did confess, could not be used against him. The fact that Siemsen was confronted with Dabner and made to listen in Dabner's presence to the latter's confession is not of itself sufficient to establish the involuntary character of the appellant's admission of the truth of that confession. In *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 563, the Supreme Court of the United States exhaustively reviewed the authorities on the general subject of the admissibility of extrajudicial confessions by persons accused of crime. In the opinion in that case there are some expressions indicating that a confession made by a prisoner immediately upon a statement by a police officer to the effect that an alleged witness had seen him commit the crime is not voluntary. But the facts of that case were very different from those here presented. It appeared that the police officer had stripped the accused of his clothing, and had said to him: "If you had an accomplice, say so. Do not have the blame of the crime on your own shoulders." That these circumstances were inconsistent with the exercise by the prisoner of a free will, uninfluenced by threat or promise, may well be. The situation is not the same, however, where the prisoner is treated with all the consideration shown to any prisoner, where no word is said to urge him to confess, where by his own declaration he indicates clearly his appreciation of the fact that he is not required to speak, where he has knowledge of his codefendant's confession before he is told of it by the police officers, and where he has, in effect, adopted that confession and admitted its truth in all material respects before being confronted with the codefendant, and before making any request to be allowed to see counsel. The fact

that Siemsen said he preferred to consult a lawyer before making a statement, and that the police officers continued the interview without giving him an opportunity to obtain legal advice, would, if there had been no confession up to this point, undoubtedly be a circumstance entitled to considerable weight in determining whether or not the police officers were withholding such advice from him as a means of inducing him, through fear, to assent to Dabner's confession. On the showing here made, however, there was clearly ample ground for the court to conclude that Siemsen's confession was the "spontaneous suggestion of the defendant's own mind, unmoved and uninfluenced by any inducement, promise, threat, or menace by the officer to obtain it." *People v. Ramirez*, 56 Cal. 536, 38 Am. Rep. 73.

3. After the introduction in evidence of Dabner's confession, assented to by Siemsen, the people offered the testimony of several witnesses to the effect that shortly after the alleged robbery and murder Siemsen and Dabner had purchased various articles of jewelry and clothing, and had paid cash for the same. The sums so shown to have been expended amounted to more than \$1,000. In several instances this testimony was objected to on the ground that it had not been shown that the defendant was, prior to the alleged robbery, without means to make these purchases. That the sudden possession of money, immediately after the commission of a larceny, by one who had before that been impecunious, is admissible as a circumstance in the case (*People v. Kelly*, 132 Cal. 430, 64 Pac. 563), is not disputed. Nor is it questioned that the same rule is applicable here, where, although the charge does not embrace larceny, the proof tends to show that, in the course of committing the crime under investigation, money was taken by the person or persons guilty of the main crime charged. It is urged, however, that before evidence of the possession of money by the defendant can be admitted a foundation must be laid by showing that such defendant was impecunious before the commission of the alleged crime. It may be questioned whether this objection goes to the admissibility, or merely to the weight, of the evidence. This need not be decided here, however, since the evidence was clearly admissible upon another ground. All of the items of expenditure proven over defendant's objection corresponded, more or less closely, with the amounts which, according to the confession, had been paid by the defendants out of money taken by them from the bank. The evidence in question was relevant and proper for the purpose of corroborating the confession in this particular.

4. It is urged that the district attorney was guilty of misconduct, in that, in the course of his opening statement to the jury, he referred to the confession of Dabner and stated its purport. In view of our conclusion, above expressed, that the confession itself was proper-

ly admitted as against the appellant, it was, of course, not improper for the prosecuting officer to state that he would prove it.

No other point is made, and we see no reason for disturbing the verdict.

The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

153 Cal. 405

ZIHN v. ZIHN et al. (S. F. 4,624.)

(Supreme Court of California. April 27, 1908.)

1. DEEDS — EVIDENCE — PRESUMPTIONS — DELIVERY.

Where a deed is in possession of the grantee, the presumption is that it was delivered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 577.]

2. SAME—BURDEN OF PROOF.

In an action to annul a deed of gift to land, the burden is on plaintiff to rebut a presumption that the deed was delivered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 574, 575.]

3. APPEAL — REVIEW — FINDINGS OF TRIAL COURT—CONCLUSIVENESS.

In an action to annul a deed of gift, the question of delivery is one of fact for the trial court, and, where the evidence is conflicting, the finding of the trial court is conclusive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

4. DEEDS — VALIDITY — CONFIDENTIAL RELATIONS OF PARTIES—PRESUMPTION OF FRAUD.

The presumption of fraud arising from confidential relations between the parties to a deed of gift goes no further than to throw upon the grantee the burden of showing that the gift was made freely and voluntarily, with full knowledge of all the facts, and with perfect understanding of the effect of the transfer.

5. APPEAL—REVIEW—HARMLESS ERROR.

The erroneous admission of evidence is harmless, where the subject-matter of the evidence has been fully covered by other testimony in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Andreas Zihn against Clara G. Zihn and others. Judgment for defendants, and from an order denying a new trial plaintiff appeals. Affirmed.

Charles G. Nagle, for appellant. Edwin L. Forster and William H. Cobb, for respondents.

ANGELLOTTI, J. This is an action to obtain a decree adjudging that the plaintiff is the owner of a lot of land, 43 by about 150 feet, on Twelfth street, in the city and county of San Francisco, and annulling a deed of gift of the same, purporting to have been executed by plaintiff to his three unmarried daughters, defendants herein. Judgment went for defendants, decreeing them to be the owners in fee of said property, subject to a

life estate in plaintiff therein, and plaintiff appeals from an order denying his motion for a new trial.

The complaint proceeds upon the theory that the deed of gift was never delivered by plaintiff to the daughters as a conveyance to them of the property described therein, but was simply given by him into their possession to be kept for him among his other papers, and not recorded, until such time as he was ready to deliver it to them, they promising to so dispose of and keep it, and he, by reason of his trust and confidence in them, relying on their promise to do so. It contains allegations of the confidential relations existing between plaintiff and his unmarried daughters, and the reasons why he was induced to sign and acknowledge the deed and give it to them for safe-keeping; but these allegations all apparently go to the ultimate fact alleged that there was no valid delivery of the deed, and not to the proposition that there was an executed conveyance induced by fraud or undue influence.

The trial court found that on the 4th day of January, 1902, the plaintiff "made, executed, and delivered to the defendants Clara G. Zihn, Emma A. Zihn, and Elizabeth D. Zihn, as grantees, his certain deed of conveyance" of the property, "and that at the same time it was understood and agreed by and between the parties thereto that the plaintiff should have a life estate therein, and that said grantees should become the owners in fee thereof, subject to plaintiff's life estate and right to use and occupy the same for his life," and further that "plaintiff unconditionally delivered said deed to said defendants, and it was not merely delivered to be placed among his papers for safe-keeping and not to be recorded, and it was not agreed that it should be returned to him upon demand." These findings completely negative the allegations of the complaint as to want of delivery of the instrument, and plaintiff is forced to contend that they do not find sufficient support in the evidence given on the trial. There is no warrant in the record for any such claim. The deed was in the possession of the grantees, and therefore presumably had been delivered. *Ward v. Dougherty*, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151; *McDougall v. McDougall*, 135 Cal. 319, 67 Pac. 778. The burden was on plaintiff to rebut this presumption. This the trial court was fully justified in holding he had not done. Plaintiff was residing with his three unmarried daughters on this property, which had been for a long time the family home. His wife had died a short time before, and the only other heir was a married daughter, who is also a defendant herein, she having been granted an undivided interest in the property by the unmarried daughters. He was 68 or 69 years of age, possessed of other property, and, so far as appears, fully capable of understanding the nature of a transaction of the character under discussion. Great

affection had always existed between him and his unmarried daughters, and he was apparently desirous of so arranging the title to this property that they would not be disturbed in their enjoyment thereof after his death. While the daughters suggested and requested that he make them a gift of the home, there is nothing in the record to indicate any undue influence or fraud, or anything inconsistent with the theory that all that he did was done by him freely and voluntarily and for the purpose of giving them a valid claim to the property. He went alone to the office of a notary, and, as alleged in the complaint, "having concluded to arrange said real property," "caused to be written" the deed of gift in question (a deed of gift absolute in terms and without reservation), subscribed and acknowledged the same, carried it to his home, explained it to the grantees therein named, and gave it into their possession. There was some little conflict between the evidence of plaintiff and that of the daughters as to what was said at that time, but the testimony of the daughters was clear to the effect that he gave it into their possession without making any statement inconsistent with the theory that he was making a delivery of a conveyance to the grantees therein named, with the intent to vest in them the title of the property described therein. There was nothing in the relation of the parties or the circumstances surrounding the transaction as disclosed by the record to force a different conclusion. He himself testified that he said: "Here is the paper which you have been whining so much about." He also testified that he told them to take it, keep it for him, put it among his papers, and not record it during his lifetime. But this was expressly denied by the grantees. No question in regard to the matter arose until he subsequently contracted a second marriage in the year 1904. He admitted in his testimony that he told his married daughter, when she suggested that he borrow some money for her on the property, that the property was in the other daughters' names. Immediately after his second marriage, and prior to any question arising as to the deed, and prior to his discovery that it had been recorded, he obtained from the unmarried daughters a written promise and agreement that the property should be their "father's and his wife's and family's home during our father's (Andreas Zihn's) whole lifetime." The testimony quite clearly shows that this writing was prepared under his dictation and given at his suggestion, and was wholly inconsistent with the theory that the deed of gift had not been delivered to the daughters. The question of delivery is one of fact to be determined by the trial court, and, where the evidence is substantially conflicting, the finding of the trial court is conclusive.

It is contended that, even if the deed was delivered, it should be set aside on the ground of fraud. As before stated, this was not the

theory of the complaint, but certain facts alleged therein as to the relations of the parties, some of which were admitted by failure to deny in the answer, are relied on. This being simply an appeal from an order denying a new trial, the only question that can be considered in this connection is whether the evidence was sufficient to support the findings made in regard thereto. The trial court found upon this question "that plaintiff was not and is not unaccustomed to or inexperienced in business; * * * that the deed * * * was not executed by reason of any statement made by said defendants, as set forth in his said complaint, nor was it obtained by any threats, coercion, or fraud, but was freely and voluntarily given in consideration of love and affection, and for the better maintenance and support of said defendants." Counsel for plaintiff has not pointed out in his briefs wherein the evidence is insufficient to support these findings, except in so far as he claims that certain admitted facts and other facts shown by evidence without conflict as to the confidential relations of the parties were sufficient to raise the presumption of fraud. Without conceding this, for the purpose of the decision, it may be admitted. The utmost effect of such presumption would merely be to throw upon the donees the burden of showing that the gift was made freely and voluntarily, with full knowledge of all the facts, and with perfect understanding of the effect of the transfer. *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910; *Arellanes v. Arellanes* (Cal.) 90 Pac. 1059. The evidence amply warranted a conclusion that defendants had fully complied with this requirement, and that the case was one of an absolute gift, made freely and voluntarily in the execution of a purpose to so dispose of the property, without the exercise of any fraud on the part of the grantees. Considerable reliance is placed by plaintiff in this connection upon the finding heretofore referred to that at the time of delivery of the deed "it was understood and agreed by and between the parties thereto that the plaintiff should have a life estate therein, and that said grantees should become the owners in fee thereof, subject to plaintiff's life estate and right to use and occupy the same for his life." This finding, which is upon a matter not specifically referred to in any of the pleadings, does not necessarily imply any lack of understanding upon the part of the donor as to the effect of the absolute deed of gift, or that the deed as delivered was not fully in accord with the desire and intention of the grantor, but is entirely consistent with the fact of a separate understanding and agreement then assented to by the grantees, relying on which plaintiff was willing to make and knowingly and voluntarily made delivery of the absolute deed of gift, with full understanding of its legal effect. The finding is apparently based upon the testimony of plaintiff that the under-

standing was that the place was to be his home as long as he lived, and the writing subsequently executed by the donees to the effect that the property should be their "father's * * * whole lifetime." Although not material on this appeal, it may be noted that the judgment gives the plaintiff all that he can properly claim under such agreement, viz., a life estate in the property.

Certain other findings attacked upon the ground of insufficiency of evidence relate to probative facts, and are of such a nature that a finding in favor of plaintiff thereon could not affect the clear and specific finding of ultimate facts in favor of defendants, as there would be no necessary conflict between such findings. See *People v. McCue*, 150 Cal. 195, 88 Pac. 899. They are, therefore, immaterial, and need not be here considered.

What we have said in regard to the finding of the understanding and agreement at the time of the delivery of the deed disposes of another contention of plaintiff, viz., that if the deed was delivered, untainted by fraud, nevertheless it should be set aside on the ground that it did not express the intentions of the donor.

The only remaining contention of plaintiff relates to the ruling of the trial court in sustaining an objection to a question asked plaintiff, near the close of his direct examination, as follows: "And you never intended to deliver it to them, you say?" The matter under discussion was the question of the delivery of the deed of gift by plaintiff to the grantees, and the objection made was that it called for the conclusion of the witness. It is unnecessary to consider whether the ruling was technically erroneous, for certainly it was not prejudicial error. The subject-matter of the inquiry had been fully covered by the previous testimony of the witness, as the question itself indicated, the witness having testified substantially that he gave the custody of the deed to his daughters solely that they might keep it for him among the family papers, and he subsequently testified in effect that he did not want to deliver it, and allowed it to go into the possession of his daughters in order that they might put it away among his private papers. It is apparent that an additional statement by him that he never intended to deliver it could not have affected the result.

The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

153 Cal. 448

SCHELL v. GAMBLE et al. (S. F. 4716.)
(Supreme Court of California. April 29, 1908.)

1. FRAUDULENT CONVEYANCES — INVALID TRANSACTIONS—INTENT TO DEFRAUD FUTURE CREDITORS.

While a deed of gift may be void because made with intent to enable the grantor to defraud future creditors, to bring a case within

that rule the deed must be fraudulent in its inception and made with the specific intent to defraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 178-184.]

2. SAME—BURDEN OF PROOF.

The burden of proving that a conveyance was made with intent to defraud future creditors is upon the complaining creditor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 806.]

3. APPEAL — REVIEW — CONCLUSIVENESS OF FINDINGS OF TRIAL COURT—STATUTORY PROVISIONS.

Under Civ. Code, § 3442, providing that the question of fraudulent intent in cases arising under the title relating to fraudulent transfers is one of fact and not of law, the decision of the trial court on an issue of fraudulent conveyance is conclusive where the most that an appellant can establish is a substantial conflict in the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3806-3913.]

4. FRAUDULENT CONVEYANCES — EVIDENCE — SUFFICIENCY.

In an action to subject certain property standing in the name of a son to the payment of debts of his father, on the ground that part of the property was conveyed directly to the son to defraud creditors, and the remaining portion was taken in the son's name to defraud creditors, though it was in fact the property of the father, evidence held to sustain findings for defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 892-895.]

Department 1. Appeal from Superior Court, Contra Costa County; Wm. S. Wells, Judge.

Action by George W. Schell against A. W. Gamble and another. From a judgment for defendants, plaintiff appeals. Affirmed.

D. W. Burchard and R. H. Latimer, for appellant. M. R. Jones, for respondents.

ANGELLOTTI, J. This is an appeal from an order denying plaintiff's motion for a new trial. The action was instituted September 15, 1902, by a judgment creditor of defendant A. W. Gamble, to subject certain real property in Santa Cruz and Contra Costa counties, standing of record in the name of defendant W. H. Gamble, son of defendant A. W. Gamble, to execution upon the judgment of plaintiff, upon the ground, as to the Santa Cruz property, that a conveyance thereof by the father to the son, made July 20, 1893, was made with intent to defraud certain designated creditors and is void, and upon the ground, as to the Contra Costa property, that the same is in fact the property of A. W. Gamble, purchased by him in November, 1898, and that the legal title thereto was at the time of the purchase caused by said A. W. Gamble to be placed in his son, with the intent and for the purpose of defrauding said creditors.

The principal contention of appellant is that the findings of the trial court in favor of defendants upon these matters are not sufficiently supported by the evidence. This contention cannot be upheld.

First, as to the Santa Cruz property: The conveyance of this property was made by A. W. Gamble to his son on July 20, 1893, although the deed was not recorded until July, 1894. At the time of the execution of the conveyance, no one of the designated creditors was a creditor of A. W. Gamble, and the record does not show that he then had any creditor at all. The designated creditors were one Lasserot, J. H. Skirm, and W. D. Storey, attorneys at law, and plaintiff. Lasserot's claim was founded in tort, and none of the acts upon which the claim is based was committed until December 1, 1893. Mr. Skirm's claim was for \$50 for legal services, rendered in the year 1894; he having been retained in December, 1893. Mr. Storey's claim was also for legal services; he having been first retained in July, 1894. Plaintiff's claim was for legal services rendered under employment of date March 2, 1898. The record does not show that, at the time of the execution and delivery of the conveyance, there was any probability that any of these parties would ever be a creditor of A. W. Gamble. It is true that a deed of gift, which we may assume this deed to have been, may be void because made with intent to enable the grantor to defraud future creditors. See *Bush & Mallett Co. v. Helbing*, 134 Cal. 676, 66 Pac. 967, and authorities there cited. But to bring a case within this rule the deed must be fraudulent in its inception, made with the specific intent to defraud future creditors. The question of such fraudulent intent as to such future creditors is one of fact and not of law (Civ. Code, § 3442), and the burden of proof is upon the complaining creditor to show that the conveyance was made with such intent (*Bush & Mallett Co. v. Helbing*, supra). We have carefully examined the evidence contained in the record, and find no warrant for holding that there is not therein substantial evidence to support the conclusion of the trial court in this matter so far as the conveyance of the Santa Cruz land on July 20, 1893, is concerned. The most that appellant can establish in this regard is that there was a substantial conflict of evidence, and, under the well-settled rule, the decision of the trial court is conclusive.

Second, as to the Contra Costa property: The evidence was ample to sustain the conclusion of the trial court that A. W. Gamble never owned any interest whatever in this property. It was acquired by W. H. Gamble from one Bishop in the year 1898, apparently in exchange for certain property of Mrs. A. W. Gamble, who was the wife of A. W. Gamble and the mother of W. H. Gamble, and the assumption by the grantee of certain existing mortgages on the property. No part of the consideration therefor came from A. W. Gamble. It is claimed that the real property given by Mrs. Gamble in exchange for this property had been fraudulently conveyed to her by W. H. Gamble. She acquired this property in the year 1893 by deed from her

husband, and there was substantial evidence to the effect that it was so conveyed to her in payment of a just debt due her from him, and without any intent on his part to defraud anybody.

Other findings attacked are not material in view of our conclusion upon those already discussed. Several alleged errors of law on the part of the trial court in the matter of the admission and rejection of testimony were assigned in the statement on motion for new trial, but they are noticed in appellant's brief only by a general statement that all of them were valid and well taken. We have, however, examined them, and find nothing therein of sufficient importance to warrant a reversal, even if any of them was technically erroneous.

The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

153 Cal. 423

CRESCENT FEATHER CO. v. UNITED UPHOLSTERERS' UNION, LOCAL NO.

28, et al. (S. F. 4,593.)

(Supreme Court of California. April 28, 1908.)

1. APPEAL—SCOPE OF REVIEW—APPEAL FROM ORDER ON MOTION FOR NEW TRIAL.

Upon an appeal from an order granting or denying a new trial, only such matters can be considered as are made grounds upon which the superior court is authorized to grant the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3476-3486.]

2. SAME.

Upon an appeal from an order granting or denying a new trial, the appellate court cannot consider either the sufficiency of the complaint or of the findings to support the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3476-3486.]

3. INJUNCTION—RESTRAINING TRADE UNIONS—ISSUES AND PROOF.

In an action to enjoin a union from interfering with plaintiff's business, it was defendant's right to insist upon proof of every material allegation of the complaint which had been controverted by the answer, and such right was not in the least affected by the court's intimation that a complete case had been made out, which intimation caused plaintiff to refrain from offering further evidence.

In Bank. Appeal from Superior Court, Santa Cruz County; J. C. B. Hebbard, Judge.

Action by the Crescent Feather Company against the United Upholsterers' Union, Local No. 28, and others. Judgment for plaintiff. From an order denying a new trial, defendants appeal. Reversed.

F. V. Meyers, for appellants. Bush Finnell, for respondent.

SLOSS, J. This is an action brought by a manufacturing corporation against a labor union and some of its officers and members to obtain an injunction restraining the defendants from interfering with the plaintiff in the conduct of its business by stationing pickets

in the neighborhood of plaintiff's place of business, or otherwise molesting or interfering with any person or persons transacting business with plaintiff. The plaintiff recovered judgment as prayed. A motion by defendants for new trial was denied, and the defendants appeal from the order denying their said motion. There is no appeal from the judgment.

The defendants contend that the relief granted to the plaintiff was too broad; the judgment restraining the commission of acts which, it is said, should not, upon the facts as alleged and found, have been enjoined. This question cannot be raised on the record before us. "Upon an appeal from an order granting or denying a new trial, only such matters can be considered as are made grounds upon which the superior court is authorized to grant or deny the motion." *Green v. Duvergey*, 146 Cal. 379, 80 Pac. 234. Upon such appeal the appellate court cannot consider either the sufficiency of the complaint or of the findings to support the judgment. *Martin v. Matfield*, 40 Cal. 42; *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 186; *Bode v. Lee*, 102 Cal. 583, 36 Pac. 936; *Riverside Water Co. v. Gage*, 108 Cal. 240, 41 Pac. 299; *Rauer v. Fay*, 128 Cal. 523, 61 Pac. 90; *Hunter v. Milam*, 133 Cal. 601, 65 Pac. 1079; *Williams v. Long*, 139 Cal. 186, 72 Pac. 911; *Williams v. Hawley*, 144 Cal. 97, 77 Pac. 762; *Brownlee v. Reiner*, 147 Cal. 641, 82 Pac. 324. The record before us does, however, properly present the question whether the evidence is sufficient to justify the findings, and in our opinion this is the only question which need be considered.

The complaint alleges, in substance, that on October 5, 1904, a representative of the defendant union informed plaintiff, a corporation engaged in the business of manufacturing and selling mattresses and bedding, that six men, members of the said union, must quit plaintiff's employ, and that if plaintiff would not discharge all its nonunion mattress makers the said union would call out on a strike the six union members and would declare a boycott against the plaintiff's business. The plaintiff declined to comply with this demand. Thereupon the defendant union inaugurated and declared a boycott upon plaintiff's business, and called out the six men, who quit the employ of plaintiff, although said six men had informed plaintiff that they were willing to re-enter plaintiff's employ, but feared violence at the hands of members of the union if they did so. It is alleged that the defendants "entered into a combination, confederation, and conspiracy for the purpose of coercing the plaintiff and subjecting the control of plaintiff's business" to said union by inaugurating and declaring a boycott on plaintiff's business, and in pursuance of said combination, confederation, and conspiracy, placed pickets in the vicinity of plaintiff's place of business, and that said pickets intercepted, molested, intimidated, and frightened the non-

union employes of plaintiff by threats of violence and prevented them from remaining in the employ of plaintiff. In furtherance of the said conspiracy the defendants sent plaintiff's various customers a notice, informing them that a boycott had been placed on plaintiff by the defendant union, and requesting them to withdraw their patronage from plaintiff. A notice stating that plaintiff was so boycotted was similarly posted in many public places. It is averred that the pickets were so placed for the purpose of not only intimidating the plaintiff's employes into quitting its service, but for the purpose of intimidating customers of plaintiff. Plaintiff alleges on information and belief that many persons have been frightened and intimidated from plaintiff's said place of business by the pickets, and by said notices and posters above mentioned. It is alleged that the pickets threaten to continue the acts complained of; that plaintiff has already been damaged in the sum of \$1,000, and if said acts continue as threatened plaintiff will suffer irreparable injury; that there is no plain, speedy, or adequate remedy at law; and that each of the defendants is financially irresponsible.

The defendants filed an answer denying some of the allegations of the complaint and making certain affirmative averments. Upon the trial the court found that "all the allegations contained in the plaintiff's complaint are true and that all the allegations contained in the answer of the defendants are untrue." The bill of exceptions contains specifications questioning the sufficiency of the evidence to justify the finding in favor of each of the foregoing allegations of the complaint. As to some of these no issue is raised by the answer. The defendants did, however, make direct and positive denials that any representatives or pickets of the defendant "interfered or molested or intimidated or frightened non-union employes of plaintiff or any thereof, or any person"; that "any threats of violence or of doing violence to the person have ever been made by any person whatever on behalf of these defendants, or any thereof, to any of the employes of plaintiff or to any one else for any purpose whatever; that any of the defendants have ever placed any pickets in the neighborhood of plaintiff's place of business for the purpose of intimidating patrons or customers of plaintiff, or that any customer of plaintiff has ever been intimidated or frightened from patronizing the plaintiff by anything done or said by defendants, or any one acting upon their behalf, or any picket of said defendant union." It is denied that pickets or representatives of defendant union "were at the time of the filing of the complaint herein, or are now, engaged in any of the acts complained of."

It cannot be questioned that these denials raise material issues. The essence of plaintiff's complaint is the unlawful interference by defendants with the conduct of its business. Such interference is alleged to have

been exercised in two ways—by posting or sending out notices, and by stationing pickets about plaintiff's place of business. Of these two methods, the latter was probably the more objectionable, as more likely to have a coercive or intimidating effect. It is alleged that the pickets were intended to, and did in fact, threaten and intimidate prospective customers of plaintiff, and that they sought to frighten workmen from the employ of plaintiff by threats of physical violence. The record is entirely devoid of evidence tending to show that the pickets had come in contact with, or had in any manner whatever influenced, any one who may have desired to deal with plaintiff as a customer. It may be questioned whether there is any competent evidence tending to show, on the part of the pickets, any acts or words amounting to a threat, express or implied, of bodily violence as against the plaintiff's employees. But, if we assume that what was shown in this regard would justify the inference that the conduct of the pickets conveyed such threat to the workmen of plaintiff, it was not made to appear that any pickets were stationed at or near plaintiff's place of business at any time after the 12th of October. The complaint was filed on October 19th. There was no testimony, therefore, to justify the finding that the pickets "are still engaged in the acts * * * complained of." The findings here under discussion form the basis of much of the relief awarded by the decree, and the fact that no support for them is to be found in the evidence requires the reversal of the order appealed from.

In justice to counsel for respondent it should be stated that the meagerness of the evidence offered in support of the complaint was not due to any neglect upon his part. While he was examining a witness, and before he had given any indication of a readiness to close his case, the court interrupted and asked what the defense in the case was. This information having been given, the defendants were directed to put in their defense at once. This colloquy then ensued:

"Mr. Hutton (Attorney for Defendants): Do you close your case, Mr. Finnell?"

"Mr. Finnell (Attorney for Plaintiff): If his honor thinks it is sufficient."

"The Court: Put your defense in."

The defendants thereupon moved for a nonsuit, which was denied, and then rested their case without offering any evidence. Apparently the plaintiff was prepared to offer further evidence, but very naturally hesitated to insist upon his right to present it in the face of the court's intimation that a complete case had been made out. It is unfortunate for the respondent that it may have been thus prevented from fully proving its right to the relief sought. The fact remains, however, that it was the right of the defendants to insist upon proof of every material allegation of the complaint which had been controverted by the answer. The record failing to show

such proof the cause must be remanded for a new trial.

The order appealed from is reversed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

153 Cal. 502

O'SULLIVAN v. GRIFFITH. (S. F. 4,621.)
(Supreme Court of California. April 30, 1908.
Rehearing Denied May 29, 1908.)

1. STREET RAILROADS — FRANCHISE—USE OF STREETS—NATURE OF RIGHT.

The right to use the streets of a city as a way upon which to operate a street railroad is a right in real property, an incorporeal hereditament.

2. VENDOR AND PURCHASER — ACTIONS FOR PURCHASE PRICE—DEFENSES—DEFECT IN TITLE.

At common law, where the deed contains no covenant of seisin, etc., a purchaser cannot avoid the payment of purchase price of land, on the ground that his vendor did not have good title, unless the sale was procured by fraud or by mistake of such a character that equity would relieve the purchaser from its effect.

3. STREET RAILROADS—SALE OF FRANCHISE—VALIDITY AND EFFECT—ESTOPPEL OF PURCHASER.

Plaintiff transferred to defendant by deed all of his interest in certain franchises for the building of a street railroad, which had been granted to him, the deed containing no covenants of title or seisin, and no fraud or mistake was alleged in making the sale. Held, that the deed transferred, not merely the paper under which plaintiff claimed, but was a transfer of an interest in real property, and amounted to a quitclaim deed; and hence the fact that plaintiff had no title to the franchise sold was not a defense in an action for the purchase price, and evidence that the original grant of the franchise to plaintiff was invalid was properly rejected.

4. COVENANTS—IMPLIED COVENANTS—WORDS OF CONVEYANCE.

A covenant of warranty is never implied from a mere recital, but any words in a deed which show an agreement to do a thing constitute a covenant, and where an agreement is contained in a deed an action will lie for its breach, whether it is contained in a recital or elsewhere.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1691, 1693.]

5. SAME — CONVEYANCE OF FRANCHISE—RECITALS.

Where plaintiff transferred to defendant certain franchises for a street railroad, the conveyance reciting that the franchise was "duly given" by the city council, such recital was merely a description of the thing granted; and, while it might constitute an estoppel against the grantors, it did not amount to an express agreement or covenant that plaintiff had good title to the franchise conveyed.

6. SALES—ACTIONS FOR PRICE—DEFENSES—DEFECT IN TITLE.

Even if a conveyance by plaintiff of certain franchises to defendant was merely a transfer of the instrument by which the franchise was granted, and not of an interest in real property, there being no warranty or title or seisin in plaintiff, in the absence of fraud or mistake, the doctrine of caveat emptor applies; and the fact that the instrument transferred was invalid was not a defense to an action for the purchase price of the franchise.

7. SAME — WARRANTIES OF TITLE—COMMON-LAW DOCTRINE.

The doctrine of the civil law, raising an implied warranty of title upon the sale of personal property, has no application in this state, where the common law on that subject prevails.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 749, 750.]

8. TRIAL — RECEPTION OF EVIDENCE—SUFFICIENCY OF OFFER.

In an action for the purchase price of certain franchises transferred by plaintiff to defendant, an offer by defendant to show that the franchises were wholly void, and were defective under the laws of the state wherein they were granted, cannot be construed as an offer to prove that the laws of such state did not permit the transfer of a franchise without the consent of the state.

9. EVIDENCE—PRESUMPTIONS—LAWS OF OTHER STATES—STATUTES AND COMMON LAW.

In the absence of proof to the contrary, the laws of another state, its statutes as well as the common law, are presumed to be the same as the law of this state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 101.]

10. STREET RAILROADS—FRANCHISES—SALE OF FRANCHISE—CONSENT OF STATE—NECESSITY.

Civ. Code, § 510, provides that street railways are governed by the provisions of title 3, in so far as they are applicable, unless such railroads are specially excepted. Section 511 provides that, when a street railway is constructed, owned, or operated by a natural person, this title is applicable to such person, as well as to corporations. Section 494 of title 3 provides that any railroad corporation or person owning any railroad in this state may transfer its franchise to any other railroad corporation, whether organized within or without this state, and the transferee may operate the franchise property within the state and exercise all the rights of a domestic corporation. *Held*, that a street railroad franchise may be transferred in this state, whether held by a corporation or natural person, and the formal or express consent of the state is not necessary.

11. SAME — VALIDITY—PUBLIC POLICY — SALE OF FRANCHISE — ISSUANCE OF CORPORATE BONDS TO PAY PURCHASE PRICE.

Where plaintiff transferred to defendant franchises for a street railroad, defendant agreeing to form a corporation, to build and operate a street railroad, and to cause corporate bonds to be issued to plaintiff in payment for the franchise, such agreement to issue bonds and to construct the road was not contrary to public policy, and was a legitimate and valid undertaking.

Department 1. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by J. B. O'Sullivan against S. N. Griffith. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

N. C. Caldwell, for appellant. Smith & Ostrander, for respondent.

SHAW, J. Appeal from a judgment and from an order denying defendant's motion for a new trial.

Plaintiff sued to recover \$2,700 alleged to be due as the purchase price of all the right, title, and interest of plaintiff and J. Wiseman MacDonald in certain street railroad franchises in Reno, Nev., sold and conveyed by plaintiff and MacDonald to the defendant. The conveyance to the defendant recited the fact that the franchises had been duly given

to the plaintiff and two other persons, who had subsequently transferred their interest to the plaintiff, and then proceeded thus: "Now, it is witnessed that for a valuable consideration the said J. B. O'Sullivan hereby grants, bargains, sells, conveys, and assigns to S. N. Griffith, of Fresno, Cal., all and every his right, title, and interest in and to and under said franchises and each of them." MacDonald had previously obtained from O'Sullivan an option to purchase the franchises, and a clause was added to the effect that he likewise assigned and conveyed to O'Sullivan his interest under the option. A separate instrument of the same date was simultaneously executed, whereby Griffith agreed that he would at once form a corporation to build and operate the roads and cause it to issue bonds secured by a mortgage upon the roads, and would buy said bonds to the amount of \$2,700, par value, and deliver the same to MacDonald within six months from the date of the contract, and that "if said bonds are not issued and delivered in said time the said Griffith shall pay to the said MacDonald the sum of \$2,700." MacDonald assigned to plaintiff all his interest under the contract. The defendant did not cause said bonds to be issued and delivered to MacDonald within the six months specified, nor at all. The defendant alleged in his answer that the promise to pay the money sued for was without consideration. This claim is based on allegations that, under the laws of Nevada, the proceedings by which the alleged franchises were granted to the original grantees were so defective in several particulars that they were wholly void, and that, in consequence, the grants of the franchises were void, or, in other words, that the grantors of the defendant had no title to the franchises they attempted to convey to Griffith, that he received nothing for the transfer, and hence that there was no consideration. In support of this answer defendant offered in evidence the law of the state of Nevada. An objection that the evidence was immaterial and incompetent was sustained, and this ruling is assigned as error.

Appellant's argument is in part based on the theory that the things granted and forming the consideration of the promise were the papers or documents by which the grant of the franchise was manifested, and not the right to use the streets as a way upon which to construct and operate a street railroad. This is not the effect of the conveyance to Griffith. O'Sullivan and MacDonald did not merely transfer the paper; but, as the instrument itself declares, O'Sullivan and MacDonald each granted "his right, title, and interest in and to and under the franchises." This language purports to transfer the estate or property rights created by the original grant, and not merely the document containing the grant. The right to use the streets of a city as a way upon which to build and operate a street railroad is a right in real

property, an incorporeal hereditament. *Stockton, etc., Co. v. San Joaquin Co.*, 148 Cal. 319, 83 Pac. 54, 5 L. R. A. (N. S.) 174. The grant to Griffith purports to convey only the right, title, and interest of the grantors, with no covenants of title, and is, in effect, a mere deed of quitclaim. *Gee v. Moore*, 14 Cal. 472; *Allen v. Holton*, 20 Pick. (Mass.) 458. The case, therefore, stands upon the same ground as a suit for the price of land granted by quitclaim deed, where the grantor had no title in the premises. "It has long been the settled rule at the common law that, where there are no covenants of seisin, etc., in the deed, the defendant cannot avoid payment of the purchase money on the ground that the title existed elsewhere than in the grantor." *Fowler v. Smith*, 2 Cal. 44. It is no defense to a note given in consideration of the conveyance to the maker of all the interest of the payee in a tract of land that the payee had no interest in the land, unless the sale was procured by the fraud of the payee, or by reason of mistake of such a character that equity would relieve the maker from its effects. *Rawle on Covenants*, § 321; *Perkins v. Bumford*, 3 N. H. 522; *Tobin v. Bell*, 61 Ala. 125; *Owens v. Thompson*, 4 Ill. 502; *Hulett v. Hamilton*, 60 Minn. 21, 61 N. W. 672; *Smith v. Winston*, 3 Miss. 601; *Foy v. Haughton*, 85 N. C. 168; *Cross v. Noble*, 67 Pa. 74. The defendant, by the conveyance, obtained exactly what his contract calls for; that is, all the right, title, and interest of the grantors in and under the franchises. No fraud or mistake is alleged. The grantors did not covenant that they had any interest, but only conveyed such as they had. In such cases the purchaser is deemed to take all the risk of title upon himself. The answer did not show a want of consideration and the evidence was properly rejected.

The appellant assumes, without argument, that from the recital in the instrument transferring the franchises to him that the franchises had been "duly given" the law will imply a covenant or warranty that they were valid. This assumption is not well founded. In *Rawle on Covenants*, § 280, that author says: "Owing to a misapprehension of one or two old cases, the dangerous doctrine has been more than once broached that covenants for title may be implied from a recital; but this has since been distinctly and decisively repudiated." A covenant or warranty is never implied from a mere recital. The true rule is thus stated in *Comyn's Digest*, quoted with approval in *Hale v. Finch*, 104 U. S. 269, 26 L. Ed. 732: "Any words in a deed, which show an agreement to do a thing, make a covenant; but, where words do not amount to an agreement, covenant does not lie." An agreement may be set forth in a deed, as well as in any other writing; and, where it is so expressed, an action will lie for its breach, whether it is contained in a recital or elsewhere in the conveyance. But it must be so drawn as to express a contract, and a mere

recital that a fact has transpired, that a franchise has been duly given, cannot be turned into an agreement to be held responsible in the event that it was not legally granted. The recitals in the conveyance that the franchise in the city of Reno was duly given by the city council, and regularly confirmed at a special election, that the franchise in the county of Washoe was duly given, and that both franchises had been duly transferred to O'Sullivan, do not state any contract or agreement on the part of the grantors. They merely declare the chain of title, and serve as a more particular description of the thing granted to Griffith. They might constitute an estoppel against the grantors in the instrument, but they do not express any agreement. *Ferguson v. Dent*, 8 Mo. 669; *Peck v. Hensley*, 20 Tex. 678. The same rule would obtain if the grant is regarded merely as a transfer of the instruments by which the franchises were granted. In that event, there being no warranty, fraud, or mistake, the rule is that the doctrine of caveat emptor applies, and the fact that the instrument transferred was void is no defense to an action for the price. *Christy v. Sullivan*, 50 Cal. 337; *Sutro v. Rhodes*, 92 Cal. 117, 28 Pac. 98; *Harvey v. Dale*, 96 Cal. 160, 31 Pac. 14. The case of *Meyer v. Richards*, 163 U. S. 383, 16 Sup. Ct. 1148, 41 L. Ed. 199, was decided according to the rule of the civil law prevailing in Louisiana, whereby a sale or transfer of the thing implies a warranty of title. See *Fowler v. Smith*, supra. It has no application in this state, where the common-law rule on that subject prevails. We do not think the decision in *Amestoy v. Electric R. T. Co.*, 95 Cal. 311, 30 Pac. 550, announces a doctrine contrary to the common-law rule on this subject as settled by the decisions above cited.

The defendant further answered that under the law of the state of Nevada the franchises in question could not be assigned without the consent of the state. It may be conceded that the allegation on this point is an allegation of fact as to the law, and not a mere conclusion. It is not necessary to decide the question whether or not it is sufficient in form, for there was no offer to prove the laws of Nevada on this point. The offer which counsel for the defendant made to prove certain things by the law of Nevada cannot reasonably be construed as an offer to prove that that law did not permit the transfer of a franchise of this kind without the consent of the state. The defense, therefore, must rest upon the presumption which prevails in this state concerning the law of another state in the absence of proof thereof. Such law in that case is presumed to be the same as the law of this state. *Hickman v. Alpaugh*, 21 Cal. 225; *Hill v. Grigsby*, 32 Cal. 60; *Marsters v. Lash*, 61 Cal. 624; *Shumway v. Leakey*, 67 Cal. 460, 8 Pac. 12; *Mortimer v. Marder*, 93 Cal. 178, 28 Pac. 814; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674;

Cavallaro v. Texas, etc., Ry. Co., 110 Cal. 357, 42 Pac 918, 52 Am. St. Rep. 94; *Brown v. S. F. Gas Co.*, 58 Cal. 426. This rule applies to statute law as well as to the common law. *Cavallaro v. Texas, etc., Co.*, supra. In this state a street railroad franchise may be transferred, whether held by a corporation or natural person, and no formal or express consent of the state is necessary. Civ. Code, §§ 494, 510, 511.

The franchises in question were not personal property, and the provisions of the civil law and the decisions relating to warranties implied from the sale of personalty have no application to this case. As above stated, there is no pleading attempting to show that the sale was made through fraud on the part of the grantors or by the mistake of the defendant. It is not alleged that the defendant was ignorant of the actual facts in regard to the proceedings for the granting of the franchises, nor that he relied on any representations or recitals in the deed, nor that he was not as well informed as to the validity of the franchises, both in law and in fact, as the plaintiff and MacDonald.

We do not perceive any ground on which to hold that the stipulations in the agreement sued on, requiring Griffith to form a corporation to build and operate a street railroad and to cause corporate bonds to be issued to MacDonald in payment for the franchises—that is, the rights of way upon which the road was to be built—are contrary to public policy, or of such effect as to make the entire contract void. It seems to be a perfectly legitimate and valid undertaking.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

153 Cal. 426

SEQUEIRA v. COLLINS et al. (S. F. 3,752.)
(Supreme Court of California. April 28, 1908.)

1. APPEAL — NOTICE—SERVICE AND FILING—
FAILURE TO FILE IN TIME.

A notice of appeal from a judgment, served and filed more than six months after the entry of the judgment, confers no jurisdiction on the appellate court to entertain the appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1926-1931.]

2. PLEDGES—CREATION—CONTRACT.

Defendant, having possession, under an oral contract for purchase, of land on which he had commenced making brick, executed two written instruments, one of which purported to transfer all his interest in the contract for the purchase of the land and in and to the brick made and to be made thereon to plaintiff; the other instrument, after reciting the transfer, providing that it was made as security for all moneys to become due from defendant to plaintiff, who agreed to advance money for the making of the brick. The agreement further provided that plaintiff was to be and remain the owner of all brick made, and entitled to its possession, until payment of all sums due him. Held that, while the instrument purported to transfer the property, the transfer was made as security and operated to vest in plaintiff only a lien, and, as far as the bricks were concerned, the writings

were to be viewed as a contract for the creation of a pledge.

3. SAME—DELIVERY OF PROPERTY—STATUTORY PROVISIONS—EVIDENCE.

Civ. Code, § 3440, requires a transfer of personal property, in order to be good against creditors, to be accompanied by an immediate delivery and followed by an actual and continued change of possession, if made by a person having at the time the possession or control of the property. Held, that the statute by its terms excepts transfers of property not in existence at the time of the transfer from the requirement of immediate delivery, and where, at the time of the transfer of certain brick made and to be made, only the first arch in one kiln had been laid, which arch contained only 18,000 brick, none of which had been burned, no immediate delivery was required to make the transfer valid.

4. SAME.

Under Civ. Code, § 3440, requiring the transfer of personal property, in order to be good against creditors, to be accompanied by an immediate delivery and followed by an actual and continued change of possession, the possession taken by a pledgee must be actual, and not merely constructive, in order to give him a valid lien, and the mere fact that a pledgee of brick gave some directions to men engaged in making the brick did not show a taking of possession: it not appearing that he ever supplanted the pledgor in the general management of the work, or took the direction thereof out of his hands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, §§ 28-40, 47.]

5. SAME.

Where goods sold or transferred are bulky, or require further labor to fit them for use, it is not essential to a change of possession that they should be removed from the land of the transferor, nor does the mere fact that the transferor retains some measure of control over the goods conclusively establish the absence of an actual and continued change of possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, §§ 28-40.]

6. SAME—SUFFICIENCY OF EVIDENCE.

Evidence examined, and held insufficient to show that certain personal property ever passed from the possession of the pledgor into that of the pledgee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, §§ 28-40.]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Antone George Sequeira against J. D. Collins and another. From a judgment for plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Appeal from judgment dismissed, and order denying new trial reversed.

H. U. Brandenstein and Stanton L. Carter, for appellants. L. L. Cory, for respondent.

SLOSS, J. This is an action to recover damages for the conversion of 640,000 bricks alleged to be of the value of \$4,000. The plaintiff recovered judgment for \$3,100, and the defendants appeal from the judgment and from an order denying their motion for a new trial. The notice of appeal from the judgment was served and filed more than six months after the entry of judgment, and therefore conferred no jurisdiction on the appellate court to entertain this appeal.

The brick in question were in two kilns

standing upon land in Fresno county. The defendant Weihe commenced an action against one Spinney to recover \$4,000, with interest and costs, and in that action caused a writ of attachment to be issued and placed in the hands of defendant Collins, the sheriff of Fresno county, for levy. Pursuant to this writ and to the instructions given by Weihe, Collins attached and took into his possession the two kilns of brick. The plaintiff, claiming to be the owner and entitled to the possession of the attached property, served upon the sheriff a demand for the release of the attachment, and, his demand being refused, he instituted this action.

The main question between the parties is whether certain transactions had between Spinney and the plaintiff prior to the levy of the writ of attachment operated to transfer to the plaintiff an interest in the brick which he could assert as against an attaching creditor. It appears without controversy that the land upon which the kilns were standing had originally belonged to defendant Weihe. In August, 1897, Weihe made an oral agreement with Spinney whereby it was agreed that Spinney should purchase from Weihe the land in question for the sum of \$4,000, with interest, payable in annual installments of \$1,000 each. Spinney went into possession of the land under this agreement and remained in possession until after the levy of the writ of attachment. In 1901 Spinney commenced the manufacture of the brick in question; the material therefor being taken from the land. In May, 1901, some of the brick in one of the kilns being then in place but not yet burnt, he made an agreement with Sequeira, the plaintiff, whereby the latter agreed to advance the money necessary for the making of the brick. Two written instruments were executed. One of these purported to transfer to Sequeira all his right, title, and interest in and to the contract with Weihe for the purchase of the land, and also his right, title, and interest in and to the brick made and to be made thereon. The other, after reciting the transfer, provided that it "is made as security for the performance on the part of the said first party (Spinney) of the agreements herein mentioned and to secure to said second party (Sequeira) all sums due and in any manner to become due from said first party to second party." By this writing, Sequeira agreed to advance, for the making of the brick, such sums as he might "deem best," and was to receive interest on all sums advanced, and one-half of the net profits realized from the sale of the brick. The agreement in question further provided that Sequeira was to be and remain the owner of all brick made, and entitled to its possession, until payment of all sums due him. There is no room for controversy as to the legal effect of these instruments. While they purport to transfer the property, the transfer is plainly made as security, and operated to vest in the plaintiff only a lien. So far as the bricks are con-

cerned, the writings are to be viewed as a contract for the creation of a pledge. Civ. Code, § 2988.

Sequeira made advances from time to time to pay for the expense of preparing, manufacturing, and burning the brick; his advances amounting in all to \$3,270. Spinney completed the moulding and laying of the brick in the first kiln, laid a second kiln, and proceeded to burn both. One of the kilns was finished in August, and the other in September, 1901. The attachment was levied on the 16th day of April, 1902. It is contended by the appellants that there had been no such "immediate delivery" or "actual and continued change of possession" of the property transferred, as is required by section 3440 of the Civil Code, to make the transfer valid as against a creditor of the transferrer. In this connection the court found "that said bricks were not in existence at the time the said agreements were so entered into and executed, and thereafter, and long prior to this action, and since said bricks were manufactured, the plaintiff took possession thereof, and ever since maintained the possession thereof down to the time when the defendant J. D. Collins took possession thereof in pursuance of the writ of attachment herein referred to." Section 3440, above referred to, requires a transfer of personal property to be accompanied by an immediate delivery and followed by an actual and continued change of possession "if made by a person having at the time the possession or control of the property." If the property is not in existence at the time of the transfer, it is obviously impossible that it should be in the possession and control of the transferrer, and the statute by its terms excepts transfers of such property from the requirement of immediate delivery. There is evidence here that at the time of the transfer only the first arch in one kiln had been laid, and that this arch contained only 18,000 brick, none of which had been burned. We think this clearly brings the case within the exception of the statute, and that no immediate delivery was required in order to make the transfer valid. *Newell v. Desmond*, 74 Cal. 46, 15 Pac. 369. But, apart from the question of an immediate delivery, it was essential, in order to vest in plaintiff an interest in the property which would entitle him to hold it as against a creditor of Spinney, that he should have taken possession and held the bricks. The instruments under which the plaintiff claimed amounted, as has been said, to no more than a pledge of the brick. "A pledge is a deposit of personal property as security (Civ. Code, § 2986), and is dependent on possession, and is not valid until the property is delivered to the pledgee (Civ. Code, § 2988). The delivery must be as complete as is required in case of sales of personal property by section 3440 of the Civil Code, and change of possession must be continuous and open." *Lillenthal v. Ballou*, 125 Cal. 183, 57 Pac. 897.

The testimony relied upon to support the finding that plaintiff took and maintained possession is, in the main, that of the plaintiff himself. He stated that he took possession of the brick and always remained in possession of them until they were seized by the sheriff; that he went out to the land on which the bricks were being made "right along," sometimes at night, sometimes in the morning; that when there he would look around to see that everything was going along all right; that he went out every day during some weeks, and twice or three times a week at other times, sometimes staying and working on the premises all day; that he was there every night while the second kiln was being burnt, but that sometimes he did not go there for a month; and that he was in charge of the brick. He employed some men to work on the kilns, but this was at the request of Spinney. He instructed the men not to lay the brick too close. It appeared, without controversy, that Spinney was in possession of the land on which the kilns stood, and was conducting some farming operations on the portion of the tract not used in making brick. There was no evidence that Spinney ever did any act or said any word indicating an intent to make an actual or a constructive delivery of the kilns to the plaintiff. We think this testimony was insufficient to justify the finding that the plaintiff took or maintained possession of the brick. No importance is to be attached to his general statements that he had possession or was in charge. These are mere conclusions, and have no value if unsupported by the facts testified to. It clearly appears that Spinney, the man in possession of the land, commenced the manufacture of the bricks on that land, and carried that work to completion with the aid of men employed by him. There is nothing in the testimony of Sequeira to show that the possession of the brick ever passed from Spinney. There is no contention, and no basis for a contention, that Sequeira and Spinney were in joint possession, assuming that such joint possession would be sufficient. The claim that the plaintiff took possession must rest on the assumption that he took it from Spinney, with or without the latter's consent. But the record fails to show that Spinney's possession of the brick was not as full and complete at the date of the levy of the attachment as it had been at any prior time. The character of the possession which must be taken by a pledgee in order to give him a valid lien is, as above stated, the same as that defined in section 3440 of the Civil Code. *Lilienthal v. Ballou*, supra. That is to say, the change of possession must be actual, not merely constructive. *Bunting v. Saltz*, 84 Cal. 168, 24 Pac. 167. It must be "open and unequivocal, carrying with it the usual marks and indications of ownership." *Stevens v. Irwin*, 15 Cal. 503, 78 Am. Dec. 590; *George v. Pierce*, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53. As was said in

McKee Stair Co. v. Martin, 126 Cal. 557, 58 Pac. 1044: "There must be a visible and apparent change of the custody of the property, such as to give evidence to the world of the claims of the new owner." There was nothing in this case to show that Spinney did not at all times retain the full custody and control of the bricks. The mere fact that Sequeira gave some directions to the men engaged in the work cannot be given this effect, for it is not pretended that he ever supplanted Spinney in the general management of the work, or took its direction out of his hands.

We do not overlook the consideration that the acts necessary to constitute a change of possession depend upon the character and situation of the property transferred. "The law recognizes the fact that all species of personal property are not capable of the same kind of possession, and requires only that a purchaser or donee shall take such possession as the character and nature of the property admit of." 14 Am. & Eng. Ency. of Law (2d Ed.) 374; *Chaffin v. Doub*, 14 Cal. 384; *Porter v. Bucher*, 98 Cal. 454, 33 Pac. 335; *Dubois v. Spinks*, 114 Cal. 280, 46 Pac. 95. Where the goods sold or transferred are bulky, or require further labor to fit them for use, it is not essential to a change of possession that they should be removed from the land of the transferor. *Chaffin v. Doub*, supra; *Porter v. Bucher*, supra; *Dubois v. Spinks*, supra. Nor can it be said that the mere fact that the transferor retains some measure of control over the goods conclusively establishes the absence of an actual and continued change of possession. *Stevens v. Irwin*, supra. In *Dubois v. Spinks*, supra, it was held that a quantity of cord wood had passed into the possession of the transferee, although the wood had not been removed from the place where it had been piled. In *Tognini v. Kyle*, 17 Nev. 209, 30 Pac. 829, 45 Am. Rep. 442, the same rule was applied to the transfer of a large quantity of charcoal. In each of these cases, the vendor or transferor, by words of delivery, or otherwise, turned over his possession to the vendee. Other cases of similar purport are cited; but it has never been held, at least in this state, that an actual change of possession has taken place, where the transferor, after the transfer, continues to exercise the same control and dominion over the property as before, and has done nothing to indicate any intention of passing that control and dominion from himself to his transferee. *Woods v. Bugbey*, 29 Cal. 467, was a case, the facts of which were strikingly like those here presented. In holding that there had been no actual change of possession, the court used language which may well be applied to the case at bar: "In no case that we are aware of has the Supreme Court of this state laid down a rule requiring less than that the purchaser must have that possession which places him in the relation to the property which owners usually are to the like

kind of property. In *Lay v. Neville*, 25 Cal. 552, the court, in reference to the subject, say: 'It was intended that the vendee should immediately take and continuously hold the possession of the goods purchased, in the manner and accompanied with such plain and unmistakable acts of possession, control, and ownership, as a prudent bona fide purchaser would do in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property.' Testing the evidence by this rule, we are satisfied that it fails to show that the klins ever passed from the possession of Spinney into that of Sequeira. There is nothing in the case tending to raise the slightest doubt as to the good faith of plaintiff in taking the assignment of the brick as security for his advances, but the hardship of a particular case furnishes no reason for disregarding the provision of the statute which makes the lien of the pledgee dependent upon actual possession of the property pledged.

The conclusion reached makes it unnecessary to consider the other points made.

The appeal from the judgment is dismissed. The order denying a new trial is reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

163 Cal. 474

KAISER v. BARRON. (L. A. 1903.)

(Supreme Court of California. April 29, 1908.)

1. PAYMENT—VOLUNTARY PAYMENT.

A payment of money made on execution is not a voluntary payment, even though there has been no seizure of the property of the one who makes the payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 264.]

2. COSTS—TAXATION—DUTIES AND PROCEEDINGS OF TAXING OFFICER.

The only judgment for costs which the clerk has authority to enter is for costs which have been taxed, and an entry of costs in the judgment against plaintiff, while a motion to tax them was pending, was without authority, and an execution issued for the collection of such costs should be recalled.

In Bank. Appeal from Superior Court, Orange County; J. W. Taggart, Judge.

Suit to quiet title by Emil Kaiser against U. M. Barron. From a judgment for defendant, and from certain orders made after judgment, plaintiff appeals. Reversed and remanded.

F. C. Spencer, for appellant. Charles S. McKelvey, for respondent.

HENSHAW, J. Plaintiff sued to quiet title to a certain 25 acres of land. Defendant answered, setting forth a contract entered into by himself and plaintiff's predecessor in interest, the substance of which contract was that defendant would plant the northern 15 acres in walnut trees, and would nurture

and care for them until the 1st day of January, 1906, at which time defendant having fulfilled the conditions of his contract, plaintiff's predecessor in interest agreed to convey to him the southerly 10 acres. Defendant then averred that Sisson, plaintiff's predecessor in interest, placed him in the actual possession of the 25 acres of land for the purpose of fulfilling the covenants contained in the agreement, and that ever since he has been in such possession under the provisions of their contract. After trial, judgment passed for defendant; the judgment being to the effect that the contract above referred to was valid and subsisting, and that defendant was entitled to possession of the premises and was entitled, upon complying with the provisions thereof, to have a conveyance made to him of the southerly 10 acres. From this judgment plaintiff appeals upon the judgment roll. He also appeals from certain orders made after judgment, and which will hereinafter be more particularly specified.

Upon appeal from the judgment the contention is that the findings do not support it. The judgment, as has been said, decrees a rightful possession of the premises in defendant. Defendant pleaded, as above noted, that Sisson placed him in possession of all of the land for the purposes of fulfilling the contract and that such possession, under such license and in accordance with the contract, he has ever since maintained. The findings, however, are silent upon the matter, and while it may be said that it can be gathered from a reading of the contract that defendant, for the purposes of executing it, was entitled to the possession of the northerly 15 acres which he was to set out as an orchard and irrigate, cultivate, and prune, yet the contract is wholly silent as to the possession or right of possession of the southerly 10 acres. Defendant's right of possession of this comes, as he pleads, from the act of Sisson. But the court's failure to find upon this important matter leaves the judgment as to this 10 acres without any support in the findings. The same may be said of another piece of the northerly 15 acres, amounting to 1.92 acres. As to this, the finding of the court is that by executed parol agreement this portion of the 15 acres was excluded, or, in other words, defendant was called upon to put into orchard only 13.08 acres. Nothing in the findings justified the court's judgment awarding a continued possession to defendant of this 1.92 acres. It stands in this regard precisely as does the 10 acres above considered.

Defendant filed his cost bill, and plaintiff gave timely notice to tax the costs. The matter of taxing costs was continued by order of court, and, while so pending and undetermined, the judgment for costs was entered and docketed by the clerk and execution thereon issued. Plaintiff then made his motion to recall the execution, upon the ground that it was improvidently issued, and also to tax the costs, and in so doing to disallow an item of

\$3.75 for serving a subpoena, and an item of \$20 for reporter's charges, and to correct an error of \$9.95 in the addition of the items as they appeared upon the face of the bill. In response to this the defendant showed that, after the execution levy for the costs upon the land, plaintiff, desiring to make a sale of his interest therein, paid the amount called for. Upon this showing the court ruled that the costs had been voluntarily paid, and denied these motions. But it is well settled that a payment of money made on execution is not a voluntary payment, even though there has been no seizure of the property of the one who makes the payment. *First Nat. Bank v. Watkins*, 21 Mich. 483; *Knox Co. Bank v. Doty*, 9 Ohio St. 506, 75 Am. Dec. 479; *Scholey v. Halsey*, 72 N. Y. 578; *Hiler v. Hiler*, 35 Ohio St. 645; *Manning v. Poling*, 114 Iowa, 20, 83 N. W. 895, 86 N. W. 30. The only judgment for costs which the clerk has authority to enter is for costs which have been taxed. The entry of costs in the judgment, while a motion to tax them was pending, was without authority, and the issuance of an execution for the collection of such costs and the levy upon plaintiff's property was improvident and untimely. The motion to recall the execution should have been granted, as well as the motion to tax costs.

The order refusing to tax costs and the order refusing to recall the execution are reversed. The judgment appealed from is reversed, and the cause remanded for a new trial. This renders unnecessary a consideration of the appeal from the order refusing to modify the judgment.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; SHAW, J.

153 Cal. 398

PEOPLE v. DABNER. (Cr. 1,418.)

(Supreme Court of California. April 27, 1908).

1. CRIMINAL LAW—APPEAL—APPEALABLE ORDERS.

An order refusing leave to withdraw a plea of guilty is not appealable, though it may be reviewed on appeal from the judgment.

2. HOMICIDE—MURDER—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding that a homicide was murder in the first degree, without mitigating circumstances.

3. CRIMINAL LAW—PLEA OF GUILTY—WITHDRAWAL—JUDICIAL DISCRETION.

A trial court did not abuse the sound discretion expressly vested in it by Pen. Code, § 1018, in refusing to permit one accused of murder to withdraw a plea of guilty after a finding that the homicide was murder in the first degree, without mitigating circumstances, where the plea was made after ample time for deliberation and with full knowledge of law, the facts, and course of procedure to follow such plea, and where there was no serious doubt as to accused's guilt, and it did not appear that evidence could be produced tending to mitigate the offense; that he voluntarily confessed; that his plea was prompted by a hope that he would escape death and be condemned to imprisonment; and that he had previously borne a good

reputation not entitling him to withdraw the plea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 629, 633.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Louis Dabner was convicted of murder in the first degree, and he appeals from a judgment on the conviction and from an order refusing leave to withdraw his plea of guilty. Affirmed.

G. P. Hall, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Wm. H. Langdon, Dist. Atty., for the People.

SHAW, J. The defendant and one John Siemsen were jointly charged with the murder of one M. Munekata. Upon arraignment Dabner pleaded guilty. Thereupon the court heard evidence to enable it to ascertain and determine the degree of the crime, and upon the evidence taken declared it to be murder of the first degree without mitigating circumstances, and punishable with death. When subsequently brought before the court for judgment and sentence upon the said plea, the defendant asked leave to withdraw his plea of guilty and enter a plea of not guilty to the charge. Evidence and affidavits in support of, and in opposition to, this application, were introduced. The court refused to allow the withdrawal of the plea of guilty, and pronounced judgment and sentence of death. The appeal purports to be taken from the judgment and also from the order refusing leave to withdraw the plea. The latter order is not appealable; but, inasmuch as it can be reviewed on appeal from the judgment, the point is immaterial. A bill of exceptions, setting forth the evidence taken and proceedings had upon the inquiry as to the degree of the crime and upon the motion for leave to withdraw the plea, was duly settled and appears in the record on appeal.

The evidence shows that Siemsen and Dabner about noon on November 3, 1906, entered a bank in San Francisco, known as the Japanese Bank, which was then in charge of the deceased Munekata, who was its manager, and an assistant named Sasaki, and asked to see the manager on business. They were admitted to the manager's private office, which was in the rear of the premises, and Siemsen immediately struck Munekata on the head with a piece of gas pipe which Dabner had procured the night before. Munekata was rendered unconscious by the blow, and died therefrom shortly afterwards. Dabner, as soon as the blow was struck and Munekata fell back unconscious, called to Sasaki, the assistant, to come to the manager's office. He came and he also was beaten over the head by Siemsen and rendered unconscious. Siemsen then took from the till some \$2,000 or \$3,000, and the two defend-

ants went off with it. The entire occurrence occupied but a few minutes and attracted no attention from the outside. The two had visited the bank the day before, for the purpose of observation to ascertain how the robbery could be accomplished, and had carefully planned the affair beforehand, even to the detail that Dabner was to call Sasaki to the manager's office as soon as Siemsen had stricken down the manager with the gas pipe. There was no fact or circumstance connected with the commission of the murder that tends in the least degree to mitigate it. The only mitigating circumstance concerning the defendant was the fact that he confessed his crime when he was arrested. It was upon his confession that the details of the killing and the robbery were first disclosed. We cannot perceive that his subsequent confession has any bearing upon the question whether or not the crime itself was committed with deliberation and under circumstances which rendered it particularly flagrant and heinous. The court did not err in holding that it was murder of the first degree with no mitigating circumstances.

In support of the application to withdraw the plea of guilty, substitute a plea of not guilty, and go to trial before a jury, it was shown that the defendant was only 18 years old, and that until February, 1906, he had lived in or near the city of Petaluma; that he had there borne a good reputation for honesty, integrity, and good behavior; and that he was not a strong-minded person, but was easily influenced by others. It was also claimed that he was insane. The grounds of his motion were that his plea of guilty was made through inadvertence, without due deliberation, in ignorance of the law and the consequences of such a plea, in obedience to the advice and instruction of his father, and in the belief that, if he made that plea, a jury would be called to fix his punishment, and that he would be sentenced only to imprisonment for life. Evidence was given tending in some degree to support some of these grounds. On the other hand, the record shows that when he was arraigned, an attorney was appointed by the court to represent him; that two days were given him to consider his plea, that at the expiration of the two days other counsel were appointed to act as his attorneys and the case was continued for two more days; that a demurrer was then filed and submitted without argument and overruled by the court; that the attorneys then stated to the court that the defendant wished to plead guilty; that this was against their advice; and that they wanted to withdraw from the case. The court then asked the defendant personally if he wanted to plead guilty, and he said that he did. The court then informed him that he could have other counsel if he desired it, and proceeded to explain to him, clearly and at length, that, if he pleaded guilty, it would be the duty of the judge of the court, and not a jury, to as-

certain and determine whether the crime committed was murder of the first or second degree, and that, if it was determined to be of the first degree, the judge also would have to determine whether he was to be hanged, or sentenced only to life imprisonment, but that, if he pleaded not guilty, these questions would be decided by a jury. He was then directed to talk to his attorneys further about the matter, and after such conversation inform the court what he desired to do. He then talked with his attorney, and again signified his desire to plead guilty, his attorney again declaring that he had advised against it. On the hearing of the motion he testified that in this conversation with his attorney he was advised that, if he pleaded guilty, the court would determine the crime to be murder of the first degree and sentence him to death by hanging, and that he fully understood what was said to him by the attorney and by the court, but that he was governed in the matter by the advice of his father. After the last statement by the attorney, the court again asked the defendant if he fully understood what he was doing, and he answered that he did. His plea was then taken and entered of record, his attorneys immediately withdrawing from the case. The case was continued to the following day to take evidence as to the degree of the crime. At that time the evidence was given, the degree of the crime, and punishment was fixed as above stated, and the matter was continued two days for sentence. At the time fixed for sentence a different attorney appeared for the defendant and made the application for leave to withdraw the plea, as above stated.

It thus appears that the defendant was given five days for deliberation as to his plea; that during this time he had the counsel and advice of three attorneys, all urging him to plead not guilty; that he was fully informed by them as to the difference in the procedure if he pleaded guilty from that to be had if he pleaded not guilty; and that the court also explained to him the course of procedure. His own testimony taken in these proceedings indicates that he is a young man of at least ordinary intelligence and quickness of apprehension, while that of others tended to show that he was possessed of considerable shrewdness and cunning. It must be conceded that the court justly concluded that the defendant made his plea after ample time for deliberation and not in ignorance of the law, or facts, nor of the course of procedure to follow, and with full knowledge thereof. Doubtless he was prompted by the hope that he would escape death and be condemned only to imprisonment, and he seems to have been induced to indulge this hope largely by the suggestions and advice of his father. But we do not think this fact of sufficient force to have required the court to permit a withdrawal of this plea after the event had proven that his hope was vain. If this was

so, then the punishment upon a plea of guilty must always be something less than the greatest allowed by law, for the defendant in pleading guilty, always hopes for less, and, if his disappointment was sufficient to give the right to withdraw the plea, it would in such a case always be withdrawn. It was not until the court had declared that the penalty would be death, and after a subsequent delay of six days, that the defendant applied to withdraw and change his plea. There was no contention to the effect that there was any serious doubt as to the defendant's guilt, or that evidence could be produced which would tend to prove that the offense was anything less than murder of the first degree, or even to mitigate its atrocity and lay the foundation for a verdict of imprisonment for life, except the claim that the defendant was insane and that prior to his departure from Petaluma, 10 months before the time of sentence, he had borne a good reputation for honesty, integrity, and good behavior. The evidence of his insanity was very slight, but nevertheless the court appointed three physicians to examine him in that respect, and they unanimously pronounced him sane. His previous good character might have some bearing on the fact of his participation in the crime, if that were in doubt, but there is no pretense that he did not aid and assist therein with deliberation and previous knowledge of the character of assault which was to be made. A cold-blooded, cruel, and deliberate murder is not rendered any the less atrocious by the fact that the person committing it was previously of good reputation.

Section 1018 of the Penal Code provides that the court may at any time before judgment permit the withdrawal of a plea of guilty and a substitution of a plea of not guilty. It is a matter within the sound discretion of the court, and its action must be upheld unless an abuse of discretion is shown. The following remarks of the court in *People v. Miller*, 114 Cal. 16, 45 Pac. 987, are particularly applicable here: "The mere fact that a defendant, knowing his rights and the consequences of his act, hoped or believed, or was led by his counsel to hope or believe, that he would receive a shorter sentence or a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by jury, presents no ground for the exercise of this liberal discretion, *People v. Lennox*, 67 Cal. 113, 7 Pac. 260. To hold that it did would be equivalent to saying that a defendant might speculate upon the supposed clemency of a judge, with the right to retract if, at any time before sentence, he began to think that his expectation would not be realized. * * * Only after it is made manifest that defendant is to suffer the extreme penalty, and that no further delay will be permitted, do counsel produce the affidavit, itself made upon the day of the hearing, but not offered until that mo-

ment, and asked to be allowed to retrace all these steps thus advisedly taken. What conclusion can be reached except the one that, because the court was about to pronounce sentence of death, defendant and his counsel, knowing that he could not fare worse at the hands of a jury, and might fare better, sought an opportunity to essay the other chance." If we could perceive anything in the evidence which would have called for a lesser punishment than that the trial court was about to impose, some reason might appear why defendant should have been permitted to withdraw his plea and put his fate before a jury. No showing of this kind is made. The record not only fails to show an abuse of discretion, but, to the contrary, from first to last makes manifest that the trial judge, placed in an unusual and trying position, conducted all of the proceedings with a just and even solicitous regard for the defendant's rights, and ruled as alone it was permissible for him to rule under the facts before him. The defendant's acts indicate that he is not so dangerous or vicious as his codefendant Siemsen. His voluntary confession seems to have been full and frank. These facts might have aroused in the mind of the court some degree of sympathy for him, and perhaps, if a jury had considered the case, such sympathy might have been sufficiently potent to have saved him from the death penalty. But the comparison with his partner in crime does not establish the fact that his own acts were not sufficiently atrocious to deserve the severest penalty, but only to show that there were degrees of viciousness to which his disposition and capacity did not carry him. His voluntary confession does not lessen or soften the character of his crime. But, whatever its effect may be, it was addressed to the discretion of the court below, and it is not of sufficient weight to control our action to such an extent as to justify us in declaring that that discretion was abused. The responsibility in such matters rests upon the superior court. This court has no function to perform regarding it, except to see that the discretion of that court is not unreasonably exercised. As a matter of law the action of the superior court is justified by the facts. If an appeal is to be made to sympathy and sentiment, it can only be done on an application for clemency and mercy addressed to the executive department of the state.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

153 Cal. 451

COREA v. HIGUERA et ux. (S. F. 4,674.) (Supreme Court of California. April 29, 1908.)

1. EASEMENTS—WAYS OF NECESSITY—REQUISITES.

No right of way over another's land exists as a way of necessity where claimant's land is

bounded by a road connecting with the county roads, though there is no easy access to that road, and no constructed track for teams connecting his land with it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 50-55.]

2. SAME—EFFECT OF CONVEYANCE OF LAND.

If a right of way over defendants' land was appurtenant to a tract which they conveyed to plaintiff's predecessor, it passed with the conveyance of the tract, under Civ. Code, § 1104, providing that a transfer of land passes all easements attached thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 60.]

3. SAME—"APPURTENANCE."

Under the express terms of Civ. Code, § 662, a thing is deemed to be incidental or "appurtenant" to land when it is by right used with the land for its benefit, e. g., a way, water course, or passage for light, air, or heat from or across the land of another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 8, 9, 10.]

For other definitions, see Words and Phrases, vol. 1, pp. 477, 487; vol. 8, p. 7580.]

4. SAME—NATURE.

An easement is real property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 1, 2.]

5. TRIAL—FINDINGS—NATURE.

A finding or an allegation that plaintiff owned a right of way across defendants' land and that it was appurtenant to his land is a sufficient statement of ultimate facts to be established, and is not a conclusion of law.

6. APPEAL—REVIEW—FINDINGS.

A judgment, based upon allegations and findings of sufficient ultimate facts, cannot be attacked on an appeal on the judgment roll alone, merely because the complaint and the findings contain in addition a showing of probative facts which, taken alone, might not support the judgment.

7. SAME.

Findings of probative facts can be used to overcome an express finding of the ultimate fact only where the probative facts found are inconsistent with the ultimate fact found, or where it appears that the trial court made the alleged finding of ultimate fact simply as a conclusion from the particular facts found.

8. LIMITATION OF ACTIONS—PLEADING—DEMURRER.

A demurrer to a complaint on the ground that limitations have run is not good unless the complaint shows affirmatively that they have run.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 671.]

9. EASEMENTS—DISUSE—PLEADING.

In an action involving plaintiff's right of way across defendant's land, if the right had been extinguished by disuse, under Civ. Code, § 811, prescribing how servitudes may be extinguished, it was a matter of defense to be pleaded and proved by defendants, and could not be raised by demurrer, where such extinguishment did not appear on the face of the complaint.

Department 1. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Frank Corea against Bernardo Higuera and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Charles Clark, for appellants. Wm. H. Johnson, for respondent.

SLOSS, J. The complaint in this action alleges that on November 2, 1894, the defend-

ant Bernardo Higuera was the owner of lot 7 of the Higuera rancho. On that day the defendants conveyed a portion of said lot to John Freitas, one of the boundaries of the tract conveyed being described as the center of the Higuera ranch road, a road connecting with the county road. Thereafter Freitas died, and in 1897 the executors of his will, pursuant to a probate sale duly authorized and confirmed by the superior court, conveyed the land so acquired by their testator to the plaintiff, who has ever since been the owner and in possession thereof. At all the times mentioned there had been a road leading from the land conveyed to Freitas across the remaining portion of lot 7 to the Higuera ranch road. The road which thus traversed lot 7 was used by defendants prior to their conveyance to Freitas, and at the time of the latter's purchase was open, laid out, and used as a means of ingress and egress to and from the land conveyed, "and was the only road so laid out and open by which said place could be reached by team; and * * * the said road was and had been appurtenant to said lands." The defendants claim to be the exclusive owners of said road and have obstructed it. It is alleged that plaintiff is the owner of and entitled to said right of way. A demurrer to the complaint having been overruled, the defendants answered, denying the allegations of the complaint regarding the existence of the road in question; denying that said alleged road was open, laid out, or used, at the time Freitas' purchase, or that of plaintiff, or that it was the only road by which said place could be reached by team. The answer denies, further, that the road was or is appurtenant to the land of plaintiff, or that plaintiff is the owner of any right of way over defendants' lands. By way of affirmative defense it is alleged that the land conveyed to Freitas and subsequently to plaintiff was at all times bounded on one side by the main Higuera ranch road, by which the plaintiff and his predecessors had access to and from his lands to the county roads. There is a further averment that any use which plaintiff or Freitas may have made of the road over defendants' lands was solely by the permission of the defendants. The court finds that at the times of the conveyances to Freitas and to plaintiff there had been and was, leading from the land so conveyed across the remaining portion of lot 7, a road used by the defendants prior to their conveyance with the lands conveyed to Freitas. This road is found to have been open, laid out, and used as a means of ingress or egress to said lands, and was the only road so laid out and open by which said lands could be reached by team. Said road was, at the time of Freitas' purchase, appurtenant to said lands and passed with the same. It was appurtenant to said lands at the time plaintiff purchased, and passed to him as appurtenant thereto. There is a finding that plaintiff "is the owner of and entitled to said

right of way over the lands of defendants to the county road, to pass and repass on foot and with team." The court further finds that the lands of plaintiff are bounded on one side by the Higuera ranch road, which was and is an open traveled road leading to the county road. Said Higuera ranch road was not, prior to the commencement of this action, used by plaintiff, and plaintiff "has not easy access to said Higuera ranch road for any purpose to and from his own lands or at all." It is found "that plaintiff is entitled to the said right of way as appurtenant over the lands of defendants," and there is a finding against the allegation of the answer that the use of said way by plaintiff and his predecessors was by the permission of defendants. Upon these findings the court entered a judgment declaring the plaintiff to be the owner of the roadway described in the complaint, and enjoining the defendants from obstructing said road or interfering with plaintiff's use thereof. The defendants appeal from the judgment. The evidence is not before us, the appeal being taken on the judgment roll alone.

The principal point urged is that neither the complaint nor the findings state a case entitling the plaintiff to relief. Assuming that the plaintiff claims a "way of necessity," the appellants argue that the facts alleged and found do not authorize the assertion of such right. This conclusion is undoubtedly sound. The complaint shows, as do the findings, that the land conveyed to plaintiff's predecessor was at all times bounded on one side by the Higuera ranch road, which connected with the county roads. This circumstance alone is fatal to the existence of a way of necessity. The facts that there was no constructed track for teams connecting plaintiff's land with the Higuera ranch road, as may be inferred from the complaint, or that, as the court finds, plaintiff had not "easy access" to that road, would not entitle him to assert a right of way by necessity. "The right of way from necessity must be in fact what the term naturally imports, and cannot exist except in cases of strict necessity. * * * That the way over his land is too steep or too narrow, or that other and like difficulties exist, does not alter the case, and it is only when there is no way through his own land that a grantee can claim a right over that of his grantor. It must also appear that the grantee has no other way." *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. 879. But, as is pointed out by respondent, his right does not rest upon the claim of a way of necessity. The complaint alleges, and the court finds, that the right of way here in dispute was, at the time of the conveyance to Freitas, appurtenant to the land conveyed. It is also alleged and found that the plaintiff is the owner of said right of way, which is specifically described. If the right of way was appurtenant to the land, it passed with the transfer of that land. Civ. Code, § 1104. What is an appurtenance is defined by section 662 of the

Civil Code. The findings that the plaintiff was the owner of the way in question and that it did constitute such appurtenance are findings of fact, and such findings, in the absence of a claim that they are not supported by the evidence, necessarily lead to the conclusion that plaintiff was entitled to judgment. An easement is real property, and an allegation that plaintiff is the owner of specific real property, has always in this state been regarded as an averment of an ultimate fact not of a conclusion of law. *Payne v. Treadwell*, 16 Cal. 220; *Haight v. Green*, 19 Cal. 117; *Garwood v. Hastings*, 38 Cal. 218; *Johnson v. Vance*, 86 Cal. 130, 24 Pac. 863; *Haggin v. Kelly*, 136 Cal. 483, 69 Pac. 140. An averment that a certain road or street is a public highway is a statement of a fact (*Bequette v. Patterson*, 104 Cal. 282, 37 Pac. 917; *People v. McCue*, 150 Cal. 195, 88 Pac. 899), and we see no reason why an allegation that the plaintiff is the owner of a described right of way or other easement over defendant's land, and that such easement is appurtenant to plaintiff's land, should not be regarded as a sufficient statement of the ultimate facts to be established. Such allegations have been held to be sufficient in other jurisdictions (*Whaley v. Stevens*, 27 S. C. 549, 4 S. E. 145; *Hall v. Hedrick*, 125 Ind. 326, 25 N. E. 350), and we are cited to no authority in support of the contention that they set forth merely conclusions of law.

The appellants argue, however, that the specific facts alleged and found are insufficient to show the existence of a right of way appurtenant to the land conveyed. But, if we assume this to be true, the appellants would not be helped. The facts stated regarding the use of the way prior to the conveyance to Freitas are merely probative facts, and, if not inconsistent with the findings of ultimate facts, cannot affect those findings. This subject was fully considered by this court in *People v. McCue*, 150 Cal. 195, 88 Pac. 899. Upon a careful review of the authorities, it was there declared that upon an appeal on the judgment roll alone a judgment based upon allegations and findings of sufficient ultimate facts cannot be successfully assailed merely because the complaint and the findings contain in addition a showing of probative facts which, taken alone, might not support the judgment. The findings of probative facts can be used to overcome an express finding of the ultimate fact only where the probative facts found are inconsistent with the ultimate fact found, or where it appears that the trial court made the alleged finding of ultimate fact simply as a conclusion from the particular facts found. These conditions do not exist here. The averments and findings regarding the use of the road prior to the conveyance to Freitas, if they are not sufficient to establish the existence of a right of way as appurtenant, are in no way inconsistent with such right; nor is there anything on the face of the findings to show.

that the court treated the finding that the right of way was appurtenant, or the further finding that plaintiff was the owner of such way, as mere conclusions following from other facts found. The findings of these ultimate facts are separate and independent.

Appellants urge that plaintiff's cause of action is barred by the statute of limitations, and that their demurrer, which specified this ground, should have been sustained. A demurrer on this ground is not good unless the complaint affirmatively shows that the statutory period has run since the accrual of the cause of action. *Wise v. Hogan*, 77 Cal. 184, 19 Pac. 278; *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877. The complaint here does not show when the defendants first obstructed the road or interfered with plaintiff's use of it. If, as is suggested by appellants, plaintiff's right was extinguished by disuse (Civ. Code, § 811), such extinguishment did not appear on the face of the complaint, and, if it existed, was matter of defense to be averred and proved by the defendants.

There are no other points requiring notice. The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

153 Cal. 421

REDWOOD CITY SALT CO. v. WHITNEY
et al. (S. F. 4,685.)

(Supreme Court of California. April 28, 1908.)

1. SALES—ACTION FOR VALUE OF GOODS—COMPLAINT—SUFFICIENCY.

A complaint against partners and against one of them individually, alleging that plaintiff sold "defendants" goods, etc., alleges clearly and intelligibly a joint purchase by the partnership and an individual.

2. PARTIES—JOINDER—PARTNERSHIP AND INDIVIDUAL.

A complaint against partners and one of them individually for the value of goods sold them does not show a misjoinder of causes of action; all the parties to the joint purchase being necessary parties defendant.

3. PARTNERSHIP—DEBTS—LIABILITY OF PARTNERS.

Under the express terms of Civ. Code, § 2442, partners are liable jointly with their copartners for partnership debts.

4. APPEAL—DISPOSITION—PARTLY ERRONEOUS JUDGMENT.

That judgment for goods sold should have been awarded against partners only, instead of against them and one of them individually, does not require a reversal of the judgment against the partners, since Code Civ. Proc. § 578, formerly Prac. Act, § 145 (St. 1851, p. 73, c. 5), providing that judgment may be given for or against one or more of several parties, has abrogated the common-law rule that in an action on a joint contract, plaintiff must recover against all or none of the defendants, and the judgment may be set aside on appeal so far as the individual liability of the partner is concerned.

5. SALES—ACTION FOR VALUE OF GOODS—PLEADING—VARIANCE—MATERIALITY.

Under Code Civ. Proc. § 469, providing that no variance between pleading and proof shall be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense, the variance

in an action to recover the price of goods sold between an allegation that they were sold to partners and one of them individually and proof that they were sold to the partners was not material.

6. SAME—EVIDENCE—SUFFICIENCY.

Evidence in action for the value of goods sold held sufficient to show the value of the goods.

Department 1. Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the Redwood City Salt Company against Arthur L. Whitney individually and as a partner and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Hewlett, Bancroft & Ballantine, for appellants. Ross & Ross, for respondent.

ANGELLOTTI, J. This is an appeal by all the defendants from a judgment in favor of plaintiff against them for the sum of \$2,215.20 for goods sold and delivered.

1. The action was against Arthur L. Whitney and Albion H. Whitney, copartners doing business under the name and style of C. E. Whitney & Co., and said Arthur L. Whitney, individually. The complaint alleged that the plaintiff "at the special instance and request of the defendants sold and delivered to the said defendants goods, wares, and merchandise," the reasonable value of which was \$2,410, and that no part of said sum had been paid. A demurrer on the grounds (1) that several causes of action were improperly united, in that a cause of action against Arthur L. Whitney and Albion H. Whitney as copartners was joined with a cause of action against said Arthur L. Whitney, individually; (2) that there was a misjoinder of parties, in that said partners were joined as defendants with said Arthur L. Whitney individually; (3) that the complaint was uncertain in that it did not appear therefrom whether the goods, etc., were sold and delivered to said partners or to Arthur L. Whitney individually; (4) that it was ambiguous for the same reason; and (5) that it was unintelligible for the same reason—was overruled, and complaint is made of this ruling on this appeal. There was no uncertainty, ambiguity, or unintelligibility in the complaint. It is susceptible of but one construction, viz., that the goods were sold and delivered to the partnership, and Arthur L. Whitney as an individual, or, in other words, that Arthur L. Whitney and the firm of C. E. Whitney & Co., of which he was a member, jointly purchased the goods. We know of no reason why a member of a partnership as an individual cannot unite with the partnership in the purchase of property for the joint benefit of the partnership and himself personally. Certainly it would not be contended that property could not be purchased jointly by a partnership and a third person not a member of the firm, and there is no material distinction in this regard between the case

of a third person and that of one who is a member of the partnership. The complaint states clearly, unambiguously, and intelligibly the simple case of a joint purchase by a partnership and an individual. There was no misjoinder of causes of action. There was but a single cause of action stated, namely, a cause of action for the reasonable value of goods sold and delivered, to all the defendants, and there was no misjoinder of parties, for all of the parties jointly purchasing were necessary parties defendant. See *Harrison v. McCormick*, 69 Cal. 616, 620, 11 Pac. 456; *Cox v. Gille, etc., Co.*, 8 Okl. 483, 58 Pac. 645. The demurrer, therefore, was properly overruled.

2. The verdict and judgment must, likewise, be construed as being against Arthur L. Whitney jointly with the partnership. It is contended that the evidence was not sufficient to support a conclusion of any joint purchase by the firm and Arthur L. Whitney individually. We think it is true that there was no substantial evidence to show anything but a purchase by and delivery to the partnership firm of C. E. Whitney & Co. This the evidence amply shows with the result that each of the members of the firm, Arthur L. Whitney and Albion H. Whitney, was, jointly with his copartners, liable to plaintiff for the value of the goods. Civ. Code, § 2442. But there was no liability on the part of defendant Arthur L. Whitney except such as the law imposed upon him as a member of the partnership for a partnership debt. The judgment against him in so far as it may be a judgment for an individual debt as distinguished from a partnership debt is improper. It does not follow, however, as appears to be assumed by appellants, that the judgment against the partners must be reversed. It is established that the common-law rule to the effect that, in an action on a joint contract, the plaintiff must recover against all or none of the defendants has been abrogated in this state, and that in such an action the plaintiff is entitled to a judgment against those of the defendants who are shown to be liable on the obligation. This is held to be the effect of section 578 of the Code of Civil Procedure, Code 1906, p. 210, formerly section 145 of the practice act, providing that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants. *Lewis v. Clarkin*, 18 Cal. 399; *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198; *Bailey Loan Co. v. Hall*, 110 Cal. 490, 42 Pac. 962. This is undoubtedly the rule in this state, subject perhaps to the qualification that the defendants held liable are entitled to be protected against any material variance between the pleadings and the proof. See *Chetwood v. Cal. Nat. Bank*, 113 Cal. 424, 45 Pac. 704. The variance here was not material within the definition of that term in our Code of Civil Procedure (section 469), and judgment could properly have been given in the lower court

against the partners alone, without any amendment of the complaint (Code Civ. Proc. § 470). This court may on this appeal vacate the judgment in so far as it purports to impose any liability on Arthur L. Whitney in addition to his liability as a member of the partnership of C. E. Whitney & Co., and leave the judgment in force in all other respects. See *Nichols v. Dunphy*, 58 Cal. 605. We have discussed this question upon the assumption that it is of some practical importance to Arthur L. Whitney that the judgment should be so changed as to relieve him from any such apparent additional liability. It appears to us that this assumption may be well based, and we are satisfied that he is entitled to have the judgment show clearly that the liability imposed thereby on him is solely one for the debt of a general partnership of which he is a member.

3. The only other point made for reversal is that the evidence was insufficient to show the value of the goods sold and delivered, which consisted of 777½ tons of salt. As already stated, the verdict was for \$2,215.20. Of the 777½ tons, 185 tons were what is known as half ground salt, salt that had been run through the crusher, and it is admitted that the reasonable market value of such half ground salt, delivered, as this was, at the works of plaintiff at Redwood City, was \$3.10 per ton, or a total for the 185 tons of \$573.50. There being an admitted credit to defendants of \$156.38 for work done by their employes in sacking the salt, there would be left \$1,485.32 of the verdict for the remaining 592½ tons, which would make the price of such salt delivered in sacks at plaintiff's works about \$2.50 per ton. We do not think that it can be held that there was not sufficient evidence that such salt so delivered was reasonably worth at least this amount. The original understanding between the parties appears to have been that the salt to be furnished should be half ground salt, but as it was wanted immediately by defendants to fill an order for foreign shipment, and as it was impossible to run it through the crusher in time, Mr. Arthur L. Whitney, after a personal inspection of the salt at plaintiff's plant, authorized and directed the order to be filled by the sacking and delivery of a lot of "drift" salt on hand, which he said was sufficiently fine for the purpose. He himself testified that while in price there was some distinction between drift salt and half ground salt, without stating how much, there was practically none in character, that one is often sold for the other, and that he did not know that any one could tell the difference. The salt delivered, for which recovery is here sought, was in fact used by defendants in filling the contract for half ground salt for foreign shipment. It also appeared that defendants subsequently purchased from plaintiff salt of the same character as that here purchased for \$3.50 per ton. There was, it is true, evidence on the part of defendants

that some of the salt delivered did not come up to the standard of the drift salt authorized, but there was nothing to indicate how much there was of this. There is enough in the record to support a conclusion that the unground salt delivered was generally the drift salt described by Mr. Whitney, and that such drift salt was reasonably worth in the market nearly, if not quite, as much as half ground salt. In addition to this, there was the positive testimony of Mr. Lovie, the secretary of plaintiff, that the market value of the 777½ tons of salt was \$3.10 per ton. Certainly we cannot say that a conclusion that the unground salt delivered was reasonably worth \$2.50 per ton does not find sufficient support in the evidence.

It is ordered that the judgment be and the same is hereby modified by adding thereto the following provision, viz.: "This judgment, so far as defendant Arthur L. Whitney is concerned, is one against him solely in his capacity as a member of the partnership of C. E. Whitney & Co., and imposes no individual liability on him other than such as is imposed by reason of his membership in said firm." And, as so modified, said judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

153 Cal. 418

BONESTELL, RICHARDSON & CO. v.
CURRY et al. (S. F. 4,451.)

(Supreme Court of California. April 28, 1908.)

1. VENUE—ACTION AGAINST PUBLIC OFFICER.

Code Civ. Proc. § 393, subd. 2, provides that an action against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office or against a person who by his command or in his aid does anything touching the duties of such officer, must be tried in the county where the cause arose, subject to the power of the court to change the place of trial. *Held*, that the subdivision applies only to such affirmative acts of the officer as directly interfere with the personal rights or property of a person, and not to mere omissions or neglect of official duty, and it is not applicable to an action against certain state officers and a firm to whom a contract for the furnishing of paper for use in the state printer's office had been awarded by the state officers in their official capacity, to enjoin further action under the contract on the ground of its illegality because not awarded to the lowest bidder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 20.]

2. SAME.

In all cases as to which express provision is not made to the contrary, the proper county for trial, subject to the power of the court under Code Civ. Proc. § 397, to change the place of trial on account of convenience of witnesses, disqualification of judge, or inability to have an impartial jury, is the county in which defendants or some of them reside at the commencement of the action, as provided by Code Civ. Proc. § 395.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, §§ 34-37.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Cal. Rep. 95-97 P.—9

Action by Bonestell, Richardson & Co. against Charles F. Curry and others. From an order denying a charge of venue, certain of the defendants appeal. Affirmed.

U. S. Webb, Atty. Gen., and Geo. H. Sturtevant, Deputy Atty. Gen., for appellants. M. H. Wascowitz, Hiram W. Johnson, and C. K. Bonestell, for respondent.

ANGELLOTTI, J. This is an appeal from an order of the superior court of the city and county of San Francisco denying appellants' motion for a change of place of trial of the above-entitled action from said superior court to the superior court of the county of Sacramento. The action was one instituted in the superior court of the city and county of San Francisco against appellants, who were respectively Secretary of State, Assistant Attorney General, and state printer of the state of California, and the members of the partnership firm of A. Zellerbach & Sons, to which a contract for the furnishing of certain paper for use in the state printer's office had been awarded by appellants in their official capacity, to enjoin further action in regard to or under said contract, upon the ground that the same was illegal and void. The official acts of appellants in the matter were performed in the county of Sacramento, the place where they had their offices and transacted their official business. The defendants Zellerbach were residents of the city and county of San Francisco. The plaintiff corporation was a taxpayer of the state, and was engaged in the same line of business as A. Zellerbach & Sons, and claimed that it was the lowest bidder for the furnishing of the paper, and was itself entitled to the contract.

Appellants' motion for a change of place of trial was based entirely on the provisions of subdivision 2 of section 393 of the Code of Civil Procedure, which, so far as is material here, provides: "Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial: * * * (2) Against a public officer, or person especially appointed to execute his duties, for an act done by him in virtue of his office; or against a person who, by his command or in his aid, does anything touching the duties of such officer." This subdivision is not applicable to the case at bar. This action is not one against a public officer "for an act done by him in virtue of his office" within the meaning of those words as the same are used in this law. It was held in *McMillan v. Vischer, Sheriff, etc.*, 9 Cal. 420, 70 Am. Dec. 655, that a similar provision in our practice act was not applicable to a proceeding in mandamus to compel a sheriff to execute a deed, the court saying through Field, J.: "The second subdivision of section nineteen, which provides that actions against a public officer for acts done by him in virtue of his office shall be tried in

the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, by which, in the execution of process, or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty. *Elliott v. Cronke's Adm'rs*, 13 Wend. (N. Y.) 35; *Hopkins v. Haywood*, Id. 285." The cases cited, construing a practically similar New York statute, fully sustain the text. The provision was subsequently made a part of our Code of Civil Procedure in the light of the construction previously given by the courts, and with the intention, we must assume, that it should continue to be so construed. This construction contemplates only such affirmative acts of an officer as directly interfere with the personal rights or property of the person complaining, such as wrongful arrest, trespass, conversion, etc. The complaint in the case at bar shows no such case. Moreover, the action is not one against public officers for an act done by them, but is an action against them and certain other persons solely to prevent the doing of certain acts by such officers and by the other defendants in the future. It is thoroughly established, both by statute and by the decisions, that in all cases as to which express provision is not made to the contrary the proper county for trial, subject to the power of the court to change the place of trial on account of convenience of witnesses, disqualification of judge, and inability to have an impartial trial (Code Civ. Proc. § 397), is the county in which the defendants, or some of them, reside at the commencement of the action (Code Civ. Proc. § 395).

The order denying appellants' motion for a change of place of trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

153 Cal. 477

YOUNG v. BLAKEMAN. (S. F. 4213.)
(Supreme Court of California. April 29, 1908.)

1. BOUNDARIES—LOCATION BY PARTIES.

Where adjoining lot owners, being uncertain of the true position of a boundary established by measuring from a fixed object, agree upon its true location, mark it upon the ground, or build up to it, and acquiesce in the location for a period equal to that of the statute of limitations, or under such circumstances that substantial loss would be caused by a change, the line located becomes in law the true line called for by the descriptions of their deeds, regardless of the accuracy of the agreed location as it may appear by subsequent measurements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 212-226.]

2. SAME—PAROL AGREEMENT OF PARTIES.

The agreement as to the line may be in parol.

3. FRAUDS, STATUTE OF—CONVEYANCE OF LAND—ESTABLISHMENT OF BOUNDARY.

The agreement does not operate to convey title to the land which may lie between the agreed line and the true line, and hence is not in violation of the statute of frauds, although it is not in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 112.]

4. BOUNDARIES—LOCATION BY PARTIES—EFFECT OF SUBSEQUENT CONVEYANCE BY ORIGINAL DESCRIPTION—PRESUMPTION.

A conveyance of one of the lots by the original description, executed after the line has been established by the parties, will be presumed to have been intended to refer to the distance as fixed by the agreement and marked by the occupancy in pursuance thereof, unless there is something in the deed or in the attending circumstances to rebut the presumption.

5. ESTOPPEL—EQUITABLE ESTOPPEL—PLEADING—NECESSITY OF PLEADING ESTOPPEL AGAINST DEFENSE IN ANSWER.

Where no reply is allowed in pleading, if plaintiff claims an estoppel against defenses set up in the answer, he is entitled to give evidence concerning it without plea; the rule that estoppels must be pleaded not being applicable.

6. SAME — INCONSISTENT CLAIMS TO REAL PROPERTY.

Defendant held an option on a 20-foot lot, the boundaries on each side of which were in controversy. Former owners of the lot and of the one west had agreed upon a division line running a little west of the line called for by the description in the deeds, and a 20-foot building had been erected bordering on the agreed line. Pending a suit by defendant for specific performance of the contract to convey the lot in accordance with the option, a prospective purchaser of the lot east of defendant's was informed that the building on that lot extended over onto the lot described in the deeds to defendant's lot, and defendant and the opposing parties in the pending suit for specific performance agreed that the party who should prevail in that suit should quitclaim the strip on the east side of defendant's lot as described in the deeds which was covered by the building on the next lot east, for a specified consideration, which was fixed, not as the value of the strip, but as the probable cost of quieting title to the strip occupied by defendant on the west side. Defendant was successful in the specific performance suit, and he, as well as the opposing parties, quitclaimed the strip as agreed. Held, that defendant, by quitclaiming the strip on the east, was not estopped to claim the strip on the west side.

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by W. W. Young against T. Z. Blakeman. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

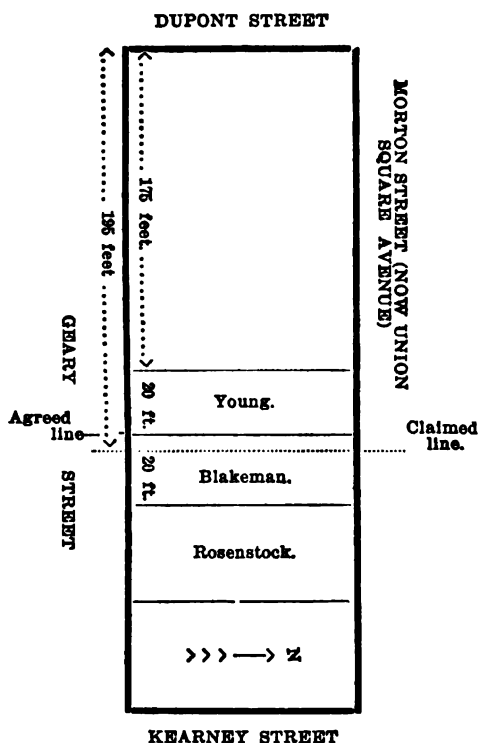
Olney & Olney, for appellant. Lindley & Eickhoff and T. Z. Blakeman, for respondent.

SHAW, J. This is an action to recover possession of land, and involves the location of the boundaries between the respective lots of the plaintiff and defendant, situated in San Francisco. The plaintiff appeals from the judgment and from an order denying his motion for a new trial. The two principal points urged by the plaintiff are: First, that, where adjoining owners have agreed upon and established a division line, a subsequent deed by one of them, purporting to convey his tract by the original description, will not convey the title to the grantee up to the agreed line, if it turns out that the position of the line, according to the calls of the deed, newly measured, is within the bounds of his possession and includes less territory on his

side than the agreed line; second, that the defendant is estopped to claim the strip in controversy.

1. The action was begun in January, 1903. The defendant's predecessor, Miller, owned the lot which, according to his title deeds, was bounded as follows: Beginning 195 feet easterly from the northeasterly corner of Geary and Dupont streets, and running thence easterly, along the line of Geary street, 20 feet; thence northerly at right angles, parallel with Dupont street, 122 feet 6 inches, to Morton street; thence at right angles westerly, along the southerly line of Morton street, 20 feet; thence southerly, at right angles, 122 feet 6 inches, to the place of beginning. The plaintiff's predecessor owned a lot which his deeds described in the same manner, except that the point of beginning was situated 175 feet easterly from the northeasterly corner of Geary and Dupont streets. Each owned a lot fronting 20 feet on Geary street, and by their title deeds the boundary between them was 195 feet westerly from the corner. More than 30 years before the action was begun they agreed upon the location of this division line and established it upon the ground. They and their respective successors have, ever since that time, acquiesced in the location and have erected buildings on their respective lots, with walls on the line, and have occupied the same for many years, without dispute until shortly before the action was begun. The buildings on the defendant's lot were erected in 1874. In 1884 Miller, the owner, made a lease of the lot to one Apel, for a term of 20 years, at a fixed rental, inserting therein a clause giving Apel or his assigns an option to purchase the lot, at any time after 15 years from the date of the agreement, at the price of \$40,000. In pursuance of this lease and option Miller delivered possession of the lot and buildings to Apel. In 1894 Blakeman purchased the lease and option agreement, and was given possession of the lot and buildings accordingly, and has ever since held possession thereof up to the agreed line in question. During all this period Young and his predecessors under the original title deeds have had possession of the lot to the west of the division line. After the expiration of the 15 years Blakeman elected to exercise the option and buy the Miller lot at the price fixed. He made a tender, which was refused, brought suit for specific performance, obtained judgment, and received from the heirs of Miller, who died before the suit was begun, a conveyance of the property. See *Blakeman v. Miller*, 136 Cal. 138, 68 Pac. 587, 89 Am. St. Rep. 120. In all the conveyances of all parties and their predecessors, and in the said lease, the respective lots were described by metes and bounds in the words above given; the Blakeman lot being described as a lot beginning 195 feet west of Dupont street, and the Young lot as a lot beginning 175 feet west thereof, without mention of any monument at the division line, or of any

agreement regarding the same. Dupont street is now known as Grant avenue. After the execution of the deed to Blakeman by the Miller heirs, they set up a claim to a strip of land on the west side of the lot 9½ inches wide on Geary street and 13¾ inches wide on Morton street. This strip they quitclaimed to Young, who thereupon brought this suit for possession thereof. The subjoined plat, though not drawn exactly to scale, illustrates the position of the lots.



When the division line of adjoining owners is designated in their respective deeds as a line beginning at a specified distance from a fixed object, the only method of ascertaining the location of the line on the ground is by measuring the required distance from the object. Experience shows that such measurements, made at different times, by different persons, with different instruments, will usually vary somewhat. The position of the object or monument at which the course begins may also be changed, and the change may not be known to the parties, or there may be no means of ascertaining its original position. If the position of the line always remained to be ascertained by measurement alone, the result would be that it would not be a fixed boundary, but would be subject to change with every new measurement. Such uncertainty and instability in the title to land would be intolerable. For these and other reasons the rule has been established that when such owners, being uncertain of the true position of the boundary so described,

agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed, and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements. The court found that the line in question had been thus located by the predecessors in interest of the parties more than 30 years before the suit was begun. The evidence of the fact, though entirely circumstantial, is reasonably satisfactory.

It is conceded that such location is binding upon the parties who own the respective lots at the time the agreement is made, while their ownership continues. The plaintiff's theory is that the agreed line is good only between the original parties, and suffices to mark the line called for by the description only with respect to the deeds under which they hold; that if one of these owners transfers his lot by a deed giving only the original description, delivering possession up to the agreed line, the vendee would not take title to the agreed line, but only to the area called for by the metes and bounds of the deed; that the subject is reopened for settlement between him and his grantee, and if, upon a new measurement, it is found that part of the vendor's holding lies outside of the newly measured line and between that and the agreed line, the vendor will remain the owner thereof, and may convey it to another, or recover the possession thereof from the vendee. His argument is that the vendor, in such a case, is the owner of the intervening strip by adverse possession against the adjoining owner, and not by his original title deeds, and that a conveyance by the original description will not carry title to the land acquired by such adverse possession. The object of the rule is to secure repose, to prevent strife and disputes concerning boundaries, and make titles permanent and stable. If it had no greater force than is thus contended for, it would be of little benefit, and would fail to accomplish the purposes which led to its establishment. If the descriptions were not by metes and bounds, but designated the lots solely by their respective numbers, or, as in the case of government lands, by sectional subdivisions, and there had been an agreement of this character between previous owners fixing the common boundary, it would scarcely be contended that the division line thus fixed is not binding on their respective grantees, or between a subsequent grantor and his grantee. The effect, however, is precisely the same in this case. The designation of the land by its number or sectional subdivision is nothing more than a reference to a previous survey which states the distance of the line from some fixed object and an

adoption of that statement into the deed by the reference. It will still call for a measurement to ascertain the true position on the ground, unless it has been marked by a monument, and in that case, if the monument is removed and other means of locating its position are not available, as often happens, a measurement must still be resorted to. If a measurement is made, and the line agreed on and acquiesced in as required by this rule, it is binding on and applicable to all parties to the agreement and their successors by subsequent deeds. It is stated by the authorities that the line so agreed on becomes in legal effect the true line; that the agreement as to the line may be in parol, and that it does not operate to convey title to the land which may lie between the agreed line and the true line, but that it fixes the line itself and the description carries title up to the agreed line, regardless of its accuracy; that the agreement as to the line is not in violation of the statute of frauds, because it does not transfer title; that the parties hold up to the agreed line by virtue of their original deeds, and not by virtue of the parol agreement; that "the division line, when thus established, attaches itself to the deeds of the respective parties, and simply defines, not adds to, the lands described in each deed"; and that, if more is thus given to one than the calls of his deed actually requires, he "holds the excess by the same tenure that he holds the main body of his lands." *Sneed v. Osborne*, 25 Cal. 630; *White v. Spreckels*, 75 Cal. 616, 17 Pac. 715; 4 Am. & Eng. Ency. of Law, 861; 3 Wash. Real Prop. § 2232; *Lewis v. Ogram*, 149 Cal. 509, 87 Pac. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151, and cases there cited; *Kellogg v. Smith*, 7 Cush. (Mass.) 382; *Miles v. Barrows*, 122 Mass. 579.

There is as much reason for the application of this rule to a grantor, so as to estop him from withholding from his grantee the possession up to the agreed line, or from asserting title to any part of the granted premises within the agreed line, as for applying it to the respective coterminous owners. Where land is occupied by buildings up to the agreed line, as in this case, the grantee is presumed to have bought the property with a view to the boundaries thus visibly marked, and to have relied thereon and fixed the price according to the value of the property as thus defined and used. There is every reason that the grantor should be estopped to claim the contrary. In 1884, when Miller agreed to sell the property to Apel after 15 years for \$40,000, the buildings were on the land in the same position as when this suit was begun, and they served to mark the boundaries. It is to be presumed that it was the land thus built upon, used, and occupied which Miller agreed to sell and Apel agreed to buy. It was this land and building that Miller delivered to Apel in pursuance of the agreement, and of which Blakeman obtained possession in 1894, when he succeeded to Apel's

right under that agreement. A boundary line thus fixed and marked has the same effect as a monument erected to mark a point in a survey. The distance does not control, and the course runs to the monument, or to the agreed termination. A conveyance by the original description, executed after the line has been thus established, will be presumed to have been intended to refer to the distance as fixed by the agreement and marked by the occupancy in pursuance thereof, unless there is something in the deed or in the attending circumstances to rebut the presumption, which is not the case here.

It may be remarked that there is no evidence that any subsequent survey has been made by which the true line is located at the exact point claimed by the plaintiff. There is a reference to a recent survey in the testimony of the plaintiff, but he does not give the results disclosed thereby. From the agreement between the heirs of Miller and Blakeman, to be hereinafter noticed, it may be inferred, by the aid of other evidence, that the true east line of the Blakeman lot is about 7 inches east of the east line of his building. But this would not prove that the west line of his lot was an average distance of about 11 inches east of the west line of the building as claimed by plaintiff. The building is exactly 20 feet in width. There is a finding to the effect that a line 195 feet easterly from Grant avenue would fall east of the agreed line the exact distance of the strip in dispute, according to the location of Grant avenue as "established at the time when this action was commenced." No evidence appears corresponding to this finding. But, conceding its truth, it does not follow that the line of Grant avenue was at the same place as that occupied by Dupont street in 1863, when the defendant's lot was first measured and located therefrom, or when the agreed line was established, or in 1884, when Apel received possession from Miller. Our conclusion is that the effect of the deed to Blakeman by the heirs of Miller was to convey title to Blakeman up to the agreed line on the west side of the lot, and that the subsequent deed from them to Young of the strip in controversy carried no title, unless Blakeman is estopped to claim that strip by reason of the transaction now to be considered.

2. The main contention of the appellant is that the defendant is estopped to claim the strip in dispute. It is objected that the estoppel was not pleaded. Under our system of pleading no reply is allowed, and if the plaintiff claims an estoppel against the defenses set up in the answer he is entitled to give evidence concerning the same without plea. The rule that estoppels must be pleaded does not apply in such cases. The question presented for our consideration is whether or not the evidence established the estoppel claimed. While the suit of Blakeman

against the Miller heirs for specific performance was pending, one Rosenstock, being about to purchase the lot adjoining Blakeman's lot on the east, was informed that the building on that lot extended over the west line thereof upon the lot described in the deeds to the Blakeman lot, covering a strip of the latter 7 $\frac{1}{4}$ inches wide at the north end and 6 $\frac{3}{4}$ inches wide at the south end. Wishing to settle all disputes about his boundary and title before buying, Rosenstock asked Blakeman to make him a quitclaim deed for this strip. This was agreed to, and Rosenstock agreed to pay \$2,000 for the deed. To satisfy his fears Rosenstock required that the Miller heirs should join in quitclaiming to him. Blakeman and the Millers thereupon executed a written agreement, reciting the description of the Blakeman lot as hereinbefore given, the pending suit for specific performance, and, in effect, that the west wall of the Rosenstock building projected over the east line of the lot as thus described and bounded, covering the strip proposed to be quitclaimed to Rosenstock, and providing that the \$2,000 should be deposited with a trust company, to be by it held until the suit for performance was determined, and then paid to the party who should finally prevail in said suit, whereupon both parties should quitclaim to Rosenstock the strip covered by his building. This agreement was carried out, the suit terminated in favor of Blakeman, the \$2,000 was paid to him, and he and the Millers, by separate deeds, quitclaimed to Rosenstock. Thereafter the Millers, as before stated, quitclaimed to Young the strip on the west side of Blakeman's lot, covered by Blakeman's building and described in the complaint, claiming as it now appears, that by reason of the conduct of Blakeman in asserting title to the strip on the east side and receiving the \$2,000 from Rosenstock he is estopped to claim title to the strip on the west side, even if their deed to him did have the effect of transferring the title up to the agreed line and beyond the true theoretical line. The evidence shows that Blakeman, in making the arrangement with Rosenstock for the payment of the \$2,000, did not fix that sum as the value of the strip to be conveyed to Rosenstock, but only as the amount which he estimated it might cost him to quiet his title to the land claimed and occupied by him on the west side of his lot.

We are of the opinion that the circumstances under which this agreement was made and executed did not create an estoppel as claimed. As we have seen, the subsequent instruments concerning the lot operated to convey title to the agreed line. Hence the option agreement with Apel bound the Millers to convey title to Blakeman, the assignee thereof, up to that line, and their deed in pursuance thereof transferred that title to Blakeman. The result of the suit for performance showed that the Millers had no legal defense to the suit and that they

were bound to convey as agreed. It is clearly apparent from the whole case that neither the Millers nor Blakeman had ever previously claimed title to the land under the Rosenstock building, and that Rosenstock's vendor had a good title thereto by adverse possession, if not by his title deeds. Blakeman did not in any manner impose on the Millers, or conceal anything from them. It does not appear that the Millers were then claiming that they were not bound to convey to Blakeman the strip on the west side of the Blakeman lot, if they were bound to convey at all. Their defense to the suit for performance made no reference to any mistake in the boundary on either side of the lot, but was founded on other circumstances having no relation to the boundary lines. There is nothing to indicate that either party contemplated or claimed that, if Blakeman won the suit and the \$2,000, it would in any manner affect his right to a conveyance of all the land included in the Apel option up to the agreed line, or would give the Millers, after executing the conveyance, any right to a strip including the greater part of the Blakeman west wall. The respective values of the two strips are not shown. But as the east side strip was in the adverse possession of Rosenstock, and was only an average of 7 inches wide, while the west side strip was in Blakeman's possession, was of an average width of 11 inches, and the Miller deed would give him title thereto, and as it included part of his wall, so that, if he had to relinquish it, he would be compelled to take down his west wall and reconstruct it again at a point 11 inches further east, it is reasonably certain that the strip on the west side was worth far more, and probably twice as much, as the strip deeded to Rosenstock. If Blakeman had understood that he was required to elect whether he would take one or the other, and could not have both, as against the Millers, if he prevailed in the pending suit, it is not improbable that he would have refused to make any agreement with them, or with Rosenstock, to accept \$2,000 in lieu of his rights, and that he would have chosen to retain his rights in the strip on the west side. His relations with the Millers, however, were not of a character to put him to such election, and he was entitled by his contract to a conveyance of all their rights in the premises. The most reasonable conclusion from the entire transaction as shown by the evidence is that both the Millers and Blakeman considered the \$2,000 as equivalent to the expense of quieting the title to the strip on the west side of the lot, and that it was to go for that purpose to the party who succeeded in gaining title to the lot in the suit for performance. This would not give the losing party any right whatever, either to the \$2,000 or to any part of the land. The plaintiff is claiming by virtue of what is usually designated as an "equitable estoppel." If the defendant were held to be estopped, under the

circumstances, it would clearly be an unjust and inequitable estoppel. The court was fully justified in refusing to make any finding on the subject of estoppel, on the ground that the evidence was insufficient to establish any estoppel.

The judgment and order are affirmed.

We concur: ANGELLIOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

McFARLAND, J., expresses no opinion.

BEATTY, C. J. I dissent. Blakeman, after demanding and receiving the \$2,000 paid by Rosenstock for the strip on the east of the Miller building, in my opinion, is estopped to claim the strip on the west under his conveyance from the Miller heirs. They were bound by their father's agreement to convey to Blakeman, as assignee of Apel, a 20-foot lot, and no more. Conceding that a conveyance according to the description in that contract might have been claimed by Blakeman to effect a transfer of the 20 feet covered by the building, he could not claim at the same time that it would transfer the strip east of the building which Rosenstock was desiring to acquire. Blakeman must be held to have known what he was seeking by his suit for specific performance, and to have known that if he took the strip on one side he must relinquish that on the other. He made his election when he claimed the price of the strip on the east, and the decree and conveyance by which he got the legal title accurately described the particular 20 feet which he elected to take. The strip in controversy is not included in that description, and remained to the Miller heirs, who conveyed it to plaintiff. He had the title, legal and equitable, and should have prevailed.

153 Cal. 276

BARTHEL v. BOARD OF EDUCATION OF CITY OF SAN JOSE et al. (S. F. 4,643.)

(Supreme Court of California. April 27, 1908.)

1. SCHOOLS AND SCHOOL DISTRICTS—PUBLIC SCHOOLS—TEACHERS—REMOVAL.

A teacher holding a city certificate and employed for an indefinite term is, by Pol. Code, § 1793, protected from removal, except for insubordination or when the board of examination recommend the revocation of his certificate for immorality, unprofessional conduct, profanity, intemperance, or unfitness for teaching, as provided by section 1791.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 302.]

2. SAME.

The election and dismissal of teachers in the public schools are not "municipal affairs" which may by a freeholders' charter be regulated in a manner in conflict with that provided by the general law.

3. SAME—CONTRACT OF EMPLOYMENT—VALIDITY.

It is valid to limit the term of a teacher's employment to one year.

4. SAME—REMOVAL.

Section 5, art. 9, San José Charter, gives the board of education power to employ, pay,

and dismiss teachers, and provided that no election of a teacher should be construed as a contract as to duration of time or amount of wages. Section 13 provides that teachers in their first or second year shall be classed as probationary teachers, and may be dropped on the adverse report of the classification committee by a majority of the board. *Held*, that a teacher duly elected for the year ending June 30, 1903, could not be legally removed, except upon such adverse report by the classification committee.

5. APPEAL—REVIEW—PRESUMPTIONS — FINDINGS — CONSTRUCTION TO SUPPORT JUDGMENT.

Findings of the trial court will be given such a construction on appeal as will support the judgment of the court below.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3762–3771.]

Department 1. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Mandamus by F. K. Barthel against the board of education of the city of San José and other to readmit plaintiff as a teacher in the city schools, and to draw its order for three months' salary. From a judgment ordering drawing of the order, defendants appeal. Affirmed.

John E. Richards, F. B. Brown, and F. H. Benson, City Atty., for appellants. Partridge & Jacobs, for respondent.

SLOSS, J. The plaintiff in November, 1902, applied to the superior court of Santa Clara county for a writ of mandate requiring the board of education of the city of San José and its members to admit plaintiff to the position of principal of the Washington school in said city, or an equivalent position, and to draw its order upon the proper officer directing the payment to plaintiff of three months' salary as such teacher. Plaintiff's claim was that he had in July, 1902, been elected and employed as a teacher in the San José school department, and that the defendants had prevented him from performing his duties as such teacher. The salary claimed was at the rate of \$100 per month for the months of July, August, and September, 1902. An alternative writ issued, and the defendants answering, the matter came on for hearing. The court made findings, upon which it entered judgment awarding plaintiff a peremptory writ of mandate as prayed. This judgment was entered in November, 1903. In the meanwhile the plaintiff had, at the expiration of the school year, been duly removed by the board of education. These facts were shown to the court by the defendants, and, upon their motion, an order was made limiting the writ of mandate so that it omitted any direction requiring the reinstatement of plaintiff, but merely directed the board to draw its order upon the proper officer for the payment to plaintiff of the three months' salary claimed by him. The defendants appeal from the judgment. There is no bill of exceptions, and the sole question is whether, upon the facts alleged and found, the plaintiff was entitled to the writ directing the payment of the salary in question.

That the findings are responsive to the issues made by the pleadings is not questioned, and it will be sufficient, therefore, to briefly state the facts as found. On July 2, 1902, the board of education of the city of San José duly granted to plaintiff a city grammar grade certificate, authorizing him to teach in any of the common public schools of said city. On the same day, and after the granting of said city certificate, plaintiff was by said city board of education duly elected and employed as a teacher in the schools of said city, "without any term specified." He had on the 30th day of June, 1902, and again on the 2d day of July, 1902, prior to the granting of his city certificate, by separate orders of the board, been elected and employed as a teacher in the school department for the school year ending June 30, 1903, and had been assigned to the position of principal of the Washington school. The salary attached to such position was \$1,200 per year, payable in equal monthly installments. On July 30, 1902, the board passed an order purporting to remove and dismiss plaintiff, and to set aside the election of June 30, 1902. On August 5, 1902, said board adopted a resolution purporting to remove and dismiss all teachers (including plaintiff) elected on July 2, 1902. Plaintiff did not receive any notice prior to either attempted removal. No charges of any kind have ever been filed or made against him. On September 10, 1902, the schools in the city of San José were opened for the ensuing school year. Plaintiff presented himself at the Washington school, ready, able, and willing to perform his duties as principal, and has ever since been willing to perform these duties or those of a similar position, but the defendants have prevented him from so doing. His demand that he be permitted to perform such duties and for the payment of his salary have been refused.

The contention of the appellants is that the plaintiff was rightfully removed by virtue of certain provisions of the charter of the city of San José. In so far as plaintiff's rights are based on his election of July 2, 1902, for an indefinite term, it is difficult to see how this contention can be maintained, in view of the fact that at the time of such election the plaintiff was the holder of a city certificate, and as such was, by section 1793 of the Political Code, protected from removal except for causes mentioned in that section and in section 1791. *Kennedy v. Board of Education*, 82 Cal. 483, 22 Pac. 1042; *Fairchild v. Board of Education*, 107 Cal. 92, 40 Pac. 26. It is not, and cannot be, claimed that the election and dismissal of teachers in the public schools are "municipal affairs," which may, by a freeholders' charter, be regulated in a manner in conflict with that provided by the general law. See *Kennedy v. Miller*, 97 Cal. 429, 32 Pac. 558; *Mitchell v. Board of Education*, 137 Cal. 372, 70 Pac. 180. It may be argued, however, that plaintiff's assignment to the particular position carrying the salary

claimed took place before his receipt of a city certificate, and that his right to recover such salary must rest on his election antedating such certificate. For the purposes of the present case we may assume this view to be correct.

Neither section 1793 of the Political Code nor any other provision of the general state law precludes a city board of education from removing at pleasure a teacher who does not hold a city certificate. *Stockton v. Board of Education*, 145 Cal. 247, 78 Pac. 730. We must look, then, to the charter of San José to see whether plaintiff, viewed as a teacher appointed without holding a city certificate, was removed pursuant to the provisions of that instrument. The two elections of plaintiff taking place prior to his receipt of a city certificate in terms limited his employment to the school year ending June 30, 1903. Such limitation was valid. *Marion v. Board of Education*, 97 Cal. 607, 32 Pac. 643, 20 L. R. A. 197. Here, however, the board sought to dismiss the plaintiff from the department before the expiration of the school year. The charter provisions relied on to sustain its action are found in article 9 of the charter. Section 5 of this article gives to the board of education power to employ, pay, and dismiss teachers, janitors, school census marshals, and such other persons as may be necessary to carry into effect the powers and duties of the board " * * * provided, that no election of a teacher or other person employed by the board shall be construed as a contract, either as to the duration of time or amount of wages of such person." St. 1897, p. 621, c. 15. This section, standing alone, would probably authorize the board to dismiss teachers or other employés at will, but it is limited by section 13, reading as follows: "Teachers during their first and second years of service in the department, and all special teachers, shall be classed as probationary teachers, and may be dropped from the department on the adverse report of the classification committee by a vote of a majority of the board. Teachers who have been assigned to duty for more than two years, other than special teachers, shall be classed as permanent teachers, and shall hold their positions without re-election until removed in the manner hereinafter provided. No teacher shall be removed save at the close of the school year, who has not had at least one month's notice of such contemplated action, nor shall any teacher's salary be reduced, except when there is a corresponding reduction made in all the salaries in the same grade. A permanent teacher may be removed for cause by a majority vote of the board of education or upon the recommendation of the city superintendent and a vote of a majority of the board, or by a vote of four members of the board; a vote for removal shall be taken by ayes and noes, and the vote recorded in the minutes." St. 1901, p. 957, c. 37. Section 13 of article 9 of the San José char-

ter, as originally adopted, was construed in *Stockton v. Board of Education*, supra, but the section there considered was amended in 1901, and now reads as above set forth.

Under this section the plaintiff, who was in the first year of his service, is to be classed as a probationary teacher. While there does not appear to be any great difference between "dropping" a teacher from the department, and "removing" him, so far as the effect on the teacher is concerned, the section does apply the latter term only to permanent teachers, and it is reasonable to infer that the clause protecting teachers from removal without prior notice, except at the end of the school year, was intended to refer only to permanent teachers. The purpose of the section, as regards teachers newly appointed, is to provide a period during which they are on trial or probation, to be retained if their work is satisfactory or dismissed if they fail to show their fitness to the satisfaction of the board. During this period of probation their tenure must necessarily be uncertain. They may, long before the expiration of a year, prove their inability to do the work required of them. To hold that, in such case, they must have a month's notice of the contemplated dismissal, would bring about a result which is not required by the language of the section and seems at variance with its purposes. The facts that no charges had been made against plaintiff and that he had received no prior notice of a contemplated removal did not, therefore, prevent his being dropped from the department. But, under any construction that can be given to section 13, the power to "drop" a probationary teacher is not absolute. Authority to take such action is given to the board, or a majority of its members, only "on the adverse report of the classification committee." During the year for which plaintiff was appointed by the orders antedating his certificate an adverse report of this committee was the condition upon which depended the power of the board to dismiss him. One of the issues raised by the pleadings was whether or not every step necessary to give the board jurisdiction to remove plaintiff had been taken. While there is no finding dealing specifically with the matter of an adverse report by the classification committee, the findings, read as a whole, may fairly be said to show that no such report had been adopted. This construction should be given to the findings, in order that they may support the judgment. *People v. McCue*, 150 Cal. 195, 88 Pac. 890.

It follows that, regardless of the effect of the city certificate, the plaintiff, who had been duly elected for the year ending June 30, 1903, was not legally removed from his position, and was therefore entitled to an order for the payment of the salary demanded.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

153 Cal. 441

PAYNE v. BAEHR. (S. F. 4,843.)

(Supreme Court of California. April 28, 1908.)

1. COUNTIES—OFFICERS—LIABILITIES—COUNTY AUDITOR—FAILURE TO COMPLY WITH STATUTE—GARNISHMENT OF MONEY DUE FROM COUNTY.

Code Civ. Proc. § 710, providing that when a transcript of a judgment for money against a defendant, accompanied by an affidavit stating the exact amount at the time due on the judgment, and that the claimant desires to avail himself of the provisions of the section, is filed with the auditor of any county, etc., from which money is owing to the judgment debtor, such official shall draw a warrant in favor of the court wherein the judgment is docketed for so much of the money owing the judgment debtor as will satisfy the judgment, prescribes an official ministerial duty the failure or refusal to perform which by the auditor would render him liable to the creditor for any actual damages caused him by such official's refusal.

2. OFFICERS—LIABILITIES—NEGLIGENCE OR REFUSAL TO ACT.

A public officer is liable to respond in damages to one specially injured by his negligence or refusal to perform a ministerial duty to the extent of such special injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 103.]

3. SAME—LIABILITY ON OFFICIAL BOND—MANDAMUS—CUMULATIVE REMEDIES.

Pol. Code, § 4332 (County Government Act, St. 1897, p. 574, c. 277, § 222), providing that for every failure or refusal to perform an official duty, where the fees are tendered, the officer is liable on his official bond, gives the injured party a remedy independent of his right to compel a performance of the duty by mandamus.

4. COUNTIES—OFFICERS—LIABILITIES—COUNTY AUDITOR—GARNISHMENT OF MONEY DUE FROM COUNTY—PLEADING—COMPLAINT.

Code Civ. Proc. § 710, provides that when a transcript of a judgment for money, accompanied by an affidavit stating the amount due on a judgment and that the claimant desires to avail himself of the provisions of the section, is filed with the auditor, etc., of any county, etc., from which money is owing to the judgment debtor, such official shall draw his warrant in favor of the court wherein the judgment is docketed for so much of the money owing the judgment debtor as will satisfy the judgment. In an action against defendant, as county auditor, to recover for his failure to pay over money garnished under the statute, the complaint alleged that defendant was at all times named the auditor of the county and city; that V. was a stenographer of the police court, and during certain months performed the duties pertaining to his position and all conditions to entitle him to have his demands against the treasury of the county for a certain sum audited by defendant; that defendant had audited each of the demands, but did not deliver any of the demands to V.; that a judgment was given for plaintiff against V. which was wholly unpaid, and a duly authenticated transcript of such judgment accompanied by the affidavit prescribed by the statute was filed with defendant; and that during a certain month V. performed the official duties and all conditions to entitle him to have his demand for a certain sum audited, and the auditor audited the demands to V., and, after the filing of the transcript and judgment, delivered to him the demand so audited, and when the affidavit and transcript were filed there was unpaid to him a certain sum due him from the county, and defendant had refused to draw his warrant to satisfy plaintiff's judgment to his damages, etc. Held, that the complaint stated a prima facie case, as against a general demurrer, and was not defective on demurrer in not alleging that

the demands of V. had been approved by the police judge, it being alleged that he had performed all conditions necessary to entitle his demands to be audited, and the complaint sufficiently alleged that the money was owing to the judgment debtor from the county when the affidavit and transcript were filed.

5. SAME—TIME OF FILING TRANSCRIPT.

It was unnecessary that the transcript be filed after the debtor's demands had been audited; it being sufficient within the statute if the claim of the judgment debtor had fully accrued when the transcript was filed, and that nothing remained to entitle the debtor to the money except to present his demand therefor and its approval by the auditor.

6. SAME—EXEMPTION OF MONEY GARNISHED—NECESSITY OF ALLEGING EXEMPTION.

It was not necessary for plaintiff to allege that none of the money owing to the debtor was exempt from execution, since, if any of the money was exempt, so that plaintiff would not have been able to obtain the amount due on the judgment had defendant drawn the warrant, that was a matter for defendant to show on the issue of damages.

7. SAME—APPROVAL OF CREDITOR'S CLAIM BY POLICE JUDGE—NECESSITY.

Even though it was necessary that the judgment debtor's demand against the county be approved by the police judge in whose employment the judgment debtor was, before it could be audited, it was not necessary that plaintiff's claim be approved by the police judge.

8. SAME—DEMAND BY JUDGMENT CREDITOR.

It was not essential, to entitle a judgment creditor to recover damages against a county auditor for his failure to draw a warrant to satisfy a judgment, as required by Code Civ. Proc. § 710, providing that if a transcript of a judgment against a person to whom money is owing from the county, etc., accompanied by the affidavit stating the amount, is filed with the auditor, he shall draw a warrant sufficient to satisfy the judgment, that the judgment creditor make a demand on the auditor other than the filing of the transcript and affidavit.

9. PLEADING—DEMURRER TO COMPLAINT—OPPORTUNITY TO AMEND.

Unless a defective complaint cannot be amended so as to obviate the objections thereto on demurrer, plaintiff should be allowed a reasonable opportunity to amend, if he desires to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 656.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Clyde S. Payne against Harry Baehr. From a judgment dismissing the complaint on demurrer thereto, plaintiff appeals. Reversed and remanded.

John Hubert Mee, for appellant. W. H. Cobb and A. L. Weil, for respondent.

ANGELOTTI, J. This is an appeal from a judgment dismissing the plaintiff's action upon sustaining defendant's demurrer to plaintiff's complaint. The action was one for the recovery of damages for the failure of defendant, as auditor of the city and county of San Francisco, to draw his warrants in favor of the justices' and superior courts of said city and county for sufficient to pay certain judgments recovered in said courts by plaintiff against one Howard Vernon, a creditor of said county. The complaint was in

two counts in substantially the same form; the first alleging a judgment of the justice's court given and made on October 9, 1901, for \$325.86, and the second alleging a judgment of the superior court given and made on June 22, 1904, for \$395.49, being apparently a judgment recovered on the justice's court judgment. The demurrer attacked each count, both for want of facts, and for uncertainty, ambiguity, and unintelligibility.

The action is based on the provisions of section 710, Code Civ. Proc., enacted March 20, 1903 (St. 1903, p. 362, c. 263), providing for the garnishment of moneys owing a judgment debtor from any county, city and county, city, or other municipal or public corporation. That section has been held constitutional by this court, and applicable to the salaries of public employes, at least to all except officers whose salaries are fixed by a provision of the Constitution, and in a proceeding for a writ of mandate instituted by a salaried employe to compel the auditor of the city and county of San Francisco to audit and allow a demand in favor of petitioner for his salary, the writ was denied on the ground that such auditor had been served by a creditor of the petitioner with a certified copy of a judgment for \$98 in his favor against the petitioner, accompanied by the affidavit prescribed by said section. It was held that it was the duty of the auditor, under this section, to deliver the demand, when audited, allowed, and indorsed, to the court rendering the judgment, or its authorized officer. *Ruperich v. Baehr*, 142 Cal. 190, 75 Pac. 782. Section 710, Code Civ. Proc., provides that when a duly authenticated transcript of a judgment, for money, against a defendant, rendered by any court in this state, accompanied by an affidavit stating the exact amount at the time due on such judgment, and that the claimant desires to avail himself of the provisions of the section, is filed with the auditor of any county, city and county, etc., from which money "is owing to the judgment debtor in such action," "It shall be the duty of any such official * * * to draw his warrant in favor of or to pay into the court from the docket of which the transcript was taken," so much of the money owing to the judgment debtor as shall be necessary under the judgment, so that the court may properly apply the same. The law thus prescribes an official duty, ministerial in nature, to be performed by the auditor for the benefit of the judgment creditor, when properly requested, somewhat analogous to the duty of a sheriff to whom a writ of attachment or execution is delivered with directions to levy the same. It cannot reasonably be claimed that he would not be liable to the creditor properly demanding the performance of such duty, for any actual damage caused such creditor by his refusal to perform the same. It is elementary that a public officer is liable to respond in damages to one specially injured by his neglect or refusal to perform an official ministerial duty

to the extent of such special injury (see *Mock v. Santa Rosa et al.*, 126 Cal. 330, 344, 58 Pac. 826), and our statutes provide that for every failure or refusal to perform official duty where the fees are tendered the officer is liable on his official bond (Pol. Code, § 4332; County Government Act, St. 1897, p. 574, c. 277, § 222). This remedy to the injured party necessarily exists independently of the right of a party beneficially interested in the performance of an official duty to compel the performance of the same by a resort to the proceeding of mandamus. We are of the opinion that, as against a general demurrer for want of facts, the complaint sufficiently stated a cause of action for damages specially caused plaintiff by the failure and refusal of defendant to perform a ministerial duty which he was called upon to perform for the benefit of plaintiff.

It is substantially alleged in the second count of the complaint that the defendant was at all the times named the auditor of the city and county of San Francisco; that ever since January 2, 1901, one Howard Vernon was a stenographer of the police court of said city and county under appointment by the judges thereof; that during the months of May, June, July, and August, 1903, said Vernon performed all duties pertaining to his said position, and "all conditions on his part to be performed to entitle him to have his demand against the treasury of said city and county" for \$200 for each of said months "audited by said auditor"; that said auditor has "audited" each of said demands, but did not deliver and has not delivered any of said demands to said Vernon; that on June 22, 1904, in the superior court of said city and county, a judgment was duly given and made, in favor of plaintiff and against said Vernon for \$395.49, which judgment remains wholly unpaid; that on September 1, 1904, a duly authenticated transcript of such judgment, accompanied by the affidavit prescribed by section 710, was filed with defendant as auditor; that during the month of August, 1904, said Vernon performed all the duties pertaining to his said position and "all conditions on his part to be performed to entitle him to have his demand against the treasury * * * for the sum of two hundred (\$200) dollars audited by said auditor"; that the auditor audited the same for said amount, "and after the filing of the authenticated transcript of judgment and affidavit" hereinbefore referred to, delivered the demand so audited to said Vernon; that at the time said affidavit and said transcript of judgment were filed with the auditor "there was unpaid to said Howard Vernon by said city and county of San Francisco" the sum of \$1,000 for services rendered by him as such stenographer for the months of May, June, July, and August, 1903, and August, 1904; that said defendant has refused and failed to comply with the demand of plaintiff and to draw his warrant in favor of said superior court for so much of

said money as would satisfy said judgment; and that "by reason of the premises plaintiff was damaged in the sum of" \$400.79, the amount due on said judgment. These allegations sufficiently make a prima facie case as against the general demurrer.

In regard to the objection that it was not alleged that the demands of Vernon had been approved in writing by the police judges, it was alleged that Vernon had performed all conditions on his part to be performed "to entitle him to have his demand against the treasury * * * audited by said auditor," which sufficiently implied, as against the general demurrer, the presentation of a demand in proper form to be audited by the auditor. The objection that it does not appear in the complaint that the authenticated transcript was filed subsequent to the auditing by the auditor is immaterial. It is undoubtedly true that the judgment creditor can obtain under section 710, Code Civ. Proc., only such money as "is owing to the judgment debtor" at the time of the filing of the authenticated transcript of judgment and affidavit, but money may be so "owing" although the demand therefor has not been audited. It is sufficient for all the purposes of this section that the claim of the judgment debtor against the city and county has fully accrued at the time of the filing of the transcript, etc., and that nothing remains to be done to entitle him to the money except the presentation of a proper demand therefor and the approval of the same by the auditor. The auditor is, of course, not required to do anything in the way of drawing his warrant until after audit, but when finally the demand is audited and ready for payment, the transcript of judgment previously filed is sufficient to cover the audited claim to the extent that it had accrued at the time of such filing. The delivery of the audited claim to the person entitled thereto may, and generally does, immediately follow the auditing, and a construction of section 710 which would require the transcript of judgment to be filed after audit and before delivery would practically nullify the remedy sought to be granted judgment creditors thereby. The allegations sufficiently showed as against the general demurrer that there was \$1,000 "owing to the judgment debtor" from the city and county at the time of the filing of the transcript of judgment and affidavit. It was not necessary, in order to show damage to plaintiff, that the complaint should allege that the moneys owing to Vernon from the city and county were in whole or in part not exempt from execution. It was alleged in terms that plaintiff was damaged in the sum of \$400.79 by the failure of the auditor to perform the duty incumbent on him in the matter of plaintiff's claim, which sufficiently tendered an issue as to damage and the amount thereof. If the circumstances were such as to exempt all or any portion of this money from execution, so that plaintiff would not have been able to

obtain the amount due him on the judgment from the money that would have come into the possession of the court if the auditor had done his duty, that was, at most, a matter for the defendant to show on the issue of damage.

We have now discussed all the objections urged by defendants under the general demurrer for want of facts, which are applicable to the second count. There is an additional objection applicable only to the first count. The judgment upon which the claim set forth in that count was based was rendered in the year 1901, which was prior to the enactment of section 710, Code Civ. Proc., and it is claimed that the section has no application to judgments rendered prior to its enactment. It is not necessary to consider this contention for the purposes of this appeal, for, if the demurrer was improperly sustained as to the second count, the judgment must be reversed, and as the second count is apparently based on a later judgment obtained in an action given in 1901, the question may be immaterial in any further proceedings in this case.

The demurrer on the ground of uncertainty was not well taken in so far as the second count was concerned. Conceding that it was necessary that the demand of Vernon against the city and county should have been approved by the police judges of the city and county before it could be audited by the auditor, it was not necessary that the demand of plaintiff, Payne, should be approved by said police judges, and a specification of uncertainty in this regard is immaterial. It was not essential to a cause of action in favor of plaintiff against the auditor for damages that he should have made any demand on the auditor, other than the demand embraced in the filing of the authenticated transcript of judgment and affidavit provided for by section 710, Code Civ. Proc., which affidavit in terms stated that the creditor desired to avail himself of the provisions of this section. As we have seen, such a demand will cover moneys "owing" to the judgment debtor at the time of the filing, although the claim therefor has not as yet been audited. It does clearly appear in the complaint that the demand of Vernon was audited prior to the commencement of the action. This disposes of all objections on the ground of uncertainty which were applicable to the second count. Specifications of ambiguity and unintelligibility were the same as those of uncertainty, and none of them was well taken.

It thus appears that the demurrer should have been overruled, at least so far as the second count is concerned. It is therefore unnecessary to consider the contention of appellant that, even if the demurrer was good, the trial court erred in sustaining it without leave to plaintiff to amend. It is proper, however, to state that, unless it be clear to a trial court that a defective complaint cannot be amended so as to obviate

the objections made thereto, a plaintiff desiring it should be allowed reasonable opportunity to so amend. See *Schaaake v. Eagle, etc.*, Can Co., 135 Cal. 480, 63 Pac. 1025, 67 Pac. 759.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

153 Cal. 496

HERZOG et al. v. ATCHISON, T. & S. F. R. CO. (S. F. 4,575.)

(Supreme Court of California. April 30, 1908.)

1. ACTION—NATURE AND FORM—SPECIFIC PERFORMANCE OR BREACH OF CONTRACT.

A complaint alleged that, in consideration of a conveyance to a railroad company of a right of way over plaintiffs' land, the railroad agreed to establish a station at a certain place, that thereafter the company laid tracks and operated trains on the right of way, and that subsequently another railroad company purchased the right of way and continued the operation of the trains. It further alleged that neither of the companies established the station at the place specified by the contract, on account of which plaintiffs were irreparably damaged, and prayed for a decree compelling the railroad purchasing the right of way to establish a station, as agreed. *Held*, that the action was for specific performance of a contract, and not to recover for its breach.

2. RAILROADS—LOCATION OF STATIONS—CONTRACTS RELATING TO—VALIDITY—ENFORCEMENT.

The rule that it is the duty of railroad corporations which are performing functions partaking of a public character to locate their stations where they will best serve the public needs and convenience, and that a court of equity will not, in order to subserve mere private interests, compel the location of stations so as to hamper the company in the performance of its duties to the public, does not apply so as to preclude a party contracting with a railroad from specifically enforcing a contract by which the railroad agreed to establish a station at a certain place, where the contract does not debar the company from establishing stations at any other place, or from fully complying with all its duties to others entitled to its service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 133.]

3. SPECIFIC PERFORMANCE—GROUNDS FOR REFUSING—RATIO OF BENEFIT TO INJURY.

Specific performance of a contract will be denied where to enforce it will impose a great burden upon defendant, with a slight or no corresponding benefit to the plaintiff, and where the performance of the contract will be detrimental to the interests of the public.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 35.]

4. SAME—COMPLAINT—REQUISITES.

A complaint for specific performance must, in order to be good against a general demurrer, state facts from which the court may determine that the consideration is adequate, and that the contract is, as to the defendant, just and reasonable, and that it would not be inequitable to enforce it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 35, 356-372.]

5. SAME.

A complaint, in a suit against a railroad company to compel specific performance of a

contract of the railroad's predecessor in interest to establish a station at a certain place, in consideration for the conveyance of a right of way to it, did not state the value of the right of way conveyed, did not allege the costs to the defendant of compliance with the contract, nor any facts indicating the adequacy of the consideration or the fitness of the contract, and did not contain even a general allegation that the contract was just and fair as between the parties, or that plaintiffs owned land adjoining the right of way, at any time after its conveyance to the defendant's predecessor. *Held* that, so far as appeared from the complaint, the plaintiffs were endeavoring to enforce a bare legal right to have defendant comply with the contract of its predecessor, without showing that such compliance would in any way add to plaintiffs' convenience or to the value of any property owned by them at the time of the suit, and hence the complaint did not show that the contract as originally made was fair and just as between the parties, or that it would be equitable to enforce it.

6. SAME—DEFENSES—REMEDY AT LAW—PLEADING.

A complaint in a suit for specific performance must show that a recovery for breach of the contract would not be an adequate remedy, a condition which is essential to obtaining the relief prayed for, as well as for obtaining other forms of equitable relief for the infringement of legal rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 356-372.]

Department 1. Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

Action by J. Herzog and another against the Atchison, Topeka & Santa Fé Railroad Company. From a judgment sustaining defendant's demurrer to the complaint, plaintiffs appeal. *Affirmed*.

J. J. Scrivner and Alfred H. Cohen, for appellants. T. J. Norton, H. D. Pillsbury, and E. E. Milliken, for respondent.

SLOSS, J. To plaintiffs' complaint the defendant interposed a demurrer for want of facts constituting a cause of action. The demurrer was sustained without leave to amend, and plaintiffs appeal from the ensuing judgment in favor of defendant.

The complaint states these facts: On September 20, 1881, and long prior thereto, the plaintiffs were the owners and in possession of a tract of land in Alameda county containing some 65 acres. On September 30, 1881, the California & Nevada Railroad Company executed and delivered to plaintiffs a writing, whereby, in consideration of plaintiffs "signing for" a right of way for said railroad over their land, the railroad company agreed to "establish and maintain a permanent station to deliver and take passengers and freight at each passing train, said station to be situated at the north side of said Alcatraz avenue and on the west side of Lowell street, and to receive and discharge passengers from all but express trains upon proper signal." At the same time, and in consideration of the execution and delivery of this instrument, the plaintiffs signed and delivered to the railroad company the right

of way over their lands referred to in the instrument. Subsequently, the California & Nevada Railroad Company laid down railroad tracks over such right of way and operated passenger and freight trains thereon. In 1893 the defendant, Atchison, Topeka & Santa Fé Railroad Company, purchased of the California & Nevada Railroad Company the right of way granted by plaintiffs, and has ever since been in possession of the same, and has been operating passenger and freight trains thereon. At the time of its purchase, the defendant had notice of its predecessor's agreement with plaintiff and assumed the obligation to perform the same. Neither the defendant nor its predecessor in interest has ever established or maintained a permanent or any station at the place or for the purposes specified in the agreement, nor has either of them stopped any train at such place. On June 2, 1904, plaintiffs requested the defendant to comply with the terms and conditions of said agreement, but the defendant has failed and refused to perform any of such terms and conditions. Plaintiffs have, upon their part, performed all the terms and conditions required of them to be performed. On account of the failure and refusal of the defendant to so comply, plaintiffs "have suffered great and irreparable damage, and, if said terms and conditions, as aforesaid, are not carried out and performed by defendant, these plaintiffs will continue to suffer great and irreparable damage." The complaint concludes with a prayer for a decree compelling the defendant to establish a station as agreed, to deliver, receive, and discharge passengers thereat, and to stop all trains except express trains, at such station for these purposes.

The action is clearly one for specific performance of a contract, not to recover damages for its breach (*Pittsburgh Coal Co. v. Greenwood*, 39 Cal. 71; *Bohall v. Diller*, 41 Cal. 532; *Prince v. Lamb*, 128 Cal. 130, 60 Pac. 689), and the sole question is whether the complaint alleges facts entitling the plaintiff to the equitable relief sought. It is argued by the respondent that it is the duty of railroad corporations, which are performing functions partaking of a public character, to locate their stations at places where they will best serve the public needs and convenience, and that, accordingly, a court of equity will not, in order to subserve mere private interests, compel the location of stations for the stopping of trains in such manner as to hamper the company in the performance of its duties to the public. The rule thus invoked has been applied to cases more or less similar to the present one. *Texas & P. R. Co. v. City of Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 885; *Beasley v. Texas & P. R. Co.*, 191 U. S. 492, 24 Sup. Ct. 164, 48 L. Ed. 274; *Marsh v. Fairbury, etc., R. Co.*, 64 Ill. 414, 16 Am. Rep. 564; *Mobile, etc., R. R. Co. v. People*, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556; *St. Joseph, etc., R. Co. v. Ryan*, 11

Kan. 602, 15 Am. Rep. 357; *Pac. R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *Holladay v. Patterson*, 5 Or. 177; *Texas, etc., R. Co. v. Scott*, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94. Nearly all of these cases, however, involved contracts which undertook to bind the railroad company, not merely to locate a station at a particular place, but to establish no other station within a given distance of such places. In such cases, it was the exclusive character of the accommodation contracted for that was thought by the courts to involve an attempt to interfere with the companies in the performance of their duty to the public. In other words, the common carrier could not be permitted to bind itself not to furnish accommodations wherever they might be needed. This consideration does not apply to the case of a contract which merely binds the company affirmatively to furnish certain accommodations to the plaintiff, without in any way debarring it from fully complying with all its duties to others entitled to its service. The contract here alleged did not bind the company to limit in any degree the facilities to be furnished to the public. It required the establishment and maintenance of a station at a place named, but left the company free to establish additional stations as they might be needed, without limitation of number or location. Contracts similar to the one here in question have been specifically enforced. *Hood v. N. E. Ry. Co.*, L. R. 8 Eq. 661; *Lawrence v. Saratoga Lake Ry. Co.*, 36 Hun (N. Y.) 468, cited with approval in *P. P. & C. I. R. R. Co. v. C. I. & B. R. R. Co.*, 144 N. Y. 153, 39 N. E. 17, 28 L. R. A. 610; *Murray v. N. W. R. R. Co.*, 64 S. O. 520, 42 S. E. 617. Where such contracts are limited to the creation of a right to a certain station or train service at given points, without in any way making the right exclusive or infringing upon the company's obligation to furnish proper service at any other place where it may be needed we are not prepared to hold that their enforcement would necessarily be violative of public policy. *Texas & St. L. R. R. Co. v. Robards*, 60 Tex. 545, 48 Am. Rep. 268; *Int. & G. N. R. R. Co. v. Dawson*, 62 Tex. 260; *Greene v. West Cheshire Ry. Co.*, L. R. 13 Eq. 44. A different question is presented where, upon the trial, or from the allegations of the bill, it appears that the enforcement of the contract would impose a great burden upon the defendant, with a slight or no corresponding benefit to the plaintiff, or that such enforcement would be detrimental to the interests of the public. Such circumstances, showing that the performance sought would be oppressive or inequitable, will warrant the denial of specific relief. 6 Pom. Eq. Jur. § 796; *Conger v. N. Y., etc., R. R. Co.*, 120 N. Y. 29, 23 N. E. 983; *Murdfeldt v. N. Y., etc., R. R. Co.*, 102 N. Y. 703, 7 N. E. 404; *Clarke v. Rochester R. R. Co.*, 18 Barb. (N. Y.) 350.

The consideration last suggested points

directly to a fatal objection to the complaint under discussion. It is thoroughly settled in this state that a complaint for specific performance must in order to make out a case good as against general demurrer, state facts from which the court may determine that the consideration is adequate, and that the contract is as to the defendant just and reasonable. Civ. Code, § 3391. In *Agard v. Valencia*, 39 Cal. 302, the court says: "Another well-established rule of courts of equity is that, in a suit for specific performance, it must be affirmatively shown that the contract is fair and just, and that it would not be inequitable to enforce it. The court will not lend its aid to enforce a contract which is in any respect unfair or savors of oppression, but in such cases will leave the party to his remedy at law. It is incumbent upon the plaintiff therefore to state such facts as will enable the court to decide whether the contract is of such a character that it would not be inequitable to enforce it." This court has frequently restated its adherence to this rule. *Bruck v. Tucker*, 42 Cal. 352; *Nicholson v. Tarpey*, 70 Cal. 608, 12 Pac. 778; *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190; *Windsor v. Miner*, 124 Cal. 492, 57 Pac. 386; *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689; *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231; *Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148; *White v. Sage*, 149 Cal. 618, 87 Pac. 193.

The complaint in this case is entirely devoid of any showing of this character. The value of the right of way conveyed is not stated, nor is there any allegation of the cost to the defendant of compliance with its contract. No attempt is made to state any facts indicating the adequacy of the consideration or the fairness of the contract. There is not even an allegation in general terms of the conclusion that the contract is just and fair as between the parties. As bearing upon the question whether the granting of the relief sought would be equitable, it is to be observed that the complaint does not aver that the plaintiffs, at any time since 1881, have been the owners of any land in the neighborhood of the proposed station, or that they live near it. The allegation that they owned land adjoining the right of way in 1881 is not an allegation that they owned it at any later date. The presumption of the continuance of facts once shown to exist (Code Civ. Proc. § 1963, subd. 32) declares merely a rule of evidence and has no application to the statement of facts in a pleading (*Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750). So far as appears from their complaint, the plaintiffs are endeavoring to enforce a bare legal right to have the defendant comply with the contract of its predecessor, without showing that such compliance would in any way add to their convenience or to the value of any property owned by them. The complaint therefore fails to show that the contract as originally made was fair and just as between the par-

ties or that it would be equitable to enforce it. Furthermore, it fails to show that the recovery of damages for a breach of the contract would not be an adequate remedy, a condition which is as essential to the obtaining of specific performance as of other forms of equitable relief for the infringement of legal rights. *Senter v. Davis*, 38 Cal. 450; *Flood v. Templeton*, supra.

Respondent urges some additional points in support of the rulings sustaining the demurrer, but these need not be discussed in view of the conclusions above expressed.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

153 Cal. 488

ALDRICH v. BARTON et al. (GREIG et al. Interveners). (S. F. 4,702.)

(Supreme Court of California. April 30, 1908.)

1. WILLS—CONSTRUCTION—TERMINATION OF TRUST.

Testator gave the residue of his estate to trustees to pay out the net income derived from one-fourth thereof for the maintenance and support of plaintiff so long as he should be incompetent to hold and properly manage his affairs and property, and, on his restoration to capacity, to turn over one-fourth of the residue with all accumulations to him and his heirs forever; but, if he should be permanently of unsound mind up to the time of his death, his share should pass to and be distributed among testator's heirs at law then living according to the laws of descent. Held, that the event on which testator intended to make plaintiff's right to possession of one-fourth of the residue depend was his actual recovery in fact from his mental incapacity, and not on the mere making of an order purporting to declare such recovery.

2. INSANE PERSONS—RESTORATION TO CAPACITY—PROCEEDINGS.

The proceeding for the restoration of an insane person to capacity defined by Code Civ. Proc. § 1766, is not applicable to the case of one who was confined in an insane asylum without having been put under guardianship.

3. SAME—DISCHARGE BY ASYLUM AUTHORITIES.

The discharge of an insane person not under guardianship confined in an insane asylum by the asylum authorities prior to St. 1903, p. 485, c. 304, regulating the care of insane persons, while an adjudication that the person committed and discharged had recovered from his insanity, was nevertheless only prima facie evidence of legal capacity in the person so discharged, under Civ. Code, § 40, declaring that such a certificate shall establish the presumption of legal capacity in the person discharged from the time of such discharge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, § 42.]

4. SAME—PROCEEDING—NATURE AND EFFECT—JUDGMENT.

The proceeding defined by Code Civ. Proc. § 1766, for the determination of whether an insane person has been restored to capacity, is judicial in its nature, and the judgment rendered is conclusive on the condition or relation of the person, as expressly provided by Code Civ. Proc. § 1908.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, § 42.]

5. JUDGMENT—COLLATERAL ATTACK—JURISDICTION.

A judgment of a court of general jurisdiction cannot be collaterally attacked even for

want of jurisdiction, unless it appears on the face of the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 924, 940.]

6. INSANE PERSONS—DISCHARGE—CERTIFICATE OF CAPACITY—EFFECT.

Pol. Code, § 2189, subd. 6, declares that, when a person is discharged as recovered from the state hospital for the insane, a copy of the certificate of discharge may be filed with the clerk of the superior court of the county from which the person was committed, which record shall have the same legal effect as a judgment of restoration to capacity made under Code Civ. Proc. § 1766. *Held*, that such a certificate of restoration to capacity was not effective to deprive a party against whom such certificate was offered to show that it was in fact issued in a case in which the superintendent of the asylum issuing it had no power to act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, § 42.]

7. SAME—INMATES OF HOSPITAL.

Where plaintiff was released from an insane asylum on parol in 1892, after which from time to time, until 1900, he went to the asylum occasionally to visit the physicians, but from that time until 1905, when he applied for and received a certificate of discharge, he had not been in the asylum at all, he was not an inmate at the time such certificate was issued.

8. SAME—CERTIFICATE OF DISCHARGE—JURISDICTION TO ISSUE.

Under Pol. Code, § 2189, authorizing the superintendent of a state hospital for the insane to discharge a patient who in his judgment has recovered, such superintendent had no jurisdiction to issue a certificate of discharge to a person who was not a patient in the sense of having been committed to the asylum and having remained there for care and treatment except in case of temporary absence at the time of such discharge.

9. SAME—CERTIFICATE UNDER FORMER ACTS.

A certificate of capacity, granted by the superintendent of an insane asylum under St. 1897, p. 331, c. 227, covering the commitment and care of insane persons, or under St. 1901, p. 639, c. 211, providing for the discharge of persons who have been committed to a hospital for the insane but are not confined in such hospital, constitutes only *prima facie* proof of sanity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, § 42.]

Department 1. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by George Albert Aldrich against Annie Aldrich Barton and another; Helen H. Greig and others, interveners. A decree was entered denying plaintiff the relief asked, and he appeals. Affirmed.

Aldrich & Gentry, for appellant. Drown, Leicester & Drown, for respondents. A. Everett Ball, for interveners.

SLOSS, J. William A. Aldrich, the father of plaintiff, died on February 25, 1892, leaving a will dated the 29th day of October, 1891. In May, 1888, the plaintiff, George Albert Aldrich, had been duly committed to the Napa State Asylum for the Insane by a judge of the superior court of Alameda county, and he remained a patient in said asylum until after his father's death. By said will the testator gave the residue of his estate to trustees, in trust, among other things, to

appropriate and pay out of the net income derived from one-fourth of such residue "so much thereof as may be required for the proper and comfortable maintenance, support and care of my son George Albert Aldrich, now at the State Asylum for the Insane in Napa county, California, so long as he shall be incompetent to hold and properly manage his affairs and property. Upon the restoration of my said son George Albert Aldrich to mental soundness and capacity to turn over and pay and deliver to him the said one-fourth of such residue of my estate, with all increment and accumulations thereof, to have and to hold the same to him and his heirs forever. If, however, my said son George Albert Aldrich shall prove to be permanently of unsound mind and shall so continue up to the time of his death, the said one-fourth of such residue of my estate shall, upon his death, pass to and be thereupon paid and delivered to and distributed among my heirs at law then living, according to the laws of the state of California then in force relating to the succession to the property of the estate of those dying intestate." The will was duly admitted to probate, and on the 31st day of May, 1893, at the close of the administration of the estate, a decree of distribution was made, whereby the residue of the estate was distributed to the trustees named in the will upon the trusts therein declared. The defendants Annie Aldrich Barton and Helen Aldrich Dunning are the sole remaining trustees.

This action was brought by plaintiff against such trustees to obtain a decree terminating the trust and requiring the defendants to account for and turn over to plaintiff one-fourth of the residue of the estate. The complaint alleges that on or about January 30, 1905, the medical superintendent of the Napa State Hospital for the Insane filed with the secretary of the board of managers of said Napa State Hospital his certificate of discharge of plaintiff, and that on the 1st day of February, 1905, a copy of said certificate, certified by the secretary of the board of managers of said Napa State Hospital, was filed with the county clerk of Alameda county and entered by said county clerk in a book kept by him for that purpose. It is further alleged that plaintiff was, prior to the commencement of this action, discharged from said asylum and restored to mental soundness and capacity. The defendant trustees answered, admitting the filing and recording of the discharge in question, but averring on information and belief that said certificate of discharge is void and of no legal effect, and that the medical superintendent of the Napa State Hospital for the Insane did not, when he signed, made, or filed said certificate of discharge, have any jurisdiction over or concerning the person of the plaintiff or the subject-matter of the discharge of the plaintiff from the said hospital. They further alleged that at the time of said discharge, and at all times since the 1st day of January,

1905, the plaintiff was not in said hospital, nor a patient at said hospital, nor an inmate thereof, nor within the control nor under the jurisdiction of said hospital, or of the medical superintendent thereof or any of the officers of the same, nor within said county of Napa. The answer further denied that the plaintiff was, prior to the commencement of this action, or that he has been at any time, restored to mental soundness or capacity. Other matters are set up in the answer, but the statement here made is sufficient to make clear every point which need be considered in disposing of this appeal. There was also a complaint in intervention, filed by persons claiming to be heirs at law of the testator, and as such entitled to an interest in the trust fund upon the death of plaintiff, if he should remain incompetent until his death. The interveners joined with the defendants in opposing plaintiff's prayer for relief. The court found in favor of the foregoing allegations and denials of the answer. With reference to the mental condition of the plaintiff, there is a finding numbered 11, as follows: "That said plaintiff George Albert Aldrich was not, at the date of the death of his said father, William A. Aldrich, to wit, on the 25th day of February, 1902, and that he was not on the 12th day of November, 1902, or on the said 30th day of January, 1905, and that he has not been at any time since the date of the death of his said father, and is not now of sound mind or competent to hold and properly manage his affairs and property, or restored to mental soundness or capacity; but that ever since the date of the death of his said father he has been, and he is now, of unsound mind and incompetent to hold and properly manage his affairs." As conclusions of law the court found that the discharge of plaintiff from the said asylum did not terminate or extinguish the said trust, but that the same still continues. A decree, denying the plaintiff any relief and declaring the right of the defendants to hold the property upon such trust, followed. The plaintiff appeals and brings up the evidence by a bill of exceptions.

While the record contains numerous exceptions, but a single question is presented. The plaintiff relies exclusively upon the certificate of discharge given by the superintendent of the state asylum, or hospital, as it is now called, on January 31, 1905. By an act of March 26, 1903 (St. 1903, p. 485, c. 364), chapter 1 of title 5 of part 3 of the Political Code was repealed, and there was substituted therefor a new chapter, comprising sections 2136 to 2199, inclusive, of that Code, and dealing with the care and custody of insane persons, etc. Section 2189 deals with the discharge of patients from state hospitals. Subdivision 1 of that section authorizes the superintendent of a state hospital to discharge "a patient who, in his judgment, has recovered," and subdivision 6 provides that: "When any person is discharged as recovered from a state

hospital, a copy of the certificate of discharge, duly certified by the secretary of the board of managers, may be filed for record with the clerk of the superior court of the county from which said person was committed. * * * Such certified copy of such certificate and the record of the same shall have the same legal effect as the original, and if no guardian has been appointed for such person, as provided by sections 1763 and 1764 of the Code of Civil Procedure, such certificate and duly certified copies thereof and such record thereof shall have the same legal force and effect as a judgment of restoration to capacity made under the provisions of section 1766 of the Code of Civil Procedure." The contention of the plaintiff is that, by this provision, the certificate of discharge of the superintendent is made final and conclusive upon all parties. It is expressly conceded that if the court was authorized to go behind the certificate and inquire into the question of whether, as a matter of fact, the plaintiff had ever become competent, the evidence is ample to sustain finding 11 above quoted, to the effect that he had not at any time since the date of his father's death been of sound mind or competent to hold and properly manage his affairs and property, or restored to mental soundness or capacity.

There is no discussion in the briefs regarding the proper construction of the trust clause; both parties apparently assuming that the event upon which the testator intended to make the plaintiff's right to the principal of one-fourth of the residue depend was his actual recovery, in fact, from mental derangement or incompetency, rather than the mere making of an order purporting to declare such recovery. And this, we think, is the proper interpretation of the clause. The testator provided that the trust should continue so long as the plaintiff should be incompetent. Upon his "restoration to mental soundness and capacity," he was to receive the corpus of the trust. The phrase "restoration to capacity," standing alone, might be construed to mean a judicial or other adjudication of restoration, regardless of the actual fact. But the only proceeding known to our law which, at the date of testator's will, could with propriety be designated as a "restoration to capacity" was the proceeding defined in section 1766 of the Code of Civil Procedure, and that proceeding was not applicable to the case of one who was confined in an insane asylum without having been put under guardianship. *Kellogg v. Cochran*, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104. Leaving out of consideration such relief as might be afforded by a court on habeas corpus, the asylum authorities alone had power to affect the status of such person, and while a discharge by such authorities was an adjudication that the person committed had recovered from insanity (*Kellogg v. Cochran*, supra), it afforded, prior to the enactments of 1903, only *prima facie*

evidence of legal capacity in the person so discharged (Civ. Code, § 40). Such order of discharge is not fairly within the meaning of the phrase "restoration to mental soundness and capacity," as used by the testator. What effect it may have as evidence of such restoration is another question.

The appellant, as has been stated, takes the position that a certificate of discharge which formerly only raised a presumption of capacity is, if issued under section 2189 of the Political Code, as that section now reads, conclusive evidence of restoration to capacity of the person discharged. This contention is based upon the provision of the statute that such certificate shall have "the same legal force and effect" as a judgment of restoration under section 1766 of the Code of Civil Procedure. The proceeding defined in section 1766 is, in its nature, a judicial proceeding. In it a court, upon application by petition on behalf of a person declared incompetent, and after notice to adverse parties and a hearing, is authorized to "judicially determine" the fact of the restoration to capacity of such person. The judgment rendered in such case is one "in respect to the personal, political, or legal condition or relation of a particular person," and, when rendered by a court having jurisdiction to pronounce the judgment or order, is "conclusive upon the condition or relation of the person." Code Civ. Proc. § 1908. The decision in *Kellogg v. Cochran*, supra, established the proposition that this proceeding had no application to the case of a person who had been committed to an insane asylum, but had not been put under guardianship by virtue of sections 1763 and 1764 of the Code of Civil Procedure. The Legislature, in enacting section 2189 of the Political Code, doubtless intended to afford to persons who, upon recovery should be discharged from insane asylums, some record proof, which should operate to establish their recovery in the same way that the judgment of restoration under section 1766 of the Code of Civil Procedure, operated in the case of persons who had been declared incompetent, and for whom guardians had been appointed; that is to say, the certificate when made by an official having jurisdiction to make it, was made evidence of an adjudication of the fact that the person discharged had recovered. But the argument of the appellant goes, and, as will appear, necessarily goes, further than this. He contends that the certificate of discharge, in and of itself, conclusively proves the jurisdiction of the superintendent to make it; that is to say, that it cannot be collaterally attacked even for want of jurisdiction, unless such want of jurisdiction appears on the face of the record. This is, no doubt, the rule applicable to judgments of courts of general jurisdiction. *Carpentier v. Oakland*, 30 Cal. 439; *Hahn v. Kelly*, 34 Cal. 402, 94 Am. Dec. 742; *Drake v. Duvenick*, 45 Cal. 464; *Lyon v. Petty*, 65 Cal. 325, 4 Pac. 103; *Bennett v. Wil-*

son, 133 Cal. 379, 65 Pac. 880, 85 Am. St. Rep. 207. We need not here decide whether the superior court, acting under the provisions of section 1766 of the Code of Civil Procedure, is to be regarded as a court of general or one of limited jurisdiction. In any view, we are satisfied that the statute giving to the certificate of discharge the same legal force and effect possessed by a judgment under Code Civ. Proc., § 1766, is not to be construed as putting it beyond the power of a party against whom such certificate is offered to show that in fact it was issued in a case in which the superintendent of the asylum had no power to act. It is not to be supposed that the Legislature intended to give to an executive officer, acting ex parte, the power to determine conclusively, even as against collateral attack, that he had jurisdiction, when in fact he had none. It is not necessary to decide whether the effect contended for could, under fundamental constitutional restrictions, be given to a certificate such as the one here relied on. Nor need we consider whether, even if issued in a case within the jurisdiction of the superintendent, such certificate can constitutionally be made conclusive evidence of restoration to capacity. It is enough, for the purposes of this case, to say that the reasonable interpretation of section 2189 of the Political Code is that it purports to make a certificate conclusive as against collateral attack, if issued by one having authority, in the particular case, to make it, but that such certificate always remains open to attack for want of such authority. The purpose of the section was to give to a certificate of discharge the effect of a judgment, as an adjudication of a fact, not to confer upon it any evidentiary value as conclusive proof of jurisdiction to make such adjudication.

The court found that, at the time of said discharge, the plaintiff was not in the Napa State Hospital for the Insane, nor a patient at said hospital, nor an inmate thereof, nor within the control of the hospital or the medical superintendent thereof. These findings are fully sustained by the evidence, which shows that plaintiff was released from the asylum on parole in 1892. Between that time and 1900 he went to the asylum occasionally to visit the physicians. Since 1900 he has not been to the asylum at all. In 1902 there was granted to plaintiff, at his request, a certificate of discharge. The discharge of 1902, whether valid or not, was treated as effectual by the asylum authorities and by the plaintiff. Plaintiff had no communication thereafter with any official of the asylum until 1905, when he applied for the certificate now relied on. This certificate was issued by Dr. Stone, whose incumbency of the office of medical superintendent began after plaintiff left the asylum. The certificate was issued after an examination of plaintiff made by Dr. Stone at San Francisco. There can be no doubt that the jurisdiction

of the superintendent of an insane asylum to discharge a person as recovered from insanity exists, under Pol. Code, § 2189, only where such person is a patient in the asylum. The only authority given to the superintendent by the statute is to discharge a "patient," and that by such "patient" is meant one who has been committed to the asylum and has remained there (except in case of a temporary absence as on parole) for care and treatment, is clear from a reading of the entire chapter of the Political Code dealing with the commitment and care of insane persons. One who has for many years been away from the asylum, claiming, without opposition, to have been discharged by virtue of an order purporting to have that effect, and over whom the asylum authorities do not exercise, or claim the right to exercise any power of restraint whatever, cannot be said to be a "patient" within the meaning of the law. Such was the condition of the plaintiff, as is found by the court on ample evidence. Nor would plaintiff's situation be improved if the discharge of 1902 could be regarded as valid, either under the act of 1897 covering the commitment and care of insane persons (St. 1897, p. 331, c. 227), or under the act of 1901, providing for the discharge of persons who have been committed to a hospital for the insane, but are not confined in such hospital (St. 1901, p. 639, c. 211). A certificate granted under either act would afford no more than *prima facie* proof of sanity.

The certificate of 1905, having been issued without authority, was ineffectual for any purpose, and the plaintiff's right to recover depended upon his establishing that he had in fact been restored to a condition of competency. On this issue, the finding was against him, and, as is conceded, there was sufficient evidence to support the finding. Since every point made by appellant is based on the claim that the certificate was conclusive in his favor, it follows that the court below rightly gave judgment for the defendants.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

7 Cal. App. 735

GERTH v. GERTH. (Civ. 421.)

(Court of Appeal, First District, California.
March 23, 1908.)

1. REPLEVIN—PARTIES—PARTIES DEFENDANT—PARTIES CLAIMING INTEREST.

In an action in claim and delivery to recover certain promissory notes payable to plaintiff, executed by a person of whom defendant was formerly guardian, defendant alleged that while guardian of such person and in possession of the notes she applied the money belonging to her ward on certain of the notes payable by him, and that she had filed her accounts as guardian, and that the ward had objected thereto, and the accounts and objections were then pending, but did not claim that she had accounted to plaintiff for the money which she claimed to have applied on the notes. *Held*,

that it was not error to refuse to make defendant's ward a party to the action, since he claimed no interest in the notes or right to their possession, his only claim being against defendant for the money which she claimed to have applied to their payment.

2. APPEAL—REVIEW—HARMLESS ERROR—ERROR NOT AFFECTING RESULT.

A judgment will not be reversed for failure to find upon a material issue, if the omitted finding must have been adverse to appellant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4034.]

3. SAME—FINDINGS ON IMMATERIAL MATTER.

In an action to recover possession of promissory notes, where defendant had deposited all the notes with the trial court for delivery to plaintiff if the judgment for him should be affirmed, it was immaterial whether or not the trial court may have found the value of the notes to be greater than the evidence warranted, and the question will not be reviewed.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Henry Gerth against Annie Gerth. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

Rogers, Bloomingdale & Free, for appellant. Samuel G. Tompkins, for respondent.

HALL, J. This is an appeal by defendant from a judgment rendered against her for the possession of certain promissory notes, and from the order denying her motion for a new trial.

The point principally relied upon by appellant concerns the action of the trial court in denying a motion made by defendant to have one Andrew Gerth, the maker of some of the notes sued for, made a party to the action. The action is in claim and delivery, wherein plaintiff prays for judgment for the possession of five certain promissory notes, or, in the event that possession thereof cannot be given, for the value thereof. Three of the notes sued for were executed by the said Andrew Gerth, and all are in terms payable to plaintiff. Defendant set forth in her affidavit used on her said motion the fact that she had been the guardian of said Andrew Gerth during a time that he was incompetent, and while such guardian, and while she had possession of the said notes, certain moneys belonging to said Andrew Gerth had come into her possession, which she had applied on certain of the said notes payable by him; that she had filed her accounts as such guardian showing such application of said moneys, and that said Andrew Gerth had filed objections thereto, which said accounts and objections were pending in the superior court of Santa Clara county, unsettled and yet unheard. She did not claim that she had accounted to plaintiff for any of the money of Andrew Gerth which she claimed to have applied on the said notes. Under the circumstances the court did not err in refusing to make Andrew Gerth a party to the action. The action was

brought by plaintiff, the payee of the notes, to recover the possession thereof from defendant. Andrew Gerth claimed no interest in the notes, or any right to the possession of them or of any of them. His only claim was that defendant had no right to apply any of his money in payment of said notes, or had not in fact made any such application. This was a matter to be settled between him and her in the court having jurisdiction of the guardianship proceeding. No matter how it should be settled, its proper settlement could not affect plaintiff's right to recover possession of the notes from defendant. At the outset of the oral argument upon this appeal appellant conceded that the evidence supported the finding as to the ownership and right of possession of the notes being in plaintiff. Upon delivery of the notes to plaintiff and payment of the costs the judgment in this case against her will be fully satisfied. It was admitted at the oral argument that the notes not only can be delivered, but that they had been placed in possession of the court to be delivered to plaintiff if the judgment be affirmed. Neither in her affidavit nor in her evidence does she claim to have ever accounted to plaintiff for any money that she may have received or applied on the Andrew Gerth notes, and plaintiff in this action is not seeking to recover of her any money that she may have received on the Henry Gerth notes. We think the court properly denied appellant's motion to have Andrew Gerth made a party to this action.

Appellant also makes the point that the court erred in not finding upon the issues presented by the allegations in her answer that the consideration for which the notes were given consisted in part of separate property of defendant, and that there was an agreement between plaintiff and defendant that she should hold, manage, and control said notes. We are not pointed to any evidence in the record that would have sustained any finding upon either of these issues favorable to appellant. Upon the contrary, all the evidence in the record is the other way. It is not pretended that the findings as made do not support the judgment. A judgment will not be reversed for failure to find upon a material issue, if the omitted finding must have been adverse to appellant. *People v. Center*, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; *Hutchings v. Castle*, 48 Cal. 152. See also *Hihn Company v. Fleckner*, 106 Cal. 95, 39 Pac. 214; *Rogers v. Duff*, 97 Cal. 67, 31 Pac. 836; *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. 1098; *Winslow v. Gohransen*, 88 Cal. 450, 26 Pac. 504.

We do not think it necessary to examine the evidence for the purpose of ascertaining whether or not the court may have found the value of the notes to be greater than the evidence warrants. It was admitted at the oral argument that appellant has deposited all the notes with the clerk of the trial

court for delivery to plaintiff if the judgment shall be affirmed. It is therefore of no consequence to either plaintiff or defendant as to what the value of the notes may be. The question of value has become a moot question.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 725

BADEN BRICK CO. v. CHUBBUCK et al.
(Civ. 460.)

(Court of Appeal, First District, California.
March 18, 1906.)

CORPORATIONS—SALES—ACTIONS FOR PRICE—EVIDENCE.

A corporation operating a brickyard contracted to sell brick therefrom to a buyer. The contract was signed by the corporation per its president. Thereafter a bill of sale of brick at another yard was executed by the president individually. The president testified that, while the lease of the latter yard was in his name, it was the yard of the corporation, and that he signed the bill of sale personally because he was president and manager of the corporation and generally made its contracts in his own name. Brick from both yards was delivered to the buyer, and his books showed that the corporation was credited for all the brick received. He testified that the books were so kept for convenience only. *Held*, to authorize a verdict in favor of the corporation for all brick delivered.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Baden Brick Company against C. I. Chubbuck and another. From a judgment for plaintiff and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Henry G. W. Dinkelspiel, for appellants.
Roger Johnson, for respondent.

KERRIGAN, J. This action was commenced to recover a balance of an account for goods, wares, and merchandise sold and delivered by plaintiff to defendants. Judgment went for plaintiff. From an order denying a motion for a new trial, this appeal is prosecuted.

The ground chiefly relied upon by appellants is the insufficiency of the evidence to justify the decision. It appears from the record that the respondent owned and operated a brickyard near Baden, in San Mateo county; that on March 3, 1906, it entered into a contract with appellants for the sale of brick. The contract was signed by Thomas Butler, the president of the respondent, as follows: "The Baden Brick Company, per Thos. Butler." Two days later a bill of sale was executed of certain brick at a brickyard in San Francisco at Sixth and Berry streets by Thomas Butler individually to the appellants. The appellants expressly admit the indebtedness alleged, but claim it is due,

not to the respondent, but to Thomas Butler. This claim is without merit.

The amount sued for covers brick delivered in March, 1906, from both the yards in San Francisco and in Baden; and appellants' own ledger, which was introduced in evidence by respondent, shows that the Baden Brick Company was credited by them for all the brick received during that month. C. I. Chubbuck, one of the appellants who kept the books for his firm, in explanation of the entries in their books just referred to, said: "In keeping our ledger account, for convenience sake I put into one account the transactions with the Baden Brick Company and with Thomas Butler." Thomas Butler, a witness for respondent, testified that while the lease of the brickyard at Sixth and Berry streets stood in his name at the date of the contract of March 3, 1906, nevertheless the respondent owned that yard and everything there, including the brick mentioned in the bill of sale of March 5, 1906; that he signed the bill of sale of March 5, 1906, personally because he was president and manager of respondent, and generally made its contracts in his own name.

It is true, as contended by appellants, that the testimony on cross-examination of Butler revealed some inconsistencies. It is also true that appellants introduced testimony to show that the sale of the brick at Sixth and Berry streets was by Butler personally, and not for the respondent. But we are satisfied that there is sufficient evidence to support the findings of the court.

There are other points urged in appellants' brief which we have carefully examined, and which we think do not merit discussion.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

7 Cal. App. 717

JERRUE et al. v. SUPERIOR COURT OF
LOS ANGELES COUNTY et al.
(Civ. 327.)

(Court of Appeal, Second District, California.
March 17, 1908.)

1. EXECUTORS AND ADMINISTRATORS—SALE OF
DECEDENT'S PROPERTY—REVIEW—PRESUMPTIONS—JURISDICTION.

An order confirming an administratrix's sale of personal assets being one within the power of the superior court in a proper case, its authority to act will be presumed unless the absence thereof is clearly made to appear.

2. SAME — SALES — CONTINUOUS BID — EVIDENCE.

Evidence held to justify a presumption that a bid made by petitioners to an administratrix for the sale of saloon fixtures was an open and continuous one, subject only to petitioners being successful in their efforts to secure a transfer of the license.

3. CERTIORARI — SCOPE OF WRIT — ADEQUATE
REMEDY AT LAW.

Since want of jurisdiction alone will not justify the issuance of certiorari, the writ would not lie to review an order confirming an administratrix's sale of certain personal property belonging to the estate on the ground that there was no bid by petitioners which the administra-

trix could accept at the time the order was made, as in such case the bidder had an adequate remedy at law by defense to a suit for the purchase price.

4. EXECUTORS AND ADMINISTRATORS—SALE—
CONFIRMATION—EFFECT.

An order confirming an administratrix's sale of assets pursuant to an order of sale is not an adjudication against the purchaser, but is only sufficient to constitute a *prima facie* case in an action against the bidder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1535.]

Petition for a writ of certiorari by D. B. Jerrue and others to review an order entered by the superior court of Los Angeles county confirming an alleged sale of the stock of a saloon, fixtures, etc., by an administratrix. Writ refused.

E. F. Wehrle and Frank James, for petitioners. C. W. Pendleton, E. A. Meserve, R. J. Dillon, and Mott & Dillon, for respondents.

SHAW, J. Petition for writ of certiorari. By an order made on April 14, 1906, the administratrix of the estate of Charles A. Robb, deceased, was authorized to sell at private sale certain personal property, consisting of the stock, fixtures, license to sell liquor at retail, lease, and good will of a certain retail liquor business, all of which belonged to said estate. The petitioners bid \$7,000 for said property, which bid, however, was made subject to their obtaining from the board of police commissioners of the city of Los Angeles a transfer of the license to conduct the business described in said order of sale. The administratrix accepted said bid and sold the property to petitioners, and on April 30, 1906, made due return of said sale to the court, asking that the same be confirmed. At the hearing upon the return and petition for confirmation one Kutzmann in open court made a bid in writing whereby he offered the sum of \$7,025 for the property, provided the said police commission would grant or assent to the transfer to him of the said liquor license. By the terms of said bid the amount thereof, less 10 per cent., accompanying the same, was payable upon confirmation of sale and the making of the transfer of said liquor license, and in case of failure to obtain said transfer the bid was by its terms to be null and void. On the same day, April 30th, the court made its order reciting the return made by the administratrix, the bid in open court made by Kutzmann, the acceptance of which it found was for the best interest of the estate, and ordered that his bid be accepted and the sale to him confirmed. Thereafter the administratrix filed a petition reciting the foregoing facts, and stating that said police commission had refused to transfer said license to Kutzmann, by reason whereof she was unable to comply with the terms of his bid; that the license had been transferred to Jerrue & Co.; and that she had sold all of said personal property to Jerrue & Co., who had paid her the sum of \$3,759.50 as a partial payment therefor. She further asked that the order

confirming the sale to Kutzmann be vacated and an order made confirming the sale to Jer-rue & Co. On June 6, 1906, the court made the order as prayed for.

The order being one within the power of the court to make in a proper case, its authority to act will be presumed unless the want of such authority is clearly made to appear. It appears that both bids were conditional upon the success of the bidder in securing a transfer of the license to himself. The order confirming the sale to Kutzmann contained a like condition which could not be fulfilled by reason of the fact that Jerrue & Co. secured the transfer. These facts, together with the further fact that the administratrix had sold the property to Jerrue & Co., who had made a partial payment of \$3,759.50 upon the purchase price, was set forth in her supplementary report in the matter made to the court on June 6, 1906. The fact that petitioners did secure the transfer of the license and paid the sum of \$3,759.50 as a partial payment for the property, it not appearing that he had paid anything thereon at the time of the making of the order confirming the sale to Kutzmann, justifies the presumption that they made their bid an open and continuous one, subject only to their being successful in their efforts to secure a transfer of the license. Additional color at least is given to this presumption by reason of the fact that on July 14, 1906, and after the making of the order complained of, petitioners in writing gave notice to the administratrix that they withdrew their bid made on April 14, 1906, and rescinded the same. This action on the part of petitioners is indicative of the fact that up to the time of the giving of such notice they regarded their bid on file as an existing, open, and standing bid for the purchase of the property as made to the administratrix.

Want of jurisdiction alone, however, will not justify the issuance of a writ of review. Conceding that no presumption of jurisdiction arises in this case, and admitting a want of jurisdiction in the court making the order confirming the sale to petitioners, nevertheless it seems clear that they have a plain, speedy, and adequate remedy in due course of law. *Auzerals v. Superior Court*, 101 Cal. 542, 36 Pac. 6. If, in fact, at the time of making the order confirming the sale there was no existing bid whereby petitioners were legally bound to complete the purchase upon a transfer of the license in accordance with their proposal as set forth in the return of the sale and report of the administratrix, then such fact would constitute a complete defense to any action brought to enforce payment or otherwise compel performance of the alleged contract. The fact that the court confirms a sale upon the return thereof made by an administrator pursuant to an order of sale is not an adjudication against the alleged purchaser. He may not have bid at all, or, if he did bid, he may have been, by timely

withdrawal or otherwise, legally released from any obligation thereon. In an action to enforce the alleged contract of purchase against him the proceedings at most could constitute evidence only of a prima facie case.

The order, in so far as its effect is to vacate and set aside the order confirming the sale to Kutzmann, whether properly or erroneously made, is not a subject wherein petitioners are concerned. Since they are not affected by such action, they are in no wise interested therein.

The demurrer interposed by respondents is sustained, and the proceeding dismissed.

We concur: ALLEN, P. J.; TAGGART, J.

7 Cal. App. 719

LUNNUN v. MORRIS et al. (Civ. 389.)

(Court of Appeal, Second District, California.
Sept. 24, 1907. On Rehearing,
March 17, 1908.)

1. JUDGMENT—DEFAULT—OPENING—MISTAKE—MATTERS FOR CONSIDERATION.

On application for relief from the consequences of the mistake and inadvertence of counsel, all the circumstances surrounding the parties and the litigation, as shown by the papers, are proper matters to be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 265-268.]

2. SAME.

Whether acts of counsel amount to a mistake is to be ascertained by the court from the facts before it, and not from the conclusion of counsel or party that there was a mistake.

3. APPEAL—REVIEW—DISCRETION OF COURT—OPENING DEFAULT.

Whether or not the circumstances of a particular case are such that a mistake or inadvertence should be excused rests largely in the discretion of the court to which application is made, and the exercise of its discretion will not be disturbed, except where a clear abuse of discretion is apparent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3877-3879.]

4. JUDGMENT—OPENING DEFAULT—VERIFIED ANSWER AS AFFIDAVIT OF MERITS—SUFFICIENCY.

A verified answer, which denies every material allegation of the complaint, is sufficient as an affidavit of merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 312, 314-316.]

5. SAME—PLEADING BEFORE DEFAULT ENTERED—POWER TO ENTER DEFAULT WHILE PLEA STANDS.

As a general rule in ordinary civil actions, where a party pleads before his default is entered, though out of time or without leave, if the plea be good in form and substance, his default cannot be entered while the plea stands, but the proper practice is to move to strike the plea from the files.

6. SAME—ENTRY OF DEFAULT.

The entry of a defendant's default is not a step in acquiring jurisdiction, but is an act done after jurisdiction has been acquired for the purpose of limiting the time during which he may file his answer.

7. SAME—ENTRY—AUTHORITY TO ENTER—JURISDICTION.

The power to enter judgment depends solely upon the court having acquired jurisdiction by proper service of process on defendant, or by his appearance, and the failure of its ministerial of-

ficer to enter up a default, like the failure to make a proper return of service of process, in no way affects the court's power to act.

8. PLEADING — ANSWER FILED AFTER TIME—EFFECT—DISCRETION OF COURT.

Not only is an answer filed after time not a nullity, but plaintiff is not as a matter of right entitled to have it stricken from the files; but the court in its discretion may retain the answer or permit another to be filed, or may pursue whatever course justice may require.

On Rehearing.

9. APPEAL—RECORD—JUDGMENT ROLL—BILL OF EXCEPTIONS.

A bill of exceptions, when duly settled, becomes a part of the judgment roll on appeal from a final judgment, and is presumed to contain all evidence material to the rulings, to which exceptions are reserved and specified therein, under Code Civ. Proc. § 950, providing that any bill of exceptions settled as provided by statute may be used on appeal from a final judgment equally as upon appeal from an order granting or refusing a new trial.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by A. Lunnun against J. E. Morris and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded on rehearing.

H. C. Millsap, for appellants. Haas, Garrett & Dunnigan, for respondent.

TAGGART, J. This is an action of forcible entry under section 1159, Code Civ. Proc., and the appeal is by defendants from a judgment in favor of plaintiff.

Complaint was filed December 20, 1906, and summons thereupon issued directing the defendants to appear and answer on or before December 26, 1906. On the latter date attorneys for defendants served plaintiff's attorneys and filed with the clerk notice of their appearance for defendants. On the same day an order of court was made giving them three days in addition to the time fixed in the summons in which to plead. On the 31st day of December, 1906, and prior to any other or further proceedings in the case, defendants filed with the clerk of the court their verified answer. At the time of such filing no default had been taken against defendants or either of them. Thereafter, and on the same day, and when plaintiff's attorneys were in court and about to proceed with the introduction of testimony in said action, they were served with a copy of the said answer so filed as above stated. Attorneys for defendants thereupon called the attention of the court to the filing of the answer and objected to the introduction of any testimony for the reason that the case was at issue, and had not been regularly set for trial, and that they had no notice of trial under section 594 of the Code of Civil Procedure. Plaintiff asked that the default of defendants be entered, and that the testimony of plaintiff's witnesses be heard, upon the ground that the time for the filing and serving of said answer had expired before the same had been filed. Defendants then asked leave of the court to pre-

pare motion, affidavits, etc., upon an application to be relieved from the failure to serve and file their answer within the time allowed by law, on the ground of mistake, inadvertence, and excusable neglect of defendants' counsel. By consent, the attorney for defendants made a statement in open court of the facts upon which he based said motion for relief and introduced the verified answer as an affidavit of merits. His statement was accepted as true for the purpose of the motion, and, together with said answer, appears in the bill of exceptions in the record. The evidence on behalf of plaintiff in the cause was then heard and the objection and motion of defendants taken under submission, and thereafter, on the 2d day of January, 1907, the objection was overruled and the motion denied. Judgment by default in favor of plaintiff for the recovery of the premises was filed January 5, 1907, and the recital in this judgment shows that it was made upon a hearing had on December 31, 1906, at which time evidence was introduced on behalf of plaintiff. The above-mentioned appearance of defendants, the extension of time to plead, and their failure to answer within said time are recited in the judgment.

In the consideration of the application for relief from the consequences of the mistake and inadvertence of counsel, all the circumstances surrounding the parties and the litigation as shown by the papers were before the court and were proper matters for it to weigh in reaching a conclusion. *Lakeshore v. Modoc*, 108 Cal. 263, 41 Pac. 472; *Montijo v. Sherer & Co.* (Cal. App.) 91 Pac. 261. It does not clearly appear from the bill of exceptions whether or not evidence on the part of plaintiff was heard on the motion. If there was, it is not stated. The language of the bill in this respect is as follows: "The verified answer of the defendants was read and used as and for an affidavit of merit. Whereupon the court stated that the evidence of plaintiff would be heard, and the objection and motion would be submitted." The real inadvertence or mistake of counsel consisted of having on Friday, December 28, 1906, informed his associate, who was to prepare, serve, and file the answer in the case, that the answer must be filed December 31, 1906, instead of December 29, 1906. His reason given for doing this is that when telephoning to plaintiff's attorneys for an extension of time to plead, on December 28, he made the entry of his office diary under the date of December 28, "Last day to plead in case of Lunnun v. Morris et al.," and, when asked by his associate when the answer was due, looked at his office diary and computed the time allowed by the order of the court (three days) from December 28th instead of December 26th. There is nothing in the statement from which the court could determine that this information was not given by counsel with full knowledge that the three days terminated December 29th, and not December 31st, except

his characterization of it as a mistake in the statement. This the court might well regard as not sufficient. The character of the mistake is to be ascertained by the court from the facts before it, and not from the conclusion of counsel or party that the act was a mistake. *Shearman v. Jorgensen*, 106 Cal. 484, 39 Pac. 863. Even if there was no showing upon plaintiff's part, which does not seem clear from the record, we cannot say that the trial court abused its discretion in denying the motion. Whether or not the circumstances of a particular case are such that the mistake or inadvertence should be excused is a question the determination of which must of necessity be left largely to the court to which application is made, and it is well settled that an appellate court will not interfere with the exercise of the discretion of that tribunal, except in a case where a clear, abuse of discretion is apparent. *Freeman v. Brown* (Cal. App.) 90 Pac. 970; *Vinson v. L. A. P. R. Co.*, 147 Cal. 483, 82 Pac. 53. While this discretion is best exercised when it tends to bring about a judgment on the merits, it would cease to be a discretion if it could only be exercised to this end.

The answer denies every material allegation of the complaint and is a sufficient affidavit of merits. *Montijo v. Sberer & Co.*, supra; *Melde v. Reynolds*, 129 Cal. 314, 61 Pac. 932. The application was not made for leave to file the answer. That had already been filed by the clerk when the default was entered. While there are jurisdictions in which it has been held that an answer filed after the time limited by the statute, without leave of the court, may be disregarded as a nullity (6 Enc. of Pl. & Pr. p. 86), the general rule, and that adopted by the Supreme Court of this state in ordinary civil actions, appears to be that, where a party pleads before default entered, though out of time or without leave, if the plea be good in form and substance, his default cannot be entered while the plea stands. The proper practice in such case is to move to strike the plea from the files. 6 Enc. of Pl. & Pr. pp. 82, 85; *Bowers v. Dickerson*, 18 Cal. 420; *Acocck v. Halsey*, 90 Cal. 216, 27 Pac. 193.

The entry of the default is not a step in acquiring jurisdiction, but an act done after jurisdiction has been acquired by the court. *Sichler v. Look*, 93 Cal. 608, 29 Pac. 220. The purpose of the entry of default is to limit the time during which the defendant may file his answer (*Drake v. Duvenick*, 45 Cal. 463), but such entry is not necessary in order that the court may enter a judgment against the defaulting party. The power to enter judgment depends solely upon the court having acquired jurisdiction by proper service of process, on the defendant, or his appearance, and, the failure of its ministerial officer to enter up a default, like such failure to make proper return of service of process, in no way affects the power of the court to act. *Hibernia Saving Soc. v. Matthal*, 116 Cal. 426, 48 Pac.

370; *Herman v. Santee*, 103 Cal. 523, 37 Pac. 509, 42 Am. St. Rep. 145. Not only is the answer filed after time not a nullity, but the plaintiff is not as a matter of right entitled to have it stricken from the files. The discretion to do this is lodged in the court, which has absolute power either to retain the answer or permit another to be filed, or pursue whatever course in that respect the justice of the case may require. *Bowers v. Dickerson*, supra.

There is nothing in the bill of exceptions to show that any motion was made to have the answer stricken from the files, nor does it appear that the court of its own motion did this. Neither is there anything in the record to negative this; that is, to show that no such motion was made or that such action was not taken. The bill of exceptions contains merely the recital that "the following proceedings were had therein." It nowhere appears that the proceedings displayed and the action taken were all the proceedings had or acts done. In the absence of such showing, the presumption must be in favor of the court having done every act necessary to sustain the judgment. In support of the judgment all proceedings necessary to its validity will be presumed to have been regularly taken, and any matters which might have been presented to the court below, which would have authorized the judgment, will be presumed to have been thus presented, if the record shows nothing to the contrary. *Von Schmidt v. Von Schmidt*, 104 Cal. 547, 38 Pac. 361.

This holding renders it unnecessary for us to determine whether any distinction is to be drawn in this respect between the rules of practice in ordinary civil actions and summary proceedings in forcible entry. Presuming, then, in support of the judgment that the answer filed was stricken from the files before the default judgment was rendered, the record shows no reversible error, and the judgment should be affirmed.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

On Rehearing.

TAGGART, J. An action in forcible entry. The statement of facts in this case will be found in the decision rendered by this court September 24, 1907. We are satisfied with the views expressed in that opinion, except what is said as to the intentment declared to exist in support of the judgment.

The bill of exceptions contained in the record was treated as if entitled to be considered only in connection with the motion of appellant for relief under section 473 of the Code of Civil Procedure on the ground of mistake. In this we overlooked the fact that it was a part of the judgment roll, and the presumption which, under such circumstances, attached to it, to wit, that it contained all the ex-

dence material to the rulings to which exceptions were reserved and specified therein. This presumption rendered it unnecessary that it should negative the introduction of other evidence bearing upon the point to be considered. *Hidden v. Jordan*, 28 Cal. 301; *Bedan v. Turney*, 99 Cal. 652, 34 Pac. 442. The bill of exceptions when settled became a part of the judgment roll (section 950, Code Civ. Proc.), and the court's record of its own acts, and an appellate court could no more assume that error appearing therein was cured by some matter which is not contained in the bill, than it could consider matters outside of the roll for the purpose of impeaching the correctness of the judgment. The oversight mentioned resulted in an erroneous conclusion and the entry of an improper order by this court.

Respondent, upon the rehearing, again urges that a distinction should be drawn between an action of forcible entry and an ordinary civil action in considering the question presented by the appeal. The question is one of practice, and, unless otherwise provided in the chapter relating to forcible entry and unlawful detainer, must be determined by the general rules of practice in civil actions. Section 1177, Code Civ. Proc. The particular question here involved is not covered by a statutory rule relating to either class of cases. An answer was filed after the expiration of the time provided by law. It was not stricken out before default was entered. The power to enter judgment does not depend in either case upon the entry of the default. Jurisdiction to enter the judgment is acquired by service of process in both cases, and the defendant in either may at the discretion of the court be relieved from a default and permitted to answer after the expiration of the time given by statute for that purpose. A reason from which a distinction might be drawn on account of the summary character of the action is apparent, but the statute provides that the general rule shall be followed in all instances for which express provisions are not made in the chapter relating to the special proceeding. In the absence of the special provision, we must be governed by the general rule declared in ordinary civil action, which is that the default should not be entered until the answer shall have first been stricken from the files. *Bowers v. Dickerson*, 18 Cal. 420; *Acock v. Halsey*, 90 Cal. 216, 27 Pac. 193; 6 Ency. of Plead. & Prac. pp. 82, 85. A note under the last citation distinguishes the rule in the state of New York (from which cases are cited by appellant), as not being in accord with this; but the New York rule is stated as the exception. No decision in this state has been called to our attention which modifies the effect of *Bowers v. Dickerson*, supra, as an authority on this question.

Judgment reversed, and cause remanded.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 757

WHITAKER v. CALIFORNIA DOOR CO.
(Civ. 495.)

(Court of Appeal, First District, California. March 24, 1908. Rehearing Denied April 22, 1908; Denied by Supreme Court May 19, 1908.)

1. APPEAL—ORDER DENYING NEW TRIAL—REVIEW OF EVIDENCE.

The appellate court will not disturb an order refusing a new trial where there is a substantial conflict in the evidence, and will not review the evidence as though the motion were presented directly to it, though it was denied by a judge of the trial court who did not hear the evidence at the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3864, 3872.]

2. SAME—INSTRUCTIONS—HARMLESS ERROR.

Where the testimony was conflicting in all material points, an instruction that if the jury should find that the evidence was conflicting and that any witness had testified falsely as to any material fact the jury was at liberty to disregard and discard the whole testimony of the witness from further consideration, while objectionable, because limiting the rule to conflicting evidence alone, was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219-4223.]

3. TRIAL—WITNESSES—FALSE TESTIMONY—INSTRUCTIONS.

An instruction that if any witness had willfully testified falsely in regard to any material fact the jury was at liberty to "disregard and discard his entire testimony" was not objectionable because of the use of the words "disregard" and "discard" instead of "distrust": Code Civ. Proc. § 2061, subd. 3, providing that when a witness is false in one part of his testimony he is to be "distrusted" in the others.

Appeal from Superior Court, Alameda County; W. E. Greene, Judge.

Action by Clarence Whitaker, a minor, by his guardian, James A. Whitaker, against the California Door Company. From a judgment for plaintiff and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Myrick, Deering & Gibbons, for appellant. Charles E. Naylor, for respondent.

KERRIGAN, J. This is an appeal from the judgment and from an order denying defendant's motion for a new trial.

The action was brought to recover damages for injuries received by plaintiff, a boy 15 years of age, while operating a grooving machine in the defendant's mill. As there is a conflict in the evidence on the question involved, a statement of the facts of the case or even a summary of them is unnecessary. Appellant concedes, as indeed he must, that there is a conflict in the evidence; but he contends that the rule applied by appellate courts in such cases is inapplicable here under the peculiar circumstances of this case.

It appears from the record that the case was tried before the Honorable W. E. Greene, sitting with a jury; that before the motion for a new trial was made Judge Greene died, and the motion was submitted to another judge of the same court, the Honorable John Ellsworth. Appellant contends that the

judge who heard and denied the motion for a new trial, not having seen the witnesses nor observed their manner of testifying, was in no better position to weigh the testimony than is this court, and that therefore the rule which prevents appellate courts from examining the testimony when there is a conflict does not apply. In other words, appellant desires that we should examine and weigh the evidence as though the motion for a new trial were presented directly to us. Appellate courts will not disturb an order of a trial court in granting or refusing a new trial when there is a substantial conflict in the evidence, and the circumstance that the motion was decided by a judge of the trial court who did not hear the evidence at the trial makes no difference in the application of the rule.

In *Reay v. Butler*, 95 Cal. 214, 30 Pac. 208, the Supreme Court holds that the rule just stated is not adopted merely because courts of review do not have, as do trial courts, the advantage of observing the appearance and bearing of witnesses; but it is also founded on the essential distinction between trial and appellate courts, and grows out of a consideration of jurisdiction, that it is the province of the trial courts to decide questions of law and fact, and of the appellate courts to decide questions of law, and that appellate courts can rightfully set aside a finding for want of evidence only when there is no evidence to support it, or when the supporting evidence is so slight as to show an abuse of discretion. The court further says: "It has been held directly in several cases that the rule as to conflicting evidence applies to a case where the trial was before one judge and the motion for a new trial passed upon by his successor, and where the latter saw none of the witnesses, or where the trial was before the old district court and the motion before the succeeding superior court." See, also, *Garton v. Stern*, 121 Cal. 349, 53 Pac. 904. The rule is the same in all cases, whether the evidence is given orally or by deposition or affidavit (*Sheehan v. Osborn*, 138 Cal. 515, 71 Pac. 622; *Parrott v. Floyd*, 54 Cal. 535), or upon testimony in other cases (*Knox v. Moses*, 104 Cal. 505, 38 Pac. 318).

The judge who presided at the trial gave the following instructions: "*If in this case in the consideration of it you shall find that the testimony is conflicting, and if you shall find from the evidence that it is so conflicting, and that any witness who has testified in it has willfully testified falsely in regard to any fact material to the issue in the case, you are at liberty to disregard and discard the whole testimony of such witness from your further consideration in coming to a verdict.*"

Appellant objects to the part of the instruction in italics, because it does not apply the rule that a witness, false in one part of his testimony, is to be distrusted in others to the whole testimony, but confines and limits the

rule to conflicting testimony. We do not approve of this instruction, but as the testimony was contradictory in all the material points in the case the instruction, even considering it apart from the others, was entirely harmless. Subdivision 3 of section 2061 provides that, when a witness is false in one part of his testimony, he is to be distrusted in others. The foregoing instruction, it will be noted, uses the words "disregard" and "discard" instead of the word "distrust," and appellant says that disregard and discard do not mean the same as distrust; that distrust means suspicion, not disbelief; and that therefore, so he contends, the court erred in giving this instruction. Code Civ. Proc.

This matter has been passed on adversely to appellant's views in the case of *People v. Soto*, 59 Cal. 367, in which case the same judge who tried this case gave an instruction almost word for word like the one under consideration. There as here the words "disregard" and "discard" were employed. The instruction read: "If you believe that the defendant or any other witness in this case who has testified has willfully testified falsely in regard to any fact material to the issue, you are at liberty to disregard and entirely discard the whole testimony of such witness in coming to your verdict." And the Supreme Court, in sustaining the lower court, says (pages 369-370): "The court did not tell the jury that they ought to reject, or that they must reject, the entire evidence of the witness, but simply instructed them that they were at liberty to disregard and discard the whole evidence of a witness who had willfully testified falsely to a material fact in the case. We are at a loss to see how the court, by leaving the matter entirely within the discretion of the jury, in any manner invaded its province, and we think the instruction was a correct and proper one."

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

7 Cal. App. 733

PAJARO VALLEY BANK v. SCURICH et al.
(Civ. 418.)

(Court of Appeal, First District, California.
March 23, 1908.)

1. ATTACHMENT—AFFIDAVITS—AMENDMENTS—
FATALLY DEFECTIVE AFFIDAVIT.

A fatally defective affidavit on which a writ of attachment was issued cannot be amended so as to meet a motion to discharge the writ.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, §§ 323-334.]

2. SAME.

Code Civ. Proc. § 556, permits a defendant, either before or after the release of the attached property, to move that the attachment be discharged as improperly or irregularly issued. Section 538 provides that an affidavit for attachment shall show that "the attachment is not sought, and the action is not prosecuted, to hinder, delay or defraud any creditor of the defendant." In an action on a note against the maker and four indorsers, etc., the writ directed

a levy on any property of defendants, or either of them, and the affidavit upon which the writ was issued stated that "the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the said defendants." Held, that the statute required the affidavit to negative an intention to hinder, etc., any creditor of any defendant against whom the writ ran, and the affidavit filed did not negative a purpose to hinder, etc., any creditor of any number less than all of them, and was fatally defective.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by the Pajaro Valley Bank, a corporation, against Stephen Scurich and others, upon a note. From an order denying a motion to discharge a writ of attachment, one of defendants appeals. Reversed, with direction to discharge the attachment as against appellant.

Chas. B. Younger, for appellant. Dickerman and Torchiana, for respondent.

HALL, J. This is an appeal by defendant Stephen Scurich from an order of the trial court refusing to discharge a writ of attachment as to said defendant that had been issued in the above-entitled action, and been levied upon property of said defendant as well as upon property of the defendant corporation.

The motion was made under section 556, Code Civ. Proc., upon the ground that the writ was improperly and irregularly issued as to appellant, in this, that the complaint fails to state a cause of action against appellant, and that the affidavit for attachment is insufficient, in that it fails to show "that the said attachment is not sought, and the action is not prosecuted to hinder, delay, or defraud any creditor of defendant Scurich." The action is one upon a promissory note, and is against the defendant corporation as the maker thereof, and against the other defendants, including appellant, as indorsers thereof. By its terms the note is payable one day after date, and the complaint fails to allege that any demand was made on the maker on said day, or any notice of dishonor served at that time; the first demand and notice alleged being made and given about 20 months after the date of the note.

Whether or not the court should have granted the motion for this reason it is not necessary for us to decide in this case. It has been held that a motion of this kind cannot be made to take the place of a demurrer, and that, if the complaint can be amended so as to state a cause of action upon which an attachment will lie, the motion should be denied. But whether the amendment should be made before the determination of the motion may not be perfectly clear. See *Hale Bros. v. Milliken*, 142 Cal. 137, 75 Pac. 653; *Hathaway v. Davis*, 83 Cal. 161; *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741. A fatally defective affidavit cannot be

amended so as to meet a motion to discharge the writ. *Winters v. Pearson*, 72 Cal. 553, 14 Pac. 304. And as we are of the opinion that the affidavit in this case is fatally defective, the court should have granted the motion. The statute requires that the affidavit shall show "that the attachment is not sought, and the action is not prosecuted, to hinder, delay or defraud any creditor of the defendant." Section 538, Code Civ. Proc. The manifest object and purpose of the statute is to require the affidavit to show that the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of any defendant against whom the writ may run. In the case at bar there are five defendants, and the writ directs a levy upon any property of the said defendants, "or either of them," and the writ was in fact levied upon the property of the corporation defendant and also upon property of appellant. The affidavit upon which the writ issued stated that "the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the said defendants." This statement would be perfectly true, and perjury could not be assigned thereon unless the attachment was sought or the action prosecuted to hinder, delay, or defraud a creditor of all the defendants. The purpose to hinder, delay, or defraud a creditor of the defendants, or any number less than all, is not negated by the affidavit. The affidavit should have stated that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor of the said defendants, or any creditor of either of said defendants.

We have not been cited to any case where the defect existing in this affidavit has been before the appellate courts of this state, or where the provision of our statute in this regard has been construed. But a similar provision of the attachment law of Texas has been construed by the courts of that state. The statute of that state requires that "the affidavit shall further state that the attachment is not sued out for the purpose of injuring or harassing the defendant." In *Lumber Co. v. Bank*, 91 Tex. 95, 41 S. W. 64, upon an appeal from an order refusing to quash an attachment, it was pointed out that an affidavit that "the attachment now applied for is not sued out for the purpose of injuring or harassing the said defendants," there being two defendants, was not a sufficient compliance with the statute, in that it did not negative a purpose to harass or injure "the defendants or either of them." In the Texas case the court reversed the order of the trial court for another reason, but took pains to clearly lay down the proper form of the affidavit where several defendants joined in an attachment suit. The defendants were the drawer and acceptor of a bill of exchange.

The order is reversed, and the court is

directed to discharge the writ of attachment as against appellant.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 700

COON v. BOARD OF PUBLIC WORKS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 435.)

(Court of Appeal, First District, California.
March 24, 1908. Rehearing Denied
April 22, 1908.)

1. NUISANCE—PUBLIC NUISANCES—LIVERY STABLE.

The business of running a livery stable is not a nuisance per se, for whether a stable is a nuisance depends upon the manner in which it is conducted.

2. MUNICIPAL CORPORATIONS—BUILDING ORDINANCE—VALIDITY—CONSENT OF OTHER PROPERTY OWNERS.

An ordinance requiring the consent of owners of property within 200 feet of a proposed stable for more than six horses as a prerequisite to the issuance of a permit is unreasonable and void as vesting in private individuals the arbitrary power to determine whether the owner of real property may use it in pursuit of a lawful occupation.

3. MANDAMUS—SUFFICIENCY OF COMPLAINT.

The building law of a city provided that when a proposed building was to cost more than \$1,000 plans and specifications should be filed, and if it was to cost less than \$1,000 a written statement of the character of the improvement should be filed. The complaint for a writ of mandate for the issuance of a permit did not show the estimated cost of the building, but averred that the permit was refused because consent of adjoining property owners had not been obtained. It was admitted that the complaint was sufficient if the building was to cost more than \$1,000. *Held*, that a general demurrer was properly overruled, especially where the record indicated a cost exceeding \$1,000, since the defect in the complaint could have been remedied had it been pointed out or relied on in the trial court, and the permit was refused on other grounds.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Application by J. R. Coon for a writ of mandate to compel the board of public works of the city and county of San Francisco to issue a permit for the construction of a stable. From a judgment for plaintiff, defendants appeal. Affirmed.

James A. Devoto, for appellants. Van Ness and Denman, for respondent.

KERRIGAN, J. This is an appeal from a judgment granting a writ of mandate compelling appellants, as the board of public works of the city and county of San Francisco, to issue a permit for the construction of a certain one-story frame building in said city and county to be used as a stable.

Respondent set forth in his complaint, among other provisions of the building law of the city and county of San Francisco, section 320, which reads as follows: "Permits for public livery and boarding stables, or

for stables to accommodate more than six (6) horses, will be granted upon the presentation of the written consent of the owners of property within two hundred (200) feet of the stable. Buildings for stabling animals above the first or ground floor, unless fire-proof, shall not be erected nor altered."

It is also alleged in the complaint that respondent filed and submitted to the said board of public works an application in writing for a permit to erect a certain one-story building; that said building was to be used as a stable in said city and county to accommodate more than six horses; that said appellants refused to take any action looking to the granting of said permit unless the respondent should present to said board the written consent of the owners of the property within 200 feet of said stable proposed to be erected. The complaint further shows that respondent refused to comply with this demand of the board, and prays for a writ of mandate that appellants be required to receive and to examine the plans and specifications in the complaint described, and, if found to embody all the requirements applicable to such cases, to issue the permit demanded. Preliminarily it should be stated that the business of running a livery stable is not a nuisance per se. Whether a stable is a nuisance depends upon the manner in which it is conducted. *City of St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721. See, also, *Ruffin, C. J., in Dargan v. Waddill*, 31 N. C. 244, 49 Am. Dec. 421; *Kirkman v. Handy*, 11 Hunph. (Tenn.) 406, 54 Am. Dec. 45; *Am. & Eng. Ency. of Law*, p. 935, note. In our judgment section 320 of the ordinance is unreasonable and void, because it vests in private individuals the arbitrary power to determine whether the owner of real property may use it in the pursuit of a lawful occupation.

In the case of *Ex parte Sing Lee*, 96 Cal. 354, 31 Pac. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218, a similar ordinance passed by the city of Chico was considered and held unreasonable and invalid. In that ordinance it was provided that no permit should be granted to maintain or carry on the business of a public laundry, unless the applicant should have first obtained the written consent of a majority of the property owners within the block in which it was proposed to carry on the laundry, and also the four blocks immediately surrounding that block. The court said: "The business of conducting a laundry is a lawful occupation precisely as much so as is that of the carpenter, blacksmith, or merchant, and is not of itself, and irrespective of the manner in which it is conducted, offensive or dangerous to the health of those living within its vicinity, and no municipal corporation has the power to make the right of a person to follow this business at any place he may select for that purpose dependent upon the will of any number of citizens

or property owners within its limits, as it attempted in the ordinance under review. A town or city may, when deemed necessary for the public health or safety, adopt reasonable regulations as to the manner in which such a business shall be conducted. * * * But the ordinance which the petitioner here is charged with violating is not of this character, and the restrictions which it imposes upon the right to carry on a public laundry have no tendency to promote the public health, or in any way to secure the public comfort or safety. The sections of the ordinance above quoted bear no kind of relation to such objects, and do not attempt to regulate the business mentioned with the view of accomplishing such ends; but they commit the right to carry on such business at all in all but two blocks of the town to the unrestricted will and caprice of a majority of the real property owners within the block upon which it is proposed to establish such laundry, and of the four blocks immediately surrounding such block. Such a condition upon the right of a person to maintain a public laundry is not only an unauthorized interference with the inalienable right of such person to engage in a lawful occupation, but also with the right of the owner of property to devote it to a lawful purpose. The personal liberty of the citizen and his rights of property cannot be thus invaded under the guise of a police regulation."

The court in the same opinion quotes from the case of *Yick Wo v. Hopkins*, 118 U. S. 373, 6 Sup. Ct. 1070 (30 L. Ed. 220), which involved the validity of an ordinance of the city and county of San Francisco declaring it unlawful for a person to conduct a laundry within the corporate limits without first having obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone. The Supreme Court of the United States held this provision of the ordinance void, saying in the opinion therein filed: "It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupants into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom this consent is withheld, at their mere will and pleasure. And both classes are alike only in this that they are tenants at will under the supervisors of their means of living."

The case of *City of St. Louis v. Russell*,

116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721, involved the validity of an ordinance of the city of St. Louis, which provided that no livery stable should be located in any block of ground in St. Louis without the written consent of owners of one-half of the ground of that block; and it was held that the city had no right to delegate to the owners of one-half the ground in any block in which a livery stable was proposed to be erected the power to say whether it should be done or not, or to require any person desiring to construct such stable, before a building permit would be granted him for its erection, to obtain the consent in writing of the owners of one-half the ground of such block.

The building law of San Francisco provides that when the proposed building is to cost more than \$1,000 plans and specifications shall be filed; that when the building is to cost less than \$1,000 a written statement of the character of the improvement shall be filed. The averments of the complaint do not show whether the estimated cost of the building was over or under \$1,000; but the complaint does aver that the permit was refused solely on the ground that the consent of the adjoining property owners had not been obtained. It is virtually conceded that if the building was to cost more than \$1,000 the complaint is sufficient, but it is claimed that as the estimated cost of the building may have been less than \$1,000 the complaint is defective. The demurrer was general only, and the defect is one that could easily have been remedied had it been pointed out or relied upon in the trial court. The record indicates quite clearly that the building was to cost in excess of \$1,000. The permit was refused, as stated, on the single ground of want of consent of adjoining property owners, and the case was heard and submitted on this theory only. Under these circumstances, we think the point is wholly without merit.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

7 Cal. App. 721

LEUSCHNER v. DUFF. (Civ. 461.)

(Court of Appeal, Second District, California.
March 17, 1908.)

1. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE.

A unilateral contract, though evidenced by a writing sufficient under the statute of frauds, is not necessarily a contract which may be specifically enforced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 89-98.]

2. SAME.

Under Civ. Code, §§ 3386, 3388, providing that neither party to an obligation can be compelled to perform it unless the other party has performed or can be compelled to specifically perform, and that a party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed, where the latter has performed or offers to

perform it, the mutuality of remedy necessary to specific performance is supplied by an offer to perform or the filing of a bill for specific performance; but one executing a unilateral agreement to execute a contract for the sale of realty may withdraw his offer before acceptance thereof by the other party, in which case the latter is not entitled to a decree for specific performance, but is left to his action at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 11.]

3. SAME—OTHER RELIEF—RETENTION OF JURISDICTION.

The court, in a suit for the specific performance of a unilateral agreement, may, on determining that plaintiff is not entitled to the relief demanded, retain jurisdiction and award him the relief he is entitled to.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 412-419.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Oscar Leuschner against Christina J. Duff. From a judgment for defendant and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Edw. F. Wehrle and C. H. Bretherton, for appellant. Galbreth & Bryson, for respondent.

TAGGART, J. Action to compel specific performance of a unilateral agreement to execute and deliver a contract of sale of real estate. Plaintiff appeals from a judgment in favor of defendant and from an order denying his motion for a new trial.

The writing relied upon to satisfy the requirements of the statute of frauds is set out in the complaint, and is in the words and figures following, to wit:

"Los Angeles, Cal., Nov. 13, 1905.

"Received from Oscar Leuschner ten dollars on part payment lot 30, block E, of West Los Angeles Tract, lot on N. W. corner Figueroa St. and 39th. 65 or more by 130. Price \$800.00; \$190 more on contract delivery; \$25.00 per month, interest 6 p. c.

"\$10. Christina J. Duff."

The sufficiency of the writing to satisfy the statute is not questioned by respondent, and although this matter is presented by appellant as if the judgment of the court rested upon the theory that the writing was not sufficient for this purpose, we find nothing in the findings to justify this assumption. Accepting it as sufficient for this purpose, it does not follow necessarily that it is a contract the specific performance of which can be compelled. It is not an option for which a valuable consideration was paid, and it is not a contract by its terms binding both parties to it. The \$10 received was accepted as a part of the purchase price, and the contract of sale to which plaintiff was entitled was dependent upon the payment of "\$190 more," and his obligating himself to pay the further sum of \$600, payable \$25 per month, being the residue of the price fixed, \$800. The court found in plaintiff's favor upon the defenses of inadequacy of consideration and unfair advantage alleged to have been taken of de-

fendant in procuring the execution of the contract. It also found that the writing was the only agreement between the parties; that the \$10 mentioned therein was in the form of plaintiff's personal check, which was never cashed; that the same day it was received by defendant she offered to return it to plaintiff, and notified him that she withdrew and revoked the offer contained in the contract; that there was no further act or offer of performance by plaintiff until 10 days after such revocation, when he demanded of defendant that she carry out the agreement, which she refused to do; and that no tender of the "\$190 more" was made by plaintiff until August 31, 1906.

A party to an obligation cannot be compelled to perform it unless the other party, claiming the right to enforce, has performed or can under the terms of the agreement be compelled to specifically perform. Civ. Code, § 3386. The exception to this rule is that: "A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it (is not bound to perform), if the latter has performed (as in section 3386), or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance." Section 3388. The mutuality of remedy necessary to specific performance in the latter case is said to be supplied by the offer to perform or the filing of the bill for the purpose of procuring the decree. *Vassault v. Edwards*, 43 Cal. 458; *Sayward v. Houghton*, 119 Cal. 549, 51 Pac. 853, 52 Pac. 44. This is upon the theory that the want of mutuality of obligation which obtained at first is overcome by the acts mentioned; they being held sufficient to bind the party not originally obligated. *Spres v. Urbahn*, 124 Cal. 110, 56 Pac. 794; *Bird v. Potter*, 146 Cal. 286, 79 Pac. 970.

We are not aware of any rule which requires the signer of a unilateral agreement to maintain the status of the property affected in order that the other party thereto may offer to perform at his pleasure and thereby compel specific performance. A construction of section 3388 which would bring about this result would work a repeal of section 3386, and neither mutuality of remedy nor mutuality of obligation be a prerequisite to the specific performance of a contract. The offer having been withdrawn by the defendant before the offer of performance by plaintiff, the latter was not entitled to a decree compelling defendant to execute the contract and was left to his action at law for any relief to which he was entitled. *Pacific Electric Co. v. Campbell-Johnston* (Cal.) 94 Pac. 623. The trial court, applying the rule that a court of equity, having acquired jurisdiction of the cause, would grant any relief to which the parties were entitled, ascertained that the property had not appreciated in value since the contract was executed, and decreed that the restoration to plaintiff of the

\$10 check was all the relief he was entitled to.

The evidence is sufficient to sustain the findings against the attacks made upon them, and they in turn support the judgment.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 745

CONNELL v. HARRON, RICKARD & McCONE. (Civ. 432.)

(Court of Appeal, Second District, California. March 23, 1908.)

1. DAMAGES—EXPENSES INCURRED—BREACH OF CONTRACT.

A contract for the manufacture and sale of a machine contemplated that it should be manufactured in Ohio and shipped to California, and as a part of the contract the buyer guaranteed that the freight rate should not exceed \$1.25 per hundred, the rate for transportation of like machinery in car-load lots. The machine delivered did not comply with the contract. It was shipped to New York, and the buyer loaded it with a car of his goods and shipped it to California at the rate of \$1.25 per hundred. The buyer paid \$35 for freight. *Held*, that the buyer, in an action for damages for breach of contract, was not entitled to recover freight charges on the theory that the transportation charges would have been \$4.50 per hundred if the machine had been shipped separately, but his recovery was limited to the actual amount paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 92-99.]

2. APPEAL—REVERSAL—AMOUNT OF RECOVERY—TRIVIAL ERROR.

In an action for damages for breach of contract to manufacture and deliver a machine in accordance with specifications, the failure to award the buyer \$7.85 freight charges paid by him on a machine delivered by the seller, which did not comply with the specifications, was within Civ. Code, § 3533, declaring that the law disregards trifles, and did not warrant a reversal of the judgment.

3. SALES—REMEDIES OF BUYER—ACTION FOR BREACH OF CONTRACT—DAMAGES.

In an action for breach of contract to manufacture and deliver a machine in accordance with specifications, it appeared that the contract contemplated that the machine should be manufactured in Ohio and shipped to California, and that the machine which was shipped did not comply with the specifications. The buyer offered no evidence to prove the price for which he could have bought a machine constructed in accordance with the specifications in the market in California, but offered to prove the price at which he could have bought a machine similar in character and just as good. None of the witnesses pretended to give the price at which a machine of the pattern and make called for could be bought at any place. *Held*, that the damages were not controlled by Civ. Code, § 3354, providing that in estimating damages the value of property to the buyer deprived of its possession is deemed to be the price at which he might have bought an equivalent in the market nearest to the place where the property ought to have been put into his possession, and the damages must be limited as provided by section 3308, providing that the damage caused by the breach of a seller's agreement to deliver personally the price of which has not been fully paid is deemed to be the excess of the value of the property to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled.

4. NEW TRIAL—GROUNDS—RULINGS ON EVIDENCE.

In an action for breach of contract to manufacture and deliver a machine according to specifications, where the machine delivered did not comply with the specifications, a witness for the buyer having stated that he could tell what such machines of the same size were worth, and having been asked to do so, the question was objected to as incompetent, irrelevant, and immaterial, if the witness referred to machines of another make. The objection was overruled; the court stating that the measure of damages was the market price at which an equivalent could be purchased in the market, and that that did not mean necessarily the same thing. *Held*, that the admission of the testimony, with the statement that an equivalent article was not necessarily the same thing, could not be construed into a meaning that would justify the buyer in believing that the court regarded the evidence as other than one link in the chain of proof, and he was not entitled to a new trial on the ground of surprise from having been misled by such statement.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by J. F. Connell against the Harron, Rickard & McCone Company. From a judgment for plaintiff for an amount less than that claimed, and from an order denying a motion for a new trial, he appeals. Affirmed.

Earle & Creede, for appellant. Charles T. Howland, for respondent.

SHAW, J. Action for damages for breach of contract. At an agreed price of \$655, defendant sold and agreed to furnish to plaintiff, f. o. b. Los Angeles, Cal., a piece of machinery, known and designated as a lathe of Lodge & Shipley pattern, supplied with a Bullock motor; all of which machinery should be constructed in accordance with and conform to certain specifications designated in the contract. At the time of making the contract of purchase, plaintiff paid to defendant \$25 upon the purchase price thereof. The contract contemplated that the lathe and machinery should be manufactured in Ohio and shipped to Los Angeles, and as a part of the contract plaintiff guaranteed the freight rate should not exceed \$1.25 per hundred, which was the rate for transportation of like machinery in car-load lots. The contract called for a lathe 18 feet in length, but the lathe shipped, owing to an error of defendant's, was only 8 feet in length. The lathe was shipped from Ohio to a point in New York, where it was loaded with a car of goods of plaintiff's and shipped through to Los Angeles at a rate of \$1.25 per hundredweight; whereas, if it had been shipped alone, the transportation charges would have been \$4.50 per hundred on 2,800 pounds. The cost of shipping from Ohio to New York, where plaintiff's car was being loaded, was \$7.85, and this sum, as well as the \$1.25 per hundred on 2,800 pounds, was paid by plaintiff; but as the lathe shipped was not the one ordered by plaintiff, he, by separate cause of action, claims a freight charge of \$4.50 per hundred thereon, basing such claim upon the fact that had defendant shipped the lathe separately,

rather than in a car-load lot, it would have cost defendant such sum, and that he (plaintiff) did not guarantee the \$1.25 freight rate upon this lathe.

1. As to the amount of \$150.42, which plaintiff claimed to have paid on account of transportation charges, the court found that he was entitled to \$35, and no more. This finding is attacked as being unsupported by the evidence. According to appellant's contention, the charge of \$150.42 consists of \$7.85, freight from Ohio to New York, which he paid, and \$126, freight from New York to Los Angeles, \$35 only of which he paid, and \$16.55 for cartage, none of which he paid. As plaintiff only paid \$35 for transportation of the lathe from New York to Los Angeles, it is difficult to conceive of any theory upon which he could be entitled to any amount in excess of said sum. Under the circumstances of this case, there is no merit in the contention of appellant that he is entitled to a charge based upon quantum meruit. For transportation from New York to Los Angeles he paid \$35, and he is entitled to nothing more than reimbursement for such expenditure. As to the item of \$16.55 on account of cartage charges, we have been unable to find any evidence in the record bearing in the remotest degree upon the subject. Plaintiff paid out the sum of \$7.85, freight charges from Cincinnati to North Tonawanda, N. Y., where the machine was loaded upon a car with other freight consigned to plaintiff at Los Angeles. The evidence shows that plaintiff paid this sum solely for defendant's benefit, and, while he was entitled to be reimbursed for the outlay, we are nevertheless of the opinion that the case justifies the application of the doctrine of *de minimis non curat lex*. Section 3533, Civ. Code.

2. The court found that defendant neglected and failed to carry out the terms of the contract, in that it failed to deliver the lathe described in the contract, and that by reason of such breach plaintiff was damaged in the sum of \$25, and no more. For the purpose of ascertaining the amount of damages sustained, plaintiff introduced evidence which he claims tended to prove the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, as provided by section 3354 of the Civil Code. Unless the evidence fixes the damages in accordance with this rule, then the amount of damages must be ascertained in accordance with the rule prescribed in section 3308 of the Civil Code, under which plaintiff would be entitled to "the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled." Applying this latter rule, there is no evidence which would entitle plaintiff to damages other than the \$25 paid on account of the purchase price of the machine, as to which the court found in his favor. The lathe called

for by the contract was described as being, "a Lodge & Shipley make and pattern, to be and have a 16-inch swing and to be 18 feet long, also to be what is known and designated as the 'tool room lathe,' with cabinet legs, 18 feet in length as aforesaid, supplied with what is known and designated as 'the Bullock motor,' connected directly to the spindle of said lathe; said motor to be built for 110 volts direct current. Also to be supplied with compound rests, taper attachments, two modern and latest pattern chucks, and also to be fitted with all proper attachments, so that said lathe may be run and operated at varying speeds and with reverse attachment." While plaintiff offered no evidence tending to prove the price at which he could have bought a lathe constructed in accordance with these specifications in the market nearest Los Angeles, where under the contract it should have been placed in his possession, he did offer evidence tending to prove the price at which he could have bought lathes similar in character and "just as good"; the price thereof varying from \$1,000 to \$1,100, f. o. b. Los Angeles. None of the witnesses, however, pretended to give the price at which a lathe of this particular pattern and make and constructed in accordance with the specifications called for in the contract could be bought at any place. The evidence touching lathes of other pattern and specifications, even though similar in character and equally good, cannot be held to be the equivalent of this particular piece of machinery. The rule is usually applied to marketable commodities where the different grades of such articles are well recognized in the commercial world. *Bullard v. Stone*, 67 Cal. 477, 8 Pac. 17. In *Bateman Brothers v. Mapel & American Surety Co.*, 145 Cal. 241, 78 Pac. 734, suit grew out of a failure to deliver terra cotta and ornamental pressed brick of a certain pattern, and the measure of damage was held to be the cost of buying terra cotta and ornamental pressed brick of the specified quality and pattern. So, in the case at bar the equivalent of this lathe would be a duplicate thereof constructed of material of like quality. The evidence offered failed to bring the case within the rule prescribed by section 3354 for ascertaining the amount of damages. This being true, it follows that in ascertaining the amount of damages sustained by reason of the breach of the contract recourse must be had to the rule prescribed by section 3308 of the Civil Code, under which the court was justified by the evidence in fixing the damages in the sum of \$25; there being no evidence of any special damages.

3. Appellant contends that he was misled by the rulings of the court in admitting testimony, and insists that the order denying his motion for a new trial should be reversed on the ground of surprise. Upon the trial a witness for plaintiff stated (with reference to 18-foot lathes), "I could tell you what the lathes would be worth to-day of that particu-

lar size," and to the question, "You may do so, then," an objection was interposed upon the ground that it was "incompetent, irrelevant, and immaterial, if the witness refers to the American Tool Company lathe and not the Lodge & Shipley lathe." "The Court: The measure of damages is the price at which an equivalent could be purchased in the market. I am not holding that that means necessarily the same thing. Objection overruled." The witness then answered: "About \$760 for a lathe 16-inch swing and 18-foot bed, without a motor. The motor would cost extra." The question at issue was the price of an equivalent article. The size of the machine was an important factor in determining that question. Evidence of the price of an 18-foot lathe, followed by evidence that this lathe complied in other respects with the lathe described in the contract, would have tended to prove an equivalent article. Standing alone, however, it wholly failed of its purpose. Admitting this testimony, with the statement that an equivalent article was not necessarily the same thing, cannot be construed into a meaning that would justify appellant in believing that the court regarded the evidence as other than one link in the chain of proof. Standing alone, it did not even tend in the remotest degree to prove an equivalent article. The facts of this case do not bring it within the rule laid down in the authorities cited by appellant.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

STATE v. PRESTON et al. (No. 1,733.)

(Supreme Court of Nevada. May 25, 1908.)

1. CRIMINAL LAW—APPEAL—NOTICE—SUFFICIENCY.

Under Cr. Prac. Act, § 474 (Comp. Laws, § 4439), requiring a criminal appeal to be taken by a written notice that appellant "appeals," a notice that it is his "intention" to appeal is defective.

2. SAME—NECESSITY FOR SUFFICIENT NOTICE.

Under Cr. Prac. Act, §§ 474, 475 (Comp. Laws, §§ 4439, 4440), requiring a criminal appeal to be taken by service of a written notice on the clerk of the trial court, that appellant appeals, with similar notice to the district attorney, when defendant appeals, filing and service of a proper notice, are essential to confer jurisdiction on the Supreme Court.

3. SAME—SUFFICIENCY OF NOTICE.

A notice that two persons convicted of murder and manslaughter respectively intend to appeal from "the judgment of the district court herein" is fatally defective as insufficiently identifying the judgment or judgments from which appeal was intended to be taken, and for failing to show that each appealed from the judgment against him.

4. SAME.

Substantial compliance with statutes regulating criminal appeals is essential to the Supreme Court's jurisdiction of an appeal.

Appeal from District Court, Esmeralda County.

M. R. Preston and Joseph Smith were convicted of crime, and they appeal. The state moves to dismiss the appeal. Appeal dismissed.

O. N. Hilton, Frank J. Hangs, and P. M. Bowler, Jr., for appellants. R. C. Stoddard, Atty. Gen., for the State.

PER CURIAM. Appellants were jointly tried in the First judicial district court of Nevada in and for Esmeralda county upon an indictment charging them with the crime of murder for the killing of John Silva, a restaurant keeper of Goldfield, on the 10th day of March, 1907. Verdicts of murder in the second degree against M. R. Preston and of voluntary manslaughter against Joseph Smith were returned by the jury, and they were sentenced, respectively, to 25 and 10 years' imprisonment in the Nevada state penitentiary by the district judge of said court. A motion for a new trial interposed by defendants was overruled by said district judge, and appellants now invoke the aid of this court to reverse the mandate of the lower court.

The respondent moves to dismiss the proceedings instituted by appellants upon the ground generally that this court has no jurisdiction to determine the questions in controversy because the proceedings of appellants on appeal have not been perfected in accordance with law or at all and are fatally defective, upon the following grounds more specifically, to wit: (1) That there was no service on the clerk or the district attorney of the alleged notice of appeal. (2) That the alleged notice of appeal is insufficient to confer jurisdiction upon the Supreme Court herein. (3) That no record on appeal in the form and as required by law has ever been filed in the Supreme Court. (4) That the said alleged volume or transcript of evidence should be stricken from the files of the Supreme Court, for the reason that the same is no part of the record on appeal required or provided by law. The following sections of the criminal practice act of Nevada treating of the manner of perfecting appeals in criminal cases to the Supreme Court of this state provide as follows: "Sec. 473. An appeal must be taken within three months after the judgment is rendered." Section 4438, Comp. Laws. "Sec. 474. An appeal must be taken by the service of a notice in writing on the clerk of the court in which the action was tried, stating that the appellant appeals from the judgment." Section 4439, Comp. Laws. "Sec. 475. If the appeal be taken by the defendant, a similar notice must be served on the district attorney." Section 4440, Comp. Laws. The following is a copy of the only instrument filed in the present case, which defendants maintain is the notice of appeal on which they base their appellate proceedings, after entitling court and cause: "To E. Hardy,

Clerk of the District Court, and A. H. Swallow, District Attorney. You, and each of you, are hereby notified that it is the intention of the defendants in the above-entitled cause of action to appeal from the judgment of the district court herein to the Supreme Court of the state of Nevada, and that we tender, together with this notice, to you, E. Hardy, clerk of the district court, the original copy of the bill of exceptions herein, and to you, A. H. Swallow, district attorney, a true copy of the bill of exceptions herein, and we hereby notify you both that we will ask the judge of the district court on Monday, June 10th, 1907, at the incoming of court on said day, to allow and settle said bill of exceptions. P. M. Bowler and Frank J. Hangs, Attorneys for Defendants." It will be observed from reading the said instrument that the defendants notify the clerk and district attorney "that it is the intention of the defendants in the above-entitled cause of action to appeal." They do not state that they appeal from the judgments rendered against them. Neither do they state that they do appeal. Their notice, literally construed, is a mere notification to the clerk and district attorney that they intend to appeal, which is a totally different matter from appealing as required by the statute in order to start the appellate machinery in motion. Their intention to appeal may or may not be abandoned. The intent to do and the doing of an act are distinct and separate matters. The Supreme Court of this state has heretofore held that a notice similar to the above is faulty. *Simpson v. Ogg*, 18 Nev. 29, 1 Pac. 827. In the latter case this court, in speaking of the notice, said: "It is stated in the notice that the defendants 'will' appeal, when it ought to state that they 'do' appeal." It is, however, unnecessary to determine whether the notice is, for this reason, so irregular as to constitute a fatal defect, for in other respects it is clearly insufficient. It would appear that it was the intention of the attorneys for defendants, through said alleged notice of appeal, to give notice to the clerk and district attorney of a certain date and place at which they would ask the judge of the district court to allow and settle their bill of exceptions, and thereafter a proper notice of appeal would be expected to be filed by said attorneys in behalf of the defendants. No further notice of appeal, however, was ever filed or served on the clerk or district attorney. The above-quoted instrument was served on the district attorney two days before it was filed and served on the county clerk, and no other notice was ever served on the district attorney. This court has held in a number of appeals in civil cases that the notice of appeal must be filed before served upon opposing counsel, or the appeal will be fatally defective. *Lyon County v. Washoe County*, 8 Nev. 177; *Johnson v. Badger Co.*, 12 Nev. 261; *Reese Co. v. Rye Patch Co.*, 15 Nev. 341;

Spafford v. White River V. Co., 24 Nev. 184, 51 Pac. 115. The language of the statute regulating appeals in criminal cases is somewhat different from that in civil cases; and, while it would unquestionably be the better practice in criminal appeals to file the notice before serving, it is unnecessary now to determine whether a failure so to do would be fatally defective. As the filing and service of a proper notice of appeal on the county clerk and district attorney as required by law are essential to perfect an appeal, it follows that a failure to so file and serve such a notice fails to clothe this court with jurisdiction. *Territory v. Hanna*, 5 Mont. 243, 5 Pac. 250; *Courtright v. Berkins*, 2 Mont. 404; *Redhead v. Baker*, 80 Iowa, 162, 45 N. W. 733; *State v. Clossner*, 84 Iowa, 402, 51 N. W. 16; *Anderson v. Halthusen*, 30 Utah, 31, 83 Pac. 500; *People v. Colon*, 119 Cal. 668, 51 Pac. 1082; *People v. Phillips*, 45 Cal. 44; *People v. Bell*, 70 Cal. 33, 11 Pac. 327; *People v. Clark*, 49 Cal. 455; *Morris v. Brewster*, 60 Wis. 229, 19 N. W. 50; *State v. Gibbs*, 10 Mont. 210, 25 Pac. 289, 10 L. R. A. 749; 2 *Encyc. Plead. & Prac.* 210.

A further observation of the alleged notice of appeal reveals that it is fatally defective for uncertainty, in view of the fact that it does not sufficiently describe or identify the judgment or judgments from which it is intended to appeal, and that it fails to state the date of the rendition or entry of the judgment or otherwise sufficiently or at all describe the said judgments or either of them. The alleged notice of appeal states: "That it is the intention of the defendants in the above-entitled cause of action to appeal from the judgment of the district court herein to the Supreme Court of the state of Nevada." The record in the present case discloses that there were two separate verdicts and judgments rendered, one against the defendant Smith for voluntary manslaughter, for which he was ordered confined in the penitentiary for the period of 10 years, and another verdict of the jury and judgment of the court thereon against the defendant Preston for murder in the second degree, for which he was sentenced to 25 years' imprisonment. Can it be said in this case from which judgment the alleged appeal was intended to have been taken? Could it be said by this court or any one else that the judgment to be appealed from was the judgment rendered against Smith or against Preston, or definitely could it be stated that the appeal was to have been taken from both judgments when the alleged notice of appeal states but one judgment? We think not. Preston had not an appealable interest in the judgment against Smith, nor Smith in that against Preston. It was essential that the notice state that each appealed from the judgment against himself. The judgment or order appealed from should be sufficiently described in the notice of appeal so as to leave no doubt as to its identity. If it fails

to do so, it is fatally defective. 2 Cyc. 806; *Christian v. Evans*, 5 Or. 253; *Oliver v. Harvey*, 5 Or. 361; *Luse v. Luse*, 9 Or. 149; *State v. Gibbs*, 10 Mont. 210, 25 Pac. 289, 10 L. R. A. 749; *Schnabel v. Thomas*, 92 Mo. App. 180; *State v. Hammond*, 92 Mo. App. 231; *Thomas v. Missouri*, 89 Mo. App. 12; *Fairall on Crim. Proced.* p. 462; *People v. Center*, 61 Cal. 194; 2 *Encyc. Pl. & Prac.* 217; *Olinger v. Liddle*, 55 Wis. 621, 13 N. W. 703; *Meley v. Boulon*, 104 Cal. 262, 37 Pac. 931.

There are many other irregularities and defects in the proceedings of defendants attempting to perfect this appeal, but in view of the fatality of the notice of appeal, which is essential to confer jurisdiction on this court, it is unnecessary to comment on them. The opinions are numerous in holding that, unless a court has jurisdiction to consider questions in controversy it cannot do so. *Marx v. Lewis*, 24 Nev. 306, 53 Pac. 600. In the present proceedings the motion to dismiss herein is interposed and vigorously urged by respondent. The Supreme Court of this state, to be clothed with jurisdiction to adjudicate whatever questions are properly raised by an appeal from an inferior court, must be connected with the proceedings had in the lower court substantially in the manner required by the statutes regulating appeals; otherwise this court acquires no jurisdiction. If any of these essential links required by mandatory statutes and necessary to give this court jurisdiction are lacking, the attempted appeal confers no jurisdiction on this court, and the proceedings must be dismissed. This court in the case of *Burbank v. Rivers*, 20 Nev. 83, 16 Pac. 432, said: "The method of taking appeals and the questions to be considered thereunder by the appellate court are matters of purely statutory regulation." *Kirman v. Johnson*, 29 Nev. —, 93 Pac. 502; *Burbank v. Rivers*, 20 Nev. 81, 16 Pac. 430; *Gaudette v. Glissan*, 11 Nev. 184; 2 Cyc. 868, and authorities there cited; 2 *Encyc. Pl. & Prac.* 213. No legal notice of appeal in this case having been filed and served in this proceeding, this court is without jurisdiction to consider the questions attempted to be raised.

As was said in the case of *Marx v. Lewis*, 24 Nev. 306, 53 Pac. 600, quoting with approval the language of this court in *Sherman v. Shaw*, 9 Nev. 152: "It is as unsatisfactory to the court, as it is to counsel, to have cases disposed of upon mere questions of practice, but it must be remembered that the rules of practice are as obligatory upon us as upon the parties to a suit, and, if attorneys desire to have their cases examined upon the merits, they must comply with the plain provisions of the statute and the rules of practice established by the court." So, in the present case, it is with reluctance, especially in view of the vast amount of labor expended in the preparation of the briefs and arguments presented upon the merits of this case, that we

dismiss proceedings brought to this court otherwise than on the merits, but in the present case, being without jurisdiction, we have no alternative.

The proceedings are dismissed.

BUTLER v. HANDS et al.

(Supreme Court of Colorado. May 4, 1908.)

1. JURY—CHALLENGES—NATURE AND RIGHT—PEREMPTORY CHALLENGES.

A peremptory challenge is not permitted at common law, and the right exists, if at all, by statute, but it is a valuable right, and unless the statute regulating peremptory challenges excludes its application to a special jury it should be held to exist.

2. SAME—SPECIAL JURIES—RIGHT TO CHALLENGE—STATUTES.

Mills' Ann. St. § 1093, provides that in the county court either party may have a jury summoned upon advancing fees, etc., such jury to consist of not less than 3 or more than 12, as the party demanding may direct, but either party may have it increased to 12 upon advancing additional fees. *Mills' Ann. Code*, c. 13, § 181, provides that either party may challenge jurors, and that each shall be entitled to four peremptory challenges. Section 185, providing the mode of challenging, requires that after all challenges for cause there shall remain on the panel 8 jurors more than the number who are to compose the jury. The regular panel not being in attendance upon the county court, one of the parties advanced the requisite fees and demanded a jury of 6, under section 1093, and after plaintiff had waived peremptory challenges defendant entered a peremptory challenge to a juror, which the court overruled, on the ground that peremptory challenges were not proper. *Held* that, while some of the sections of chapter 13 applied only to regular panels, as section 179, which had no application to a special jury, it did not limit the right of challenge or repeal the law granting peremptory challenges, and that section 181 applied to special jurors drawn under section 1093, and a sufficient number of jurors should be drawn so that the number required by section 185 should remain after challenge for cause.

Gabbert and Maxwell, JJ., dissenting.

En Banc. Appeal from La Plata County Court; Chas. A. Pike, Judge.

Action by William Hands and another against H. S. Butler. Judgment for plaintiffs. Defendant appeals. Reversed.

O. S. Galbreath, for appellant. Melville & Clements, for appellees.

STEELE, C. J. There is but one question raised by the brief of counsel for the appellant, and that relates to the alleged error of the court in refusing to permit the exercise of a peremptory challenge. The regular panel of jurors not being in attendance upon the county court, one of the parties advanced the fees and demanded a jury of 6, as provided by section 1093, *Mills' Ann. St.* After the jurors were passed for cause and the plaintiff had waived peremptory challenges the defendant challenged one of the jurors, and the court overruled the challenge. The section under which the jury was summoned makes no provision for challenges, and it is contended that, there being no provision

made for such, the right to challenge does not exist when a jury is summoned under this section. A peremptory challenge is not granted by the common law, and the right exists, if at all, by virtue of a statute. The section of the statute has been upheld by the court of appeals in Pitkin County v. First National Bank, 6 Colo. App. 423, 40 Pac. 804, and it is there held that the section applies when for any reason jurors of the regular panel are not in attendance. The section provides the manner in which a jury in the county court shall be summoned, but does not prescribe the mode of impaneling such jury; and we must determine whether the Code of Civil Procedure, which does provide for impaneling jurors in all courts of record, does or does not apply to the special jury summoned under the section mentioned. Counsel for the appellee contends that chapter 13, Mills' Ann. Code, was intended to apply to the regular panel, and not to a special jury summoned under section 1093 mentioned. That some of the sections of the chapter do not apply is evident. That portion of section 179 which provides that the jurors shall be drawn by chance from the whole number of jurors in attendance of course cannot apply to a special jury. The purpose of the section is to secure to each party an impartial jury, and to prevent the officer whose duty it is to call the names from making a selection, but where a special jury is summoned the officer calls the names of all the jurors summoned. This section was not designed as a limitation upon the right of challenge, and it does not repeal the former law which granted peremptory challenges. But section 181 of the Code we think does control the procedure, and by that section it is provided that each party shall be entitled to four peremptory challenges. This section appears in the Code of 1877 (section 161) and was intended to and did supersede the statute authorizing peremptory challenges in civil cases.

Counsel says that if peremptory challenges had been allowed and exercised, as but 6 jurors were summoned, the jurors would all have been excused and no way left to fill the panel. This condition would result if challenges for cause had been sustained, and counsel does not contend that the right of challenge for cause does not exist where a special jury is summoned under the section. The right to peremptory challenge is a valuable right, and unless the Code regulating the manner of challenges is such that the right cannot be exercised we must hold that the right exists, as declared in the section of the Code we have quoted. Section 185 of the Code, which provides the mode of challenging, requires that after the challenges for cause have been completed there shall remain on the panel 8 jurors more than the number who are to compose the jury. This requires that when the jury is to be composed of 6 there shall be 14 jurors in the

box until the peremptory challenges are exhausted. This method of challenging is very different from that provided by the Code of 1877. The act for the Code and section 1093 of the statutes were passed at the same session, and the two acts were entirely harmonious, and provided a less complicated method of challenging when special jurors were summoned; and, although the Code now in force deprives litigants of some of the advantages intended to be conferred by the section providing for special juries, section 1093 and the Code are not so inharmonious that they may not both stand as the law regulating the summoning and impaneling of special juries. The statute does not limit the number of jurors to be summoned, and the county judge may order such number summoned as in his discretion will be required, and the seeming difficulty of applying the statute may be overcome by the making of proper rules concerning the summoning of special juries.

For the reasons given, the judgment will be reversed.

GABBERT and MAXWELL, JJ., dissent.

CURTIS v. HAMMOND.

(Supreme Court of Colorado. May 4, 1908.)

JUDGMENT—RES JUDICATA—SPLITTING CAUSE OF ACTION—"DEMAND EXISTING AT TIME OF COMMENCING SUIT."

Rent is not due until it is earned, and cannot be recovered before it is due by the terms of the lease; and hence, where a lease for one year provided that the rent should be payable monthly, and suit was brought in a justice court before the end of the term for the installments of rent then due under the lease, the installments subsequently to become due were not a demand existing at the time of commencing that suit within 2 Mills' Ann. St. § 2644, providing that in suits commenced in justice court each party shall bring forward all his demands existing at the time of commencing the suit which are of such a nature as to be consolidated into one action or defense, and on failing to do so he shall be barred from suing for the demand not so consolidated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1111.]

Error to Delta County Court; Milton R. Welch, Judge.

Action by Weldon Hammond individually and as executor of C. M. Hammond against Fred D. Curtis. From a judgment of a justice court for plaintiff there was an appeal to the county court, where there was a judgment for plaintiff, and defendant brings error. Affirmed.

Stephan & Vincent, for plaintiff in error. Porter Plumb, for defendant in error.

GODDARD, J. This is an action originally brought before a justice of the peace to recover certain installments of rent under and in pursuance of the terms of a certain lease. From a judgment rendered in favor of the defendant in error for the sum of

\$13.86 an appeal was taken to the county court of Delta county. Upon a trial to the court a judgment was rendered in favor of defendant in error for the sum of \$179.83 and costs. To this judgment plaintiff in error, defendant below, prosecutes this writ of error.

The facts as found by the trial court are, in brief, as follows: On October 10, 1903, the defendant in error executed a lease to Fred Hammond, Charles Scales, and James Thomson for a certain building in Paonia for a term of one year at a rental of \$32 per month, payable in advance on or before the 10th day of each month. In the fore part of November, 1903, the plaintiff in error purchased the business and fixtures then in the building from the lessees, and took possession and continued to carry on the same business in the leased premises. Some time afterwards he agreed with the lessees to take the lease off their hands, which fact was communicated to the defendant in error and concurred in by him. Plaintiff in error paid the rent in accordance with the terms of the lease until the 10th day of February, 1904, at which time he vacated the building and refused to pay further rent. Defendant in error refused to accept the surrender of the lease. The defendant in error brought suit before a justice of the peace to recover the month's rent due February 10, 1904, and ending March 10, 1904, and recovered judgment for the sum of \$32. This judgment has been duly paid and satisfied. On the 3d day of September, 1904, he commenced this present action to recover rent for the months of April, May, June, July, and August. Plaintiff in error moved, before the justice of the peace, to dismiss the cause upon the ground that this action was barred under section 2644, 2 Mills' Ann. St., which enacts: "In all suits which shall be commenced before a justice of the peace, each party shall bring forward all his or her demands against the other, existing at the time of commencing the suit, which are of such a nature as to be consolidated into one action or defense, and on refusing or neglecting to do the same, shall forever be debarred from the privilege of suing for any debt or demand." This motion was renewed in the county court and overruled, to which plaintiff in error excepted.

The only question presented by the record, therefore, is whether by the provisions of this statute the defendant in error was barred from prosecuting this present action for subsequently accruing rent, having brought his action only for the installment of rent then due; in other words, whether the present action is for demands existing at the time of the commencement of the former suit. The case of *Carson v. Arrantes*, 10 Colo. App. 382-387, 50 Pac. 1080, 1082, is relied on by counsel for plaintiff in error in support of their contention that at the time the defendant in error brought the former action he could have recovered for the rent for the en-

tire term. In that case it is said: "The landlord of course has his election between one of two remedies. He may leave the premises vacant, sue for the rent for the balance of the term. * * * If he chooses he may likewise terminate the contract and enter a claim for rent up to the date of the abandonment and the acceptance of possession." We do not think this language justifies the claim of plaintiff in error that an action for non-accrued rent can be maintained, but that it was intended to express the well-settled rule that the rent for the balance of the term may be sued for and recovered when and only when it becomes due under the terms of the lease. It is too well settled to admit of controversy that rent is not due until it is earned, and that an action cannot be maintained to recover rent before it is due by the terms of the lease. "This rule that rent is not due and payable until the end of the term, in the absence of agreement to the contrary, is well established, resting on the principle that rent is not due till it is earned." *Jones on Landlord and Tenant*, § 661; *Stanley v. Turner*, 68 Vt. 315, 35 Atl. 321; *Ordway v. Remington*, 12 R. I. 319, 34 Am. Rep. 646; *Indianapolis, Decatur, etc., Ry. Co. v. First Nat. Bank*, 134 Ind. 127, 33 N. E. 679; *Tignor v. Bradley*, 32 Ark. 781; *Castleman v. Du Val*, 89 Md. 657, 43 Atl. 821. So it is apparent that the rent sued for in the present action was not a demand existing at the time of the commencement of the prior suit, and could not, under the conditions of this lease, have been recovered at that time.

The liability of the plaintiff in error to pay rent as provided in the lease, notwithstanding his abdication of the premises, was adjudicated in the prior action, and is not open for consideration in this case. The rent sought to be recovered in the present action, not being due at the time of the commencement of the prior suit, did not constitute an existing demand, and the defendant in error is not debarred from the privilege of suing therefor by the provisions of the foregoing statute.

The court below did not err in overruling the motion to dismiss or in rendering the judgment complained of.

The judgment is therefore affirmed.
Affirmed.

STEELE, C. J., and BAILEY, J., concur.

JANSSEN et al. v. DUNCAN.

(Supreme Court of Colorado. May 4, 1908.)

1. REPLEVIN—REPLEVIN BOND—LIABILITY OF SURETIES—DENIAL—ESTOPPEL.

Where the value of the property in a replevin in a court of limited jurisdiction is alleged by plaintiff to be less than the maximum amount of the court's jurisdiction, and upon appeal it is determined that such value was greater than such maximum amount, and the case is dismissed, the sureties upon the bond

are estopped from denying the jurisdiction of the trial court.

2. SAME.

Plaintiff, as sheriff, by virtue of an execution, levied on certain cattle. Two of the defendants caused a writ of replevin to be issued out of a justice court under which the cattle were taken from the sheriff and delivered to such defendants. The affidavit of replevin alleged that the cattle were of the value of \$250. Plaintiff appealed to the county court, in which court the evidence showed that the value of the cattle was in excess of the jurisdiction of the justice court, whereupon the suit was dismissed. *Held*, in an action on the replevin bond, that defendants could not plead that the justice of the peace could have had no jurisdiction of the subject-matter, for the reason that the value of the property replevied was \$500, because, having alleged to the justice that the property was worth less than \$300, they could not afterwards challenge his jurisdiction by alleging that the property was of greater value.

3. SAME—ACTIONS—EVIDENCE.

In the action on a replevin bond, defendants tendered testimony that they were the real owners of the cattle replevied, and that the original judgment upon which the execution was issued, under which the defendant in replevin took the cattle, was obtained without service. *Held*, that such testimony was immaterial and properly rejected.

Error to District Court, Montezuma County; James L. Russell, Judge.

Action on a replevin bond by John T. Duncan, sheriff, against D. J. Janssen and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Charles A. Johnson, for plaintiffs in error. F. C. Perkins and P. G. Ellis, for defendant in error.

BAILEY, J. The sheriff of La Plata county, defendant in error, by virtue of an execution issued out of the county court of La Plata county, levied upon 17 head of cattle as the property of Josiah Starriett. Plaintiffs in error D. J. Janssen and M. E. Starriett caused a writ of replevin to be issued out of a justice court under which the cattle were taken from the possession of the sheriff and delivered to Janssen and Starriett. The affidavit of replevin alleged that the cattle were of the value of \$250. In the justice court judgment was rendered against defendant in error in the replevin suit, and he took an appeal to the county court of La Plata county. The evidence in the county court showed that the value of the property was in excess of the jurisdiction of the justice court, whereupon the replevin suit was dismissed. The sheriff then brought this action upon the replevin bond, and recovered judgment in the district court, from which judgment the matter was brought to the court of appeals on error.

It is contended by plaintiffs in error that the action would not lie upon the bond because the justice of the peace did not have jurisdiction of the subject-matter, and therefore all proceedings growing out of the replevin suit were void. The case of Robinson et al. v. Ronjour, 16 Colo. App. 458, 66 Pac. 451, is relied upon as being decisive of this

question. That case is not in point. The complaint therein alleged the value of the property replevied to be \$500, so that upon the face of the complaint it was apparent that the court was without jurisdiction, while in the case at bar upon the face of the papers the justice court had jurisdiction. Where the value of the property in a replevin suit is alleged by the plaintiff to be less than \$300, and upon appeal it is determined that the value of the property was greater than \$300 and the case is dismissed, the sureties upon the bond are estopped from denying the jurisdiction of the justice court. This disposes of the principal contention of plaintiffs in error.

The second defense of the plaintiffs in error was demurred to, and the demurrer sustained. This defense alleged that the justice of the peace could not have jurisdiction of the subject-matter, for the reason that the value of the property replevied was \$500. Having alleged to the justice of the peace that the property was worth less than \$300, the parties could not afterwards challenge the jurisdiction of the justice of the peace by alleging that the property was of greater value. The defendants tendered testimony as to the value of the cattle for the purpose of showing that the justice court was without jurisdiction, that they were the real owners of the property, and that the original judgment upon which the execution was issued was obtained without service. These offers were rejected by the court, and its action was assigned as error. None of these matters were material in a suit upon a replevin bond, and were properly rejected.

We are unable to discover any error in the record, and the judgment of the district court will therefore be affirmed.

Affirmed.

STEELE, C. J., and GODDARD, J., concur.

LANGLEY v. FITZGERALD.

(Supreme Court of Colorado. May 4, 1908.)

1. APPEAL—REVIEW—QUESTIONS OF FACT—FINDINGS OF COURT.

There must be a substantial conflict in the evidence in order that a judgment may not be disturbed on review, and where it does not warrant the judgment, it must be reversed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

2. MORTGAGES—FORECLOSURE BY ACTION—EVIDENCE—SUFFICIENCY—FRAUD.

Evidence in an action to foreclose a real estate mortgage examined, and *held* not to support the defense of fraud in procuring the mortgage and note secured.

3. SAME.

Notes and mortgages duly executed and acknowledged ought not to be set aside for fraud, except on the most clear and convincing proof of their fraudulent character.

Appeal from District Court, City and County of Denver; John I. Mullins, Judge.

Mortgage foreclosure by L. A. Langley against Nora Fitzgerald. Judgment for defendant, and plaintiff appeals. Reversed.

Elliott & Bardwell, for appellant. John H. Reddin, for appellee.

BAILEY, J. This was an action to foreclose a mortgage on real estate, given to secure the payment of a promissory note for \$175.30. Defendant denied that she made the note, but alleged that she did make one for \$120 under the following circumstances: That she was a servant in the employ of a Mrs. Bush who kept a rooming house in the city of Denver; that her employer had failed to pay her wages for some time, and that she pretended to be indebted to one Dunning, who claimed to be the landlord of the premises; that Dunning and Mrs. Bush entered into a conspiracy for the purpose of defrauding defendant and procuring from her a note and mortgage, and that they falsely represented to the defendant that Mrs. Bush was indebted to Dunning in the sum of \$120 for rent, and that unless the same was paid Mrs. Bush would be ejected and defendant would lose her wages; that if the defendant would sign a note Dunning would protect and hold her harmless, and that the indebtedness would be paid within 60 days by Mrs. Bush; that, relying upon these representations, and having confidence in Dunning and Mrs. Bush, defendant agreed to sign the note for \$120 payable in two months, but that she subsequently learned that the note she had signed was for \$175.30; and that she was old and feeble, had defective eyesight, and was unable to read, and did not read the note or mortgage. These allegations were denied by plaintiff. Judgment was rendered for defendant, and plaintiff appeals.

The only assignment of error presented is that the judgment is not supported by the testimony. Plaintiff testified that Mrs. Fitzgerald came to his office and wanted to make a loan, stating that she wished to help a friend. He said that he did not care what what she wanted to do with the money; if she wished to borrow it, and had sufficient security, he would loan it to her. She stated that she had the two lots mentioned in the mortgage, and he told her to try and get the money somewhere else because he did not care to make a loan upon real estate. He also stated that it would be necessary for her to have an abstract of title to the property. She returned the next day and renewed her request for the loan, said she had ordered the abstract, but that she wanted the loan immediately because it was necessary in order to help her friend. He made some inquiry, was satisfied as to the condition of her title, and made the loan of \$175.30, the sum she desired. A note and mortgage were made for such amount. Defendant then said that her friend was Mrs. Bush; that Mrs. Bush's furniture was mortgaged, and the mortgage

was about to be foreclosed because of the failure to pay the interest, amounting to \$24.30, and an insurance bill for \$10. Plaintiff and Dunning held a mortgage upon the furniture, and Dunning owned the house in which Mrs. Bush lived. Dunning and plaintiff went over to the house, and Mrs. Fitzgerald signed the note and executed and acknowledged the mortgage. Plaintiff gave his check for \$175.30, and defendant indorsed it to Mrs. Bush. Mrs. Bush indorsed it, and Dunning took it to the bank, procured the money, paid the plaintiff his portion of the interest upon the chattel mortgage, and paid himself the rent due from Mrs. Bush out of the balance. H. Dunning, who was the father of the Dunning associated with the plaintiff, testified that the defendant informed him that she was going to borrow some money upon a mortgage of her property for Mrs. Bush. Ernest W. Dunning testified: That he told the defendant the amount of the note and mortgage and what the mortgage was secured by, explained to her about the papers, and that she signed them and he took her acknowledgment. That he was there when defendant indorsed the check, and that the loan was made in the ordinary way of transacting business. That the check was given by plaintiff to defendant, who turned it over to Mrs. Bush, and she delivered it to the witness. That Mr. and Mrs. Bush were present at the time. That after about 60 days Mrs. Bush sold the place to Mrs. Martin. The note was made payable in one year. Defendant inquired of Dunning if she could pay it at any time, and she insisted that the note be made that way, so he wrote in the words "on or before." That the matter of \$120 was not spoken of. Defendant testified: That she was 64 years old. That she supported herself by doing housework. That she was working for Mrs. Bush, and that Mrs. Bush did not pay her. That she had never been in plaintiff's offices until after the note was signed. That she had nothing to do with plaintiff. That she transacted all of the business with Dunning. That she had cataracts on her eyes and could not see very well. That she refused to pay the interest when notified that it was due. That she did not remember seeing the note and mortgage. That Mrs. Bush wanted her to borrow \$120 and let her take it, and that Dunning came to the house and Mrs. Bush asked defendant to sign the paper. That she said, "All right," and signed them, and asked Mr. Dunning if he would protect her for a month or two, and he said that he would as far as he could. That she did not read the paper, and did not know what it was. She never thought it was a mortgage, and thought the note was for \$120, and that the length of time it would run was two months. That Dunning did not tell her he was a notary public, and did not ask her to acknowledge her signature to the mortgage. That she could read printing, but could not read writing. That the transaction

occurred in the evening. That there were three gas jets burning in the room. The note and mortgage introduced in evidence were shown her, and she thought they were the ones she signed. She thought he read them to her, but she could not say. That she never signed any mortgage. That if she signed two papers she did not know one of them was a mortgage. That she ordered the abstract, and that Mrs. Bush said she would pay for it. That she later went to get it, and Mrs. Bush did not pay for it, but that she wanted the abstract for her own use. The sister of the defendant testified that defendant was a widow and had to earn her own living; that a couple of years before the trial defendant was injured on a tramway car which laid her up for six weeks, and there were times when she said that her head "swims around."

Upon this testimony the court rendered judgment for the defendant. Appellee, in order to sustain this judgment, insists upon the application of the doctrine that a judgment based upon conflicting testimony should not be disturbed. This is true, but there must be a substantial conflict in the testimony. The evidence must be legally sufficient to uphold the finding of the court. If it does not clearly warrant the judgment, the judgment must be reversed. *La Crosse Gold Min. Co. v. Scudder*, 4 Colo. 44; *London C. M. & S. Co. v. Findlay*, 6 Colo. 571; *Int. Trust Co. v. United Coal Co.*, 27 Colo. 246, 60 Pac. 621, 83 Am. St. Rep. 59. In this case the allegations made in the answer were of a conspiracy between Dunning and Mrs. Bush, that the representations were falsely made that Mrs. Bush was indebted to Dunning, and that these representations were made for the purpose of procuring the defendant to borrow this money. There is not a word of testimony in support of this allegation, and the only evidence of a fraud is that the defendant states that she thought she was borrowing \$120 instead of \$175, and she thought the time the note was to run was for two months instead of one year. She says that she did not go to the plaintiff, and did not have the conversation with him which he testified to; but in corroboration of the testimony of plaintiff is the fact that the defendant at that time ordered the abstract of title to her property made and that Mrs. Bush had agreed to pay for it. That admission upon her part is, however, coupled with the assertion that she desired the abstract for her own use. She had evidently had the property for some time, and had no abstract, but, by some coincidence, she ordered the abstract at the very time the plaintiff testifies she had agreed to make the mortgage and furnish the abstract. Promissory notes and mortgages, which are duly executed and acknowledged before a notary public, ought not to be set aside as invalid for fraud, except upon the most clear and convincing proof of their fraudulent character, and we cannot find anything in

this testimony which warrants the finding and judgment of the trial court.

The judgment will therefore be reversed.
Reversed.

STEELE, C. J., and GODDARD, J., concur.

PHELPS et al. v. HALE.

(Supreme Court of Colorado. May 4, 1908.)

BROKERS—AGENCY.

No agency of plaintiff to sell defendants' land, entitling him to a commission on a sale made by them to one whom plaintiff informed that the property was for sale. is established, where plaintiff, not a broker, but an occupant of the land, as lessee of defendants, asked for and was told by them the price at which they would sell.

Appeal from District Court, City and County of Denver; P. L. Palmer, Judge.

Action by John S. Hale against Alfred C. Phelps and others. Judgment for plaintiff. Defendants appeal. Reversed.

Horace Phelps, for appellants. Charles L. Dickerson, for appellee.

HELM, J. Appellee, who was plaintiff below, brought suit against appellants, and secured judgment for commissions on the sale of the Idledale ranch in Jefferson county belonging to defendants. The recovery is contested in this court upon two grounds, viz.: First, because no agency or employment of plaintiff by defendants was shown; second, because it does not appear that plaintiff was the procuring cause of the sale. The burden of establishing both of these propositions by a fair preponderance of the evidence was upon plaintiff. Before he could recover he was required to prove his authority to sell the property and his essential agency in accomplishing the sale thereof. At the time of the transactions mentioned in the record, and for a considerable period prior thereto, plaintiff was and had been occupying the ranch in question as a tenant of defendants. On the 12th of May, 1902, defendant A. C. Phelps, in response to a verbal request from plaintiff through defendant's son, wrote plaintiff a letter, stating the price for which he would sell the ranch. The letter described the different natural divisions or tracts into which the property was divided, and fixed a total selling price of \$5,000 net for the whole. It also stated the separate price for each of the tracts or subdivisions mentioned. The letter likewise declared that, while he did not wish to consider binding the proposition, he thought that for a short time he would sell at those rates. There was no response to this letter. But a couple of months later plaintiff wrote defendant inquiring the best terms for a five years' lease upon the ranch; also mentioning a sale of 80 acres of the ground in the meantime by defendants to a third person.

And on July 22d in response defendant A. C. Phelps wrote a second letter to plaintiff. In this letter he said incidentally that he would sell the remaining 20 acres of the ranch for \$4,500, and would cut that price somewhat for cash. He then discussed the terms of rental, etc., and finally declared that the figures both as to sale and rental were for plaintiff only, and were not to be given to others; likewise that this offer would not be left open but a very short time. To this communication there was no response. But after the lapse of another two months a Mr. and Mrs. Williams appeared at the Idledale ranch with a letter from a broker in Denver asking plaintiff to show them another property near by. They had some difficulty in reaching said property, and decided not to make the purchase. Thereupon plaintiff informed them that the Idledale ranch was for sale, that the price was \$5,000, that defendants were the owners, and gave them the address of A. C. Phelps in Denver. Plaintiff further testified that he requested them to tell Mr. Phelps he had sent them. Mrs. Williams went to the office of Mr. Phelps the next day and on the day following completed the purchase of the property for \$3,600. That sum, however, included \$100 for furniture not mentioned in the foregoing negotiations. There is no testimony showing that Mrs. Williams told Mr. Phelps that plaintiff had sent her to him, although she did say that she learned from plaintiff that the place was for sale. A few days after the sale was completed plaintiff, being in Mr. Phelps' office in Denver, said he thought he was entitled to a commission thereon. Phelps immediately repudiated the claim for commission, and positively declined to recognize any right of plaintiff thereto.

The foregoing is a fair though brief synopsis of the record. It is evident therefrom that defendant Phelps, who acted throughout for both defendants, had no thought of giving plaintiff an agency for the sale of the property in question. Plaintiff was not a real estate broker. He was not engaged in the business of buying or selling property of any kind on commission. He was, on the contrary, as above stated, conducting defendant's ranch as a tenant, and was engaged in cultivating and harvesting fruit and other crops thereon. The correspondence indicates that defendant supposed plaintiff was inquiring the price of the ranch with a view of purchasing the same himself. At one time previous to this correspondence there had been some conversation between them relating to an exchange of the ranch for lands owned by plaintiff elsewhere. No time was specified within which the sale was to be made. No commissions were fixed, nor was the subject of commissions in any manner referred to. The first intimation of any such claim was the suggestion in

Phelps' office after the sale. We cannot hold that an agency or authority on the part of plaintiff was proven. To say that it was would be to establish a dangerous precedent. It would practically seal the lips of the owners of property concerning its value, or at least render hazardous any expression on the subject. In *Castner v. Richardson*, 18 Colo. 497, 33 Pac. 164, this court said: "When a real estate broker asks and obtains from the owner the price of certain real estate, or the price at which the owner is willing to sell, this, without more, does not establish the relation of principal and agent between the owner and broker. It does not establish a contract of employment. If the rule were otherwise, no one would be safe in stating the price of his own property in the hearing of a broker." This language was employed with reference to a real estate broker, one who was engaged in the business of selling real estate on commission, and one whose inquiry would therefore naturally arouse suspicion by the owner that the inquirer desired to handle the property as a broker and for a commission. Whereas, in this case, the inquiry came from a source calculated to entirely disarm such suspicion. Carefully analyzed, the evidence amounts only to a request by plaintiff for the statement of a price for the ranch and the fixing of the selling value in reply. It was simply the asking and giving of the price "without more." The conditions in this respect were not so favorable to plaintiff as were the conditions in *Castner v. Richardson*. It is doubtful if the case is any stronger upon the other proposition urged in support of the judgment. "The broker must be the efficient agent or procuring cause of the sale. The means employed by him and his efforts must result in the sale. He must find the purchaser, and the sale must proceed from his efforts acting as broker." *Lawrence v. Weir*, 3 Colo. App. 406, 33 Pac. 646; *Babcock v. Merritt*, 1 Colo. App. 89, 27 Pac. 882; *Anderson v. Smythe*, 1 Colo. 257, 28 Pac. 478. But the foregoing conclusion is decisive in favor of reversal, and we express no opinion upon the claim of plaintiff that he was the procuring cause of the sale.

If there were conflict of evidence upon matters material to a decision of the question of agency, we would probably bow to the verdict of the jury; but there was no substantial conflict in this regard. As we view the case, the court should have instructed that body to return a verdict for defendants after the evidence was all in, even though he declined to grant the motion for a nonsuit.

The judgment will be reversed.
Reversed.

STEELE, C. J., and MAXWELL, J., concur.

LA FITTE v. CITY OF FT. COLLINS.

(Supreme Court of Colorado. May 4, 1908.)

1. INTOXICATING LIQUORS—STORING FOR SALE—ORDINANCES—VALIDITY.

An ordinance against storing intoxicating liquors with intent to sell is not void as ultra vires, because the ordinance does not limit, or attempt to limit, the sale of liquors to the territorial limits of the city.

2. CRIMINAL LAW—APPEAL—REVIEW—ADMISSION OF EVIDENCE—RECORD.

On appeal of a prosecution for violation of a city ordinance against disorderly houses, where the ordinance is not abstracted, alleged error in the admission of evidence as to reputation of the house and of persons frequenting it cannot be reviewed, since its competency cannot be determined without a knowledge of the provisions of the ordinance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2934.]

Appeal from Larimer County Court; J. Mack Mills, Judge.

Marie La Fitte was convicted of certain offenses, and appeals. Affirmed.

E. A. Ballard and Chas. M. Bice, for appellant. Cornelius Ferris, Jr., for appellee.

GABBERT, J. Two informations, charging appellant with the violation of ordinances of the city of Ft. Collins, were filed before the police magistrate of that city. One charged her with keeping and using certain rooms in the city for the storing of intoxicating liquors for the purpose of selling the same. The other charged her with keeping a disorderly house. She was convicted before the police magistrate on both charges, and appealed to the county court, where she was again convicted and fined. The cases were consolidated for the purpose of appeal to this court.

It is here urged that the ordinance, under which she was charged with keeping and using certain rooms for the storing of intoxicating liquors for the purpose of selling the same, is ultra vires and void, because it does not limit, or attempt to limit, the sale of such liquors to the territorial limits of the city of Ft. Collins. The objection is not tenable. An examination of the ordinance discloses that it is only intended to cover sales of liquor made within the limits of the city, or within one mile of the outer boundaries thereof. Municipal ordinances are necessarily local in their application; and, in the absence of language employed from which the contrary can be inferred, the presumption is that it was not the intention of a city council that an ordinance should operate beyond the territorial limits of its jurisdiction.

With respect to the other case it is urged that the court erred in permitting testimony to be introduced touching the character of the house antedating the time mentioned in the information, that error was committed in receiving testimony tending to prove the reputation of the persons frequenting her place of business, and that the house had the reputation of being disorderly. The ordinance of the city, which she is charged with having

violated by keeping a disorderly house, is not abstracted. In this state of the record we cannot determine what latitude should be allowed the prosecution in the introduction of testimony with respect to acts antedating the date of the offense charged in the information, nor what character of testimony would be competent to prove a violation of the ordinance in question.

The judgment of the county court must therefore be affirmed, and it is so ordered.

Judgment affirmed.

STEELE, C. J., and CAMPBELL, J., concur.

WALLBRECHT et al. v. BLUSH et al.

(Supreme Court of Colorado. May 4, 1908.)

1. PARTNERSHIP — CAPACITY TO SUE — CONSTRUCTION OF STATUTE.

Acts 1897, p. 248, c. 65, requires persons doing business as partners under a firm name other than the names of the members to file affidavits with the county clerk or recorder showing the members of the firm, and provides that firms failing to do so may not sue for the collection of their debts until such affidavits shall be filed. *Held*, that the statute is penal, and will not be construed as embracing any penalty except that provided by its terms, and hence the filing of the prescribed affidavit is not a condition precedent to the prosecution of an action to recover possession of real property.

2. PUBLIC LANDS — ERECTION OF BUILDINGS THEREON BY MISTAKE.

If a person erects a building on the public domain by mistake, it does not necessarily become the property of the government or of a subsequent homesteader, but the owner of the building will have a reasonable time in which to remove it.

3. LANDLORD AND TENANT—LANDLORD'S TITLE—ESTOPPEL OF TENANT.

A tenant is estopped to deny his landlord's title as long as he is not disturbed in his possession of the premises under the lease, and the fact that the property leased is public domain is immaterial, so long as the title of the landlord is the same as it was at the time the tenancy was created.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 151.]

4. SAME.

Before a tenant can dispute the landlord's title he must surrender possession and place the landlord in the same position, so far as possession is concerned, as he was in when the relation of landlord and tenant was created.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 161.]

5. SAME—ACTION BY LANDLORD TO RECOVER POSSESSION—DEFENSES—ESTOPPEL OF TENANT.

Where tenants had dealt with their landlord as a partnership, and, after a change in the membership of the firm, continued to so deal with it as it was reconstructed by the payment of rent up to a short time before the commencement of an action against them by the landlord to recover possession, they cannot defend in the suit on the ground that the partnership relation did not exist.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 151.]

Appeal from Jefferson County Court; Charles McCall, Judge.

Action by Fred G. Blush and another, copartners, against Charles Wallbrecht and another. There was a judgment of a justice of the peace for plaintiffs, and defendants appealed to the county court, where plaintiffs again obtained judgment, and defendants appeal. Affirmed.

H. G. Benson and D. C. Webber, for appellants.

BAILEY, J. This was an action of unlawful detainer, originally brought before a justice of the peace by appellees as plaintiffs against appellants for the possession of certain described buildings. The complaint alleged that plaintiffs were the lessees of two certain tracts of land situate near the town of South Platte in Jefferson county; that on the 1st day of January, A. D. 1902, John B. Blush and John D. Blush and Fred Blush then composed the copartnership known as the "Klondike Ice Company" and were the lessees of these two tracts of land, and that they sublet to the defendants certain buildings known as "the hotel, barn, and post office buildings," and also a dwelling house to be thereafter furnished and provided by the plaintiffs for the defendants; that subsequently the house was so provided upon a portion of the property above mentioned. This lease was for a year, and at the expiration of the year the firm as it then stood agreed to continue the term for another year. After this extension the membership of the firm was changed, John B. Blush and John D. Blush dropping out, and their places being filled by plaintiff Harry Blush. At the expiration of the term as so extended, namely, on the 31st of December, 1904, plaintiffs notified the defendants that they desired the premises. Defendants declined to move out, and a statutory notice was served upon them, and, as they still continued to refuse to vacate, this action was commenced. Defendants answered the complaint, and denied the copartnership, denied the title of plaintiffs, admitted that they leased the property from the Klondike Ice Company as it was composed January, 1902, but denied that their lessors were in fact copartners, and denied that the houses which were leased by them were situate upon the property described in the complaint. They admitted that the term of the lease was extended for one year, but averred that the extension was in writing, admitted that they paid the rent for the full period of two years, and averred that they paid \$6.97 as partial payment for the rent of the premises for the month of January, 1905; and they alleged that the plaintiffs had failed to file the affidavit of copartnership required to be filed by the Session Laws of 1897. Upon these issues they went to trial before a jury in the justice court, and a verdict was rendered for plaintiffs. Defendants then took an appeal to the county court, the matter was tried to the court without a jury,

and the judgment was again for the plaintiffs. Defendants appeal to this court.

At the time of the trial the defendants objected to the swearing of witnesses and the taking of testimony on the ground that the court was without jurisdiction to try the case, because of the failure of plaintiffs to file the affidavits required by Sess. Laws 1897, p. 248, c. 65. This objection was overruled, and is the first assignment of error which is discussed. We think the court was correct in its ruling in this matter. The statute provides that: "In default of filing for record such affidavits as aforesaid, such persons, partnerships and associations so trading and doing business as aforesaid shall not be permitted to prosecute any suits for the collection of their debts until such affidavits shall be filed." This is a penal statute, and will not be construed as embracing any penalty except that provided by the terms of the act, which is that the firm "shall not be permitted to prosecute any suits for the collection of their debts." An action to recover possession of real property cannot be said by any reasonable construction to be an action for the collection of a debt. This action not being of the character mentioned in the statute, the filing of the affidavit is not a condition precedent to the prosecution of the action. The plaintiffs proved that they had the lease to the property mentioned in the complaint; that they sublet the property to the defendants in 1902 and renewed the lease until December 31, 1904, and served notice at that time of their intention to terminate the tenancy and the refusal of the defendants to vacate. Defendants offered to prove that the "property in question is government property," that the plaintiffs and their grantor had no title, and that the defendants about a year before the action was commenced made a homestead filing upon it, all of which proof was rejected by the court and judgment rendered for the plaintiffs.

As we understand the contention of the appellants, it is not that the land described in the complaint was government land, but that the buildings leased to the defendants were situate upon the public domain, and not upon the subdivision described in the complaint. If it be true that some of these buildings were located upon the public domain, we fail to see how that would assist the defendants. The fact that by mistake or otherwise a person erects a building upon the public domain would not necessarily make it the property of the government or of a subsequent homesteader. The owner of the building would have a reasonable time in which to remove it. The tenant is estopped from denying the title of his landlord as long as he is in possession of the premises under the lease. But the defendants say that this doctrine does not apply in cases of fraud, unfairness, mistake, or misapprehension of fact. There was nothing of that kind either alleged in the answer or attempted to be proven at the trial. There

is no hint either in the pleadings or the testimony offered of any fraudulent action or unfairness upon the part of the plaintiffs. If it is said that the fact that one or more of the houses was upon government land constituted a mistake, this would not bar the plaintiffs from recovering their property. In view of the fact, however, that the offer of proof shows that one of the defendants made a homestead filing upon the land upon which it is contended these buildings are located about a year before the expiration of the lease, and continued to pay rent during all of that time, and even paid \$6.97 as a portion of the rent for the succeeding month, it demonstrates that they were not misled by any mistake, and that they continued to treat the plaintiffs as their landlords, and were willing to continue so to do. It is said in 24 Cyc. 941: "It is no objection to the estoppel to deny title that the landlord had no title at the time the relationship was created. The fact that the property leased by a private person is public property does not prevent the operation of the estoppel." Authority from five states, namely, Louisiana, Michigan, Minnesota, Oklahoma, and Washington, is cited in support of the doctrine. So long as the title of the landlord is the same as it was at the time the tenancy was created and the tenant is not disturbed in his possession, it is immaterial whether the title of the landlord was valid or not. Before the tenant can be heard to dispute the title of his landlord he must surrender the possession of the property, and place his landlord in the same position, so far as possession is concerned, that he was at the time that the relationship of landlord and tenant was instituted.

There seems to be some contention in the brief of appellants that the judgment was erroneous because the partnership relation of defendants was not proven. The plaintiffs dealt with it as a partnership, taking the lease, and after the change in the membership of the firm was made continued to so deal with it as it was reconstructed by the payment of rent even up to a short time before the filing of the complaint in this action, and they cannot be heard to say now that the partnership relation did not exist, even if such a defense could be available in an action of this character, which we do not determine.

Perceiving no error in the record, the judgment will be affirmed.

Affirmed.

STEELE, C. J., and GODDARD, J., concur.

(43 Colo. 517)

PRATT v. SEAMANS.

(Supreme Court of Colorado. May 4, 1908.)

1. REPLEVIN—JUDGMENT—FORM AND REQUISITES.

Where defendant in a replevin suit had given bond, and the property remained in his possession, and the jury returned a verdict for

95 P.—59

plaintiff, and found the value of the property to be \$200, but judgment was rendered for plaintiff, and that he retain possession of the property, the judgment was not in proper form, for it should have ordered the return of the property to plaintiff, and, in case it could not be returned, that he recover from defendant the sum of \$200, interest, and costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, §§ 424-427.]

2. APPEAL—REVIEW—HARMLESS ERROR.

In view of the circumstances, the judgment as it stood was merely a judgment for costs, and defendant could not complain that it was not in accordance with the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4240-4247.]

3. SAME—ADMISSION OF EVIDENCE—CONCLUSIONS OF LAW.

In an action of replevin where defendant was given ample opportunity to make his defense, permitting plaintiff to testify that at the time suit was brought he was the owner and entitled to the possession of the property in question, over objection that the ownership and right of possession was a question for the jury, was harmless error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

4. TRIAL—RECEPTION OF EVIDENCE—SUFFICIENCY OF OBJECTION—GROUNDS.

In an action of replevin, defendant testified that he had never stated to a witness that the horses in question belonged to plaintiff, but the witness in question testified that at the time and place mentioned defendant had so stated. The answer was objected to as being immaterial, but the ground that the conversation was before defendant had exercised an option to purchase the horses was not raised, and there was no motion to strike after it appeared that the conversation was prior to the exercise of the option. Held, that the admission of the evidence was not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 194-200.]

Appeal from District Court, Larimer County; Jas. E. Garrigues, Judge.

Replevin by J. G. Seamans against Arthur Pratt. From a judgment for plaintiff, defendant appeals. Affirmed.

Rhodes & Lee, for appellant. J. W. Norvull and Garbutt & Clammer, for appellee.

STEELE, J. The plaintiff in the trial court (the appellee) brought his action in replevin to recover the possession of two roan mares of the value of \$200, and for damages. The jury returned a verdict in favor of the plaintiff, and found the value of the property to be \$200. Judgment was rendered in favor of the plaintiff, and that he retain possession of the property. The defendant appealed to the Court of Appeals. The assignments of error discussed in the brief are those relating to the reception of testimony, the form of the judgment, and the overruling of the motion for a new trial.

The judgment is not in proper form. The defendant had given bond and the property remained in his possession. The judgment should have ordered the return of the property to the plaintiff, and, if the property could not be returned, that the plaintiff recover of and from the defendant the sum of \$200, interest and costs. But the defendant cannot

complain that this judgment is not in accordance with the verdict. The judgment, as it stands, is merely a judgment for costs; whereas, the plaintiff was entitled to have judgment entered in his favor for the return of the property. The complaint sufficiently states that the defendant refused, although often requested, to return the property to the plaintiff. The defendant claimed that he had an option to purchase the animals for \$150, and that prior to the bringing of the suit he had elected to exercise his option and tendered to plaintiff the sum of \$150, which plaintiff refused. The plaintiff was permitted to testify, over the objection of the defendant, that he was at the time of the bringing of the suit the owner and entitled to the possession of the horses. This, it is claimed, was error, because the ownership and right of possession was the question the jury was called upon to determine. It is error without prejudice. The defendant was given ample opportunity to make his defense, and it is clear that the jury was not misled by the statement of the plaintiff into rendering a verdict in his favor because of his mere assertion of ownership and right of possession.

The defendant was asked if he had not stated to a witness that the mares belonged to Jim Seamans. His answer was: "I will say positively that I did not say they belonged to him—absolutely." James Brinton testified that at the time and place mentioned in the interrogatory propounded to the defendant the defendant had stated that the animals belonged to Jim Seamans. The defendant objected to this answer on the ground of its being immaterial. Defendant contends that as the conversation was shown to have taken place in September, before the defendant claimed to have exercised his option, that the testimony should not have been received. Upon its appearing that the conversation was at a time when the defendant did not claim to own the animals, the defendant, if he felt that it would be considered unfavorably by the jury, should have asked to have it stricken. No prejudice resulted to the defendant, and the court was probably misled into receiving the testimony by the failure of defendant to properly state the ground of the objection. As one of the grounds for a new trial the defendant averred that the verdict was the result of a misunderstanding of the effect of the testimony, and a colloquy between certain of the jurors and the court is contained in the abstract; but we cannot say that the jury was misled into returning a verdict in favor of the plaintiff through any misunderstanding of the testimony. It is possible that the form of the verdict may have been occasioned by a misunderstanding, but the evidence is sufficient to sustain a verdict in favor of plaintiff.

We perceive no error in the record, and the judgment is affirmed.

BAILEY and HELM, JJ., concur.

STARK v. JOHNSON.

(Supreme Court of Colorado. May 4, 1908.)

1. HUSBAND AND WIFE—CRIMINAL CONVERSATION—RIGHT OF ACTION—EVIDENCE.

In an action for criminal conversation, proof of the alienation of the affections of plaintiff's wife is admissible as affecting the aggravation of the offense and the amount of damages recoverable, but is not necessary to a right of action; the essential injury to the husband consisting in the defilement of the marriage bed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1128.]

2. SAME—DAMAGES.

In an action for criminal conversation, the mental anguish suffered by plaintiff from the wound given to his feelings, his affections, and his pride by the acts of defendant should be considered in awarding damages; and plaintiff may testify as to his humiliation and the distress of body and mind and mental anguish which he suffered in consequence of the acts of defendant when brought to his knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1134.]

3. SAME—PROOF OF MARRIAGE—NECESSITY.

In an action for criminal conversation, there must be proof of actual marriage between plaintiff and the alleged wife, and proof of their cohabitation and their holding themselves out to the world as husband and wife is not sufficient, but proof of an actual marriage is not limited to the official record thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1133.]

4. SAME—EVIDENCE—SUFFICIENCY.

In an action for criminal conversation, testimony of plaintiff and his alleged wife that they were married in a sister state about 25 years before by a clergyman authorized under the law of the sister state to solemnize marriages, that they had since their marriage constantly lived together as husband and wife, and that they had a son 22 years of age, was sufficient proof of their marriage; and it was not necessary to prove the marriage by the marriage certificate provided for by the laws of the sister state.

Appeal from District Court, El Paso County; Robert E. Lewis, Judge.

Action between Thomas Stark and P. A. Johnson. From a judgment for the latter, the former appeals. Affirmed.

W. D. Lombard and T. M. S. Rhett, for appellant. Wm. Swift and C. L. McKesson, for appellee.

BAILEY, J. This is an action for criminal conversation brought by plaintiff against the defendant. There was a verdict and judgment for the plaintiff, from which defendant appeals.

The complaint is in the usual form. It is contended that the judgment is wrong because there was no proof of the alienation of the affections of plaintiff's wife. Although it is usual to allege the seduction of a wife and the consequent alienation of her affections, proof of such alienation is not necessary to the husband's right of action. Evidence of such matters is admissible as affecting the aggravation of the offense and the amount of damage to which the plaintiff was entitled. The essential injury to the

husband consists in the defilement of the marriage bed. 8 Am. & Eng. Enc. of Law, 268.

The plaintiff was permitted to testify, over the objection of the defendant, as to his humiliation and the distress of body and mind and the mental anguish which he suffered in consequence of the acts of defendant and plaintiff's wife when they were brought to his knowledge, and the court instructed the jury that, in determining the amount of their verdict, if it be for the plaintiff, they should consider the suffering and anguish experienced by plaintiff on this account. Appellant argues that the admission of this testimony and the instruction of the court was erroneous; that no cause of action for damages arises because of the distress of the mind of the husband. The law seems to be otherwise. In 8 Am. & Eng. Enc. of Law, p. 266, it is said that "the mental anguish suffered by the plaintiff from the wound given to his feelings, his affections, and his pride by the act of the defendant is the real injury, and ought to be so considered by the jury in awarding damages." And such is the doctrine announced in *Long v. Booe*, 108 Ala. 570, 17 South. 716; *Browning v. Jones*, 52 Ill. App. 605; *Prettyman v. Williamson*, 1 Pennewill (Del.) 224, 39 Atl. 731; *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006. The plaintiff and his wife each testified, over the objection of defendant, that they were married at Everett, in the state of Michigan, on the 3d of July, 25 years ago. The wife testified that they were married at her father's house in the presence of her parents and other witnesses, by a Presbyterian minister; that she had a certificate of marriage, but that it was in her trunk with some other things at her father's home in Michigan. It is contended by defendant that this testimony was not admissible, for the reason that the marriage certificate was the best evidence, and that in cases of criminal conversation an actual marriage must be proven, and such evidence of cohabitation and repute as would maintain other actions in which the marriage relation was involved is not sufficient. It is true that, in many cases, proof of the marriage of an alleged husband and wife may be proven by circumstances such as their cohabitation and their holding themselves out to the world as husband and wife; but in cases of prosecution for bigamy and actions for criminal conversation such proof is not sufficient, and, as stated by the defendant, there must be proof of an actual marriage. But this does not mean that proof of an actual marriage is limited to the official record thereof. In 2 *Greenleaf on Evidence*, § 461, it is said: "The proof of marriage, as of other issues, is either by direct evidence establishing the fact or by evidence of collateral facts and circumstances from which its existence may be inferred. Evidence of the former kind, or what is equivalent to it, is required upon the trial of indictments for

polygamy and adultery, and in actions for criminal conversation; it being necessary, in such cases to prove a marriage valid in all respects. It is not sufficient to prove that the parties went through a religious ceremony purporting to be a marriage, unless it is also shown that it was recognized by the law of the country as the form of contracting a valid marriage. * * * Other direct proof is made either by the testimony of a witness present at the celebration, or of either of the parties themselves where they are competent, or by an examined or certified copy of the register of the marriage where such registration is required by law, with proof of the identity of the parties." The appellant in his brief has favored us with quotations from the laws of Michigan, wherein we find that marriages may be solemnized by ministers of the Gospel. *Powell's Ann. St. p. 1619, § 7*. Other sections of the laws of Michigan are given, but they relate to the making of a record in certain public offices of such marriage. It nowhere appears that the absence of such a record would invalidate the marriage. So, then, we have here the testimony of the two parties that the marriage was solemnized by a minister of the Gospel, which would seem to be sufficient under the laws of Michigan. It is apparent from what is said by Mr. Greenleaf that, if the parties are competent witnesses, they may testify to the marriage themselves, and the same doctrine is announced in 1 *Bishop on Marriage & Divorce*, § 494, wherein he states that "this is the usual direct proof of the fact where the record is not produced." In the case of *State v. Rood*, 12 Vt. 396, it was held that, while an actual marriage must be proven, it was sufficient for the prosecuting witness to testify that about six years previous to the trial he went with the woman before a justice of the peace in the state of New York, and was there married to her and that she was still his wife. This was the only proof of the marriage, and there was no evidence of the laws of the state of New York, yet it was held to be sufficient. In a case similar to this, *Jacobsen v. Siddal*, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 300, it is said: "By the bill of exceptions, it appears that after the plaintiff and his wife had testified directly to the fact of marriage a certificate of the same was offered in evidence, to which several objections were made and sustained. Whether the objections were well taken or not is immaterial, as the plaintiff was competent to testify to the marriage. The contract of marriage, or its solemnization before the minister or magistrate, may be proved by the testimony of an eyewitness and for this purpose a party is competent." In support of this doctrine, the court makes a very careful and thorough analysis of the authorities. In the case before us the testimony of the plaintiff and his wife showed that the marriage took place 25 years before the time of the trial, and that they had con-

stantly lived together as husband and wife since their marriage; that they had a son 22 years of age—and, this proof being undisputed, we are unable to see that there was not sufficient direct testimony of an actual marriage to enable plaintiff to maintain the action. Inasmuch as the matter of the debauching of plaintiff's wife was confessed by the wife and admitted by the defendant, and the record of the trial being free from errors, the judgment will be affirmed.

Affirmed.

STEELE, C. J., and GODDARD, J., concur.

WOODS v. SARGENT et al.

(Supreme Court of Colorado. May 4, 1908.)

1. WATERS AND WATER COURSES—IRRIGATION—WATER RIGHTS—EVIDENCE.

Though on adjudicating water rights in a water district a court could not determine the amount of the appropriation of each individual, and could only fix the amount to which the respective ditches were entitled, evidence, etc., taken before the referee and relating to a particular ditch, is admissible in an action to determine the respective rights of the owners of the ditch; the appropriation to the ditch in the first proceeding being presumably based upon the amount applied by the owners to a beneficial use, and rights of the parties being determinable, not according to their ownership of the ditch, but according to the amount of water which they respectively used when the decree was rendered in the first proceeding.

2. SAME—APPROPRIATION—WHAT CONSTITUTES "APPROPRIATION OF WATER."

To constitute an appropriation of water there must not only be a diversion from the stream and a carrying of it to the place of use, but it must be beneficially applied, and the measure of appropriation does not depend alone upon the amount diverted and carried, but the amount which is applied to a beneficial use must also be considered.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 473, 474; vol. 8, p. 7580.]

3. EVIDENCE—PRESUMPTIONS—PERFORMANCE OF OFFICIAL DUTY.

It having been the duty of a referee in a proceeding to adjudicate water rights in a district to take in writing the testimony introduced before him and to file it with the clerk of the district court, and it being the clerk's duty to preserve the files intact, on the introduction of the files in evidence in an action to determine the respective rights of the owners of a ditch it will be presumed that the files contain the entire record, in the absence of a showing to the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 105.]

4. WATERS AND WATER COURSES—IRRIGATION—WATER RIGHTS—EVIDENCE.

That defendant in an action to determine the rights of the owners of an irrigation ditch was not a party to a prior proceeding wherein the ditch was awarded an appropriation in an adjudication of rights in the district does not affect the admissibility of testimony taken before the referee in the prior proceeding; defendant's grantor having been one of the petitioners for such adjudication.

Appeal from District Court, Delta County; Theron Stevens, Judge.

Action by Elsie Sargent and others against

Thomas Woods. From a judgment for plaintiffs, defendant appeals. Affirmed.

R. M. Logan, for appellant. Milton R. Welch, for appellees.

BAILEY, J. Plaintiffs and defendant were owners of the Bolles & Manney ditch, taking water from the Uncompahgre river. During the year 1890 there was an adjudication of water rights in water district No. 41, being the district in which the Uncompahgre river is located. Plaintiffs and the grantor of defendant filed their statement of claim for a priority in such proceeding, and a decree was rendered awarding the Bolles & Manney ditch an appropriation of water amounting to 123½ statutory inches. This present action is brought to determine the respective rights of each of the water consumers taking water from this ditch.

It was contended by the plaintiffs that the interest of each consumer was measured by the amount of land which he irrigated at the time of and previous to the rendition of the decree. Defendant denied this, and contended that each of the five owners was entitled to a one-fifth part of the appropriation, irrespective of the amount of land which he irrigated. It appears that there was no difficulty concerning the division of the water until shortly before the bringing of this action, at which time the defendant had brought under cultivation 20 acres of land in addition to that which had theretofore been irrigated upon his premises and sought to irrigate it with water obtained from this ditch, and by so doing he diminished the quantity which plaintiffs had theretofore been able to obtain. The court found the issues for the plaintiffs, and determined that the respective parties were the owners of the following amounts of water as appropriated by the ditch, namely: Sargent, 43 inches; Garren, 33.5 inches; the heirs of Stevens, now deceased, 24 inches; Woods, 11.5 inches; and Thompson, 11.5 inches. The court also found that at the time of the rendition of the decree the parties had irrigated lands as follows: Sargent, 43 acres; Stevens, 25 acres; Garren, 35 acres; Woods, 12 acres; and Thompson, 12 acres—and concluded that the water should be divided in the same proportion. The plaintiffs, to maintain the issues on their part, offered in evidence "all of the papers, evidence, and exhibits relating to the Bolles & Manney ditch that are now on file in this court in the matter of the petition of John H. Garren and others in the adjudication of water rights in water district No. 41, state of Colorado." This was objected to because of its being immaterial and incompetent; that there was nothing to show that it was all of the testimony taken in the proceeding before the referee; that there was nothing to show that the decree was based upon this testimony; and that it was not a proceeding in which defendant Thompson or defendant

Woods was a party. This objection was overruled, and the first assignment of error raises the question as to the propriety of this ruling of the court. The original decree awarding the priority of course does not determine the rights of the several owners of the ditch or the water as between themselves. It does not and could not determine the amount of the appropriation of each individual. The only authority which the court had in the premises was to render a decree fixing the amount of the appropriation to which the ditch was entitled and the date of its priority. *Evans v. Swan*, 38 Colo. 92, 88 Pac. 149; *Putnam v. Curtis*, 7 Colo. App. 437, 43 Pac. 1056; *Oppenlander v. Lefthand D. Co.*, 18 Colo. 142, 31 Pac. 854. In order to constitute an appropriation of water there must not only be a diversion of the water from the stream and a carrying of it to the place of use, but it must be beneficially applied, and the measure of the appropriation does not depend alone upon the amount diverted and carried, but the amount which is applied to a beneficial use must also be considered. For instance, in the case of *New Mercer Ditch Company v. Armstrong*, 21 Colo. 357, 40 Pac. 989, it was determined by the decree that the ditch had a carrying capacity of about 33 cubic feet of water per second of time. It was constructed to irrigate 120 acres of land, and it was determined that the appropriator was entitled to only so much water as he could beneficially apply upon that land. In this case the proof taken before the referee shows that the ditch had a carrying capacity of something like 14 cubic feet of water per second of time, but the proof shows that there was only about 130 acres of land irrigated from the ditch. The court did not render the decree for the amount of the carrying capacity of the ditch as shown by the proof, but rendered it for 123½ statutory inches, presumably the amount of water which it considered was sufficient to irrigate that amount of land. This is somewhat less than one statutory inch per acre. The amount of the appropriation being based upon the amount of water which the consumers applied to a beneficial use, it follows as a matter of course that he who irrigated 40 acres of land had appropriated twice as much as he who irrigated but 20. The appropriation being made upon the basis of the entire number of acres irrigated from the ditch allowing less than one statutory inch to the acre, if it should be determined that each of the claimants was entitled to one-fifth of the entire appropriation, the result would be that he who irrigated 45 acres would not have sufficient to irrigate his land, and that he who irrigated but 12 acres would have more than enough. So that the rights of the parties must be determined, not according to their ownership of the ditch, but according to the amount of water which they respectively used at the time of the rendition of the de-

cree, and no more satisfactory way to prove that amount can be arrived at than by the testimony taken before the referee in the adjudication proceedings. It will not be presumed that any of the claimants would testify that they had applied to a beneficial use a less amount of water than they actually did, or that they irrigated a less number of acres than they actually did at the time the decree was being sought. The evidence of witnesses who testified at that time, while the matter was fresh in their minds, would be more apt to be correct than those who at the time of the trial testified as to conditions existing 14 years before. That this testimony was pertinent, see *Greenleaf on Evidence*, §§ 551, 553.

Defendant contends that there was nothing to show that the files contained all the testimony that was introduced before the referee. It is made the duty of the referee to take the testimony in writing and to file it with the clerk of the district court, and it is made the duty of the clerk to preserve the files intact, and, unless there is something in the record by which it affirmatively appears that some of the files or some of the depositions were missing, we will presume that these officers did their duty, and that the files contained the entire record.

It is also contended that the defendant was not a party to the original action, and consequently is not bound by the testimony introduced in that proceeding. Defendant's grantor was a party to the proceeding, and was one of the petitioners for the adjudication. The grantor's rights in this water were measured by the adjudication proceedings, and the defendant could procure from his grantor no greater rights than the grantor himself possessed. We think the court did not err in the overruling of the objection to this testimony.

The other assignments of error all go to the assertion that the findings and judgment of the court are not supported by the evidence. While the oral testimony introduced at the trial was somewhat conflicting as to the number of acres which the plaintiffs and defendant irrigated at the time of the rendition of the decree, there was no conflict in the testimony taken by the referee in the original proceedings, and the whole testimony is amply sufficient to sustain the findings and judgment of the district court.

There being no other errors assigned, the judgment will be affirmed.

Affirmed.

STEELE, C. J., and GODDARD, J., concur.

GARBARINO v. HOWARD et al.

(Supreme Court of Colorado. May 4, 1908.)

1. PARTNERSHIP—EXISTENCE—PRESUMPTION.

No presumption of partnership attaches from the use of the name "Boulder Loan Com-

pany," which implies a corporation, not a partnership.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 61.]

2. SAME—EVIDENCE.

In an action against H. on a check signed by another as the alleged manager of the firm of which H. was claimed to be a member, evidence held insufficient to warrant an inference that there was any such firm, or that H. was a member thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 78.]

3. SAME—ESTOPPEL.

Where H. was sued on a check executed by the manager of an alleged firm, H. was not liable on the theory of estoppel, though no such firm in fact existed, without proof that H.'s conduct was such as to estop him from denying the existence of a partnership, or that he was a member thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 49-53.]

Appeal from District Court, Boulder County; James E. Garrigues, Judge.

Action by Louis Garbarino against F. S. Howard and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. P. Collins, for appellant. Norton & Montgomery, for appellees.

STEELE, C. J. By the action it was sought to recover of the defendant F. S. Howard the sum of \$150 and interest upon a check in the following words: "Boulder, Colo., Oct. 31, 1903. No. ——. The Boulder National Bank. Pay to the order of George C. Hall \$150, one hundred fifty and 00-100 dollars. George C. Hall, Mgr."—which the plaintiff had cashed at the request of Hall, and which the bank refused to pay because the account on which the check was drawn was short. At the close of plaintiff's testimony the jury, by direction of the court, returned a verdict in favor of the defendants. Judgment having been entered in favor of the defendant F. S. Howard and for his costs, the plaintiff appealed to the Court of Appeals.

Several defendants are joined in the complaint, but the controversy arises over the liability of the defendant F. S. Howard. In the complaint it is alleged that Howard was a member of a partnership known as the "Boulder Loan Company"; and upon the theory that Howard was a member of such firm, and that Hall was duly authorized by the firm to sign checks, as the one offered in evidence was signed, payable out of the funds of the partnership, the plaintiff sought a judgment against Howard. The judgment must be affirmed. There is no evidence showing that Howard was a member of the firm. The assistant cashier of the bank testified that the balance to the credit of the Boulder Loan Company was drawn from the bank by a check signed: "The Boulder Loan Company, by F. S. Howard." Another witness testified that he had borrowed money of the loan company through Hall and gave his watch as security. Desiring to redeem the

watch, he inquired of Howard where Hall was, and stated that Hall had his watch and he wanted to redeem it. Howard informed him that he had the watch, and the witness thereupon redeemed it by paying the amount of the loan to Howard. No other circumstance is shown in the abstract of testimony upon which to base a finding that Howard was connected as a partner with the loan company. It was not shown that the Boulder Loan Company was a partnership. No presumption of a partnership attaches from the use of the name, for the name implies that the company is a corporation. It was not shown that the plaintiff acted upon any representation that he was dealing with a partnership, and he does not contend that he cashed the check relying upon any statement or representation of Howard that he was a member of the alleged firm. The check itself does not mention the name of the company, and it was not shown that the plaintiff, when he cashed the check, knew that there was such a concern as the Boulder Loan Company. True, he states that he several times cashed checks signed "George M. Hall, Manager," as the check in suit was signed, but nowhere does it appear that he acted with knowledge that the checks were paid from the funds of the company, nor does it appear that he acted under the belief that Howard was a member of the firm, nor is there the slightest evidence in the case to show that Howard in any way, by representation or holding out, or use of the firm name or declaration or admission, induced him to part with his money believing that he was responsible for the act of Hall or of the Boulder Loan Company, or that he was interested as a partner or otherwise in the company. To hold Howard upon this instrument, not being signed by him or by a firm of which he is a member, there must be something shown upon which the doctrine of estoppel can rest, and we can find nothing in the record upon which to base the action. It is not shown that he was a member of the firm, that he ever held himself out as being a member of the firm, that he ever declared that he was a member of the firm, that he ever admitted that he was such member, or that he ever had dealings with the plaintiff wherein he acted for the firm. Nor was there anything shown upon which the jury would have the right to base a verdict that Howard was a member of the firm, and liable upon the instrument upon which this action is based. The fact that he signed the name of the company neither proves that the concern was a partnership nor that he was a member of it. He may have been a mere employé, and, as such, authorized to sign the company's name. The fact that he was in the possession of the watch that was pledged, and accepted the money with which to redeem it, is no proof that he was a member of the firm, and, as such, liable on a check signed as the one admitted in evidence

was signed; nor do both the facts, taken together, make a case which should be submitted to a jury. Howard could be held upon the instrument even though no firm in fact existed, but in order to hold him he must have done something by which he is estopped to assert that no such firm existed.

There being no proof that any firm of which Howard was a member existed, or proof that Howard's conduct was such that he should be estopped from asserting that no such a partnership existed, or that he was not a member of it, we must affirm the judgment.

BAILEY and HELM, JJ., concur.

ROBISON v. GUMAER et al.

(Supreme Court of Colorado. May 4, 1908.)

1. JUDGMENT — LIEN — LAND STANDING IN NAME OF THIRD PERSON.

A judgment does not of itself constitute a lien upon realty of a judgment debtor appearing of record in his wife's name even in the county where it is rendered, nor does the issue of execution create such a lien.

2. CREDITORS' SUIT—CONDITIONS PRECEDENT.

A mere general judgment creditor may not maintain a creditor's suit to reach real property appearing of record in the name of the judgment debtor's wife subject to a resulting trust in his favor, but a specific lien must be procured upon the judgment debtor's interest in the real estate either by levy of an execution thereon if the realty can be identified, or by filing a transcript of his judgment in the office of the clerk and recorder of the county where the property is situate, thus securing a statutory lien binding the debtor's interest in realty for six years, or by attachment of the realty before judgment and omission to merge the attachment lien through levy of execution, or filing of the judgment transcript, and a like procedure is necessary where the debtor's interest in the property constitutes a constructive trust, or where it is otherwise of such a nature that execution or other process at law is insufficient.

Error to District Court, Fremont County; Morton S. Bailey, Judge.

Action by Lyman Robison against A. R. Gumaer and others. Judgment of dismissal on demurrer, and plaintiff brings error. Affirmed.

A. L. Taylor and J. L. Cooper, for plaintiff in error. James T. Locke, for defendants in error.

HELM, J. This action is in the nature of a creditor's bill. It is brought for the purpose of subjecting certain real estate to the payment of plaintiff's judgment. That judgment was obtained against defendant A. R. Gumaer; but the property through which satisfaction is sought appears of record in the name of defendant E. L. Gumaer, his wife. The complaint among other things alleges that this property was purchased with funds belonging exclusively to A. R. Gumaer, the title thereto, however, being taken in the name of his said wife; that there was no consideration from her for the property; and

that she holds the title in trust for the sole use and benefit of her husband. The complaint also alleges the issue of certain executions upon the judgment and the return thereof nulla bona; such issue and return being several years prior to the filing of the complaint. The foregoing statement is sufficient for the purposes of the present opinion. Defendants demurred to the complaint on the ground that it failed to state a cause of action, and also on the further ground that upon the face thereof the alleged cause of action appeared to be barred by two of our limitation statutes. The court sustained this demurrer, and, plaintiff declining to amend, judgment was rendered dismissing the action.

The facts pleaded by plaintiff and admitted by the demurrer show a resulting trust in the property described in favor of the judgment debtor A. R. Gumaer; and under proper circumstances such equitable interest might by this form of proceeding be determined and subjected to the payment of plaintiff's judgment. The printed arguments are mainly devoted to a discussion of the statutes of limitation; but we deem it unnecessary to consider these arguments, or pass upon the applicability of those statutes, for the finding and judgment of the court below must be sustained upon the other branch of the demurrer. Some authorities hold that such a creditor's bill as the one before us may be maintained by a mere judgment creditor; but in this state it is otherwise. With us, save in the federal court, the judgment does not itself alone constitute a lien upon the realty of the judgment debtor even in the county where it is rendered, nor does the issue of execution create such lien save upon personalty. The doctrine has become thoroughly established that a mere general judgment creditor may not maintain this proceeding in connection with real estate. That is to say, it is not sufficient in this respect for plaintiff in cases like the present to simply allege and prove the existence of his judgment together with the issue of execution thereon and return thereof nulla bona. He is required to go a step further, and procure a specific lien upon the interest of the judgment debtor in the real estate by means of which he seeks satisfaction. This he may do in at least three ways, viz.: By levy of an execution thereon in the manner provided by law if, as in this case, the realty can be identified; by filing a transcript of his judgment in the office of the clerk and recorder of the county wherein the property is situate, and thus securing a statutory lien which binds all interest in realty then owned or afterwards acquired by the judgment debtor during the period of six years from entry of the judgment; or by attachment of realty before judgment and omission to merge the attachment lien through levy of execution or filing of the judgment transcript. Until he has acquired a specific lien in one of these

methods or by some other method, if such other method there be, he is not in position to invoke relief through a creditor's bill in cases like the present. And this is true where the judgment debtor's interest in the property exists in the form of a resulting trust as well as where it constitutes a constructive trust, or where it is of such a nature otherwise that execution or other process at law is insufficient. "The doctrine established by the authorities is that the judgment must be a lien on the real estate sought to be subjected to sale on execution through the aid of a creditor's bill." *Barnes v. Belgly*, 9 Colo. 479, 12 Pac. 908. "In cases like the present it is requisite that the judgment shall be made a lien upon the property which is to be subjected to it. Where the writ is thus operative, the lien may possibly be acquired by the execution, but otherwise the judgment must be either a lien under the statute when entered, or must be made one by the taking of those steps which the statute points out. That in some way the lien must be acquired and exist at the time the bill is filed is clearly settled." *Arnett v. Coffey*, 1 Colo. App. 38, 27 Pac. 614; *Dunklee v. Rose*, 12 Colo. App. 424, 56 Pac. 349; *Stephens v. Parvin*, 33 Colo. 63, 78 Pac. 688; *Fox v. Lipe*, 14 Colo. App. 261, 59 Pac. 850. The case of *O'Connell v. Taney*, 16 Colo. 353, 27 Pac. 888, 25 Am. St. Rep. 275, is more nearly analogous in its facts to the case at bar than any of the other decisions by this court or by the Court of Appeals. And greater reliance is placed thereon by counsel for plaintiff in error than upon any of the other authorities cited. But the complaint in that case alleged and the evidence taken at the trial showed that a specific lien was obtained by the prompt filing of a transcript of the judgment in the office of the clerk and recorder of the proper county.

This view of the law seems to be somewhat technical, but it rests upon substantial grounds. It is in harmony with the general principle requiring all legal means to be invoked before an appeal is made to equity. Again, the enforcement of this class of liens is a matter within the peculiar province of equitable jurisdiction. And, finally, under our statute, the advantage of a lien upon real estate may be obtained in every case where the maintenance of a judgment creditor's bill would be possible in connection therewith. By this statute all interests of the judgment debtor in realty are expressly made subject to execution levy and sale. Such interests may be legal or equitable. They may be in the form of a resulting trust, a constructive trust, a vendor's lien, a leasehold estate, etc. In a pure creditor's bill the specific real estate through which satisfaction of the judgment is sought must be pointed out, and the alleged interest of the judgment creditor therein must be specified. Hence the same knowledge or information that would enable the judgment creditor to institute this pro-

ceeding would also enable him to make a valid levy of his execution, and thus obtain a lien upon the realty mentioned. With us the sheriff perfects such levy by filing with the county clerk and recorder the statutory notice. Therefore, not only is it unnecessary to adopt the procedure existing formerly in cases of this kind in the absence of a specific lien, but it is doubtful if such procedure could be invoked at all. In general, to maintain such a suit, the issue of an execution and return thereof unsatisfied in whole or in part is a necessary averment. Without such averment the complaint or bill would be fatally defective. But under the statute last above mentioned this averment could not truthfully be made in a case like the one at bar; for, as already observed, information sufficient to identify the real estate for the purposes of a creditor's bill would also enable the judgment creditor to perfect the levy of his execution thereon, and thus preclude a return thereof *nulla bona*. Having made such levy, he might at once advertise and sell the property; and the purchaser at such sale might then proceed in equity to determine the interest so purchased. But the institution of an action in the nature of a creditor's bill immediately after the levy and the determination of such interest before the sale is for obvious reasons preferable. Such procedure is decidedly to the interest of the judgment debtor, because it tends to avoid the sacrifice almost necessarily suffered through the sale of a clouded and uncertain title to or interest in real property. *O'Connell v. Taney*, *supra*.

Under the circumstances it is no great hardship to require that the judgment debtor before soliciting this kind of equitable relief obtain a lien pursuant to one of the methods provided. It is sufficient, however, to say that the question is *stare decisis* in this state. The judgment of the district court must be affirmed.

Affirmed.

STEELE, C. J., and MAXWELL, J., concur.

RUSSELL et al. v. COURIER PRINTING & PUBLISHING CO.

(Supreme Court of Colorado. May 4, 1908.)

1. CONTRACTS — VALIDITY — "PUBLIC POLICY" IN GENERAL.

"Public policy," with respect to the administration of the law, is that rule of law which declares that no one can lawfully do that which tends to injure the public or is detrimental to the public good.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 6, pp. 5813, 5814; vol. 8, p. 7773.]

2. SAME.

All contracts contrary to public policy are void, and if either party to such a contract seeks redress from the other he will be left by the courts in the position in which he placed himself; the rule being to protect the public by pre-

venting such contracts being made and avoiding evils which naturally result therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 498-511.]

3. SAME.

In determining from the particular facts of each case whether the contract is contrary to public policy, and therefore unenforceable, the test is, not so much what acts the parties performed or contemplated doing in order to carry out their agreement, or its actual result, but, rather, whether or not its tendency is evil.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 498-511.]

4. SAME—INFLUENCING ACTION OF ADMINISTRATIVE OFFICERS.

Agreements for procuring government contracts, where compensation is contingent upon the success of the promisee's efforts, are void as against public policy without reference to whether improper means are contemplated or employed in their execution, as the law conclusively presumes that the tendency of such agreements is evil and removes temptation by refusing them recognition in the courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 606, 607.]

5. SAME.

Laws 1901, p. 179, c. 78, fixes the rate of compensation for legal advertising in newspapers at so much for each insertion. Const. art. 19, § 2, requires that notices of proposed amendments to the Constitution shall be published in not more than one newspaper of general circulation in each county for four successive weeks, etc. The Secretary of State ordered the publication of proposed amendments in plaintiffs' weekly newspaper. Thereafter, defendant, desiring to publish the amendments in its daily paper, agreed with plaintiffs that, in consideration of plaintiffs' relinquishment of the order for publication and the furnishing of stereotyped plates of the amendments, defendant would pay plaintiffs one-half the amount received by it for such publication in its daily paper. The agreement was entered into before the Secretary of State released plaintiffs of their obligation or contracted with defendant for the publication. There were other papers which might have been selected by the secretary. Plaintiffs were required to publish only once a week, but the contract secured by defendant provided for daily insertions, so that defendant would receive as compensation more than six times what plaintiffs were to receive. There was no suggestion that either party employed, or intended to employ, any improper means to carry out the terms of the agreement. *Held*, that plaintiffs could not enforce the agreement; it being contrary to public policy, in that its carrying out depended upon the parties' ability to induce the Secretary of State to release plaintiffs from their obligation and to make a bigger contract with defendant, and offered a temptation to resort to improper means.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 606, 607.]

Error to District Court, Larimer County; Christian A. Bennett, Judge.

Action by Howard Russell and another against the Courier Printing & Publishing Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

The question presented by plaintiffs in error is whether the contract which they undertook to enforce against defendant in error is void as being against public policy. The trial court held that it was, and they bring the case here for review on error.

By the amended complaint it appears that

plaintiffs obtained from the defendant the following contract: "Whereas, David A. Mills, Secretary of State of Colorado, has ordered the publication of proposed amendments to the Constitution of said state, as provided for in Senate Bills Nos. 1, 2, 21, 317 and 318, in the Fort Collins Express, owned by Russell & Sheppard; and whereas, the Courier Printing & Publishing Company desires to have said contract annulled and a new one made for the publication of the said proposed amendments in its paper, the Daily Courier: Now, therefore, said the Courier Printing & Publishing Company agrees that, in consideration of the relinquishment of said order for publication by said Russell & Sheppard and the furnishing by said Russell & Sheppard of the stereotyped plates of said amendments, it will pay to said Russell & Sheppard one-half the amount received by it for said publication in said Daily Courier, less such sum as may be paid to the Republican State Central Committee by said the Courier Printing & Publishing Company."

Plaintiffs alleged in their amended complaint, in substance, so far as necessary to notice, that before securing this agreement they owned and published a weekly newspaper at Ft. Collins, in the county of Larimer, known as the "Fort Collins Express"; that at this time there was also published in Larimer county six other weekly newspapers; that the Secretary of State ordered the publication of certain proposed amendments to the Constitution; that they accepted the order made by the Secretary of State, entered into a contract with him for the publication of such amendments, and prepared stereotyped plates for the printing thereof; that thereafter they learned that it was the policy of the Secretary of State, so far as practicable, to publish the notices of such amendments in daily, instead of weekly, newspapers; that the defendant, through its manager, represented to them that, if they would rescind the contract which they had made with the Secretary of State for the publication of such proposed amendments, he (the manager) believed he could secure the publication thereof in the daily paper published by the defendant, and requested the plaintiffs to rescind their contract, so that the Secretary of State would be at liberty to award a contract to the defendant, and the defendant, through its manager, then and there proposed to pay them, as a consideration for rescinding such contract, one-half of the amount received by it on account of such publication, less any amount that it might contribute to the expense of the Republican State Central Committee; and that plaintiffs accepted the foregoing proposition, whereupon the defendant executed and delivered to them the agreement above set forth. It is then alleged that, relying upon this contract, they rescinded the contract made with the Secretary of State for the publication of the proposed amendments, and re-

quested him to cancel it, which was accordingly done, and that thereafter the Secretary of State made a new contract with the defendant for the publication of such proposed amendments; they (the plaintiffs) furnishing the defendant the stereotyped plates therefor. It is further alleged that the defendant received from the Secretary of State the sum of \$1,200.60 for the publication of such amendments, that it did not contribute anything to the Republican State Central Committee, and judgment is prayed against it for one-half of the amount so received.

Geo. W. Bailey, Thomas J. Leftwich, and Newton W. Crose, for plaintiffs in error. J. Fred Farrar, for defendant in error.

GABBERT, J. (after stating the facts as above). "Public policy," with respect to the administration of the law, is that rule of law which declares that no one can lawfully do that which tends to injure the public, or is detrimental to the public good. 23 Cyc. 455. All contracts contrary to public policy are void. If either party to a contract of that character seeks redress from the other, he will be left by the courts in the position in which he placed himself. It does not sound well for a defendant to say that a contract which he deliberately entered into, and of which he has had the benefit, is void because contrary to public policy; but it is not for his sake, or for his protection, that the objection is allowed, but for the protection of the public, by thus preventing this character of contracts being made, and avoiding evils which naturally result therefrom. *Hope v. Linden Park Ass'n*, 58 N. J. Law, 627, 34 Atl. 1070, 55 Am. St. Rep. 614; *Drake v. Lauer*, 93 App. Div. 86, 86 N. Y. Supp. 986. It is clear that contracts contrary to public policy cannot be enforced, but the difficulty arises in determining whether a given contract comes within this rule. Each case therefore, where the question is raised, must be determined from its own particular facts. In determining this question the test is, not so much what acts the parties performed or contemplated doing in order to carry out their agreement, or its actual result, but, rather, whether or not its tendency is evil. *Wood v. Casserleigh*, 30 Colo. 287, 71 Pac. 360, 97 Am. St. Rep. 138; *Tool Co. v. Norris*, 2 Wall. (U. S.) 45, 17 L. Ed. 868; *McMullen v. Hoffman*, 174 U. S. 689, 19 Sup. Ct. 839, 43 L. Ed. 1117; *Richardson v. Crandall*, 48 N. Y. 348; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; 15 Enc. 934; 3 Supp. Enc. 496. The Supreme Court of the United States has declared, in effect, that agreements for procuring government contracts, where compensation is contingent upon the success of the promisee's efforts, are void as against public policy, without reference to the question of whether improper means are contemplated or employed in their execution, for the reason that the law conclusively presumes that the

tendency of such agreements is evil, and closes the door to temptation by refusing them recognition in the courts. *Tool v. Norris*, supra. Every citizen is vitally interested in a pure administration of the affairs of government, and, in order to attain this desired end, the law will not lend its aid to the enforcement of a contract between parties of a character which tends to tempt one or both to resort to sinister or improper influences to secure contracts from our government. 9 Cyc. 485; *Greenhood on Public Policy*, 363-365.

Improper influences are sometimes employed to secure government contracts, and occasionally, in awarding them, willing ears are lent to corrupt propositions, and when, by a contract between parties, a motive is disclosed to resort to improper means to secure contracts from the government, the only safe course to pursue is to meet the evil it suggests by striking it down from its inception. In the present case, there is not the slightest suggestion that either party to the contract employed, or intended to employ, any improper means to carry out its terms; but it is of a nature where such means to effect its object might be employed, and that is sufficient to condemn it. The law adopts this prohibitory rule with respect to such contracts to prevent fraud, and remove temptation to commit it, without regard to whether fraud was contemplated or committed. The law fixes the rate of compensation for legal advertising in newspapers at so much per each insertion. *Laws 1901*, p. 179, c. 78. The Constitution requires that notices of proposed amendments to the Constitution shall be published in not more than one newspaper of general circulation in each county for four successive weeks previous to the next general election for members of the General Assembly. Section 2, art. 19. The contract which plaintiffs had was for publications which would be made but once a week. The contract which it was the purpose of the arrangement made by plaintiffs and defendant to secure for the defendant contemplated daily insertions, so that the latter would receive for the notices which the plaintiffs had contracted to publish more than six times as much as plaintiffs would have received, which was to be divided between them. In other words, plaintiffs, by surrendering their contract, would, if the defendant was awarded the contract to publish the notices which they had agreed to publish, and published them, receive more than three times what they would had they published the same notices under their contract with the state. This was the inducement for the plaintiffs to surrender their contract with the state. The carrying out of this arrangement with the defendant by which this end was to be attained was contingent upon their ability to induce the Secretary of State to release them from their obligation. This contingency, in the circumstances of this case, invali-

dated the contract of defendant. It matters not that the parties entered into this agreement in good faith, or whether improper means were contemplated or employed to bring about the result which they intended by entering into it, or that the state was not a party, and was free to enforce the contract which it had made with plaintiffs, or could have selected some other paper in which to publish the notices of the proposed amendments. The fact remains that it was the intent of plaintiffs, through the contract which they now seek to enforce, to secure a sum of money from the state which they could not have obtained except by entering into, and carrying out, such contract. This result was dependent entirely upon a contingency of such a character that it offered a temptation to resort to improper means to bring it about. For this reason the tendency of the contract under consideration was evil, without reference to the question of whether fraud was intended by the parties or employed in its execution, or whether the state was, or was not, defrauded, and cannot be enforced.

The judgment of the district court is affirmed.

Judgment affirmed.

STEELE, C. J., and CAMPBELL, J., concur.

PETTIT v. MAYHEW et al.

(Supreme Court of Colorado. May 4, 1908.)

1. FRAUD, STATUTE OF—NECESSITY OF PLEADING STATUTE AS DEFENSE.

The statute of frauds, if relied upon, must be specially pleaded as a defense either by demurrer or by answer as the case may be.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 363.]

2. APPEAL—ASSIGNMENT OF ERRORS—NECESSITY.

To insure consideration of a subject by the Supreme Court, it must be covered by an assignment of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2968-2982.]

3. SAME—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Findings by the trial court on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

Appeal from District Court, Teller County; William P. Seeds, Judge.

Action by Lafe Pettit against George W. Mayhew and others. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

George H. Kohn, for appellant. Henry H. Clark, for appellees.

HELM, J. Appellant was the owner of a one thirty-second interest in a certain lease on the W. P. H. and other lode mining claims in Teller county. The lease was not taking care of itself, and for several months he paid

the assessments made upon his interest for operating expenses. But on August 10 or 12, 1902, the exact date is uncertain, being in arrears for the July and June assessments, he was requested to make payment of the amount so due. According to the testimony of one Harding, who was manager and collected these assessments, plaintiff, in response to such request, said: "I don't believe I will put any more money in it. I have carried it long enough." Also: "I will transfer all my interest in the lease to Mayhew and Pullen, and will sign any paper that you may get up to that effect." Likewise: "At any time that you will bring me a paper I will sign it." Appellant not only did not pay the June and July assessments, but he also discontinued bearing any portion of the leasing expenses, and gave no further attention thereto. He subsequently went to Tacoma, Wash., and did not return till shortly before commencing this action. Mayhew and Pullen, thus mentioned, were the original lessees, and any interest relinquished or abandoned by sublessees reverted to them. The material portions of the testimony of Harding were contradicted by appellant and the witness Frame. At the time of the foregoing conversation the lessees had been obliged to advance between \$8,500 and \$9,000; but shortly thereafter the property began to pay expenses and from December, 1902, a monthly profit was realized from the lease. On the 8th of April, 1903, appellant began the present action to have his one thirty-second interest in the lease recognized, and to recover from Mayhew and Pullen a corresponding proportion of the profits previously realized from the undertaking. He admitted his default in the July and June assessments, and that he had paid no assessment since, but claimed that in the conversation of August 12th, above mentioned, he demanded from Harding a statement of the account before making payment of the sum due from him, and that later in August and in October he repeated this demand; that such statements were rendered monthly and one was promised in this instance, but was never furnished; and that he was then ready and has ever since been ready to make such payments upon the production of said statement. The cause was tried to the court. And upon completion of the evidence and argument the court made special findings of fact, and entered a decree dismissing the complaint.

Two propositions are now urged for a reversal of that decree, viz.: That appellant's one thirty-second of said lease constituted an interest in realty which under the statute of frauds could not be surrendered except by writing; also, that the evidence received at the trial did not in any event justify the court's finding or decree.

Upon the first of the foregoing questions it is sufficient to say that the statute of frauds is a defense of which defendant may or may not avail himself. If he desires to take ad-

vantage thereof, unless the infirmity appears in the complaint, he must affirmatively plead it by answer, and he must rely upon it at the trial. This appellant did not do; nor did he in any other way raise or attempt to present the question in the court below. Even in the assignments of error here this subject is unmentioned. The first allusion to the statute of frauds occurs in appellant's printed brief supporting the present appeal. The propositions that this statute, if relied on, must be specially pleaded as a defense either by demurrer or by answer, as the case may be, also that, to insure consideration of a subject by this court, it must be covered by an assignment of error, are too well known to require the citation of authorities. Hence this branch of appellant's contention must be denied. The court below was therefore at liberty to consider from the evidence whether appellant had relinquished his interest in the lease, notwithstanding the fact that such relinquishment was not in writing. And it is unnecessary for us to follow counsel with a discussion of the distinction between a relinquishment or surrender and an abandonment of appellant's said interest as sublessee.

Turning to the other subject urged for reversal—i. e., that the findings and judgment of the court below are not sustained by the evidence—the position of appellant is also untenable. The findings of the district court touching the surrender of appellant's interest and upon other questions involved are in accord with testimony disclosed by the record. Some of this testimony is, it is true, contradicted by evidence offered on behalf of appellant. But the trial court resolved such conflicts in favor of appellees, and interference by us upon this ground would be unwarranted. The judgment must be affirmed.

Affirmed.

STEELE, C. J., and BAILEY, J., concur.

IRVING v. PEOPLE.

(Supreme Court of Colorado. May 4, 1908.)

1. CRIMINAL LAW—APPEAL—QUESTIONS PRESENTED BY RECORD—MOTION TO QUASH—EVIDENCE.

In a criminal prosecution, where the abstract of the record does not contain a copy of the information, nor any of the evidence offered on the trial, nor the motion to quash the information and the ruling thereon, error in overruling the motion cannot be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2924.]

2. SAME—INSTRUCTIONS.

In a criminal prosecution, where the abstract of the record does not contain the evidence nor a copy of the information, and the instructions given are correct as abstract propositions of law, it will be presumed that they were properly applied to the evidence introduced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3032.]

3. SAME—TRIAL—ORAL CHARGES—WHAT CONSTITUTES.

3 Mills' Ann. St. § 1468a, provides that the district court shall only instruct the petit jury as to the law of the case, and such instructions shall be in writing, and he shall not orally qualify or explain instructions to the jury after they are given. In a criminal prosecution, after having instructed the jury in writing, the trial court, at the request of the district attorney, stated orally to the jury that, the state having elected to stand upon one of the two acts testified to, evidence of the second act could not be considered for the purpose of establishing a distinct offense, but only in corroboration of the prosecuting witness. Held, that the remarks of the trial court did not constitute an instruction within the statute, but merely an oral direction which in no way modified or qualified the instruction given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1951.]

4. SAME—APPEAL—REVIEW—HARMLESS ERROR—ERRORS FAVORABLE TO COMPLAINING PARTY.

Even if the court's remarks could be considered an instruction, as it was favorable to defendant, it was not prejudicial and did not constitute reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3085-3089, 3154-3169.]

5. SAME—REMARKS OF COUNSEL—RETALIATORY REMARKS.

While, in a criminal prosecution, the defendant's character cannot be inquired into by the state unless he himself seeks to establish good character, and while, in a prosecution for rape, remarks of the prosecuting attorney that defendant, while having the right to do so, did not dare to put witnesses on the stand to show his character or reputation, were improper, yet where they were made in reply to remarks by defendant's attorney that the prosecution had used every effort to find something against defendant's character and would have done so if it could, defendant's counsel having first gone outside the record, and commented upon defendant's character, and criticised the prosecution for omitting to produce evidence which it had no right to produce, the remarks by the prosecuting attorney in reply were not reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1681.]

Error to District Court, City and County of Denver; Harry C. Riddle, Judge.

George B. Irving was convicted of rape, and he brings error. Affirmed.

John A. Deweese and C. W. Coykendall, for plaintiff in error. William H. Dickson, Atty. Gen., and George D. Talbot, Asst. Atty. Gen., for the People.

GODDARD, J: We learn from the briefs of counsel that the plaintiff in error was tried and convicted under section 1211, Mills' Ann. St. The abstract does not contain a copy of the information, the sentence imposed, nor any of the evidence offered or introduced upon the trial. Error is assigned upon the overruling of a motion to quash the information. The record does not contain the motion to quash, or the ruling of the court thereon. We are therefore unable to consider this objection. Nor can we consider the errors assigned upon the giving and re-

fusing of instructions, since none of the evidence is before us to which the same were applied. Those given seem to correctly announce abstract propositions of law, and we must presume that they were properly applied to the evidence introduced. Those refused may or may not express the law applicable to the facts proven. This we cannot determine in the absence of such facts.

The only questions presented that we can consider are:

1. Whether the court committed a reversible error in orally stating to the jury that the district attorney having elected to stand upon the first of the two acts testified to by the prosecuting witness, and cautioning them that the evidence as to the second act could not be considered for the purpose of establishing a distinct offense, but solely for the purpose of corroboration or explanation of the testimony given by the prosecuting witness in regard to the first act, and in stating to them that the defendant could be found guilty, if at all, only of the first offense charged. Counsel for plaintiff in error excepted to this statement upon the ground that it constituted an oral instruction and was in violation of section 1468a, 3 Mills' Ann. St. which enacts: "The district court, in all cases, both civil and criminal, shall only instruct the petit jury as to the law of the case; and such instructions shall be reduced to writing, * * * and he shall in no case, after instructions are given, orally qualify, modify, or in any manner explain the same to the jury; Provided, That upon request of both parties such instructions may be given orally, but in such case if either party except to such instructions, the same and every part thereof shall immediately be reduced to writing." We think this objection is, under the circumstances, untenable for two reasons: (1) The oral remarks complained of were made in pursuance of a request of the district attorney to caution the jury as to the purpose for which the evidence relating to the second act was admissible, and do not in our opinion constitute an instruction within the contemplation of the statute, but was merely an oral direction during the progress of the trial which in no way modified or qualified any instruction theretofore given; (2) if the statement could be considered as an instruction as to the law, it being in favor of the plaintiff in error, giving it orally was at most an error without prejudice, and one that does not constitute a ground for reversal.

2. The error assigned upon the remarks of the district attorney in his closing argument presents a more serious question, and while we think such remarks were improper in so far as they reflected upon the defendant's character, in regard to which no testimony, as we are informed by counsel, was introduced, and in face of the instruction given that: "The law presumes that a person has a good character and reputation un-

til the contrary is shown, and the jury have no right to consider the omission on the part of the defendant to introduce evidence of a good character as a circumstance against him or as tending to show his guilt in this case"—the only justification claimed for making such remarks was the statement theretofore made by counsel for defendant in his argument to the jury, to wit: "That the prosecution had raked hell with a fine-tooth comb to find something against the defendant, and if they could have found anything against him they would have shown it." The remarks complained of were in reply to this statement of counsel for defendant, and were to the effect that counsel for defendant, while having the right to do so, did not dare to put decent, reputable witnesses on the stand who had known defendant to show that he had any character or reputation in the community. While it is the law that a prisoner's character cannot be inquired into or commented upon by the prosecuting attorney until he himself has sought to establish his good character, yet if his counsel goes outside of the record and comments upon his character, and especially when, as in this case, he criticises the prosecution for omitting to produce evidence which it had no right to produce, and charges that it was unable with all its diligence to show anything against defendant's character, in view of this statement and the inference that it was intended the jury should draw therefrom, we think the district attorney did not commit a reversible error in replying that it was within the province of the defense only to introduce that character of evidence, and that, not having done so, it did not dare to do so. While, even under these circumstances, the conduct of the prosecuting attorney is not wholly excusable, yet in the light of the provocation given therefor we do not think it constitutes an error which the defendant, under the circumstances, can avail himself of.

Upon the record before us there is no question presented that would justify a reversal of the judgment of the court below. It is therefore affirmed.

Affirmed.

STEELE, C. J., and BAILEY, J., concur.

MILLER v. DE GRAFFENRIED.

(Supreme Court of Colorado. May 4, 1908.)

COVENANTS—WARRANTY—BREACH.

A deed described the land conveyed, as "subject * * * to one certain trust deed incumbrance * * * which said incumbrance has been assumed by" a third person, and contained a general covenant of warranty against all incumbrances except for taxes for a designated year, which the grantee agreed to pay. Held, that the covenant of warranty was not a covenant that the third person would pay the trust deed at maturity, but applied only to the estate conveyed, which was an equity of redemp-

tion; the statement that the incumbrance had been assumed by the third person being at most an added identification of the incumbrance.

Error to District Court, Delta County; Theron Stevens, Judge.

Action by Austin E. Miller against James R. De Graffenried. There was a judgment of dismissal, and plaintiff brings error. Affirmed.

Porter Plumb, for plaintiff in error. Charles L. Pike, for defendant in error.

GODDARD, J. On the 19th of October, 1896, plaintiff in error purchased from defendant in error a certain tract of land at the agreed price of \$400. The deed described the land conveyed as follows: "The west one-half of lot one, and all of lot two in section one, township fifteen south of range ninety-five west, of Sixth principal meridian, containing sixty acres more or less. Subject however to one certain trust deed incumbrance for the sum of \$400 and interest, which said incumbrance has been assumed by one G. A. Grant"—and contained a general covenant of warranty against all incumbrances, except taxes for 1896, which the grantee agreed to pay. Thereafter suit was brought to foreclose the trust deed mentioned. The defendant was duly served with notice of the suit, and failed and refused to defend the same. Suit was prosecuted to final judgment, and judgment rendered in the sum of \$610 and costs, and a decree of foreclosure entered. The property was sold under the decree for the amount of the judgment and costs, and plaintiff was compelled to, and did, pay that sum to redeem the premises and clear the title thereto.

Upon the foregoing facts the plaintiff predicates his right to recover the amount so expended, and assigns error upon the ruling of the trial court in sustaining a demurrer to the complaint, upon the ground that it did not state a cause of action, and in holding that the clause, "subject, however, to one certain trust deed incumbrance for the sum of \$400 and interest, which said incumbrance has been assumed by one G. A. Grant," was a limitation upon the estate granted, and that the deed conveyed only an equity of redemption to which alone the covenants in the deed applied; his contention being that the words last quoted are merely words of description, and not words of limitation of the estate conveyed. We do not think that this contention of counsel can be upheld. "Subject always to a manifest intention to the contrary, general covenants will be construed as limited to the premises and estate purported and intended to be conveyed; they are intended to protect, and cannot be construed to enlarge, the estate granted." 11 Cyc. p. 1059, and cases cited. And under this rule of construction it has been frequently held that a statement in a deed, after a specific description of the granted premises, that they

are subject to a mortgage, qualifies the estate granted, and a subsequent covenant of warranty applies to the estate as thus qualified, which is an equity of redemption. In 8 Am. & Eng. Enc. Law (2d Ed.) the rule is stated as follows: "Though the dependent covenants in a deed of conveyance may be absolute in form, yet they are to be construed with reference to the subject-matter of the deed. Their office being merely to defend that which has been granted. * * *" Page 66, subd. "c." "So where a conveyance of land is expressly qualified as being subject to a mortgage, the covenants in the deed, though absolute, apply only to the equity of redemption, which is all that such a deed purports to convey." Id. p. 70, subd. "dd." Among the cases announcing this rule, see *Freeman v. Foster*, 55 Me. 506, 511; *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547; *Brown v. South Boston Savings Bank*, 148 Mass. 300, 19 N. E. 382; *Walther v. Briggs*, 69 Minn. 98, 71 N. W. 909. In *Brown v. South Boston Savings Bank*, supra, it is said: "But while covenants may be, and often are, distinct from each other, and made for different objects, all are necessarily connected with the granting portion of the deed and with the description of the premises there given, and must be applied to that. The words 'subject to a mortgage * * *' are not added to the description of the land in the granting part to identify it, but to qualify the estate granted, and to that description as thus qualified the warranty applies. It receives its full force when applied to the subject of the grant, and that must be held to have been an equity of redemption; otherwise, the qualifying words are treated as without force." In *Drury v. Holden*, supra, *Sheldon, J.*, speaking for the court, said: "It is said the deed from Daggett to Drury contained full covenants of warranty, to which there was no exception; that thereby Drury's grantor covenanted that he would warrant and defend the lots conveyed against the holders of all incumbrances. The covenants extended only to what was conveyed, and that was, not the lots absolutely, but the lots subject to the incumbrance. The real covenant was that, otherwise than as subject to the incumbrances named, the lots were free from all incumbrances, and that the grantor would warrant and defend the titles."

It clearly appears in the granting portion of the deed that the estate intended to be conveyed, and that was conveyed, was the title to the premises described, subject to the lien of the incumbrance—in other words, the equity of the grantor therein—and the statement that such incumbrance had been assumed by G. A. Grant was at most an added identification of the incumbrance, and the defendant did not by his covenant of warranty guarantee that Grant would pay said indebtedness upon maturity, and in the circumstances no breach of the covenant is shown.

It follows that the court below correctly held that the complaint did not state a cause of action. The judgment dismissing the action will therefore be affirmed.

Affirmed.

STEELE, C. J., and BAILEY, J., concur.

TYLER v. McKENZIE.

(Supreme Court of Colorado. May 4, 1908.)

1. FORCIBLE ENTRY AND DETAINER—UNLAWFUL DETAINER AND RENT OR DAMAGES.

Under the forcible entry and detainer act (Mills' Ann. St. c. 53, §§ 1969, 1996), the only question to be determined in an action for unlawful detainer is the right to possession, and a demand for damages or rent cannot be joined in an action for such possession, except that in an action commenced under section 1973, subd. 4, a recovery for rent may be had.

2. APPEARANCE—WAIVER OF OBJECTIONS—DEFECTS IN PROCESS AND SERVICE.

Where a complaint sufficiently stated a cause of action within the forcible entry and detainer act (Mills' Ann. St. § 1973, subd. 3), notwithstanding claims for damages and rent, matters not triable in such an action, defendant, by appearing and answering, cured defects in the summons and its service because of a failure to comply with sections 1980, 1991, and his misapprehension of the character of the action arising from the allegations and prayer for damages and rent and the substance of the summons and manner of service supposing the action to be brought under Mills' Ann. Code Civ. Proc. c. 23, authorizing an action of ejectment and damages, cannot be availed of to change the rule that an actual appearance cures a defective service, when except for such defect the court would have jurisdiction of the person and subject-matter.

3. TRIAL—INSTRUCTIONS—WRITTEN INSTRUCTIONS.

It is reversible error for the court, over objection of a party, to instruct the jury orally.

Error to Pitkin County Court; Henry C. Rogers, Judge.

Action by L. M. McKenzie against Rose Tyler. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

This action was commenced by defendant in error, plaintiff below, against plaintiff in error, defendant below, in the county court of Pitkin county, by filing a complaint averring facts sufficient to constitute a cause of action, under subdivision 3 of section 1973 of the forcible entry and detainer statute (Mills' Ann. St.) and, in addition, claims for damages and unpaid rent. The summons was issued and served by an attorney. Counsel for defendant, supposing, from the averments and prayer of the complaint and the substance and manner of the service of the summons, that the action was brought under the provision of chapter 23 of the Civil Code (Mills' Ann. Code), appeared and filed an answer, denying the allegations of the complaint upon which plaintiff predicated her right to recover possession of the premises in controversy and her right to recover for rent and damages; and for a further answer

and defense averred that defendant entered into possession of the premises under an agreement with the plaintiff for their use and occupancy for a term not exceeding one year, and alleged a violation of said agreement by the plaintiff to her damage of \$100. Plaintiff filed a replication denying the allegations of new matter contained in the answer. When the cause came on for trial, both parties appearing, the court of its own motion announced that the case would be tried under the statute relating to forcible entry and detainer. Whereupon defendant objected to proceeding under the statute, and moved to dismiss the action on the ground that the court was without jurisdiction to entertain such proceeding, for the reason that the plaintiff had not complied with the mandatory provisions of the statute in bringing the action. The court overruled the motion, and ordered the parties to proceed with the trial. Defendant demanded a jury and was required to deposit \$20 for jury fee and costs. Upon the close of the testimony the court declined to give the written instructions asked by either party, and, against the objection of both parties, said to the jury: "The tenancy proved by the testimony in this case is one from month to month and terminable on 10 days' notice. Defendant is guilty of unlawful detainer of the premises involved from and after December 5, 1904. She owes plaintiff rent upon same from November 5, 1904, at \$25 per month, less whatever sum within the limit of \$100 that you may find she has been damaged by failure of plaintiff to live up to her contract as to the terms of defendant's occupancy thereof. Insert the amount of such damage found, at the blank space following the last \$ mark in this form of verdict."

The court refused to allow counsel to argue any question before the jury except the question of damages. The jury returned a verdict in conformity with the instruction. Both parties objected to the court's receiving the verdict, and gave notice of motion for a new trial. Motion for new trial was overruled, and thereupon the following judgment was rendered: "Whereupon, it is by the court considered, ordered, adjudged and decreed that defendant is guilty of unlawful detainer of the premises in question, substantially as charged in the complaint herein; that plaintiff have restitution of possession of the same; and that plaintiff do have and recover of defendant herein her costs, to be taxed. * * * It is further ordered and adjudged that the verdict of the jury heretofore recorded is approved by the court, and the recording of same is hereby approved and affirmed." The defendant brings the case here on error.

Thomas A. Rucker, for plaintiff in error.

GODDARD, J. (after stating the facts as above). 1. Counsel for plaintiff in error in-

sist that the court committed a fatal error in assuming jurisdiction to try the action under the statute relating to forcible entry and detainer, in the face of the record which shows a noncompliance with some of its essential requirements, relying upon the well-settled rule that, when the jurisdiction given by statute is clearly a summary one, and the manner of obtaining such jurisdiction is prescribed by the statute, such provisions are mandatory and must be strictly followed, and the record must affirmatively show a compliance therewith. It appears affirmatively from the record that the provisions of the statute in regard to the issuance and service of a summons were not complied with. These provisions require that "the court shall issue a summons, * * * that it shall command the officer to whom it may be directed, to summons the person. * * *" Section 1980, Mills' Ann. St. "Service of summons issuing out of a court of record shall be made in the same manner, and with like effect as prescribed before justice courts, in section 11 of this act. * * * Proof of such service shall give the court jurisdiction of the person of the defendant, and of the subject-matter of the suit." Section 1991, Mills' Ann. St. The following is the record entry in regard to the return and service of the summons in this case: "The original summons was never returned. Counsel for both parties agreed at the trial that the copy of summons in the files, from which this copy is made, is what was actually delivered to defendant by a person not an officer." Instead of the record therefore affirmatively showing a compliance with the mandatory requirements of the statute in regard to the issuance and service of the summons, it discloses that there was no attempt to comply with them in any particular. Under our statute, except as provided in subdivision 4 of section 1973, the only question to be determined in an action for unlawful detainer is the right to the possession of the premises, and no demand for damages or rent can be joined in an action for such possession. *MacKenzie v. Porter* (Colo.) 91 Pac. 917. While

it is manifest that such omissions, if availed of in apt time, would have rendered any further proceedings under the statute coram non iudice, yet since the complaint on its face sufficiently stated a cause of action within the purview of subdivision 3 of section 1973 of the forcible entry and detainer act, although it contained matters not triable in such action, we are forced to the conclusion that by appearing and filing an answer the defendant cured the defect in the issuance and service of the summons, and his misapprehension as to the character of the action cannot be availed of to change the well-settled rule that an actual appearance always cures a defective service of a summons, when, except for such defect, the court would have jurisdiction of the person and the subject-matter of the suit. We think therefore the court did not err in overruling defendant's motion to dismiss the action and in proceeding with the trial of the cause under the statute.

2. We think the error assigned upon the action of the court in instructing the jury orally, and in invading the province of the jury in regard to the material facts that they were called upon to determine under the issues made by the pleadings, necessitates a reversal of the judgment. That it constitutes reversible error for the court to instruct the jury orally over the objection of counsel has been repeatedly held by this court. *Wettengel v. Denver*, 20 Colo. 552, 39 Pac. 343; *Lee v. Stahl*, 9 Colo. 208, 11 Pac. 77; *Crawford v. Brown*, 21 Colo. 272, 40 Pac. 692. In the latter case, the instructions were given orally by the judge, and taken down at the time by the stenographer, and it was there held that this was not a compliance with the statute.

As the judgment must be reversed for the reason last stated, it is unnecessary to notice the further assignments of error.

The judgment will be reversed, and the cause remanded.

Reversed and remanded.

STEELE, C. J., and BAILEY, J., concur.

VILLAGE OF SANDPOINT v. DOYLE.

(Supreme Court of Idaho. May 9, 1908.)

1. BRIDGES—CHARACTER OF BRIDGE AS A "HIGHWAY."

Under section 850 of the Revised Statutes of 1887 of this state, a bridge is a "highway," and subject to the laws applicable to "highways."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bridges, § 4.]

For other definitions, see Words and Phrases, vol. 4, pp. 3291, 3306; vol. 8, p. 7678.]

2. MUNICIPAL CORPORATIONS—STREETS—PRIVILEGES OF ABUTTING OWNERS—INGRESS AND EGRESS.

Every property owner having a lot abutting on a street or highway has a special and peculiar right in that particular street or highway not common to other citizens, and such right is a property right appurtenant to his lot, and furnishes and affords him the means of getting to and from his property, and thereby enjoying the common right of all the streets and highways in common with the community in general.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1441-1447.]

3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

The owner of a lot abutting on a street or highway has the right of ingress and egress, and for the protection of such right has his cause of action, and for a municipality to prohibit and forbid him exercising his right to go to and from his property over and by way of such street, and to employ the means necessary to reach the street, would be to take his property without due process of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 807.]

4. MUNICIPAL CORPORATIONS.

A municipality has a right to establish its grades, and to fill in or bridge or plank its street and right of way, so as to raise the surface to such grade, but by doing so it cannot preclude the abutting property owner from employing and using such reasonable means, or making such reasonable improvements, as may be necessary to enable him to go from his property to the street, and exercise and enjoy the right of ingress and egress.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1445-1448.]

5. SAME.

Where a municipality constructs a bridge 450 feet long across a small stream 25 feet wide, and the adjacent ravine or depression in the natural surface of the ground, and such bridge is a height of 20 feet from the ground at the place where it passes an abutting property owner's lot, held, that it is without the power and authority to unqualifiedly prohibit and deny the property owner the right to erect a platform on his own lot to such height as to enable him to go from his building to the bridge, and to connect such platform with the bridge by proper and substantial railings, and by such means and in such manner exercise the right of ingress and egress.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1445-1448.]

Sullivan, J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Bonner County; W. W. Woods, Judge.

Action by the village of Sandpoint against William Doyle. Judgment for defendant, and plaintiff appeals. Affirmed.

John A. Steinlein and Chas. L. Heitman, for appellant. W. C. Jones, for respondent.

AILSHIE, C. J. This action was originally commenced in 1903 by the village of Sandpoint against the defendant Doyle, charging him with constructing a building for the purpose of running and conducting a saloon business, and in cutting the rails of a certain bridge across Sand creek and connecting his building therewith. The plaintiff charged defendant with certain acts committed and others threatened, which would amount to a nuisance, and asked that he be restrained and enjoined from the further commission of such acts. A demurrer was sustained to the complaint, and an appeal was taken to this court, and the judgment of the lower court was reversed. Village of Sandpoint v. Doyle, 11 Idaho, 642, 83 Pac. 598, 4 L. R. A. (N. S.) 810. The cause was remanded, with direction to the lower court to overrule the demurrer, and take such further proceedings as might be consistent with the views expressed in the opinion. The cause was tried in the district court, and findings of fact and conclusions of law and judgment were made and entered in favor of the village and against the defendant, restraining and enjoining the defendant as prayed for in the complaint. The defendant prepared and served his statement and bill of exceptions, and had the same settled, and thereupon moved for a new trial, and his motion was granted, and a new trial was ordered. The case thereafter came on for a new trial, and upon stipulation of the attorneys for the respective parties the case was submitted to the trial judge upon the evidence that had been taken on the previous trial, and no witnesses testified upon the latter trial. The case was submitted, and taken under advisement by the court, and thereafter findings of fact and conclusions of law were made and filed, and judgment was rendered and entered in favor of the defendant and against the plaintiff, and this appeal is from the judgment.

It is necessary to observe here that the first trial took place before Hon. R. T. Morgan, who was then presiding judge of the First judicial district, and a new trial was granted by him. Before the case came on for a new trial, Hon. W. W. Woods succeeded to the office of judge of the First judicial district, and accordingly tried the case on retrial. Judge Woods, therefore, did not see the witnesses or hear them testify, and the entire case was made, so far as he was concerned, upon a paper record. Under such circumstances this court must examine the evidence, and weigh the same in all respects as if the case had never been tried before, and will consider the evidence the same as if the case were being originally heard in this court. Roby v. Roby, 10 Idaho, 139, 77 Pac. 213; Morrow v. Matthew, 10 Idaho, 438, 79 Pac. 196; Stoneburner v. Stoneburner, 11

Idaho, 607, 83 Pac. 938; Van Camp v. Emery, 13 Idaho, 202, 89 Pac. 752. It appears from the evidence that the bridge in question is about 16 feet wide or $14\frac{1}{2}$ in the clear, and that it crosses what is known as "Sand Creek," and that the street at each end of the bridge is 50 feet in width, and the street over which the bridge is erected is the street connecting Railroad street with First street in the village of Sandpoint. This bridge is 450 feet long, and varies from a height of 27 feet at the deepest place in the canyon or stream down to a point at each side of the canyon at which the bridge meets the ground. It is a wooden bridge, with posts and hand rails on each side to protect pedestrians, vehicles, and animals from running or falling off the bridge. The stream is only about 25 feet wide, and at low water is only about 6 inches deep, but when the high waters come the stream is sometimes as much as 300 feet wide and 15 feet deep at the center of the stream. The defendant Doyle owns a lot, situated within the depression or canyon, between the main channel of the stream and the end of the bridge. The water seldom overflows his lot. The easement or right of way for a street in front of Doyle's lot appears to be 50 feet in width, but when defendant constructed its bridge, it built the bridge on the side of the street next to Doyle's lot, and immediately along and contiguous to the front of the lot, so that no space was left between the side of the bridge and the defendant's lot. This bridge has been constructed for some six or eight years. Doyle commenced the construction of his building, erecting it on substantial posts, well braced, and in doing so it became necessary for him to cut the railing on the side of the bridge next to his property. He constructed his building so as to make the floor on a level with the bridge, setting the building back some 12 feet from the bridge. He constructed a safe and substantial platform in front of his building, between the building and the bridge, and placed posts and rails around it so as to protect persons from falling off. The rails placed around the platform appear to be as substantial and safe in every respect as those placed around the bridge by the village. Doyle appears to have erected this building for the purpose of conducting a saloon, and so declared his intention, and when he completed the same, opened up in the saloon business. He ran the saloon, however, for only a couple hours, when he was arrested and fined for violating the village ordinances. It appears that the village trustees had duly and regularly passed and adopted an ordinance prohibiting the sale or giving away of any liquors or intoxicating drinks within 100 feet of this bridge, and it was for violating this ordinance that Doyle was arrested and fined. He appears, however, to have threatened to continue in the saloon business at that place and to complete, equip, and

maintain his building for that purpose, which was the cause of this action being instituted against him. After leaving his building idle for considerable time, he later opened up in the dry goods business, concluding, perhaps, that it would be a more peaceful business and less offensive to the municipal authorities, and perhaps less liable to invite the repeated visits of the police authorities. He continued in the mercantile business to the time of the trial of this case, and made no further attempt to conduct the saloon business, or any other unlawful, prohibited, or illegitimate business therein, so far as the record shows.

It is contended by the municipality that the decision of this court on the previous appeal is the law of the case, and that the judgment rendered and entered by the district court is in conflict therewith. On the previous appeal, this court, speaking through Chief Justice Stockslager, said: "We think the village authorities have the power to permit or reject the application of any one to construct any kind of a building to connect with this bridge. If it is by them considered injurious to the traveling public, offensive to any class of people who may have occasion to pass over the bridge, then they may prohibit its construction." Upon a casual reading of this language, it might be taken to indicate the view of the court that the municipality could absolutely prohibit the construction of any kind of a building, whether lawful within itself or not, and whether intended for use in a lawful and legitimate business or otherwise. In order to ascertain, however, the real purpose and intent of the court, it is necessary to ascertain the exact question that was before the court, and that was then being discussed and considered by the court, and out of the consideration of which the use of this language arose. The question there being considered was the right of Doyle to maintain a nuisance on his property adjacent to this bridge, and particularly the power of a court of equity to restrain him from carrying on a business within a district where the same was prohibited and forbidden by a municipal ordinance, and to maintain a nuisance on and adjacent to this bridge. The court held that, notwithstanding the right of the municipality to have Doyle repeatedly arrested for violating the ordinance, it might also invoke the aid of a court of equity to restrain him from maintaining the building and offensive business at the place and in the manner it was maintained, and wherein the offense and violation was being repeatedly committed. The question was not before the court, on that appeal, of the power of the municipal authorities to absolutely prohibit the construction of any building whatever at that place, or the maintaining and carrying on of any lawful and legitimate business on the property in question. The decision rendered by this court on the former appeal is unquestionably

the law of the case upon all matters that were involved in, presented, and passed upon on that appeal. It determines the right of the municipality to restrain and enjoin the appellant in this case from maintaining a saloon or conducting a saloon business on this property. Beyond that, however, we do not think anything said in that opinion can be treated as the law of the case.

At the trial of this case it appeared that the defendant and respondent had abandoned the saloon business more than three years previous to the trial, and had not been maintaining his place of business for that purpose, and that he had, on the contrary, maintained an orderly and legitimate business, and was at the time of the trial engaged in the mercantile business, using his property for that purpose. It was therefore unnecessary to issue a permanent restraining order against him, enjoining him from carrying on or conducting the saloon business or maintaining a place for that purpose. The only question properly presented on this appeal for our determination is the power and authority of the municipality to absolutely forbid and prohibit the respondent from erecting and maintaining a building on his own lot, and erecting and maintaining the platform in front thereof, so as to connect with the bridge and have access to and egress from his property over and by way of the bridge. In the first place, we must remember that respondent's lot abuts on one of the streets and thoroughfares of the appellant corporation. It must also be borne in mind that the bridge along and over this street is a part of the street. In other words, a bridge is a highway. Section 850, Rev. St. 1887; Elliott on Roads and Streets (2d Ed.) § 27. If the village had not seen fit to construct this bridge across Sand creek, and the ravine and depression through which it flows, but had rather preferred to leave the street as it previously was on the surface of the ground, there could be no question of the right of Doyle to construct his building, under proper regulations, and maintain the same on his lot and fronting on this street, with all the necessary privileges of ingress and egress through and over the street. But the village saw fit to raise the surface of the street, which it might have done by a fill, until it came to the main channel of the stream, or, as it did do, by erecting posts and building a platform or bridge at the grade and level to which it desired to raise the surface of the street. Now the village having seen fit to raise the surface of its easement and right of way for street purposes to an elevation of 20 feet in front of Doyle's property, has he not an equal right to raise his building to the same elevation, so as to preserve his right of ingress and egress? If he can do so, he is clearly within his legal rights. If he cannot, then the village by raising the grade of its street, through the guise and name of a bridge, may

improve Doyle out of his property and all right of use and benefit thereof. This is certainly not justice, and we do not think it is the law. Every citizen has an equal right with every other to travel the streets of this municipality; but, on the contrary, every property owner, having a lot abutting on a street or thoroughfare, has a special and peculiar right in that particular street not common to the other citizens. That right is a property right appurtenant to his lot, and furnishes him the means of getting to and from his property, and thereby enjoying the common right of all the streets with the balance of the citizens of the community. If he cannot get out from his property, and has no means of ingress or egress, then the streets and thoroughfares of the municipality will be of no use to him, and consequently his property will be of but little benefit to him. While the public generally may have no special or particular interest in the right of ingress to any particular lot owner's property, the lot owner has a very material and special interest in having the public reach his property and place of business, and in his right to go and come and carry on business and invite the public to his place of business. It has been held by the courts that to cut off this right of ingress and egress would be to take the lot owner's property without due process of law. *Transylvania University v. City of Lexington*, 3 B. Mon. (Ky.) 25, 38 Am. Dec. 173; *Story v. N. Y. Elevated R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Adams v. Chicago, etc., R. R. Co.*, 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644; *Elliott on Roads & Streets* (2d Ed.) § 695.

In considering the general question of the right of ingress and egress, and the property owner's right of action for damages on account of an obstruction thereof, the Supreme Court of Minnesota in *Brakken v. M. & St. L. R. R. Co.*, 29 Minn. 41, 11 N. W. 124, says: "With reference to the other point it is well settled that the owner of lots abutting on a public street, whether he owns the soil to the center of the street or not, has a special interest in the street, different from that of the general public. It may not be very important to the general public whether they shall be able to get to the private property of an individual, but it is important to the individual whether he should be able to get to and from his residence or business, and whether the public have the means of getting there for social or business purposes. If there be an obstruction in the street in front of or near his abutting property, so as to prevent access to it, the damage which he sustains is different, not merely in degree, but in kind, from that experienced in common with other citizens, and he may maintain a private action for the special injury to him, notwithstanding there is also a remedy in behalf of the public." Likewise the Supreme Court of Kansas, in *Venard v. Cross*,

8 Kan. 255, says: "But the petition goes further, and alleges that this highway is plaintiff's 'only means of ingress and egress' to his land. Obstructing such highway therefore prevents his access to his lands. Here is disclosed a particular injury to plaintiff, one differing not merely in degree, but also in kind, from that suffered by the community in general. It is not that he uses this highway more than others, but that the use is of a particular necessity to him, affording him an outlet to his farm. It is to him a use and a benefit, differing from those enjoyed by the public at large. Obstructing the highway destroys that particular use and benefit. He, therefore, may maintain his individual action." See, also, *Street Railway v. Cumminsville*, 14 Ohio St. 523; *Lostutter v. Aurora*, 126 Ind. 436, 26 N. E. 184, 12 L. R. A. 259; *Broome v. N. Y. & N. J. Tel. Co.*, 42 N. J. Eq. 141, 7 Atl. 851.

Considerable stress has been laid on the proposition that an abutting property owner has no right to interfere with or cut the rails of a bridge. That is a correct, general principle of law; but it is founded upon the assumption that the municipality, on its part, will not undertake to prevent the property owner's right of ingress and egress, and that it will so construct its bridges and maintain its street grades as to afford the property owner an equal right of erecting or constructing like or similar means on his property in order to enable him to get to and from the streets. If the municipality should build a bridge across another street, then, clearly, there would be no abutting property owner entitled to cut the rails of the bridge or interfere therewith, for the reason that it would be one highway across another, and the public would be entitled to both easements and to maintain and protect the same. This would also be true if the municipality should build a bridge across a navigable stream. Again we would have one highway over and across another, and the public would be entitled to maintain the easement and right of way and keep the same open and free to traffic. A very different principle of law arises, however, when the city raises its grade, either by fill, a bridge, or in any other manner, through or over a depression in the natural surface of the ground and along adjoining, and abutting properties. In such case, while the municipality may adopt reasonable rules and regulations with reference to the erection and maintenance of buildings and all approaches to the same, and entrance to and over the street, it cannot absolutely prohibit the property owner from using the street and enjoying his right of going and coming to and from his property through and over such street. In order to enjoy that right and privilege, he must be accorded an equal and concurrent right of using such means and methods on his own proper-

ty as to enable him to get to the street, and connect his property or place of business with the street or highway over which he must necessarily pass. It has been suggested that the bridge in question is not wide enough to accommodate the travelling public and also afford means of ingress and egress to abutting property owners. The question as to the extent of the duty and responsibility of the municipality in that respect does not arise in this case, for the reason that the village here constructed its bridge on the side of its right of way, next to respondent's property, and caused the bridge to adjoin the front of respondent's lot. It therefore cut him off from his previous right of access to the street on its natural surface, and left him without any means of egress and ingress at all, unless he can go over the bridge. Had his lot been on the other side of the street, and, consequently, 34 feet from the bridge, as are the other property owners on the farther side of the street, another and different question would then arise and call for our consideration. But since it does not arise in this case, we will not consider it.

We have examined all the evidence in this case, and are satisfied that the village is not entitled to an injunction restraining the respondent from maintaining his building and place of business on his lot abutting on this bridge. We are also satisfied that he is entitled to egress and ingress over this bridge.

The judgment of the lower court must therefore be affirmed, and it is so ordered, with costs in favor of respondent.

STEWART, J., concurs.

SULLIVAN, J. (dissenting). I am unable to concur in the conclusion reached by my Associates. While a bridge is a highway under our law, it seems to me that there is a clear distinction between the rights of landowners, abutting on the streets of a town or city, and the rights of landowners abutting on a bridge. Bridges necessarily require different and more careful protection from fire and other elements than the ordinary street, and most of the bridges of the state are only of sufficient width to permit vehicles to pass each other, and I do not think that the owners of property abutting on a bridge have that "special and peculiar right," referred to in the opinion of the majority, to the use of the bridge that abutting property landowners have on the ordinary street or highway. In my view of the matter the abutting landowners to a bridge have the same rights as the public to use such bridge, but they have no right to establish business houses along such bridge, cut the railing thereof, connect their business houses with the bridge, and conduct business therein.

The judgment of the lower court ought to be reversed.

STATE v. WEST.

(Supreme Court of Idaho. June 3, 1908.)

1. LARCENY—GRAND LARCENY—INFORMATION.

An information which charged that the defendant "did willfully, unlawfully, and feloniously steal, take, and drive away one brown gelding, branded H on the left stifle, said gelding being then and there the personal property of A. J. Harley, and one black gelding, branded X on the left shoulder, said gelding being then and there the personal property of J. B. Whitson and Brother, * * * contrary to the form, force, and effect of the statute in such cases made and provided, and against the power, force, and dignity of the state of Idaho," is sufficient to charge the defendant with the crime of grand larceny of the black gelding mentioned therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 93-95.]

2. SAME—EVIDENCE.

The evidence held insufficient to support the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 149-178.]

(Syllabus by the Court.)

Appeal from District Court, Elmore County; Lyttleton Price, Judge.

William L. West was convicted of grand larceny, and appeals. Reversed.

C. C. Cavanah and W. C. Howle, for appellant. J. J. Guheen, Atty. Gen., Edwin Snow, J. H. Peterson, and B. S. Crow, for respondent.

SULLIVAN, J. The appellant was convicted of grand larceny for stealing a brown gelding, and sentenced to a term of six years in the penitentiary. This case was once before this court. 11 Idaho, 157, 81 Pac. 107. On that appeal the judgment of the trial court was reversed and a new trial granted. A new trial was had, and a verdict of guilty was found by the jury, and the judgment was six years' imprisonment. A motion for a new trial was overruled, and this appeal is from that order and the judgment of conviction. Two errors are assigned, one of which goes to the sufficiency of the information and the other to the sufficiency of the evidence to support the verdict.

As to the sufficiency of the information, the charging part of the information is as follows: "The said William L. West, on or about the 6th day of June, A. D. nineteen hundred and three, at the county of Elmore, in the state of Idaho, did willfully, unlawfully, and feloniously steal, take, and drive away one brown gelding, branded H on the left stifle, said gelding being then and there the personal property of A. J. Harley, and one black gelding, branded X on the left shoulder, said gelding being then and there the personal property of J. B. Whitson and Brother (a copartnership consisting of J. B. Whitson and J. D. Whitson, doing business under the firm name of J. B. Whitson and Brother), contrary to the form, force, and effect of the statute in such cases made and provided, and against the power, force, and

dignity of the state of Idaho." The appellant was tried for stealing the black gelding mentioned in said information. No demurrer was filed to said information. It will be observed that said information charges the appellant with stealing two horses, one brown and one black gelding. The information not only clearly charges the appellant with having stolen one brown gelding, but also a black gelding, and the words "did willfully, unlawfully, and feloniously steal, take, and drive away" apply to the black gelding as well as the brown. The information is sufficient, and there was no error in the action of the trial court in holding it sufficient.

The second error assigned is the insufficiency of the evidence to support the verdict. We have examined the evidence in this case very carefully and in detail, and, while it contains some suspicious circumstances, they fall short of establishing the guilt of the defendant. There is no evidence in this record that would warrant the conviction of the defendant, and we must therefore of necessity, under the well-established rules of law, reverse the judgment; and it is so ordered, and a new trial granted.

It is suggested that, unless the state has other and further evidence than has been introduced in this case the case should be dismissed.

AILSHIE, C. J., concurs. STEWART, J., did not sit at the hearing and took no part in the decision.

TOWN OF LYONS v. WATT.

(Supreme Court of Colorado. May 4, 1908.)

1. NEGLIGENCE — LIABILITY FOR NEGLIGENT ACTS.

One is not liable for acts of negligence where an injury is occasioned by an independent intervening act which he could not have reasonably anticipated would be the result of his negligence, though the injury complained of would not have occurred except for his negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 76-79.]

2. SAME—"PROXIMATE CAUSE."

Proximate cause is that cause which in natural and continued sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 69, 70.]

For other definitions, see Words and Phrases, vol. 6, pp. 5758, 5769; vol. 8, p. 7771.]

3. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—INJURIES TO PEDESTRIANS—PROXIMATE CAUSE.

A pedestrian, while it was dark, fell into an unguarded excavation about two feet from the sidewalk. The pedestrian kept the middle of the street to avoid the danger of falling into the excavation, and when she reached a point on the street opposite the lot where the excavation was located she mistook the lot for a road and turned. In so doing she fell on the sidewalk opposite the excavation, and then, sup-

posing that she was going to the road, fell into the excavation. *Held*, that the absence of a rail guarding the excavation was not the proximate cause of the injury, and the municipality was not liable therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1666, 1667.]

Appeal from District Court, Boulder County; Christian A. Bennett, Judge.

Action by Emma Watt against the town of Lyons. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

H. M. Minor, for appellant. Grant E. Halderman and J. M. Bender, for appellee.

GABBERT, J. Appellee, plaintiff below, brought suit against appellant, as defendant, to recover damages claimed to have been sustained by the negligence of the defendant. A trial on the merits resulted in a verdict and judgment for plaintiff, from which the defendant appeals.

It appears from the testimony that on a vacant lot facing on Main street in the town of Lyons there was an unguarded excavation about two feet distant from the sidewalk. This lot is located about 100 feet east of the intersection of Main street and Fifth avenue. Plaintiff fell into this excavation, and was injured. It had existed for upwards of two years, and she knew of its existence, having frequently traveled over the sidewalk in front of the lot in question. She was upwards of 52 years of age at the time of her injury, and her eyesight was not good. The circumstances under which she fell into the excavation are as follows, as stated by herself: On the evening she was injured, which was in the month of June, she went to church. It was dark when she started for home. On reaching Main street, instead of taking the sidewalk, she kept the middle of the street for the purpose of avoiding the danger of falling into the excavation. When she reached a point on the street opposite the lot where the excavation was located, she mistook the lot, or opening, as she expressed it, for the road going south to her home, which was Fifth avenue, and turned to the south. In so doing she stumbled and fell upon the sidewalk opposite the excavation, and, to use her own language: "Being in a dazed condition, I got up, saw the open space, supposed I was going to the road, and fell right in that excavation."

Conceding, for the sake of the argument, that the town of Lyons was guilty of negligence in failing to erect a guard rail on the walk opposite the excavation, the only question necessary to determine is whether or not this omission on the part of the town was the proximate cause of plaintiff's injury. A defendant is not liable for acts of negligence where an injury is occasioned by an independent, intervening act which he could not have reasonably anticipated would be the result of his negligence, although the injury for which it is sought to hold him

responsible would not have occurred except for his negligence. In this respect the law is so well settled that citation of authority is not necessary. The difficulty arises in determining when it is applicable, so that each case based upon negligence, when it is sought to apply it, must be analyzed for the purpose of ascertaining what was the proximate cause of the injury to the person injured. "Proximate cause" has been defined to be "that cause which, in natural and continued sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred." *D. & R. G. Ry. Co. v. Sipes*, 26 Colo. 17, 55 Pac. 1093. Other decisions of the Court of Appeals and this court, defining "proximate cause" are: *Blythe v. D. & R. G. Ry. Co.*, 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403; *Travelers' Ins. Co. v. Murray*, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267; *B. & M. R. R. Co. v. Budin*, 6 Colo. App. 275, 40 Pac. 503; *City of Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62.

According to plaintiff's own testimony, it was her mistake which caused her to step from the sidewalk. She mistook the vacant lot between adjacent buildings for the road which she intended to turn into on leaving Main street. This mistake upon her part was not one for which the town was in any way responsible. The absence of a rail guarding the excavation did not cause her to make the mistake she did. Neither would the absence of such precautions on the part of the town have caused any one to anticipate that a pedestrian passing along Main street at night in the vicinity of the excavation would make the mistake which plaintiff did. Had she not made this mistake, she would not have been injured; and hence there is but one conclusion to be deduced from her own statement, namely, that the proximate cause of her injury was her own mistake, and not the negligence of the defendant. It is true the plaintiff would not have been injured had the excavation been guarded, but it is also true that she would not have fallen into it had she not mistaken the lot where it was located for Fifth avenue. The omission of the town to guard the excavation was only a condition upon which a new, independent, and unforeseen cause operated which was the cause of plaintiff's injuries; i. e., her mistake in thinking the vacant lot where the excavation existed was the road which she intended to take on leaving Main street. This error of plaintiff was in no manner induced by any act or omission of the defendant. It was not naturally and reasonably to be expected as the result or the natural and probable consequence of defendant's negligence; and therefore, as to it, plaintiff's injuries resulted from an inevitable accident. For injuries thus sustained damages cannot be recovered.

This case appeals to the sympathy of court and jury. Plaintiff is well along in years, is suffering from physical infirmities, no doubt was quite seriously injured, and is in poor circumstances financially; but these conditions cannot change the law controlling her case.

The judgment of the district court is reversed, and the cause remanded for further proceedings not inconsistent with the views expressed in this opinion.

Reversed and remanded.

STEELE, C. J., and CAMPBELL, J., concur.

KING et al. v. MECKLENBURG.

(Supreme Court of Colorado. May 4, 1908.)

PARTNERSHIP—UNAUTHORIZED NOTE—RIGHT TO RECOVER.

One having bought a note purporting to be signed by a partnership, knowing that it was executed by one of the partners outside the scope of his agency as a partner and outside the scope of the partnership business, could not recover thereon against the partnership or either of the nonsigning partners, and, he having indorsed it after maturity, the indorsee is in no better position, taking it subject to the infirmity available against his indorser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 252.]

Appeal from District Court, Park County; M. S. Bailey, Judge.

Action by Morris Mecklenburg against A. J. King and others, partners as King & Wallace. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with direction to enter judgment for defendants.

This is an action upon the following promissory note, alleged to be a partnership obligation:

"King, Park Co., Colo., Feby. 2, 1892.

"On or about Feby. 23, 1892, we promise to pay to C. L. Ferguson, or order, one hundred dollars.

"\$100.00. King & Wallace."

The note was indorsed by the payee to B. M. Mecklenburg and afterwards assigned to plaintiff. On a former review, the Court of Appeals ruled that the facts alleged in the answer as it now stands constituted a defense to the note sued on, and reversed the ruling of the lower court sustaining a demurrer thereto. After stating the case as made by the complaint and answer, that court said: "According to these averments, a member of defendant firm executed the note in question without the express or implied authority of his copartners for a purpose outside of the partnership business, and such facts were known to payee, B. M. Mecklenburg, and plaintiff prior to the indorsement to them of such note. Further, the making of the note has at no time been ratified. The gist of these allegations is that defendant firm never made the note sued on. * * * If so, then it is not liable thereon, and the answer states

a defense thereto." King v. Mecklenburg, 17 Colo. App. 312, 313, 68 Pac. 984. Upon the case being remanded, the plaintiff filed a replication denying that B. M. Mecklenburg had knowledge of all the facts stated in the answer concerning and attending the execution and delivery of the note before the same was purchased or transferred to her, and denying that plaintiff, prior to his purchase of the note, had such knowledge or notice, and averring that the note was sold, transferred, and indorsed by the payee before maturity for full value to B. M. Mecklenburg, and that she acquired the note in good faith for full value in the usual course of business and without notice of any circumstances impeaching its validity as a negotiable obligation, and that plaintiff acquired the note with the same title and the same rights that his indorser, B. M. Mecklenburg, held thereto. The cause was tried to the court, the issues joined were found in favor of the plaintiff, and judgment rendered for the amount of the note with interest. To reverse this judgment the defendants prosecute this appeal.

Webster Ballinger, for appellants. C. A. Wilkin, for appellee.

GODDARD, J. (after stating the facts as above). The Court of Appeals, in its opinion above referred to, correctly announces the rule by which the rights of the respective parties to this controversy are to be determined, and lays down the law of the case applicable to the facts averred in the answer. The only question therefore presented for our consideration is whether the evidence introduced established the truth of such averments.

It is conceded that the firm of King & Wallace was composed of A. J. King, H. S. Wallace, and W. J. Wallace, and was at the time of this transaction doing a general merchandise business at King, Park county, Colo., and it is abundantly shown that the note in question was given by H. S. Wallace without consulting either of the other members of the firm and without their knowledge or consent, and "that the giving of the note was without the scope of the partnership business of defendant, and that its giving was in no way connected with its business, and that at no time since the execution of the note has either of the other members of the firm assented thereto or agreed to pay it." It was executed solely for the accommodation of the payee, Ferguson, by H. S. Wallace, with the understanding that it was to be taken up by Ferguson out of money due him from the Union Pacific Coal Company on the next pay day, which would occur about February 23d, the time the note was made payable. The only controverted fact is whether B. M. Mecklenburg took the note with knowledge of this arrangement and was thereby advised of the fact that the note was not connected with or given within the scope of the partnership business of the defendants.

Max Mecklenburg, the husband of B. M. Mecklenburg and the father of plaintiff, and who represented B. M. Mecklenburg in the transaction, testified: "I had a talk with H. S. Wallace before I bought the note. I asked him if Ferguson had any money due him, and he said he did from the Union Pacific Coal Company, and they had made a transaction of that kind, and if I bought it I would get my money on pay day." On cross-examination he said: "I had a talk with Mr. Ferguson about this transaction a day or two before I talked with Wallace. Ferguson said he was going to Cripple creek and would like to settle the account. He offered to go and get Wallace's duebill. I understood that was to be done. It was to accommodate Mr. Ferguson, and it was an accommodation to me. Q. What did you know about it? A. I understood from Wallace he had the money coming from the coal company on the contract he had there, and Mr. Wallace could exchange this transaction with the coal company and turn the money over to him, and he done that to favor Mr. Ferguson so he could get away. * * * Q. And you knew that Mr. Wallace was intending to collect this from the coal company before you collected? A. I supposed he would collect it before; yes, sir."

This testimony discloses that Mecklenburg, before he purchased the note, was advised of the circumstances under and the purpose for which the note was executed by H. S. Wallace in the firm name, and he therefore knew that it was not executed by H. S. Wallace in the course of the partnership business or within the scope of his agency as a partner, and we are unable to find any evidence in the record that supports the finding or conclusion of the court below that "the note was by the original payee sold and transferred in the regular course of business for full value and without notice of any defect or infirmity. * * * to B. M. Mecklenburg," or that the "making and issuing of it at the time was within the scope of the agency with which each member of a trading copartnership is vested under the firm partnership of which he is a member." But, on the contrary, it appears from the undisputed testimony and all the circumstances surrounding the transaction that H. S. Wallace "executed the note in question without the express or implied authority of his copartners for a purpose outside of the partnership business, and such facts were known to the payee and B. M. Mecklenburg." That Max Mecklenburg did not at any time regard the note as a firm obligation is apparent from his subsequent conduct. The firm of King & Wallace ceased doing business on March 10, 1892, and W. J. Wallace lived in Como, where the Mecklenburgs resided, and not until 1895, about three years after the note matured, was he informed of the existence of the note, when his attention was called to it by Max Mecklenburg for the first time, whereupon he repudiated all liability therefor. And King had no no-

tice of its existence until a few months before this suit was commenced, being nearly six years after its maturity. While, on the other hand, Mecklenburg admits that he had some correspondence about the note with H. S. Wallace in 1894 and about six months before he informed W. J. Wallace of its existence.

In the light of these circumstances and the undisputed testimony of Max Mecklenburg that he purchased the note with the knowledge that it was given for a purpose clearly outside of the scope of the partnership business, a complete defense to a recovery on the note was established as against the original indorsee, under the rule announced on the former appeal, and the plaintiff, Morris Mecklenburg, having obtained the note after it was past due, took it subject to the same defect and infirmity that was available against his indorser, and consequently he is not entitled to recover as against the firm of King & Wallace or either of the nonsigning partners.

The present judgment therefore must be reversed, and the cause remanded, with direction to enter judgment in favor of defendants.

Reversed and remanded.

STEELE, C. J., and BAILEY, J., concur.

FERRARA v. AURIC MINING CO.

(Supreme Court of Colorado. May 4, 1908.)

DEATH—ACTION—RIGHT TO SUE—NONRESIDENT ALIEN.

Mills' Ann. St. §§ 1508-1510, authorizing in an action for wrongful death to recover damages to the wife of decedent not exceeding \$5,000, are not limited to citizens or residents of the state, but the nonresident alien widow of an Italian subject killed in Colorado by the alleged wrongful act of defendant was entitled to sue in Colorado for her husband's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 37.]

Error to District Court, Pueblo County; John Voorhees, Judge.

Action by Fenice Ferrara against the Auric Mining Company. Judgment for defendant, and plaintiff brings error. Reversed.

See 20 Colo. App. 411, 79 Pac. 302.

M. J. Galligan, for plaintiff in error. C. W. Waterman, for defendant in error.

STEELE, C. J. The complaint alleges in substance that the plaintiff is the wife and widow of Pietro Ferrara, deceased; that on June 26, 1897, the deceased was employed by the defendant as a miner; and that while so employed and engaged in working in the mine of said defendant the said deceased was killed by reason of the negligence of the said defendant, and without fault of the said deceased. On January 24, 1899, the answer of the defendant was filed, and on February 27th following the plaintiff filed her reply. During the trial the de-

fendant, over plaintiff's objection, was granted leave to file an amendment to its answer, which amendment is as follows: "Defendant is informed and believes, and so alleges, that plaintiff is and at all times heretofore has been a resident of Italy, and that plaintiff is not now and never has been at any time a resident of the state of Colorado or of the United States of America, and is not entitled to bring or prosecute this action in any of the courts of the state of Colorado." On May 6, 1901, on motion of the defendant, judgment was rendered on the pleadings for the reason that no reply had been filed to the said fourth defense. The motion was sustained, and final judgment of dismissal and that the defendant go hence without day was duly entered. Motion for new trial was denied, and the plaintiff took the case by writ of error to the Court of Appeals.

It is insisted by the defendant that, as a demurrer to the fourth defense was overruled, it became the duty of the plaintiff to reply, and, having failed to reply, judgment upon the pleadings was properly entered. The plaintiff not having replied to the fourth defense, the matters stated therein must be taken as true. The defendant was entitled to judgment upon the pleadings if the matters set forth in the fourth defense are sufficient in law to defeat the plaintiff's action. If they are not sufficient, then the judgment must be reversed. The only question, therefore, for our consideration is, is the plaintiff, being a nonresident alien, entitled to maintain the action?

Counsel contend: "That the overwhelming weight of authority and of all the well-reasoned decisions in this country and in England establish the proposition that, since the right to maintain an action of this kind is wholly dependent upon statute, a nonresident alien has no standing in the Colorado courts. The overwhelming weight of authority is that the laws of a state or country are made for the benefit of its citizens, or those who, by becoming denizens or residents of the state or country, have intrusted themselves to the governmental department of that country, thereby submitting themselves to its jurisdiction and entitling themselves to the benefit of its laws, unless expressly excluded from their operations." The fact is that there are but three cases in this country which sustain the contention of counsel that nonresident aliens may not maintain actions of this character. The first case is that of *Deni v. Pennsylvania Railroad Company*, by the Supreme Court of Pennsylvania, reported in 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 670, in which it is held, under the act of April 26, 1855 (P. L. 309), which gives a right to recover damages for an injury causing death, that a nonresident alien mother has no standing to maintain an action against a citizen of Pennsylvania to recover damages for the death of her son. In the course of the opinion the court said: "Our

legislation on this subject is in accord with the English statute of August 26, 1846, and therefore the decisions of the English courts construing this statute are often referred to in cases grounded upon our acts of April 15, 1851 (P. L. 674, § 19), and April 26, 1855. But no case has been brought to our notice in which an English court has held that a nonresident alien is entitled to the benefits conferred by the act of 1846. The same may be said of the decisions of the courts of our sister states having statutes similar to our own. * * * Our statute was not intended to confer upon nonresident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged for their benefit. It has no extraterritorial force, and the plaintiff is not within the purview of it. While it is possible that the language of the statute may admit of a construction which would include nonresident alien husbands, widows, children, and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it." The next in point of time is the case *Brannigan et al. v. Union Gold Mining Co.* (C. C.) 93 Fed. 164, decided by Judge Hallett in the year 1899, in which he held that nonresident aliens are not entitled to the benefit of the Colorado statute, and followed the decision of the Pennsylvania court. He says, after quoting from the Pennsylvania case: "Under the circumstances I see no reason for denying the force and effect of this opinion. It appears to be founded upon good reason, and to be as applicable in Colorado as it is in Pennsylvania." The next is the case of *McMillan, Adm'r, v. Spider Lake S. M. & L. Co.*, 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. Rep. 947, wherein it was held that the Wisconsin statutes do not give any right of action for the loss sustained by nonresident alien relatives of a person whose death was caused by a wrongful act, neglect, or default. These are the only cases from the courts of this country which have been cited in support of the proposition that nonresident aliens, heirs, or relatives of a person whose death was caused by wrongful act, neglect, or default are not entitled to maintain an action; but there is no dearth of authority sustaining the position of the plaintiff in this case that such action may be maintained. In the states of Iowa, Ohio, Indiana, Minnesota, and New York it is held that an action will lie by the administrator of a deceased person to recover damages for his death, even though the beneficiaries named in the statute be nonresident aliens. In the states of Georgia, Missouri, and Tennessee it is held that an action may be maintained by a nonresident of the state. In Georgia the court, speaking through Chief Justice Bleckley, significantly says: "Whenever a Georgia mother can recover, any other mother can do so under like circumstances. The

act is general in its terms, and has no hint of any discrimination in favor of residents or against nonresidents." In Virginia the action is maintainable by resident friendly aliens, while in Illinois, Delaware, Kansas, Massachusetts, and Arizona it is held that the action is maintainable by nonresident aliens. Such also is the holding by the United States Circuit Court of Appeals for the Eighth Circuit, and the latest case we have from England holds that the personal representative of a subject of Norway is entitled to maintain an action in the English court to recover damages for an injury resulting in death. The cases are as follows: *Romano v. Brick & Pipe Co.*, 125 Iowa, 591, 101 N. W. 437, 68 L. R. A. 132, 106 Am. St. Rep. 323; *Railway Co. v. Naylor*, 73 Ohio St. 115, 76 N. E. 505, 3 L. R. A. (N. S.) 473, 112 Am. St. Rep. 701; *Cleveland, etc., Ry. Co. v. Osgood*, Adm'r, 36 Ind. App. 34, 73 N. E. 235; *Renlund v. Commodore Mining Co.*, 89 Minn. 41, 93 N. W. 1057, 99 Am. St. Rep. 534; *Alfson v. Bush Co.*, 182 N. Y. 393, 75 N. E. 230, 108 Am. St. Rep. 815; *Augusta Railway Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *Philpott v. Mo. Pac. Ry. Co.*, 85 Mo. 164; *Chesapeake, Ohio & Southwestern R. R. Co. v. Higgins*, 85 Tenn. 620, 4 S. W. 47; *Pocahontas Collieries Co. v. Rukas' Adm'r*, 104 Va. 278, 51 S. E. 449; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 63 N. E. 94, 88 Am. St. Rep. 191; *Szymaniski v. Blumenthal & Co.*, 3 Penniwill (Del.) 558, 52 Atl. 347; *A., T. & S. F. R. R. Co. v. Fajardo*, 74 Kan. 314, 86 Pac. 301, 6 L. R. A. (N. S.) 681; *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309; *Bonthron v. Phoenix Light Co.*, 8 Ariz. 129, 71 Pac. 941, 61 L. R. A. 563; *Patek v. American Smelting & Refining Co.*, 154 Fed. 190, 83 C. C. A. 284; *Davidsson v. Hill*, 2 K. B. (1901) 606—and they are cases arising under statutes authorizing a recovery for the benefit of the relatives of a deceased where the death was caused by a wrongful act or through negligence or default. In the case *Luke v. Calhoun County*, 52 Ala. 115, the court held, construing a statute of the state of Alabama entitled "An act to suppress murder, lynching," etc., "that statutes passed for the security and protection of life, in the absence of clear and unexceptionable language forcing a contrary conclusion, will be held to apply as well to aliens and mere sojourners as to citizens. The fact that the person murdered and the widow or next of kin were aliens is no defense to a recovery under the act." Under the act in question the husband or widow or next of kin of the person murdered is entitled to maintain an action for damages.

The statutes of the states are based upon the English statute known as "Lord Campbell's Act," and, while they differ in matters of detail, they are all based upon the English act. In many of the states it is provided that the personal representatives of the deceased

may maintain the action for the benefit of the heirs, while in Colorado and other states it is provided that the action may be maintained by the beneficiaries named in the statute. But whether the action is brought by the administrator or by the heirs can make no material difference. If brought by the administrator, the recovery is paid to the heirs named in the statute, and the difference is merely in the form of the action. The purpose of the statute in all jurisdictions is to award indemnity to the heirs of a person who has sustained injuries resulting in death through a wrongful act. In every statute we have examined, whether the action is authorized to be brought by an administrator or by the heirs, the amount recovered is not subject to the payment of the debts of the deceased, but the entire amount is to be paid to the beneficiaries; nor have we seen a statute which is not general in its terms, or which expressly discriminates against aliens and in favor of citizens. In every case we have cited as sustaining plaintiff's contention the decision is grounded upon the proposition that it is within the power of the Legislature to grant benefits to aliens, and that, unless the Legislature has undertaken in express language to discriminate in favor of citizens and against aliens, the courts will not discriminate in favor of citizens. In the Virginia case cited the beneficiaries happened to be residents, although aliens. The court nevertheless held that the weight of authority in this country maintains the right of nonresident alien relatives of the deceased to receive the benefit of the statute. The latest case to which our attention has been directed is that of *Patek v. American Smelting & Refining Co.*, decided in June, 1907, by the Circuit Court of Appeals of this circuit, by Judge Van Devanter, wherein he reviews the authorities, and holds that under our statute a nonresident alien has the right to maintain an action, and this upon the theory that to deny such a person the benefit of the statute it becomes necessary to interpolate into the statute words discriminating against aliens, and upon the further ground that the policy of Colorado with respect to aliens has been such as to indicate that the Legislature did not intend to discriminate in favor of citizens. Judge Van Devanter quotes at length from a decision of Colt, Circuit Judge, in *Vetaloro v. Perkins* (C. C.) 101 Fed. 393, in which Judge Colt says: "To exclude nonresident aliens from the right to maintain an action under section 2 is to incorporate into the act a restriction which it does not contain. It is to refuse compensation to a certain class of persons for a real injury recognized by statute law. It is to relieve employers with respect to some employes from the exercise of due care in the employment of safe and suitable tools and machinery and competent superintendents. It is to offer an inducement to employers to give a preference to aliens and to discriminate against citizens.

It is to hold that the Legislature of Massachusetts intended by this act to declare that employers should not be liable for the gross-negligence which results in the instant death of an alien employé in cases where his widow or next of kin happen to reside in a foreign country." Our Constitution, § 15, art. 15, provides that: "It shall be unlawful for any person, company or corporation to require of its servants or employes, as a condition of their employment or otherwise, any contract or agreement whereby such person, company or corporation shall be released or discharged from liability or responsibility on account of personal injuries received by such servants or employes while in the service of such person, company or corporation, by reason of the negligence of such person, company or corporation, or the agents or employes thereof, and such contracts shall be absolutely null and void." We cannot believe that our Legislature, the first under the Constitution, with this provision of the Constitution before it, could have intended to release persons or corporations from liability for damages caused by their negligence by limiting the liability to those persons who happened to be citizens of the United States and residents of Colorado at the time the action was brought. To do so would be to encourage negligence and to enable the employers of labor to select aliens to the discrimination of American citizens, thus relieving themselves of liability. The public policy of this state with reference to aliens seems to be to not discriminate against them, but rather to encourage and protect them in every reasonable way. There is no prohibition against aliens having access to our courts. In fact the treaty between the United States and the kingdom of Italy expressly grants to the citizens of Italy free access to our courts of justice to maintain and defend their rights. If Ferrara had not died, there is no question but that he might have maintained an action in the courts of this state, and no good reason is apparent why his widow should not be entitled to maintain this action.

It is contended that the general rule that legislative enactments apply only to the citizens within the jurisdiction of the place where the Legislature sits, and that the laws of the states and countries have no extraterritorial effect, should control; but the overwhelming weight of authority is that these damage statutes which authorize the maintenance of an action by the relatives of a deceased do not have the effect of giving any extraterritorial effect of the statutes if aliens or nonresidents are permitted to maintain actions under them. In the discussion of the proposition that the laws of the state or country have no extraterritorial effect, the Supreme Court of Ohio, in the case *Railway Company v. Naylor*, supra, has this to say: "The plaintiffs have not sought to enforce the laws of Ohio in another jurisdiction, but they have come into the courts of Ohio to enforce

the laws of Ohio in their own behalf. The objection made to this is that the statute of Ohio does not apply in favor of nonresident aliens. If there had been three men instead of one killed at the same time, and the widow of one was a citizen of Ohio, the widow of another a resident alien, and the widow of the third a nonresident alien, it is admitted that the first and second could recover, and it is contended that the third could not; yet the language of the statute is the same as to the rights of all of these parties. It seems to us, therefore, that it is not a question of territorial jurisdiction, but that, when a nonresident alien comes into the courts of the state for redress under the laws of the state as he may do, it is merely a question of construction of the statute to determine whether he is excluded from its benefits. We have no disposition to controvert the proposition that the statute of one state cannot impose obligations or liabilities on citizens of another state or country not residing in the state enacting the statute; but we take it to be a self-evident proposition that a state, if there are no constitutional limitations on the general legislative power, may confer rights, privileges, or immunities upon nonresident aliens which they may accept, if not prohibited by the government to which they owe allegiance. Thus in our own state all disabilities of aliens as to inheritance are removed by statute." And in *Romano v. Brick & Pipe Co.*, supra, the court says: "The accident happened in Iowa. The person injured, as well as the defendant, is a resident of Iowa, and the wrong done by the defendant, if any, was done in Iowa. It is difficult, therefore, to see how it can be urged that any question of extraterritoriality arises."

If, as contended by counsel, statutes must be understood in general to apply to those only who owe obedience to the laws, then no person unless he be an actual resident of the state of Colorado can recover under the statutes, because the statute of this state has no greater force in one of the states of the Union than it has in Italy, and it would be contrary to every decision cited to hold that a resident of one of the states could not maintain an action for the negligent killing of a person domiciled in this state, if such nonresident would be entitled to maintain the action if a resident of this state. This point is discussed in *Romano v. Brick & Pipe Co.*, 125 Iowa, 597, 101 N. W. 439, 68 L. R. A. 132, 106 Am. St. Rep. 323, and the court says: "It is true"—speaking of cases from Georgia, Missouri, Alabama, and Kentucky—"It is true that these cases relate to right of recovery by a relative who is a citizen and resident of another state, and counsel in the case before us have urged that the rule as to nonresident aliens may well be different; but, if their contention is correct, that to give force to the statute in favor of a nonresident alien is to give it extraterritorial effect, then these

decisions are in point, for a state statute has no more effect or operation in another state of the Union than in a foreign country, and it is no answer to say that, by a provision of the federal Constitution, citizens of the other states of the Union are not to be denied the privileges and immunities accorded to citizens of the state, for, if the statute is to be applied only for the benefit of those who are subject to state law, then residents of another state are excluded as not among the persons for whose benefit the statute was passed." The language of Chief Justice Kent of the Supreme Court of Arizona is, we think, directly in point when he says: "We do not think that in order to entitle an alien to maintain this action specific authority therefor must be granted such alien by the Legislature. The act is broad and comprehensive, and by its terms includes any surviving husband, wife, child, or parent irrespective of their residence or citizenship; and this includes aliens, in the absence of any restrictive legislation. We know of no rule of law that prohibits the Legislature from extending such rights to nonresident aliens, or prevents their accepting the same." Mr. Justice Holmes, when chief justice of the Supreme Court of Massachusetts, said in the case *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309, in construing the Massachusetts employers' liability act: "We come then to the more difficult question whether the plaintiff can claim the benefit of the act. However this may be decided, it is not to be decided upon any theoretic impossibility of Massachusetts law conferring a right outside her boundary lines. * * * It is true that legislative power is territorial, and no duties can be imposed by statute upon persons who are within the limits of another state. But rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered." And, speaking of the purposes of the statute, he says: "In other words, it is primarily a penalty for the protection of the life of a workman in this state. We cannot think that workmen were intended to be less protected if their mothers happened to live abroad, or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in." When the case *Cleveland, etc., Ry. Co. v. Osgood* was first appealed to the Appellate Court of Indiana it was held that an administrator could not maintain an action under the Indiana statute, where the next of kin who would be entitled to recover are nonresident aliens, but upon a second appeal (in 1905) the court held that such action could be maintained. 36 Ind. App. 34, 73 N. E. 285. In the course of the

opinion the court said: "The essence of the act is found in that part of it which confers a right of action, and not in that part which provides who shall bring it or how the fund recovered shall be distributed. Its tendency is to induce care and make human life more secure—considerations of policy which are not affected by the alienage of the beneficiary. The right of personal security does not depend upon whether the individual's wife and children happen to live abroad." Although this court mentions the fact that the nonresident next of kin of the deceased was within the jurisdiction of Indiana at the time the fatal accident occurred, there is no difference in principle, it seems to us, between this case and the others cited. If the statute includes nonresidents and aliens as beneficiaries, it of course cannot be affected by reason of the fact that they happen to be within the jurisdiction of the court at the time the injury causing death occurred. Our treaty provides that citizens of both parties may appear by counsel in all courts for the enforcement of their rights, and it is therefore not essential for the enforcement of any right that the citizens of another nation appear in person before the court. The statute makes no distinction between citizens and aliens, residents and nonresidents; and public policy does not require the making of any such discrimination. Indeed the policy of the state would seem to require that no such discrimination should be made.

As the Legislature has not undertaken to limit the benefits accruing under the statute to those who happen to be subjects of this country, for us to do so by the interpolation of words into the statute for the purpose of effecting that result would be nothing short of a crying injustice. The statutes (sections 1508-1510, Mills' Ann. St.) declare in substance that whenever the death of a person shall be caused by the neglect of another, and the neglect is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages, then the person who would have been liable if death had not ensued shall be liable in an action for damages in a sum not exceeding \$5,000 to the wife of such deceased. The plaintiff shows by her complaint that she is the wife of the deceased, and that her husband's death was caused by the negligence of the defendant. She answers the description of the person entitled to the benefit under the statute; and, following the great weight of authority upon the subject, we hold that she is entitled to maintain the action notwithstanding the fact that she is a nonresident of Colorado and is a subject of the king of Italy.

The judgment is reversed.

GODDARD and BAILEY, JJ., concur.

WINCHELL v. POWELL et al.

(Supreme Court of Colorado. May 4, 1908.)

1. PARTNERSHIP—ADVANCEMENT TO MEMBER OF FIRM—LIABILITY OF FIRM.

Where one advances money to a member of a firm engaged in the business of giving osteopathic treatments, on the agreement that he shall be repaid in such treatments of himself and family, the firm is bound by such agreement, though the member obtains and used the money for expenses of a business in which his partner is not interested.

2. SAME—BREACH OF CONTRACT.

A firm, by refusing to recognize an agreement of one of the partners that a person advancing money to him should be repaid by professional services of the firm, in effect, refuses to perform such services, so that he is entitled to recover of the firm.

Appeal from District Court, Rio Grande County; Chas. C. Holbrook, Judge.

Action by Richard B. Powell and another against Howard H. Winchell. Judgment for plaintiffs. Defendant appeals. Reversed and remanded.

Appellees, as plaintiffs below, brought suit against appellant, as defendant, to recover for the value of osteopathic treatments. In their complaint they allege that they are carrying on the business, and practicing the art and science, of osteopathy under the firm name of Powell & Powell, and at divers times between the 1st day of January, 1903, and the 3d day of December, 1904, they rendered services by way of giving osteopathic treatments to defendant and members of his family of the value of \$115.53. The defendant answered, and admitted that plaintiffs were partners, and that they rendered the services alleged. As a further answer and by way of counterclaim, he alleged that between the 1st day of February, 1903, and the 1st day of June following, he loaned the plaintiffs money to the amount of \$223, no part of which has been paid. He prayed judgment against the plaintiffs for the difference between their account against him and the sum he had loaned them. The plaintiffs denied that any money had been loaned them by the defendant. It appears from the testimony that in February, 1903, defendant entered into an arrangement with R. B. Powell, a member of the firm of Powell & Powell, whereby R. B. Powell was to accompany the defendant to Pennsylvania for the purpose of assisting him in disposing of mining stock. The defendant claims that Mrs. Powell, the other member of the firm, and the wife of R. B. Powell, was interested in this venture, and was to share in the profits which her husband might realize in disposing of the mining stock. While in Pennsylvania, according to the testimony of the defendant, Mr. Powell received from him the sum of \$223, advanced at various times to pay his expenses and by way of loans, with the understanding that such advances would be repaid by giving treatments to his family and himself. That such was the understanding between the defendant and Mr. Powell is

not denied by the plaintiffs. The only dispute with respect to the advances by defendant to Mr. Powell is that it was \$183 instead of \$223. There is testimony on behalf of plaintiffs by which it was sought to establish the fact that Mrs. Powell was not interested in the sale of the mining stock which her husband went East to assist the defendant in making in such way, or under such arrangements, as would make her responsible for the money which the defendant advanced her husband. The case was submitted to a jury upon the theory that the individual debt of Mr. Powell could not be offset against the indebtedness of defendant to the firm. A verdict was rendered for the plaintiffs for the amount of their claim as admitted by the defendant, and judgment rendered accordingly. The defendant appeals.

Jas. P. Veer Kamp, for appellant. Jesse Stephenson, for appellees.

GABBERT, J. (after stating the facts as above). The interest of Mrs. Powell in the contract under which her husband went East to sell mining stock of defendant is not material. The only question which should have been submitted to the jury was the amount of defendant's set-off, for the reason that the testimony established beyond dispute that this set-off was a liability of plaintiffs, as partners, to him. The liability of partners as such for contracts made by a member of a firm depends upon the principles of agency. Hence any contract by a partner within the scope of the agency conferred upon him is binding upon the firm of which he is a member and for which he assumes to act. 22 Cyc. 135, 136. The plaintiffs were partners in carrying on the business of giving osteopathic treatments. The defendant advanced money to R. B. Powell, a member of the firm, with the understanding and agreement that it was to be repaid by treatments of himself and family. In such circumstances it was the intent of the parties that the services for which the money was advanced should be rendered by the firm, and the money was therefore advanced to the firm to pay for services which, as partners, the members thereof were engaged in rendering. In short, defendant, through his arrangement with R. B. Powell, paid the firm in advance for professional services. In making such an arrangement R. B. Powell was acting within the scope of his authority as the agent of the firm, and the partnership is bound thereby. By refusing to recognize the arrangement entered into between R. B. Powell and defendant, plaintiffs have, in effect, refused to render the professional services which they agreed to render for the advances made by defendant. The defendant, therefore, is entitled to recover from them the difference between the amount he advanced and the plaintiffs' account.

The judgment of the district court is re-

versed and the cause remanded, with directions to try the issue of the amount of defendant's set-off, as pleaded by him, and render judgment in his favor against the plaintiffs for the difference between the amount of their account and his set-off, as established. Reversed and remanded.

STEELE, C. J., and CAMPBELL, J., concur.

STOUGH v. REEVES et al.

(Supreme Court of Colorado. March 2, 1908. Rehearing Denied June 1, 1908.)

1. APPEAL AND ERROR—REVIEW—QUESTIONS CONSIDERED—REASONS FOR DECISION—ORAL REMARKS OF JUDGE.

Oral remarks made by the trial court at the time of rendition of judgment as to the reasons for the decision, brought up in the bill of exceptions and abstract of record on appeal instead of the findings formulated and signed by the judge, and entered of record as the court's ultimate findings of facts and conclusions of law, will not be considered, as the appellate court is not concerned with the reasoning by which the court below arrived at its conclusion, but will consider only the ultimate conclusions as expressed by the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3400-3430.]

2. SAME—DISMISSAL—GROUNDS.

The bringing up of oral remarks made by a trial court at the time of rendition of judgment, instead of the court's ultimate findings, is ground for dismissing the appeal, where timely objection thereto is made.

3. SAME—RECORD—DEFECTS SUPPLIED BY APPELLEE.

Though an appellant in the bill of exceptions and abstract of record omitted to bring up the trial court's ultimate findings, the cause will be determined upon its merits in the appellate court, where the omission was supplied by the appellee in a supplemental abstract filed by him.

4. TAXATION—SALES FOR TAXES—NOTICE—DESCRIPTION OF PROPERTY—CONSTRUCTION—"To."

The description in a notice of sale for taxes of the property as lots "1 to 24," does not exclude lot 24 by reason of the use of the word "to," as such word is not necessarily a term of exclusion, but one whose meaning is to be ascertained by the reason and sense in which it is used.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6984, 6986, 7816, 7817.]

5. SAME—ASSESSMENTS—DESCRIPTION OF PROPERTY—SUFFICIENCY.

The description of a parcel of land in tax proceedings as a portion of an entire larger tract simply by number and block, without any reference to a map, is not sufficient prima facie to identify the portion assessed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 720-735.]

6. SAME.

Certain property sold for taxes was described on the tax roll as "lots 1 to 24, block 8, Fairground town"; in the publication notice as "lots 1 to 24, block 8, Fairground range, Div. or Add."; and in the tax deed "1 to 24, inclusive, in block 8, Fairground subdivision to the town of Montrose." The land sold was not a subdivision of the town of Montrose, had no reference thereto, but was a subdivision of an adjoining quarter section of land known and

recorded as "Fairground plat." *Held*, that the description of the property in the tax proceedings was prima facie insufficient to identify the lands sold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 720-735.]

7. SAME—EVIDENCE—SUFFICIENCY.

Where the only evidence offered to overcome the prima facie insufficiency of the description of property in a notice of sale for taxes was the testimony of an abstracter that he thought he could, from his knowledge, identify the tract by the description in the notice, and there was no evidence showing that it was well or generally known by the description in the notice of sale, the evidence was insufficient to overcome the prima facie insufficiency of the description.

Appeal from District Court, Montrose County; Theron Stevens, Judge.

Action by A. F. Reeves and others against George A. Stough. From a judgment for plaintiffs, defendant appeals. Affirmed.

F. C. Perkins and Lewis P. Main, for appellant. Bell, Catlin & Blake, for appellees.

GODDARD, J. The appellees, plaintiffs below, bring this action to quiet their title to what is known and described in a plat on file in the county clerk's office as block 8 in Fairground plat, Montrose county, Colo. They allege possession and ownership of the property, and that appellant, defendant below, claims an interest or estate adverse to them, which is without any foundation or right whatever. Appellant denies the ownership and possession of the appellees, and alleges ownership in himself under a certain tax deed, which is set out in *hæc verba* in his answer, and a conveyance to him from the grantee in the tax deed. Appellees replied, admitting the tax deed and conveyance to appellant, but alleged: That the tax deed is voidable for several reasons, among others that the description of the property in the assessment roll, advertisement, and in the tax deed was too indefinite to identify the premises. That the proper description of the land is and was lots 1 to 24, inclusive, in block 8 of Fairground plat, according to a plat thereof on file in the county clerk's office. That on the tax roll and in the publication notice it is described as "lots 1 to 24, block 8, Fairground," and is not shown to be inclusive of lots 1 to 24, and described in the tax deed as "lots 1 to 24, inclusive, in block 8, Fairground subdivision to the town of Montrose." That said Fairground plat never has been any part of the town of Montrose, and has no reference to the same, but is a subdivision of a quarter section of land, and known and recorded as "Fairground Plat." Another subdivision adjoining it in the same quarter section is fenced and improved as fairgrounds, and known as the "Fairgrounds," and another subdivision in the quarter section is known as "a part of the Fairground tract." That the description in the deed from Musgrave to appellant is as follows: "All of block eight in Fairground plat or subdivision." Upon the trial the treasurer produced and identi-

fied the tax roll wherein the property in question is described as follows:

Lots	Block	Name of Town.
1 to 24	8	Fairground.

And in the publication notice the following description appears:

Name of owner.	Part of Sec. Lot or Block.	Sec. or Block.	Range, Div. or Add.
Holcombe, H. S.	1 to 24	8	Fairground.

The recorded plat introduced in evidence shows that the land in controversy is a subdivision of the N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, section 27, township 49 N., range 9 W., and platted as the property of the Fairground Association and of O. D. Loutsenhizer, and is described as "Fairground Plat" in lots 1 and 2.

The statute in force in 1898 provides that the county treasurer shall make out his list of town lots for publication of delinquent tax list describing such town lots as they are described on tax roll. Section 3924-q, 3 Mills' Ann. St. Supp. Section 3925, Mills' Ann. St. Rev. Supp. p. 1081, reads: "When any lands or town lots are offered for sale for any taxes, it shall not be necessary to sell the same as the property of any person or persons, * * * but such land must be in other respects sufficiently described on the tax roll to identify it."

The court found the issues in favor of the appellees, and in its signed and recorded findings bases its conclusion that the tax deed is void upon the ground "that the treasurer of said county and the other county officers charged with the duty of placing on the tax roll, advertising, and selling said block 8 in said Fairground plat for the delinquent taxes for the year 1897 wholly fail to comply with the statutory provisions of said state requiring said land to be described so it could be identified, published, and sold in substantial compliance with said statute, * * * and that by reason of said fatal descriptions of said property prior to said sale, which were calculated to mislead those interested in the property and those desiring to purchase it, and because of their total failure to describe or purport to sell a portion of the property attempted to be conveyed in said tax deed, said sale was for an excessive amount, all of which rendered said tax deed void and of no effect." In this finding the court does not specify in what particular the description of the land is insufficient, but finds that the description as a whole was too indefinite to identify the premises.

Counsel for appellant has concluded in the bill of exceptions and in the abstract of the record the oral remarks made by the court at the time of the rendition of the judgment instead of the findings formulated and signed by the court and entered of record as its ultimate findings of fact and conclusions of law, and counsel predicates much of his argument upon some expressions found in the oral dis-

quisition of the judge as to the specific objection that the description was subject to. We can consider only the ultimate conclusion of the court as expressed by the record, and we are not concerned with the reasoning by which the court below arrived at such conclusion. As was said in *Burke v. Table Mountain Water Co.*, 12 Cal. 408: "The reason given for the conclusion is not *res judicata* as to him so as to bind him in any future proceeding. * * * We do not understand that the reasons given for a judgment are judgments. The point decided is the thing fixed by the judgment, but the reasons are not." The abstract filed by appellant was therefore defective in not presenting that part of the record to which reference is made in the assignments of error Nos. 1 and 2, and the appeal might have for this reason, if availed of in apt time, been dismissed; yet appellees having by their supplemental abstract supplied this omission and presented the finding of the court complained of, we are enabled to determine the case upon its merits, to wit, whether the court below erred in its conclusion that the description in the publication notice was insufficient to identify the property to be sold.

The sufficiency of the description in the notice is challenged by counsel for appellees upon two grounds: (1) That in the description of the lots "1 to 24" without adding the word "inclusive" the word "to" must be construed as a term of exclusion, and such description, therefore, did not include lot 24. In support of this construction counsel cites volume 2, p. 1122, *Bouvier's Law Dictionary*, wherein the word "to" is defined as "a term of exclusion, unless by necessary implication it is manifestly used in a different sense." In volume 8 of *Words and Phrases*, after citing cases wherein the word is defined according to the connection in which it is used, it is said: "Its meaning is ascertained from the reason and sense in which it is used." Testing its meaning as here used by these rules, it is manifestly used as a word of inclusion. In prescribing the abstract of the assessment roll to be made by the assessors, the statute in force at the time of this proceeding gives an illustration of how lots are to be described therein, which, in the column headed "Lots," is "1 to 6," which is the form prescribed in all former and subsequent revenue laws of the state, and this form of description has uniformly been followed by the treasurers and assessors in preparing the tax roll and tax sale notices. The law that requires that the property be sufficiently described in the tax roll to identify it gives, in this illustration, what the Legislature considered a sufficient description of the lots to be taxed. The word as here used is to designate certain lots for taxation, describing them "1 to 24." It, therefore, manifestly includes both. This objection, therefore, is without merit. (2) The further objection that the de-

scription of the property on the tax roll as "Fairground town," and in the publication notice as "Fairground Range, Div. or Add.," and in the tax deed as "Fairground subdivision to the town of Montrose," does not sufficiently identify the property included in "Fairground plat" we think is well taken. It appears from the evidence that Fairground plat is not a subdivision to the town of Montrose, and has no reference thereto, but is a subdivision of an adjoining quarter section of land, and is known and recorded as "Fairground plat." Furthermore, the descriptions on the tax roll "lots 1 to 24, block 8, Fairground town"; in the publication notice "lots 1 to 24, block 8, Fairground Range, Div. or Add.," and in the tax deed "1 to 24, inclusive, in block 8, Fairground subdivision to the town of Montrose"—on their face describe three distinct tracts of land, and there was no attempt on the part of the appellant to show that these different descriptions applied to the land platted and described in the complaint, or that it was known by all or either of such descriptions. The only evidence offered was that of the witness Redding, who was engaged in the business of abstractor, who testified that he thought he could, from his knowledge, identify the tract by the description in the notice of sale, but there was no evidence to show that it was well or generally known by the description in such notice. It has been held that a designation of a parcel of land as a portion of another larger tract simply by number and block, without any reference to a map, was not sufficient prima facie to identify the portion assessed. *Miller v. Williams*, 135 Cal. 183, 67 Pac. 788; *Best v. Wohlford*, 144 Cal. 733, 78 Pac. 293; *Baird v. Monroe*, 150 Cal. 560, 89 Pac. 352; *San Diego Realty Co. v. Cornell*, 150 Cal. 637, 89 Pac. 603; *Fox v. Townsend* (Cal.) 91 Pac. 1004; *Chapman v. Zobelein* (Cal.) 92 Pac. 188.

In *Miller v. Williams*, supra, the description under consideration was "lots 13, 14, 15, 16, 17, and 18, in block F, Lelbrandt tract; lots 18 and 20, block C, Kaye & Uhden tract." Temple, J., speaking for the court, said: "The assessment does not refer to a city map, but describes the land as belonging to certain named tracts. The lots and blocks are subdivisions of these named tracts, and not of the city, and no map, even of these tracts, is referred to. * * * Even supposing these lots and blocks to have been on a city map, the failure to refer to it has been held fatal. *Labs v. Cooper*, 107 Cal. 656, 40 Pac. 1042; *Cadwalder v. Nash*, 73 Cal. 43, 14 Pac. 385. See, also, *Keane v. Cannovan*, 21 Cal. 291, 82 Am. Dec. 738; *People v. Mahoney*, 55 Cal. 286. * * * The assessment is made with a view to a possible sale, and the property should therefore be so described as to enable the owner to know what land is charged with the tax, and also to enable a possible purchaser to know what land is offered for sale. The bidder who will pay the tax for the small-

est portion of the land will have his offer accepted. To decide this matter there should be no uncertainty as to what land he is dealing with. Hence the description should be sufficient in itself to identify the land, or, if reference to a map on record is required, that should be indicated in the assessment."

The recent case of *Chapman v. Zobelein* is quite in point. Shaw, J., who delivered the opinion of the court, uses this language: "The case comes precisely within the rule of the cases of *Miller v. Williams*, 135 Cal. 183, 67 Pac. 788, *Labs v. Cooper*, 107 Cal. 656, 40 Pac. 1042, *San Diego Realty Co. v. Cornell*, 150 Cal. 637, 89 Pac. 603, and *Fox v. Townsend* (Cal.) 91 Pac. 1004, with respect to the description of the property in the assessment. The property is described in the complaint as lot 34 of the University addition tract, according to the map thereof recorded in book 15, p. 46, of Miscellaneous Records of Los Angeles County, situated in the city of Los Angeles, in said county. In the assessment book there is the following general introductory heading: 'Assessment Book of the Property of Los Angeles County for the Year 1898,' etc. The description of this particular property is as follows:

Description of property in the city of Los Angeles, city and town lots, etc.	City Town Lot	or Lots Blk	Value of City and Town Lots
University Addition Trct.	34		\$ 135

"From this it appears with sufficient certainty that the property assessed is lot 34 in University addition tract in the city of Los Angeles, in Los Angeles county. There is no reference to any map of the said tract, nor anything to indicate the character of the 'University addition tract,' the location in the city of the addition, nor the relative location of lot 34 thereof. Such a description in the cases above cited was held to be prima facie insufficient to make a valid assessment. True in the cases of *Best v. Wohlford*, 144 Cal. 733, 78 Pac. 293, *Baird v. Monroe*, 150 Cal. 560, 89 Pac. 352, and *Fox v. Townsend* (Cal.) 91 Pac. 1004, it has been decided that, while a similar description is presumptively invalid, it may be explained and supplemented by proof on the trial that there is a definite tract known by the name given, that a survey and map thereof has been made, and that the lot designated by number constitutes a known and certain subdivision thereof, and that, when so explained, the assessment will be held good. Such proof merely shows that, when the surrounding natural objects and circumstances explanatory of the descriptive words are considered, the prima facie uncertainty disappears, and thereupon the description becomes clear and definite. Such extraneous

objects and circumstances must be considered in order to give a definite location on the ground to any description. The only difference between this case and one where there is a reference to some map is that maps are of such customary use that it will be presumed that one exists to answer the description and give it certainty, whereas, if there is no reference thereto, the presumptions against tax proceedings prevail, and there must be proof sufficient to make the description certain. In the case of an ordinary instrument not subject to the strict rules applicable to tax assessments and sales the description here in question would be *prima facie* good, and could only be rendered uncertain by affirmative proof of some fact which would disclose a latent ambiguity, as that there were two lots in the tract bearing the number 34. But, as pointed out in the recent case of *Fox v. Townsend* (Cal.) 91 Pac. 1004, in cases of tax sales the proof must be made by the party who seeks to affirm the validity of the sale or other proceeding."

Our conclusion is that the description in the notice of sale was *prima facie* insufficient to identify the land sold, and that there was no evidence introduced to show that it was well or generally known by that name or designation.

The judgment is therefore affirmed.
Affirmed.

STEELE, C. J., and BAILEY, J., concur.

MITCHELL et al. v. TULSA WATER, LIGHT, HEAT & POWER CO.

(Supreme Court of Oklahoma. May 15, 1908.)

1. WATERS AND WATER COURSES—MUNICIPAL CORPORATIONS—ORDINANCES—CONSTRUCTION —GRANT OF FRANCHISE.

Where the language of an ordinance granting to a waterworks company a franchise is ambiguous and reasonably susceptible of two constructions, the construction that is more favorable to the public should be adopted.

2. SAME — POWER TO MAKE IMPROVEMENTS— WATER SUPPLY.

Act Cong. May 19, 1902, c. 816, 32 Stat. 200, authorizing cities and towns in the Indian Territory, having a population of 2,000 or over, to issue bonds and borrow money for the construction of waterworks, is not in conflict with and does not repeal Mansf. Dig. Ark. c. 29, § 755, authorizing municipal corporations to make contracts for water supply.

3. SAME.

An ordinance which grants to a waterworks company the exclusive right to construct, maintain, and operate waterworks in or near a certain city for the purpose of supplying the streets, lanes, alleys, squares, and public places of said city and for extinguishing fires therein, and for such purposes grants to the waterworks company the use of all the streets, lanes, alleys, squares, and public places of the city, or so much thereof as may be necessary in the construction and operation of its waterworks, does not grant to the waterworks company the exclusive right to use the streets, lanes, alleys, squares, and public places of the city in constructing and operating a waterworks system for

the purpose of supplying the inhabitants of the city and for domestic and industrial purposes.

4. SAME.

The granting by a city to a waterworks company of the exclusive right to use its streets, lanes, alleys, squares, and public places, to construct and operate a waterworks for supplying the streets, lanes, alleys, squares, and public places with water, and for extinguishing fires therein, precludes the city from using its streets, lanes, alleys, squares, and public places for constructing and maintaining a system of waterworks for such purposes, and from granting to other persons, firms, or corporations such right, but does not preclude the city from itself constructing and maintaining a system of waterworks, and in doing so from using the streets, lanes, alleys, squares, and public places of the city, for the purpose of supplying its inhabitants and for domestic and industrial purposes.

(Syllabus by the Court.)

Appeal from the United States Court of Appeals for the Western District of Indian Territory; Wm. R. Lawrence, Judge.

Action by the Tulsa Water, Light, Heat & Power Company against John O. Mitchell and others to enjoin defendants from constructing and maintaining a system of waterworks to be owned and operated by the city of Tulsa, from submitting the question to the city, from issuing waterworks bonds, and from supplying the inhabitants of that city or using for itself water from any system of waterworks constructed by the city. Judgment for plaintiff, and defendants appealed to the United States Court of Appeals of Indian Territory, whence the cause came to the Supreme Court of Oklahoma under the enabling act. Reversed and remanded.

On the 27th day of July, 1906, plaintiff below (appellee here) filed its complaint in equity against the defendants below (appellants here) in the United States court for the Western district of the Indian Territory at Tulsa. Upon application by plaintiff a temporary injunction was granted in the action by the Honorable Wm. R. Lawrence, judge of the United States court for said district. On the 10th day of October, 1906, plaintiff filed its amended complaint, in which it states: That it is a corporation organized and existing under and by virtue of the laws of the United States in force in the Indian Territory. That on the 28th day of September, 1903, the common council of the city of Tulsa passed an ordinance which was duly approved and became effective. That said ordinance was enacted in accordance with the law in such cases provided, and granted a franchise and contract to one George G. Bayne, of Joplin, Mo., his heirs, associates, and assigns, for the purpose of supplying the city of Tulsa with water. That said ordinance was entitled: "To provide for supplying with water the streets, lanes, alleys, squares and public places in the city of Tulsa, Ind. Ter., and for the contracting with Geo. G. Bayne, of Joplin, Mo., his heirs, associates or assigns, for the purpose of supplying with water such streets, lanes, alleys, squares and public places." That section 1

provides: "The city of Tulsa, Ind. Ter., hereby contracts with Geo. G. Bayne, of Joplin, Mo., his heirs, associates or assigns, for the supplying with water the streets, lanes, alleys, squares and public places in said city, upon the terms and conditions contained in the following sections of this ordinance." That section 2 provides: "This contract shall remain and be in full force for the term of thirty years, from and after date of passage of this ordinance. During said full term of thirty years (except sooner purchased by the city as herein provided) the said Geo. G. Bayne, his heirs, associates or assigns, shall have the exclusive right to maintain and operate waterworks for supplying said streets, lanes, alleys, squares and public places with water and for the extinguishing of fires in said city. Said water to be supplied from wells adjacent to the Arkansas river to supply the domestic use and in an emergency from the Arkansas river. * * * " That section 3 provides: "That the said Geo. G. Bayne, his heirs, associates or assigns, be and is hereby authorized to establish, construct, maintain and operate waterworks in, or adjacent to said city of Tulsa, and to use any or all of the streets, lanes, alleys, or public grounds of said city, or so much thereof as may be necessary in which to lay water-pipes and maintain all the appliances necessary or proper for the supplying of water. * * * "

A copy of said ordinance is attached to plaintiff's complaint as an exhibit. The complaint alleges that, before any work was begun under said ordinance, Geo. G. Bayne sold, transferred, and assigned all his interest therein to plaintiff, and that it had complied with the terms of said ordinance to the extent of constructing a complete system of waterworks for the city of Tulsa, and that said system of waterworks had been in operation for a period of nearly two years, and that in constructing, operating, and maintaining said waterworks it had expended thousands of dollars, and that it was at the time of the institution of this suit supplying said city and its inhabitants with all the water needed for the purposes prescribed in said ordinance. And plaintiff further alleges that it was preparing to issue bonds for the purpose of extending said water plant and for the maintenance of its present waterworks system. It further alleges that the city of Tulsa, through its council, had passed a resolution instructing its attorney to go to Muskogee and consult with the judge of the court on the necessity of taking a census prior to the issuance of waterworks bonds; that the council of said city of Tulsa, on July 2, 1906, by resolution, instructed its attorney to take all necessary steps to procure the issuance of \$100,000 of waterworks bonds for the construction and completion of a water system for the city of Tulsa, and that the council of the city of Tulsa was, at the time of the institution of this suit, proceed-

ing to prepare and issue bonds for the purpose of building a waterworks system for the city of Tulsa; that plaintiff, by such acts of the city council of the city of Tulsa, would be divested of its rights acquired in the construction and maintenance of its water system under said ordinance. It prayed for an injunction against the defendants enjoining them from attempting to construct and maintain a system of waterworks, to be owned and operated by the city of Tulsa, from submitting said question to the city of Tulsa, and from issuing waterworks bonds in the sum of \$100,000 or any other sum for the construction of a system of waterworks for the city of Tulsa, and from supplying to the inhabitants of said city or using for itself water from any system of waterworks constructed by the said city of Tulsa. Plaintiff further alleges four other causes of action in its complaint.

Upon final hearing of the case, defendants filed a demurrer to each and all of plaintiff's alleged causes of action, and the court sustained the demurrer to all said causes of action except the first; but, as to the first alleged cause of action, it overruled defendants' demurrer, to which defendants excepted and refused to plead further. Whereupon the court rendered judgment in favor of plaintiff and made perpetual the temporary injunction theretofore granted by the Honorable Wm. R. Lawrence, judge of the United States court for said district, by which defendants were perpetually enjoined from attempting to construct and maintain a system of waterworks to be owned and operated by the city of Tulsa, from submitting said question to the inhabitants of the city of Tulsa, and from issuing waterworks bonds in the sum of \$100,000, or any other sum for the construction of a system of waterworks for said city of Tulsa, and from supplying the inhabitants of said city with water, and from using for themselves water from any system of waterworks constructed by the said city of Tulsa. From this judgment of the court, defendants appealed to the United States Court of Appeals of the Indian Territory, where the case was pending at the time of the admission of the state into the Union, and it comes to this court under the provisions of the enabling act.

John E. Lydecker and Biddison, Campbell & Eagleton, for appellants. Hutchins, Murphy & German, for appellee.

HAYES, J. (after stating the facts as above). Defendants make six assignments of error, but they may be reduced to one assignment, to the effect that the court erred in overruling their demurrer to plaintiff's first cause of action, and in rendering judgment for plaintiff. The contentions of defendants may be divided into three propositions, as follows: First. That the Tulsa Water, Light, Heat & Power Company has

no exclusive franchise by which is granted the exclusive right to use the streets, alleys, etc., of the city of Tulsa, for the purpose of maintaining and operating a system of waterworks. Second. That if the water company has an exclusive franchise to use the streets, alleys, etc., of the city of Tulsa in maintaining and operating a system of waterworks, such right is limited to maintaining a system of waterworks by which water is supplied to the city of Tulsa from wells adjacent to the Arkansas river, and in case of an emergency from the Arkansas river, and does not preclude the city from granting to other persons, firms, or corporations the right to maintain and operate a system of waterworks in the city of Tulsa and in using the streets, alleys, etc., of the city of Tulsa for such purpose so long as said other persons, firms, or corporations obtain their water from other places than wells adjacent to the Arkansas river, and in cases of emergency from the Arkansas river, and that the city of Tulsa may construct, operate, and own its own waterworks and use the streets, alleys, etc., of the city for such purpose so long as it obtains its water supply from other places than from wells adjacent to the Arkansas river, and in cases of an emergency from the Arkansas river. Third. That, if the water company has an exclusive franchise of any character, such franchise gives to the water company the exclusive right to maintain and operate waterworks only for the purpose of supplying the streets, lanes, alleys, squares, and public places, and for extinguishing fires in the city of Tulsa, and does not preclude the city from constructing and operating its own waterworks or from granting such right to other persons, firms, or corporations for the purpose of supplying the inhabitants of the city of Tulsa and for mechanical and industrial purposes. Plaintiff, on the other hand, contends that it has an exclusive franchise by which it is granted by the city of Tulsa the exclusive right to use and occupy the streets, lanes, alleys, squares, and public places of the city for the purpose of constructing, maintaining and operating its waterworks system, for all purposes, and that such franchise has been accepted by it, and that it has performed the terms of same, and that thereby the franchise has become a contract between it and the city of Tulsa, which cannot be impaired by the city of Tulsa, and that to permit the city of Tulsa to use the streets, alleys, etc., of the city in constructing, maintaining, and operating a system of waterworks with which to supply itself and its inhabitants with water would impair plaintiff's contract.

It is a well-settled rule of the Supreme Court of the United States that a grant of a franchise after performance by the grantee is a contract protected by the Constitution of the United States against state legislation to impair it, and that legislation of municipal bodies created by the legislative bodies

of the states for the purpose of local legislation is legislation by the state. *New Orleans Gaslight Co. v. Louisiana Light, etc., Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. If plaintiff's franchise grants to it the exclusive right to use the streets, lanes, alleys, squares, and public places in the city of Tulsa, for the purpose of maintaining and operating a system of waterworks for all purposes, since it is admitted that plaintiff has accepted the franchise and has performed the conditions thereof, the judgment of the trial court was not error. But has the Tulsa Water, Light, Heat & Power Company such an exclusive franchise? The ordinance by which the assignor of plaintiff was granted a franchise was enacted by the city council of Tulsa on the 28th day of September, 1904. There was in force in the Indian Territory at that time section 755 of Mansfield's Digest of the Statutes of Arkansas (Ann. St. Ind. T. 1899, § 525), which reads as follows: "For the purpose of providing water, gas or street railroads, the mayor and council may contract with any person or company to construct and operate the same and may grant to such person or company for the time which may be agreed upon the exclusive privilege of using the streets and alleys of such city for such purpose or purposes." There was also in force in the Indian Territory at said time an act of Congress of May 19, 1902 (32 Stat. 200, c. 816), which authorized cities and towns in the Indian Territory having a population of 2,000 or over to issue bonds and borrow money for the construction of waterworks.

It was held by the United States Court of Appeals of the Indian Territory, in Incorporated Town of Tahlequah v. Guinn et al., 5 Ind. T. 497, 82 S. W. 886, that the act of Congress of May, 1902, was not in conflict with and did not repeal said section 755 of Mansfield's Digest. The city of Tulsa at the time of granting the franchise in controversy and at the time of the institution of this suit had the power to build and construct its own waterworks for the purpose of supplying the city and its inhabitants with water unless by some contract it had precluded itself from doing so. Plaintiff contends that the case of Incorporated Town of Tahlequah et al. v. Guinn et al., supra, is directly in point in this case and announces the correct rule of law. The language of the ordinance involved in that case in some respects is very similar and almost identical with the language of the ordinance in the case at bar, but in other respects it is materially dissimilar, but the construction of the ordinance as to whether it attempted to give an exclusive franchise was not involved in that case. It appears to have been conceded by the town of Tahlequah, who attacked the ordinance in that

case, that the language of the ordinance was sufficient to grant to the water company the exclusive right to use the streets and alleys of the town of Tahlequah for the purpose of maintaining and operating a system of waterworks; but its contention was that such ordinance was illegal and void, and that the power of the town to grant such franchise, if it existed at all, existed under section 755 of Mansfield's Digest of the Statutes of Arkansas, and that said section had been repealed by the act of Congress of May 19, 1902, prior to the passage of the ordinance granting the franchise. The court decided against the town on all of its contentions, but the construction of the ordinance was not involved in the case.

If the construction of the ordinance had been involved in that case, the decision of the court therein could not be very persuasive on this court, for the reason that there is a very material difference in the language of the section of the ordinance in that case which grants to the water company an exclusive right from the language of the corresponding section of the ordinance in the case at bar. Section 2 of the ordinance in that case provides that the water company "shall have the exclusive right to maintain and operate water works, for supplying the said streets, lanes, alleys, and public places with water and for the extinguishment of fires in said town, and for *domestic, manufacturing and industrial* uses in said town, * * * " (The italics are ours.) Whereas, the corresponding section of the ordinance in this case provides that the water company "shall have the exclusive right to maintain and operate waterworks for supplying said streets, lanes, alleys, squares and public places with water and for the extinguishing of fires in said city," but it does not provide that the water company shall have the exclusive right to maintain and operate waterworks for domestic, manufacturing, and industrial uses, or for supplying the inhabitants of said city of Tulsa.

Defendants insist that the effect of section 2 of said ordinance is to grant to plaintiff the exclusive right to furnish the city of Tulsa with water, for supplying the streets, lanes, alleys, squares, and public places of said city, and for extinguishing fires in the city, and that the city of Tulsa had no authority to make such a contract; that the only exclusive privilege it was authorized to grant under the law was to grant the exclusive use of its streets, lanes, alleys, squares, and public places to plaintiff for the purpose of constructing waterworks; and that therefore the grant is void. We do not agree with defendants in this construction of the ordinance. The language of section 2 is specific to the effect that the exclusive right is not, as contended by defendants, to furnish water to the city, but to maintain and operate waterworks for supplying the streets, lanes, alleys, and public places of the city, and for

extinguishing fires therein. Section 3 gives to plaintiff the right to use any and all of the streets, lanes, alleys, and public grounds of the city, or so much of same as may be necessary to lay water pipes and maintain all the appliances necessary in the construction and operation of its waterworks.

In construing this contract, as in construing any other contract, the primary object of the court should be to accomplish the intention of the parties, and a liberal and fair construction should be given to the words used by the parties in the contract, considered singly, and in connection with the general subject-matter of the contract. Sections 2 and 3 of the ordinance are the only sections therein by which it is attempted to make any grant from the city to the waterworks company, and taking into consideration the general purposes of this franchise as expressed in the title of the ordinance, which was "To provide for supplying with water the streets, lanes, alleys, squares and public places in the city of Tulsa," we think sections 2 and 3 of the ordinance intended by the parties to grant and do grant to the water company the right to maintain and operate waterworks for supplying the streets, lanes, alleys, squares, and public places of the city of Tulsa, and in doing so to use the lands, alleys, streets, squares, and public places of said city in so far as necessary, and make such right exclusive. By section 6 of the ordinance, the city of Tulsa agrees to rent from the grantee, during the full term of 30 years, 65 fire hydrants, and stipulates an annual rental for the same, and it is provided by the same section that such hydrants may be used by the city for the flushing of sewers as well as for extinguishing fires. By section 8 it is provided that additional hydrants shall be erected by the grantee whenever directed so to do by resolution of the city council. Section 11 provides that the city of Tulsa may have the right to purchase the waterworks at the expiration of 10 years from the acceptance of the franchise, and provides how the value of the same may be arrived at. Section 13 prescribes the rate at which water shall be furnished by the grantee to the consumers in the city. Section 17 provides that, when the city of Tulsa acquires a population exceeding 10,000 inhabitants, the rates and charges as provided by the ordinance shall be reduced 10 per cent.; but no section of the ordinance provides that the city shall purchase all of its water from the grantee, nor does it attempt to bind its inhabitants to do so.

The whole text of the ordinance considered shows it was the intention of the parties, and such intention has been fairly expressed by the terms of the ordinance, that the grantee should have the exclusive right to maintain and operate waterworks for supplying the streets, lanes, alleys, squares, and public

places of the city of Tulsa with water, and for the extinguishing of fires in the city, and that as an inducement, or as a part of the consideration for said contract, the grantee agreed to furnish water to the inhabitants of the city at a rate stipulated therein, and the city agreed to rent and did rent a certain number of hydrants as stipulated, with the privilege of using other hydrants when it deemed it necessary to use them, and reserved to itself the right to purchase the waterworks; but there is nothing in the contract that binds or indicates that it was the intention that the city should be bound to take and use any other hydrants than those directly provided for in the contract, or that the city should be bound to buy the waterworks of the grantee in the event the city should decide to construct and operate waterworks for any purpose. There is nothing in the ordinance that grants to the water company an exclusive right to use the streets, lanes, alleys, and public grounds of the city in constructing and operating a waterworks system for the purpose of supplying the inhabitants of the city for industrial and domestic purposes. The language of the ordinance limits the exclusive right to maintain and operate a waterworks system for supplying the streets, lanes, alleys, squares, and public places with water and for the extinguishing of fires in the city. It may be contended that the exclusive right to use the streets, lanes, etc., for the construction and operation of the waterworks to supply the inhabitants, and if not directly expressed in the ordinance it was inadvertently omitted; but no rule is better settled by the courts than the principle that all grants which are against the state must be clearly defined and not left to inference or presumption, and that if an ordinance is silent about any power it does not exist, and if a reasonable doubt on the fair reading of such an instrument arises as to the proper interpretation to be given to it this doubt is to be resolved in favor of the public. *The Binghampton Bridge Co.*, 3 Wall. (U. S.) 51, 18 L. Ed. 137; *Helena Waterworks Co. v. Helena*, 195 U. S. 383, 25 Sup. Ct. 40, 49 L. Ed. 245; *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 11 Sup. Ct. 892, 35 L. Ed. 622; *Bartram v. Central Turnpike Co. et al.*, 25 Cal. 283.

In *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560, the court said: "It is settled law that in grants by the public nothing passes merely by implication, and if a contract with a state, relating to the exercise of franchises, is susceptible of two meanings, 'the one restricting and the other extending the powers of a corporation, that construction is to be adopted which works the least harm to the state.'" There can be no contention in this case that the extent of the grant by the city of Tulsa is expressed in ambiguous terms, and that it is susceptible

of the construction that no exclusive grant was given to the waterworks company to use the streets, alleys, and public grounds of the city for the purpose of supplying the inhabitants of the city for domestic and industrial purposes, and following the rule quoted from *Covington & Lexington Turnpike Road Co. v. Sandford*, supra, this construction, being the one that least harms the city, should be adopted by this court.

It may be urged that the exclusive right to use the streets of the city of Tulsa for the construction and operation of waterworks for the purpose of supplying the inhabitants and for domestic and industrial purposes was intended by the parties, but inadvertently omitted. Such a right is one of great value, both for the grantee to receive and for the city to grant, and it may be argued with as great a show of reason that, if it was intended that said ordinance should convey so great and valuable a right, the grantee would have seen that the same was specifically granted by the terms of the ordinance, and not relied upon its being granted by implication. Under the well-settled rule of construction governing the construction of contracts of the nature of the one under consideration, the court should no more read into the contract that which may have been inadvertently omitted, than it should read out of the contract that with which one of the parties may have become dissatisfied. Under the franchise in this case, plaintiff has the exclusive use of the streets, alleys, and public grounds of the city of Tulsa to construct and operate waterworks for the purpose of supplying the streets, lanes, alleys, squares, and public grounds of the said city of Tulsa with water and for extinguishing fires in the city, and it has the right to use said streets and alleys for the purpose of construction and operation of the waterworks to supply the inhabitants of said city; but such last right is not exclusive, and the city of Tulsa may use the streets, alleys, and public grounds of the city in the construction and operation of a waterworks plant for the purpose of supplying its inhabitants with water and for the purpose of supplying water for domestic and industrial purposes, or it may grant such right to other persons, firms, or corporations.

Defendants, relying upon *Stein v. Bienville Water Supply Co.*, supra, insist that whatever exclusive privilege is granted by the ordinance in this case to plaintiff is limited by that portion of the language of section 2 of the ordinance which reads, "said water to be supplied from wells adjacent to the Arkansas river to supply the domestic use and in an emergency from the Arkansas river * * *"; that the effect of such language is to limit the exclusive privilege of plaintiff to use the streets, alleys, and public grounds of the city of Tulsa to the construction, operation, and maintenance of a water system by which water is supplied to the city of Tulsa from wells adjacent to the Arkansas river, and in an

emergency from the Arkansas river, and does not give it the exclusive right to use said streets, alleys, etc., in the construction, operation, and maintenance of a water system by which water is supplied from any other source. In the *Blenville Water Supply Co. Case*, supra, plaintiff's testator held a franchise by which he was given the exclusive privilege of supplying the inhabitants of Mobile for a period of 20 years from the date of the franchise with water from Three-Mile creek. The water system had been constructed and placed in operation under said franchise. Subsequent to said time, and prior to the expiration of 20 years, the *Blenville Water Supply Company* was granted a franchise which granted to it the exclusive right of conducting and bringing water from any point other than Three-Mile creek, in the county of Mobile, for the purpose of supplying the Port of Mobile and the village of Whistler, which places included the city of Mobile. Plaintiff brought suit against the *Blenville Water Supply Company* to enjoin it from constructing said waterworks, contending that to permit it to do so would impair the contract of his testator. The court denied the relief prayed for by plaintiff upon the theory that his exclusive franchise granted him only the exclusive right to supply the city of Mobile with water from Three-Mile creek, and that his contract was not impaired by the granting of another franchise giving to other persons the right to supply water from other sources than Three-Mile creek. But in the case at bar, the language used is not that all water supplied by the plaintiff shall be from wells adjacent to the Arkansas river, and in emergency from the Arkansas river, but that water supplied by it to supply "domestic use" shall be brought from "wells adjacent to the Arkansas river, and in emergency from the Arkansas river." No limitation is placed upon the source from which water is to be obtained to supply the streets, lanes, alleys, and public places of the city, or to be used in the extinguishing of fires, unless the term "domestic use" includes such places. The word "domestic," as defined by Webster's International Dictionary, means "of or pertaining to one's house or home, or one's household or family; relating to home life." And in *Crosby v. City Council of Montgomery*, 108 Ala. 498, 18 South. 723, the words "domestic purposes," as used in an ordinance granting a franchise to a water company, was construed to include "all uses which contribute to the health, comfort, and convenience of the family, in the enjoyment of their dwelling as a home." We therefore conclude that the language of section 2, which provides that water to "supply domestic use" shall be supplied from wells adjacent to the Arkansas river, and in emergency from the Arkansas river, does not include water to supply the streets, lanes, alleys, squares, and public places of the city, or to be used in extinguishing fires, and there being no limitation in the ordi-

nance upon the place or places from which water for such purposes may be brought by the waterworks company, the company is left free to obtain its water for such purposes from such source or sources as it may be able, and the rule announced in *Stein v. Blenville Water Supply Co.*, supra, does not apply in this case.

This brings us to the third contention of defendants, which, if correct, limits the exclusive right of plaintiff to use the streets and public grounds of the city of Tulsa in the construction, operation, and maintenance of waterworks for the purpose of supplying the streets, alleys, lanes, and public grounds of the city to the extent that the city of Tulsa has no power to grant a similar right to other persons, firms, or corporations, but not to the extent that the city of Tulsa is precluded from using its streets and public grounds in constructing, maintaining, and operating a waterworks system of its own for such purpose. The defendants rely upon the following authorities to support their contention: *Lehigh Water Company's Appeal*, 102 Pa. 515; *North Springs Water Co. v. City of Tacoma*, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214; *Thomson-Houston Elec. Co. v. City of Newton et al.* (C. C.) 42 Fed. 723; *Street Railway Co. v. Detroit Ry. Co. et al.*, 171 U. S. 48, 18 Sup. Ct. 732, 43 L. Ed. 67; *State ex rel. Town of Canton v. Allen*, 178 Mo. 555, 77 S. W. 868; *Hamilton Gas Light & Coke Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963.

In *Lehigh Water Company's Appeal*, supra, the company contended that it had an exclusive franchise under the language of an act of the Legislature of Pennsylvania of 1874 (P. L. p. 93, § 34), the wording of which is different from the wording of the statute under which the city of Tulsa has the power to grant an exclusive franchise, and the court, in construing the company's franchise in that case, used the following language: "While the language from the act of 1874 above quoted would seem to favor the exclusive right claimed by the water company, a careful examination of the clause 3 of section 34 (P. L. p. 94) shows that the Legislature intended that the right should be exclusive only as against other water companies, for immediately in this connection occur the words: 'And no other company shall be incorporated for that purpose until the said corporation shall have from its earnings realized and divided among its stockholders, during five years, a dividend equal to eight per centum per annum upon its capital stock.' The provision that another company shall not be incorporated was not intended to prohibit a city or borough from providing its citizens with pure water by means of works constructed by itself from money in its own treasury."

In *Water Company v. Knoxville*, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353, the language of the ordinance was somewhat sim-

ilar to the language in *Lehigh Water Company's Appeal*, supra, to the effect that the franchise provided that no contract or privilege would be granted to any other person or corporation to furnish water. The court, in construing this provision of the franchise, held that the city was not, in the absence of specific stipulation to that effect, precluded from establishing its own independent system of waterworks. That case cannot apply to the case at bar, for the reason that the contract in controversy in that case stipulated specifically against granting contracts or privileges to other persons or corporations, but made no specific stipulation against the city's exercising such privileges, and the rule that the expression of one excludes the other applied in that case; but in the case at bar the right granted is exclusive in general terms.

In *North Springs Water Co. v. City of Tacoma*, supra, in *Thomson-Houston Elec. Co. v. City of Newton et al.*, supra, and in *Railway Co. v. Detroit Railway Co.*, supra, no words of exclusion or of limitation upon the right of the city were used in the contract or statute under consideration as are used in the case at bar, and in those cases there was no contention of a grant of an exclusive right by express terms of the contract, but that such right was granted by implication, and those cases therefore cannot apply to the case at bar.

A portion of the syllabus in *State ex rel. Town of Canton v. Allen*, supra, reads: "Rev. St. 1899, § 6275, granting power to cities to purchase or erect and maintain electric plants for public and private lighting, is not violative of Const. U. S. art. 1, § 10, nor Const. Mo. art. 2, § 15, forbidding the passage of any law impairing the obligation of contracts, though an ordinance authorizing the issue of bonds for such purpose is passed while private persons, to whom had been granted an exclusive franchise, were operating a plant for that purpose, and the franchise had several years to run." But a careful examination of the opinion discloses that there is not a word in the opinion supporting this syllabus. Not only does the court fail to use any language which can be construed as announcing such rule, but, on the contrary, it is specifically stated that the franchise under consideration was not an exclusive one.

A portion of the syllabus in *Hamilton Gas Light & Coke Co. v. Hamilton City*, supra, indicates that that case supports the contention of defendants in the case at bar now under consideration. The third syllabus of that opinion reads as follows: "A grant, under legislative authority by a city, of an exclusive privilege, for a term of years, of supplying the city and its people with gas, does not prevent the city from erecting its own gas works under a state law giving it power so to do." We have read this opinion with care and scrutiny, for the reason that, if the language of the opinion supports the syllabus

quoted, that case would be decisive of the case at bar; but we are convinced that the rule laid down in said syllabus is not supported by the opinion in the case. The facts in that case were that by ordinance passed July 9, 1855, the city of Hamilton authorized the Hamilton Gas Light & Coke Company to place pipes in its streets, lanes, alleys, and public grounds to convey gas for the use of the city and its inhabitants; the company to have "the exclusive privilege of laying pipes for carrying gas in said city and of putting up pipes in dwellings in connection with the street pipes for the term of twenty years from the passage of this ordinance," but not to charge for gas furnished the city or its inhabitants a price greater than, during the period of the contract, was usually charged in cities of similar size and with like facilities for the making and furnishing of gas." The language of the ordinance quoted supra, by which the exclusive privilege was granted, is somewhat similar to the language of the ordinance in the case at bar, by which the exclusive grant is made. It is more nearly similar to the language of the ordinance in the case at bar than that of any other ordinance or statute which we have found construed by any court. Written contracts were made by the city of Hamilton with the gas company from time to time. The first one was dated April 10, 1862. The last one was dated July 16, 1883, and expired by its term January 1, 1889. On the 2d day of January, 1889, the council of the city of Hamilton passed a resolution reciting the termination of the last contract, and declaring that the city no longer desired the company to furnish gas for lighting streets and public places, and that it would not after said date pay for any lighting furnished by the gas company, and provided for submitting to a vote of the people the question of issuing bonds for the purpose of itself erecting gas works to supply the city and its inhabitants. The power to establish such plant by the city itself was claimed under an act of the Legislature of 1869 (66 Ohio Laws, p. 219, § 423) which granted to the council of all cities and villages the power, whenever they deemed it expedient for the public good, to erect gas works, or they could purchase gas works already erected therein. The gas company sought by the action to enjoin the city of Hamilton from proceeding to construct and establish its own gas plant upon the theory that by doing so it impaired the gas company's contract. By the Constitution of Ohio, adopted in 1851, it was declared that no special privilege or immunity shall ever be granted that may not be altered, revoked, or repealed by the General Assembly. The action was brought in the Circuit Court of the United States for the Southern District of Ohio, and upon trial was dismissed by that court, from which the gas company appealed to the Supreme Court of the United States. We are unable to find any language in the opinion of

the court that supports a construction of the exclusive grant in the ordinance to the gas company as it existed prior to the expiration of all contracts with the city, which occurred on the 1st day of January, 1889, as not excluding the right of the city to construct and operate its own gas plant, as is indicated in the syllabus of the opinion quoted. The court appears to have affirmed the judgment of the lower court upon two propositions, the first of which is stated by Mr. Justice Harlan, who delivered the opinion of the court, in the following language: "So, it may be said, in the present case, neither in the statutes under which the plaintiff became a corporation, *nor in any contract it had with the city, after January 1, 1889*, was there any provision that prevented the state from giving the city authority to erect and maintain gas works at its own expense, or that prevented the city from executing the power granted by the section of the Code of 1869 to which we have referred." (The italics are ours.) This statement of the court indicates to our mind that it was the holding of that court that the gas company had no exclusive privilege or franchise after January 1, 1889, but we do not construe this language of the court to mean, nor are we able to find any other language in the opinion of the court that indicates, that the court construed the language of the original ordinance or the contract made thereunder expiring prior to January 1, 1889, as not granting such an exclusive franchise as would exclude the city from the right to build and operate its own gas plant. The court then proceeds to state that the case should also be affirmed upon the further consideration that, under the statute of Ohio in force at the time the gas company obtained its franchise, the General Assembly of the state had power to alter, revoke, or repeal any special privilege granted, and that such gas company took its franchise subject to such provision of the Constitution, and that the act of the Legislature of 1869 giving to the council of cities and villages power to erect gas works was a modification of the gas company's right under its franchise. The effect of this last proposition of the court, as we understand the opinion, is that, although the gas company's contract with the city had been in force at the time the injunction was sought, it would not have been entitled to the injunction for the reason that the act of the Legislature of 1869 repealed or modified the grant of the city to the gas company to the extent that it authorized the city to construct its own gas plant.

Our attention has been called by able counsel of appellee to decisions of various courts as supporting the construction of the ordinance in the case at bar to the effect that such exclusive grant is made by the ordinance as excludes both the city of Tulsa from constructing and maintaining waterworks itself, and from granting such right to other persons or companies. Among the decisions

called to our attention are: *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *Westerly Waterworks Co. v. Town of Westerly et al.* (C. C.) 75 Fed. 181; *White v. City of Meadville*, 177 Pa. 643, 35 Atl. 695, 34 L. R. A. 567. In the *Meadville Case*, the opinion turns upon the construction of a statute granting to the city the power to construct waterworks itself, or to contract with companies to build waterworks, and not upon the construction of any language in the grant of the city to the company. The statute controlling in that case granted to the city the power to construct its own waterworks or to contract for the erection of waterworks by a company to supply the city with water, and the court held that the power was granted to the city in the alternative, and that the city, having exercised its power under the statute to contract with the company to erect waterworks and supply it with water, was precluded from exercising the power to construct and operate waterworks. In *Westerly Waterworks Co. v. Town of Westerly*, *supra*, the question involved was similar to the question in the *Meadville Case*, and was the construction of a statute granting to the city the alternative power of either constructing its own waterworks or contracting with persons or companies to construct same, and the construction of the franchise to the water company was not involved. The court makes this clear in the following language: "The question is not whether the town may grant a franchise to be exclusively exercised by the company for a term of years, without regard to its ability or willingness to furnish an adequate supply of suitable water; but the question is, rather, whether the town has not, by its own act under one branch of the law, limited its power to act under the other branch of the act." In the *Walla Walla Case*, no exclusive franchise was granted by the city to the waterworks company, but there was a stipulation in the franchise to the effect that the city would not erect waterworks of its own. The court held the city had power to do this, and that having done so it was a binding contract upon the city, but that such stipulation did not prevent the city from granting a similar franchise to another company. But the opinion of the court in that case cannot be very helpful to us in this case, except to the extent that it holds the city may contract with a waterworks company not to erect waterworks of its own.

The right of the state to control the use of the streets and alleys of its cities for the purpose of constructing and operating waterworks to supply such cities has been well expressed by Mr. Justice Harlan, in *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525, in the following language: "The right to dig up and use the streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with

water is a franchise belonging to the state, which she could grant to such persons or corporations, and upon such terms, as she deemed best for the public interest. And as the object to be attained was a public one, for which the state could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee in respect of the subject of the grant, as in the judgment of the legislative department would best promote the public health and the public comfort, or the protection of public and private property." This case has been repeatedly cited and approved by both the federal and state courts. Prior to the adoption of certain chapters of Mansfield's Digest of the Statutes of Arkansas, including section 755 thereof, the power to dig up and use the streets and alleys of the cities of the Indian Territory for the purpose of building and constructing waterworks to supply such cities with water was vested in Congress, under the section of the Constitution of the United States, giving it power to dispose of and make all needful rules and regulations respecting the territories of the United States. Subsequent to the adoption by Congress of said section 755, Mansf. Dig., and to the act of Congress of May 19, 1902, such right was vested in the cities of the Indian Territory, and the city of Tulsa by the ordinance involved in this case granted to plaintiff the exclusive right to construct and operate waterworks for certain purposes, and in doing so to use the streets, etc., of the city.

The word "exclusive" is defined in the Century Dictionary and Encyclopedia as "pertaining to the subject alone, not including, admitting; or pertaining to another or others; undivided; sole; as, an exclusive right or privilege; exclusive jurisdiction." The court, in *Re Union Ferry Company of Brooklyn*, 98 N. Y. 139, defines the word "exclusive" in the following language: "The word 'exclusive' is derived from 'ex,' out, and 'cludere,' to shut. An act does not grant an exclusive privilege or franchise unless it shuts out or excludes others from enjoying a similar privilege or franchise." In *Bass v. Pease*, 79 Ill. App. 308, the definition of the word "exclusive" given by the Century Dictionary, supra, is quoted with approval. If therefore the privilege and grant by the ordinance in the case at bar to plaintiff to construct and maintain waterworks and to use the streets, lanes, etc., of the city in doing so for certain purposes, is for such purposes a sole and undivided right and privilege, how could it be so when this right and privilege at the same time may be shared and divided by the city? It is not an exclusive privilege if it includes others, and if it permits the city to be included in sharing of such right and privilege, it certainly appears to us that it thereby includes others, and that to give such term such a meaning would be in contradiction with its well-defined meaning. We

therefore conclude that the exclusive privilege granted by the ordinance in the case at bar to plaintiff to use the streets, etc., of the city of Tulsa for certain purposes excludes the right of the city to use the streets, etc., for the same purposes, or to grant such privilege to other persons or companies.

It is also insisted by appellants that the demurrer should have been sustained for the reason that the court had no power to enjoin the city council in the exercise of its legislative functions, but appellants have indicated in their brief that, if this case should be reversed for the other reasons presented by them for reversal, they have no desire to press upon the court the consideration of this contention, but waive the same, and we therefore express no opinion upon this proposition. By way of review of the rights of the parties under the franchise in this case, it is the opinion of the court that the Tulsa Water, Heat & Power Company has the exclusive right to construct, operate, and maintain waterworks for the purpose of supplying with water the streets, lanes, alleys, squares, and public places of the city, and for the extinguishing of fires in the city of Tulsa, and has the right to use the streets, lanes, etc., of the city in the operation and maintenance of its waterworks in supplying the inhabitants of the city of Tulsa at the rates stipulated in the ordinance, but that the latter right to use the streets, etc., is not an exclusive right; that the city of Tulsa has the right to construct and operate a system of waterworks itself, or to grant such right to other persons or companies for the purpose of supplying the inhabitants of the city and for domestic and industrial purposes, and in doing so has the right to use or to grant the use of its streets, lanes, etc., to other persons or companies for said purposes; but that the city of Tulsa has not itself the right to construct and maintain waterworks and in doing so use its streets, lanes, etc., or to grant such right to others for the purpose of supplying with water its streets, lanes, alleys, squares, and public places, or for extinguishing fires in the city of Tulsa. Plaintiff alleges in its complaint that defendants are preparing to issue waterworks bonds and to construct a system of waterworks for the city of Tulsa, but there is no allegation in the complaint to the effect that defendants are preparing or are about to construct a waterworks system for the purpose of supplying the streets, lanes, alleys, squares, and public places of the city and for extinguishing fires, and that in doing so they are preparing to use or are about to use the streets, etc., of the city of Tulsa for such purposes. The demurrer should have been sustained.

The judgment of the trial court is reversed, and the cause remanded.

WILLIAMS, C. J., and DUNN, TURNER, and KANE, JJ., concur.

CHOCTAW, O. & G. R. CO. v. HENDRICKS.
(Supreme Court of Oklahoma. May 15, 1908.)
**REMOVAL OF CAUSES—ACTION ARISING UNDER
FEDERAL LAWS.**

In an action pending on the docket of the United States Court of Appeals for the Indian Territory at the time of the admission of the state, plaintiff, who was a resident of the Indian Territory prior to statehood, and has been a citizen of the state since its admission, alleges in her complaint that defendant is a corporation. Defendant, in fact, is a corporation organized under and by virtue of an act of Congress, and recites such fact in a petition for removal of the case to the federal courts. *Held*, that the action of plaintiff arises under the laws of the United States, and that defendant, under the provisions of section 16 of the Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 276), as amended by Act March 4, 1907, c. 2911, § 1, 34 Stat. 1286, is entitled to have the case removed to the Circuit Court of the United States.
(Syllabus by the Court.)

Action by Jennie Hendricks against the Choctaw, Oklahoma & Gulf Railroad Company. Judgment for plaintiff, and defendant appeals to the Court of Appeals in the Indian Territory. Appellant petitioned for removal of the cause from the Supreme Court of the state to the United States Circuit Court. Petition granted.

C. B. Stuart, for appellant. J. S. Arnote, for appellee.

HAYES, J. This is an action for damages, instituted by appellee in the United States Court for the Central District of the Indian Territory at South McAlester, against the Choctaw, Oklahoma & Gulf Railroad Company, for the sum of \$10,000. The case was tried in that court, and resulted in judgment in favor of appellee in the sum of \$2,000. An appeal was taken to the United States Court of Appeals in the Indian Territory, where the case was pending at the time of the admission of the state into the Union; and it comes to this court under the provisions of the Enabling Act. (Act June 16, 1906, c. 3335, 34 Stat. 267).

Appellant has filed its petition for removal of the case to the United States Circuit Court for the Eastern District of Oklahoma, and alleges that at the time of the commencement of the suit appellee was a citizen of the Indian Territory, and continued as such until the admission of the state into the Union, since which time she has been a citizen of the state of Oklahoma; that appellant is and has been at all times a corporation organized under and by virtue of a certain act of Congress of the United States, approved August 24, 1894 (28 Stat. 502, c. 330); and that its principal place of business is in the city of Philadelphia, and that it has at no time been a citizen or resident of either the Indian Territory, the territory of Oklahoma, or the state of Oklahoma. Under the facts alleged in its petition, appellant contends for the right to have this cause removed to the United States Circuit Court for the Eastern District of this

state upon two grounds: First, diversity of citizenship in an action in which the amount in controversy exceeds the sum of \$2,000; second, for the reason that appellant is a federal corporation and the action therefore arises under the laws of the United States. Appellee resists the removal of the cause, and insists that the first ground for removal cannot be well taken for the reason that, although appellee sought to recover by her suit against appellant the sum of \$10,000, the judgment rendered in the trial court in favor of appellee was for only \$2,000, and that the amount in controversy in the action on appeal, at this time and at the time the appellant's petition for removal was filed, is the amount of said judgment, and is not sufficient to entitle appellant to a transfer of the case.

Appellant's right of removal in this case does not arise under the judiciary act of March 3, 1875, and the amendments thereto, but under the act of Congress of June 16, 1906, and the amendments thereto, commonly known as the Enabling Act of the state of Oklahoma. *Herman v. McKinney* (C. C.) 43 Fed. 689; *Crown Point Min. Co. v. Ontario Min. Co.* (C. C.) 74 Fed. 419; *McCormick v. Western Union Tel. Co.*, 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684. Section 16 of the Enabling Act as amended (Act March 4, 1907, c. 2911, 34 Stat. 1286), provides: "That all civil causes, proceedings and matters pending in the Supreme or district courts of Oklahoma Territory, or in the United States Court or United States Court of Appeals in the Indian Territory, arising under the Constitution, laws, or treaties of the United States, or affecting ambassadors, ministers, or consuls of the United States, or of any other country or state, or of admiralty or of maritime jurisdiction, or in which the United States may be a party, or between citizens of the same state claiming lands under grants from different states; and all cases where there is a controversy between a citizen of either of said territories prior to admission and a citizen of any state, or between a citizen of any state and a citizen or a subject of any foreign state or country, in which cases of diversity of citizenship there shall be more than two thousand dollars in controversy, exclusive of interest and cost, shall be transferred to the proper United States Circuit or District Court established by this act, for final disposition. * * *" Since the admission of the state of Florida into the Union in 1845, it has been the policy of Congress, in admitting a territory into the Union as a state, to provide for the disposition of cases in the courts of such territory by providing that all cases of a federal character shall or may be transferred to the federal courts, and all cases of a local character to the state courts. The language of the various acts of Congress by which this has been accomplished in the admission of the states into the Union has not been uniform. In some of the acts the transfer of

cases of a federal character to the federal courts was made compulsory; no right of election being left by the provisions of the act to be exercised by the parties to the suit. But the general purpose of all of such acts has been to provide that cases pending in the courts of a territory at the time of its admission into the Union as a state might be disposed of in the same manner that they could have been disposed of if the territory had been a state at the time of the institution of such suits. The language used in the Enabling Act of Oklahoma, providing for the removal of cases from the courts of the Indian Territory and the territory of Oklahoma, in which matters arising under the Constitution and laws of the United States or treaties made are involved, is practically identical with the language of the judiciary act of March 3, 1875, providing for the removal of cases arising under the Constitution and laws of the United States and treaties made from the state courts to the federal courts, and should therefore, we think, receive the same construction. Under our view of the case, there is no diversity of citizenship in this action, for the reason that appellant is a federal corporation, and not a citizen of any state, and if it has a right to have this action removed, as prayed for in its petition, such right must arise by reason of the matters in controversy under some law of the United States. *Scott v. Choctaw, Oklahoma & Gulf R. R. Co.* (D. C.) 112 Fed. 180; *Supreme Lodge Knights of Pythias v. England*, 94 Fed. 369, 36 C. C. A. 298. It is therefore unnecessary for us to consider what is the amount in controversy in this action, for the reason that the right of removal, under section 16 of the Enabling Act, is affected by the amount in controversy only when there is a diversity of citizenship, and not where the action arises under the Constitution and laws of the United States or treaties made.

It is insisted that appellant's second alleged ground for removal cannot be well taken, for the reason that appellant is not such a federal corporation as makes a suit against it an action under the laws of the United States, and that same does not appear from the appellee's complaint filed in the court below. We do not deem it necessary to discuss in detail the character of appellant as a corporation, for the reason that the same has been twice decided in the federal courts. In *Scott v. Choctaw, Oklahoma & Gulf R. R. Co. et al.*, supra, Judge Rogers, judge of the United States District Court of the Western District of Arkansas, on a petition for removal filed by the railroad company, and without its codefendants joining therein, held that the Choctaw, Oklahoma & Gulf Railroad Company is a federal corporation, but that it was not entitled to have the case removed, for the reason that all the defendants did not join in the petition. A like holding was made by Judge McCall, in the United States Circuit Court

of the Western District of Tennessee, in *Hefelfinger v. Choctaw, Oklahoma & Gulf R. R. Co. et al.*, 140 Fed. 75. In the latter case the removal was also denied, for the reason that all the defendants did not join in the petition for removal, and the court, in speaking of the character of the Choctaw, Oklahoma & Gulf Railroad Company, said: "In the case at bar the pleader, either intentionally or by oversight, failed to describe the defendant Choctaw, Oklahoma & Gulf Railroad Company as a corporation created and existing under the laws of the United States; but, whether the omission was intentional or by oversight, no issue could be made as to the source of its corporate existence."

Appellee relies upon the case of *Texas & Pacific Ry. Co. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132, as supporting her in her contention that, in order for appellant to be entitled to a removal of the case at bar as prayed for in its petition, it must appear in appellee's complaint that the cause of action arises under the laws of the United States; but a careful analysis of the opinion of the United States Supreme Court in that case establishes the reverse of appellee's contention. Cody instituted suit against the Texas & Pacific Railway Company in the district court of Tarrant county, Tex., and alleged in his petition that he was a citizen of the state of Texas and a resident of Tarrant county; that the Texas & Pacific Railway Company was a private corporation and existed under the laws of the state of Texas. The railroad company filed in due time its petition for removal to the Circuit Court of the United States for the Northern District of Texas, which was granted, and after a trial in that court the case was appealed to the United States Supreme Court, where the question of jurisdiction in that court was raised. Mr. Chief Justice Fuller, who delivered the opinion of the court, used the following language: "It is obvious that in the instance of diverse citizenship a different question is presented. Plaintiff may run his own risk in respect of the cause of action on which he proceeds; but he cannot cut off defendant's constitutional right as a citizen of a different state than the plaintiff to choose a federal forum, by omitting to aver, or mistakenly or falsely stating, the citizenship of the parties. And this must be so also as to federal railroad corporations. It was held in *Union P. R. Co. v. Myers* (Pacific R. Removal Cases) 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319, that as all the faculties and capacities possessed by such corporations were derived from their acts of incorporation by Congress, all their doings arose out of those laws, and therefore suits by and against them were 'suits arising under the laws of the United States.' Conceding this, the principle applicable to diverse citizenship may reasonably be applied to them." The petition for removal in that case attempted to, and did, set up but one ground for removal, to

wit, that the railroad company was a federal corporation; and it was for this reason that the Supreme Court of the United States held that it had jurisdiction of the case, and, after discussing the general rule of law that, in order to remove from the state court to a federal court an action arising under the Constitution and laws of the United States or treaties made, the federal nature of such action must be disclosed by plaintiff's statement of his claim, the court holds that such rule does not apply in cases where the defendant is a federal corporation, but that the rule that applies to cases of diverse citizenship governs, which rule is that the cause may be removed upon petition for removal alleging the federal character of the corporation, although such fact does not appear in plaintiff's complaint. Rose's Code of Federal Procedure, vol. 1, p. 340; Moon on the Removal of Causes, p. 258, and the authorities there cited.

Appellee calls our attention to the case of Oregon Short Line & U. N. R. Ry. Co. v. Skottowe, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048, as supporting the proposition that the federal character of the defendant company must appear from the plaintiff's complaint; but this case was commented upon in the case of Texas & Pacific Ry. Co. v. Cody, supra, in which the court states that the opinion of the court in the Skottowe Case is not in conflict with the opinion rendered by the court in the Cody Case, but is in harmony with it.

Appellee relies upon the cases of Chappell v. Waterworth, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85, Postal Telegraph Cable Co. v. Alabama, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231, and East Lake Land Co. v. Brown, 155 U. S. 488, 15 Sup. Ct. 357, 39 L. Ed. 233; but in none of these cases was the party who prayed for the removal of the case a federal corporation, and the question involved in those cases upon the removal was not the question involved in the case at bar. It is not necessary to criticise favorably or adversely the reasoning by which the courts have reached the conclusion that an action against a federal corporation is an action arising under the laws of the United States, because it has become the settled rule of the Supreme Court of the United States, and until overruled by that court it is our duty to follow it.

The order of removal, prayed for in appellant's petition is granted.

WILLIAMS, C. J., and DUNN, TURNER, and KANE, JJ., concurring.

CHOCTAW, O. & G. R. CO. et al. v. HAMILTON.

(Supreme Court of Oklahoma. May 15, 1908.)

1. REMOVAL OF CAUSES—ACTION IN TERRITORIAL COURT.

An action against a federal railroad corporation, pending in the United States Court of

Appeals for the Indian Territory at the time of the admission of the state into the Union, is an action arising under the laws of the United States, and under section 16 of the Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 276), as amended by Act March 4, 1907, c. 2911, § 1, 34 Stat. 1286, may be removed to the federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 46.]

2. PARTIES—NOMINAL PARTIES.

Although one of three defendants against whom a joint action is brought for damages is indemnified by one of the other defendants against any loss by reason of any judgment that may be obtained in the action, such defendant is not a nominal or formal party to the suit, but is a substantial party thereto.

3. REMOVAL OF CAUSES — ACTIONS ARISING UNDER FEDERAL LAWS.

A joint action against three corporations for damages, one of which is a federal railroad corporation, is an action arising under the laws of the United States, and under section 16 of the Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 276), as amended by Act March 4, 1907, c. 2911, § 1, 34 Stat. 1286, may be removed to the federal courts upon a joint petition of all the defendants for such removal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 46.]

(Syllabus by the Court.)

Action by J. E. Hamilton against the Choctaw, Oklahoma & Gulf Railroad Company and others. Judgment for plaintiff, and defendants appeal to the Court of Appeals of Indian Territory, and petition for removal from the Supreme Court of the state to the United States Circuit Court. Petition granted.

C. O. Blake and Thos. R. Beman, for appellants. Potterf & Walker and A. C. Cruce, for appellee.

HAYES, J. This action was begun by appellee, as plaintiff, against appellants, as defendants, on or about July 9, 1904, in the United States Court for the Southern District of the Indian Territory, at Ardmore, to recover the sum of \$2,000 damages. A trial was had and judgment rendered in favor of the appellee against the defendants. The case was appealed by defendants to the United States Court of Appeals of the Indian Territory at South McAlester, and the case was pending on the docket of said court at the time of the admission of the state into the Union, and was transferred to this court under the provisions of the Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 267).

Appellants have filed their joint petition for removal of the case from this court to the United States Circuit Court for the Eastern District of Oklahoma, and have alleged for their ground for removal that the Choctaw, Oklahoma & Gulf Railroad Company, one of the defendants in the court below and one of the appellants in this court, was at the time of the institution of said suit, and ever since has been, and now is, a corporation organized and existing under a certain act of Congress of the United States, approved August 24, 1894 (28 Stat. 502, c. 330), and that it has at no time been a resident of the

Indian Territory, the territory of Oklahoma, or the state of Oklahoma, by reason of which facts they contend that the action arises under laws of the United States, which, under the provisions of section 16 of the Enabling Act, entitles them to removal of the action as prayed for in their petition. Appellee resists the petition of appellants for removal, and as reasons therefor contends: First, that the Choctaw, Oklahoma & Gulf Railroad Company is not a federal corporation of such character and nature as that the bringing of a suit against it presents a federal question, entitling it to removal of such suit to the federal courts under the provisions of the Enabling Act; second, that, if the Choctaw, Oklahoma & Gulf Railroad Company is a federal corporation of such character and nature that a suit against the same presents a federal question for the consideration of the court, it is in this action a nominal party, and therefore no removal can be had on account of its being one of the defendants in the action; third, that if the Choctaw, Oklahoma & Gulf Railroad Company is a federal corporation of such nature and character that a suit against the same presents a federal question for the consideration of the court, in this case such federal question is presented only as to the Choctaw, Oklahoma & Gulf Railroad Company, and is not presented as to the other defendants in the action, and therefore defendants are not entitled to a removal of the case to the Circuit Court, as prayed for in their petition.

The first contention presented by appellee as a reason why this petition should be denied has been directly passed upon by this court at the present term in the case of Choctaw, Oklahoma & Gulf Railroad Company v. Hendricks, 95 Pac. 970, not yet officially reported, in which case this court held that the Choctaw, Oklahoma & Gulf Railroad Company is such a federal corporation that a suit against it presents a question arising under the laws of the United States, for which reason a removal may be had under the provision of section 16 of the Enabling Act. We recognize the rule of law contended for by appellee in his second contention, to wit, that in an action a nominal or formal party thereto can neither defeat nor give the right of removal to the other parties to the action by reason of his being a party thereto. Moon on the Removal of Causes, p. 431. But, as stated by appellee in his brief in this action, this action is brought by him against appellants jointly for the recovery of the sum of \$2,000 damages, which he alleges he has sustained by reason of the fact that he is the owner of certain residence property situated in the city of Ardmore, and that the Western, Oklahoma & Gulf Railway Company and the Choctaw, Oklahoma & Gulf Railroad Company in the construction of a railroad built same within a few feet of his said property, and established near said property a roundhouse and machine shops, a large

water tank, and a coal bin, and in the operation of said railroad and switches the defendants have continually maintained, and the Chicago, Rock Island & Pacific Railway Company is now maintaining, thereon engines and cars, and that the defendants have continually maintained in and about said roundhouse, near said water tank and coal bin, and in front of and within a few feet of plaintiff's property, engines and cars that continually emit large volumes of smoke, dust, and cinders, which have come over and settled upon appellee's property and greatly injured the same. We do not deem it necessary to further state the allegations of appellee's complaint, for the reason that the facts therein alleged, as stated in his brief, constitute a joint action against appellants.

It was developed by the evidence that after said railroad was built the Choctaw, Oklahoma & Gulf Railroad Company leased the same to the Chicago, Rock Island & Pacific Railway Company, one of the provisions of which lease reads as follows: "The lessee [Chicago, Rock Island & Pacific Railway Company] shall and will save harmless and indemnify the lessor from and against all causes of action, legal and equitable, arising by reason of the acts or neglect of the lessee, or of the failure of the lessee or any of its officers, agents, or employees to fulfill any duty towards the lessor, or towards the public or any person or persons whomsoever, which the lessor by reason of its ownership, or the lessee by reason of its occupancy, of the demised premises, or otherwise, may owe, and shall and will at its own cost and expense defend such actions which may be brought against the lessor, and shall pay all amounts which may be recovered therein against the lessor for or upon the said cause of action." The court by its instruction permitted the jury to apportion among the defendants the damages in the action, if any they found in favor of plaintiff, and the jury by its verdict assessed the damages against defendants as follows: Against the Western, Oklahoma & Gulf Railroad Company the sum of \$200; against the Choctaw, Oklahoma & Gulf Railroad Company the sum of \$250; against the Chicago, Rock Island & Pacific Railway Company the sum of \$250. Appellee contends that by the provision of the lease contract of the Choctaw, Oklahoma & Gulf Railroad Company to the Chicago, Rock Island & Pacific Railway Company, quoted supra, the Choctaw, Oklahoma & Gulf Railroad Company is indemnified by the Chicago, Rock Island & Pacific Railway Company against any loss in this action by reason of any judgment that may be obtained against it, and that, therefore, it has no interest in this action and is a nominal party.

We cannot concur in this contention and reasoning of the appellee. Waiving the question whether, under the facts in this case, the provisions of the lease contract, cited supra, indemnify the Choctaw, Oklahoma &

Gulf Railroad Company against any judgment that may be obtained against it in this action, the Choctaw, Oklahoma & Gulf Railroad Company still has a substantial interest in this action, for the reason that, if a judgment should ultimately be recovered in this action against it, its property would be subject to execution upon a writ of execution issued at the instance of appellee, and it would be directly liable under such judgment to the appellee for such amount as might be recovered in this action against it. The fact that the Choctaw, Oklahoma & Gulf Railroad Company might, under its lease contract with the Chicago, Rock Island & Pacific Railway Company, obtain judgment against it for such amount as the Choctaw, Oklahoma & Gulf Railroad Company might be compelled to pay appellee by reason of this suit, does not make it a nominal party. Conditions could arise under which a judgment in this action against the Choctaw, Oklahoma & Gulf Railroad Company would as seriously affect it, even though it is indemnified by its contract with the Chicago, Rock Island & Pacific Railway Company, as if it had been sued alone. If, for instance, judgment should be obtained in this action against it, and it should be compelled to pay the same, and the Chicago, Rock Island & Pacific Railway Company in the meantime became insolvent, the judgment in this action would then affect the Choctaw, Oklahoma & Gulf Railroad Company just as if it had been sued alone.

In support of his third contention appellee relies upon the case of *Texas & Pacific Ry. Co. v. Huber*, 33 Tex. Civ. App. 75, 75 S. W. 547. The plaintiff and one of the defendants in that case were residents of the state of Texas. The other defendant was a federal corporation. A petition for removal was made by both defendants. The court held that an order for removal should not be granted upon a petition for removal, made by both defendants upon the ground that a federal question was raised, by reason of the fact that one of the defendants was a federal corporation. The Court of Civil Appeals of Texas held in the case that the federal question raised affected only one of the defendants, and was not ground for removal of the action. Mr. Justice Rainey, who delivered the opinion of the court, said that he had been unable to find any authorities in point on the question involved in the petition for removal, but, after citing *Railway Co. v. Martin*, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055, *Miller v. Bank* (C. C.) 116 Fed. 551, and *Mayor et al. v. Independent Steamboat Co.* (C. C.) 21 Fed. 593, said: "The proper construction of the foregoing decisions on this question, in our opinion, is that the courts only intend to hold that in suits involving no separable controversy, there being more than one defendant, each defendant should have a cause for removal, and each should join in the application for removal."

We do not believe that the facts or the language of the court in the opinions cited by Mr. Justice Rainey support the construction he has attempted to give said opinions. In all of those cases there was at least one defendant who was a resident of the state of the plaintiff, and in each of said cases it might have been as successfully contended that a federal question affected only one of the parties to the action, as could have been done in the *Huber* Case, or could be done in the case at bar, but in each of those cases, with the facts before the court, the court held that the removal would not lie for the reason that all the defendants did not join in the petition for removal. With the facts before the court in each of those cases to the effect that a federal question affected only one of the defendants in the case, and the court holding that the petition for removal should have been denied, because all the parties did not join in the petition, it appears to us much more susceptible to the construction that, if all the defendants had joined, the petition for removal would have been properly granted, than to the construction Mr. Justice Rainey has given them. This question, to our knowledge, has never been directly passed upon by the Supreme Court of the United States; but in *Landers v. Felton et al.*, 73 Fed. 311, the United States Circuit Court for the District of Kentucky held that in an action in which one of the defendants was a receiver appointed by the Circuit Court of the United States for the District of Kentucky, and the other defendant was a corporation organized under the laws of Kentucky, and another defendant a citizen of the state of Kentucky, a federal question was raised by virtue of the fact that one of the defendants was a receiver appointed by the Circuit Court of the United States, and by reason of such fact the case could be removed to the federal court upon petition for removal by all the defendants.

Landers v. Felton was cited and approved by the Circuit Court of the United States for the District of Nebraska in *Lund v. Chicago, Rock Island & Pacific Ry. Co. et al.*, 78 Fed. 385, in which case the court held, as in *Landers v. Felton*, supra, that a joint action against several defendants, one of whom was a receiver appointed by a federal court of a corporation chartered by Congress, is an action arising under the laws of the United States, which may be removed to the federal courts upon petition of all of the defendants. Both the cases of *Landers v. Felton*, supra, and *Lund v. Chicago, Rock Island & Pacific Ry. Co.*, supra, are referred to and approved in *Martin v. St. Louis Southwestern Ry. Co.* (C. C.) 134 Fed. 134, in which case *Texas & Pacific Ry. Co. v. Huber* is referred to and disapproved. Plaintiff in that case resisted defendants' petition for removal on the ground that only one of the defendants was a federal corporation, and that, since the other was a state corporation, no federal

question could arise except as to one of the defendants; but Judge Maxey, in his opinion, discussing this contention of the plaintiff, used the following language: "But it is objected by counsel for the plaintiff that the federal question affects only the Texas & Pacific Railway Company, and hence, notwithstanding the two defendants have united in the petition, the cause is not removable. The answer to the objection will be found in the fact that the cause of action as declared on by the plaintiff is joint; the purpose of the suit being, as before stated, to establish a joint liability against both defendants. Any suit, whatever its nature, brought against the Texas & Pacific Railway Company alone, would be one arising under the laws of the United States, and the same result would follow where the object of the suit was to establish a joint liability against that company and other parties defendant. In such case the federal question necessarily affects both parties and permeates the entire suit, entitling it to be removed where all the parties unite in the petition."

Chicago, Rock Island & Pacific Ry. Co. v. Martin, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055, was an action brought by Lissie Martin against the Chicago, Rock Island & Pacific Railway Company and one Clark and others as receivers of the Union Pacific Railway Company in the district court of Clay county, Kan. A petition for removal of the case to the United States Circuit Court for the District of Kansas was made on the ground that the action arose under the Constitution and laws of the United States. The petition was made by the receivers of the Union Pacific Railway Company alone. The court refused to grant the removal. Judgment was obtained against the defendants, and appeal was taken to the Supreme Court of Kansas, and ultimately carried on appeal to the Supreme Court of the United States; but throughout the entire proceeding the action of the trial court in refusing the petition for removal was relied upon by defendants as error. The Supreme Court of the United States held that the petition for removal was properly denied by the trial court, for the reason that all the defendants did not join in the petition for removal. The court in that case reserved expressing any opinion upon the question whether an action against a receiver appointed by a federal court is an action arising under the laws of the United States, and disposed of the case by holding that if the receivers in that action had a right of removal, since the controversy was not separable, a removal should not be granted upon a petition not made by all of the defendants. The court does not pass upon the question presented in the case at bar; but the language used in the opinion subjects it to the inference that, if a federal question had been raised in the action as to part of the defendants and a petition for removal had been made by all of the defend-

ants, the removal should have been granted.

A similar holding was made by Judge Rogers, judge of the District Court for the Western District of Arkansas, in *Scott v. Choctaw, Oklahoma & Gulf R. R. Co. et al.*, 112 Fed. 180, in which case one of the defendants was a corporation organized under the laws of Arkansas, of which state plaintiff was a resident. Judge Rogers used the following language in his opinion: "The plaintiff's second contention is that this is a case the removal of which can be sustained only upon the ground that there is a federal question involved, and not on the ground of diverse citizenship, for the reason that the Choctaw, Oklahoma & Gulf Railroad Company is not a citizen of any state, but is a federal corporation, and that in that class of cases a removal can only be had where all the defendants join in the petition. The court is of the opinion that this contention is upheld in the case of *Railway Co. v. Martin*, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055."

A similar holding was made by the Circuit Court for the District of Kentucky in *Marrs v. Felton et al.*, 102 Fed. 775, and by the Circuit Court for the Western District of Tennessee in *Heffelfinger v. Choctaw, Oklahoma & Gulf R. R. Co.*, 140 Fed. 75.

While, so far as we have been able to find, no appellate court has passed upon the question directly presented in this petition, in view of the fact that three nisi prius federal courts have directly passed upon the same, and held that where a federal question in a joint action against several defendants is directly presented as to one of the defendants it may be removed upon petition of all of the defendants, and in view of the fact that the language of the United States Supreme Court in *Railway Co. v. Martin*, supra, is strongly subjected to the inference that, if all the defendants had joined in the petition for removal in that action, the court would have held that the petition should have been granted, we take it that the weight of authorities upon this question supports the contention of petitioners in this action, and it is our opinion, as was said by Judge Maxey in *Martin v. St. Louis S. W. Ry. Co.*, supra, that if, in a joint action against several defendants, a federal question is raised as to one of the defendants, it permeates the entire action and affects all of the defendants. In this case all the defendants join in the petition for removal.

The order for removal is granted.

WILLIAMS, C. J., and DUNN, TURNER, and KANE, JJ., concurring.

ADAMS v. OKLAHOMA CITY.

(Supreme Court of Oklahoma. March 19, 1908.)

1. MUNICIPAL CORPORATIONS — STREETS — ESTABLISHMENT OF GRADE — DAMAGES.

Where a city, in the exercise of its lawful authority (section 443, *Wilson's Rev. & Ann.*

St. 1903), first establishes a grade on a street, and grades same with reasonable skill and care, it incurs no liability for consequential damages to abutting or adjacent proprietors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 925-928.]

2. SAME—COMPENSATION TO ABUTTING OWNERS.

It was the intention of the Legislature (section 443, Wilson's Rev. & Ann. St. 1903) to provide compensation only for owners of abutting property having permanent improvements erected thereon, where change was made in the permanent grade previously established by lawful authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 925-928.]

(Syllabus by the Court.)

Error from District Court, Oklahoma County; J. K. Beauchamp, Judge.

Action by M. A. Adams against the city of Oklahoma City. Judgment for defendant, and plaintiff brings error. Affirmed.

On the 30th day of October, 1904, plaintiff filed her petition in the district court of Oklahoma county, Oklahoma Territory, against the city of Oklahoma City; the parties in the court below occupying the same relative positions in this court. Plaintiff alleged that the defendant was an organized and existing municipal corporation under the laws of said territory of the first class, containing a population in excess of 3,000; that she was the owner of lots numbered 4, 5, and 6, in block numbered 51, in Maywood addition to said city, said lots being bounded on the north by Fourth street and on the west by Stiles avenue; that before any improvements were made on said lots the grades on said streets along the north and west of said lots were permanently established by the city authorities, and afterwards a building was erected on plaintiff's lots conforming to said grades, and above the lines of such grades so permanently established by said city authorities; that a natural water course or ravine ran from the north to the south near the east end of said lots, which carried off all the surface water that fell, and drained said lots, leaving them dry, although they were in a low place; that said lots were filled to conform to said grades, and, had said streets been left as first established, said lots would have been dry, and all surface water would have been drained therefrom into the gutters of the streets, and would have been carried off without flooding the property of the plaintiff, which was used as a residence, having five rooms and a large basement, extending under the whole of said house, the same being divided into two rooms, one a storeroom and the other being used for a kitchen and dining room, there being three rooms above said basement which were living rooms; that afterwards, in the year 1904, said city caused the grade of said Fourth street along the north line of said lots, and said Stiles avenue along the west, to be raised to the height of 18 inches above said first grade, and caused

said streets to be filled to the height of said last grade, leaving the said lots and residence of the plaintiff about 15 inches below the grade of said street in a depression, where the flood waters had no means to flow off and no outlet to escape, and same flowed on and over plaintiff's lots, the water being dammed up without leaving any outlet for same across the east end of said lots; that before making said change in said grade the defendant wholly failed and neglected to make due compensation as required by law for damages sustained by reason of said changes. Plaintiff further alleged that about the 10th of June, 1904, a severe rain fell in said city, and by reason of the unlawful change in said grade in filling or grading said streets the water was dammed up in said water course, causing a large body of water to form in said street and break through the grade therein, and by reason thereof the property of plaintiff was overflowed, and her household goods and personal property damaged to the value of \$115.80, and said house and lots have been damaged by reason of the change in the grade of said streets in the sum of \$1,500; the sum total of said damages being \$1,615.80. The defendant, on the 24th day of October, 1904, appeared through its attorney and answered, admitting that it was a municipal corporation and that the plaintiff was the owner of the lots as alleged in her petition, but otherwise denied all the allegations of said petition.

The evidence on the part of the plaintiff was to the effect that said lots faced west on Stiles avenue, a street running north and south in Maywood addition, and were bounded on the north by Fourth street, running east and west, and on the east by an alley running north and south. On said lots plaintiff had erected two houses, one near the west end and the other near the center thereof, near what had the appearance of a ravine or drain according to the plaintiff's testimony, which was in words and figures as follows: "Q. Was there any source by which the surface water was passed off through these lots? A. Yes; there was. Q. What was it? Just state it. A. Well, it had the appearance of a ravine. That is what I would call it. I don't know what else. It was natural. Q. Was there any bank to it? A. No, sir; I would not think so. Q. Any indentation in the ground, was it? State what it looked like. Did it just run smooth over the earth? A. No, sir. Q. Well, what was it? Describe it. A. It may at one time have been a water channel. Q. I wish you to describe the way the water ran there. A. The water ran in this draw. Q. Well, now, describe that draw. Was it elevated or depressed in the ground? A. It was a depression. It was lower than the other part of the country, or else I would not call it a draw. Q. Well, were the banks sloping, or square, or what? A. The banks were sloping. Q. Now, on

Fourth street, was there any opening there for the letting off of the water into the street? A. Yes. Q. What was it? A. There was a small bridge in the street, and under that, of course, was a passage. Q. What became of the water that came down from the north and east through the ravine? A. It flowed off in a few hours. Q. Where did it flow? A. It flowed in a southwesterly direction from our premises into Stiles avenue. Beyond that I don't know."

This ravine or draw headed near Lincoln schoolhouse, about a half a mile north of the premises in controversy, came down from the north, and entered the block north of the one in which plaintiff's lots were situated, about the center thereof east and west, and came down through said block near the center, and crossed said Fourth street near the alley at the east end of plaintiff's lots, and went on south to the back end of her lots until it reached the south line thereof, where the same had been deflected into a ditch, extending along the south line of her lots out into Stiles avenue, which was at the west end of said lots, where the water flowed into said avenue. Said depression or draw was not over one-half mile in length, and drained an area not to exceed 160 acres of surface waters caused by rains falling thereon. Said draw or drain had changed its place at times, occasioned by the improvement of lots. There is nothing to show that the draw existed prior to the founding or extending of the limits of the city. It is probable that the laying off and improving of the lots, and the consequent throwing off of surface water, produced this draw or drain, and the consequent change of location of same at times. There was a channel or ditch across the block north of the one on which plaintiff's lots were situated, and also across Fourth street at the east end of plaintiff's lots, to wit, in some places to a width of about 10 feet, and in some places to a depth of about 6 feet; but at various places wagons and vehicles could cross with convenience. Water never stood in this ravine, draw or drain any length of time, but ran off rapidly immediately after each rain. The proof tended to show that the ditch on the south of said lots was of sufficient capacity to carry off the surface water of ordinarily heavy rains without material injury to her lots; that prior and up to the spring of 1904 some improvement had been made upon said street, and a bridge spanning said draw or ravine had been sufficient to permit all surface water in time of rains to pass thereunder has been constructed. Plaintiff had caused the west portion of her lots to be filled up to a height above Fourth street as it then existed, though the evidence shows that no grade was ever established by the authority of the city until the spring of 1904, and that a portion of her lots were comparatively dry, and had never been injured by any flood water or

heavy rains, although said lots were on the lowlands. In the spring of 1904 defendant established a grade on Fourth street by ordinance, the first grade established on the authority of said city, which raised the grade on said Fourth street to a height of about 4 to 6 feet above the level of plaintiff's lots; and the defendant caused said street to be filled to the height of said grade. The bridge across said draw or ravine was taken out, and a dirt embankment thrown up, and no provision for the flow of such surface water accumulating north of Fourth street; it appearing that it was the intention to divert said surface water as flowed down from the north around at the north end of Fourth street to Stiles avenue west of plaintiff's lots, where it would flow south down said avenue to the lowlands southward, thus taking it out of its usual course down said draw.

On the 11th day of June, 1904, after the grade had been established by ordinance under the authority of the city, and whilst the construction or grading of the street was being completed, there fell a heavy rain, resulting in the formation of a lake in said draw north of Fourth street extending north to Fifth street through the entire block on which plaintiff's lots were situated, and same was held back by the embankment erected by defendant in grading Fourth street; that said back water was of the width of about 8 or 10 rods, and at places was 20 feet in depth. As a result of the raising of said grade and the obstruction of said water, and in consequence of the said heavy rain, a large body of water was collected on the north side of Fourth street, until it came to a point opposite plaintiff's house, where it broke over the grade embankment in the street in several places and flowed to the depth of 2 or 3 feet, thereby overflowing the plaintiff's house, flooding her basement, washing out the household goods, and in other ways injuring her property.

The trial of this cause was begun on the 21st day of November, 1904. At the conclusion of the introduction of plaintiff's testimony, defendant filed a demurrer to such evidence, which was sustained by the court. The plaintiff properly reserved her exceptions. Thereafter, within the prescribed time, plaintiff filed her motion for a new trial, assigning as ground therefor the sustaining of said demurrer and the rendering of judgment in favor of the defendant against the plaintiff, to all of which exceptions were properly saved, and the cause is now properly before this court on petition in error.

Hayes, Thorpe & Thorpe, for plaintiff in error. T. G. Chambers, for defendant in error.

WILLIAMS, C. J. (after stating the facts as above). The defendant in plaintiff's petition is not charged with negligence, nor does

the evidence tend to show such, in the construction or grading of the street; neither is there any claim that it intentionally collected the water in a body, or by drains or sewers threw it upon the premises of the plaintiff. The only question necessary to determine in this case is: Can the city, in first establishing a grade, and accordingly grading the street, obstruct the flow of surface water without incurring liability, where there is no allegation or contention of any negligence in the establishment or grading of such street? Section 443, vol. 1, Wilson's Rev. & Ann. St. 1903, is as follows: "The mayor and council of cities of the first class of this territory, having a population of more than three thousand, as shown by the last territorial or federal census, are hereby empowered to establish and change the grade of all streets, avenues, lanes, alleys and other public places, provided that any change of a permanent, established grade shall not be made without making due compensation to the owners of abutting property having permanent improvements erected thereon with reference to the previously established grade." This is the latest enactment giving cities of the first class the right to establish and change grades of all streets. The plaintiff in her brief states as follows: "It may be that we fail to show in the evidence that this was a change of grade from one once established; but nevertheless the other facts alleged in the petition show a diversion of this water from its natural course, by which it was thrown over the portions of the lots of Mrs. Adams and about her buildings, where it had never run before, and damaged her thereby."

The decision of this case necessarily depends upon the construction of the words "provided that any change of a permanent, established grade shall not be made without due compensation to the owners of abutting property having permanent improvements erected thereon with reference to the previously established grade." It is often found difficult to limit the language in the enacting clause, so as to admit every exception and limitation designed to be introduced into such act in its finished state. Hence the utility of the proviso, which is to be construed in connection with the section of which it forms a part, and is substantially an exception, and is not to apply to others unless primarily intended to. In other words, the proviso will be so restricted, in the absence of anything in its terms, or the subject dealt with, evincing the intention of giving it a broader effect. Its proper function being to limit the language of the Legislature, it will not be deemed intended from doubtful words to enlarge or extend the act or the provision in which it is engrafted, when it follows and restricts an enacting clause. Generally in its purpose and language it is to be strictly construed and limited to subjects fairly within its terms. "Expressio

unius est exclusio alterius." This is a complete statute. It authorizes the city to establish grades, and also, after having established same, to make changes therein, providing at the same time for compensation to property owners where the city, after having established a permanent grade, changes the same. It especially refrains from providing compensation to property owners from any damage sustained from the original establishment of a grade.

There is good reason for the policy that cities should not be liable for damages occasioned in the first establishment of grades. It would discourage public improvements if an entire section of a city were allowed to recover damages from the municipal government for injuries resulting to abutting or adjacent lots on account of grades first established. Cities are built upon tracts of land irrespective of the existing natural conditions; some parts upon elevation, others upon depressions. These must be made to subserve the demands for necessary city improvements. By no other rule or policy could cities reasonably be built with a view to the construction of streets for the necessary travel and the placing of sewerage for the preservation of health, thereby promoting the public comfort and convenience. Elevations must be leveled, and lowlands and depressions raised. Buildings first constructed are erected with an understanding that a change in the physical conditions must take place for the benefit of the entire community. A building is placed upon a hill with a reasonable expectancy that a street is to be cut there, and that such building will in all probability be above the grade when established; and one is put upon a draw or lowland with the reasonable apprehension that a street will be graded and filled, being raised at least to a grade far above its level. These are the inevitable incidents of improvement, development, and progress. Otherwise no cities could reasonably be built. There would be no boulevards, no parks, no broad streets paved and provided with commensurate sidewalks for the convenience of the public, whether pedestrians, equestrians, or by vehiculation, steam, or electricity; for bankruptcy would overtake the city in its first growth. With any other interpretation in this country there could be no material development or improvement in our cities as to streets and thoroughfares; but we would have narrow, irregular streets like unto those of the Spanish-American countries, without any regard to grade or surface. Nor is the right of the individual morally encroached upon by such a policy, though "private interest must yield to public accommodation." With the grading of streets, the laying of sewerage and water pipes, the cutting down of hills and filling up of hollows, and the beautifying of cities, there is corresponding increase of value as to space and area. The party having such property, by raising the grade of the lot to that

of the street, the value of the same, as a rule, is proportionately increased to amply compensate for all cost in the grading thereof. The values of lots and realty in cities keep corresponding pace with its growth and development, and an outlay for grading of lots to conform to the streets is usually followed by such increment of value as to work no hardship. *Smith v. Corporation of Washington City*, 20 How. (U. S.) 146, 15 L. Ed. 858; *Davis v. County Commissioners*, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750; *Alden v. City of Minneapolis*, 24 Minn. 262.

Municipalities are agencies of the commonwealth, created by the sovereignty of the people. "A Legislature may and often does authorize, and even direct, acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the Legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer; but then the right is the creature of the statute. It has no existence without it." *Transportation Co. v. Chicago*, 99 U. S. 640, 25 L. Ed. 336. In the case of *Field v. Township of West Orange*, 36 N. J. Eq. 119, the court says: "Where damage is done that way by grading the streets under competent authority, there is no responsibility to the injured party." In the case of *Field v. West Orange*, 46 N. J. Eq. 183, 2 Atl. 236, the court says: "The Supreme Court has, however, held that where damage results to an individual from the discharge of surface water upon his land, in consequence of a proper power delegated to a municipality to make and grade highways, no legal liability exists." In the case of *Inhabitants of West Orange v. Field*, 37 N. J. Eq. 601, 45 Am. Rep. 670, the court said: "As stated in that case (*Durkes v. Town of Union*, 38 N. J. Law, 21), the authorities are quite uniform in holding that no responsibility attaches for damage done by the diversion of surface water by the public authorities, where the diversion is merely incidental to and occasioned by the making or altering of street grades."

In the case of *Alden v. City of Minneapolis*, 24 Minn. 262, "there was a natural depression from all sides," and "a pond" was formed by the accumulation of surface waters, with no outlet, and the court says: "It had the right, as was its duty, to fix the grades of its streets and improve them accordingly, and wholly with reference to the public use and accommodation, and no right of action could accrue against it by reason of any consequential injuries resulting necessarily from the proper execution of this power. *Lee v. City of Minneapolis*, 22 Minn. 13. It was under no obligation, in establishing such grades and making such improvements, to conform them

to the special necessities and requirements of plaintiff's abutting property, for the purpose of draining it or preventing the accumulation upon it of mere surface waters. Its clear duty to the public required, as was done in this instance, the elevation of the grades of Nicollet and Third streets, through this low place of ground to such a height and level above its natural surface as would make them fit and suitable for public use and travel, by keeping them properly drained of such surface waters as usually collected in that locality. If thereby plaintiff's lot was necessarily overflowed during heavy rains, to his injury, it was the misfortune of his situation in occupying premises thus naturally low, and his loss, if any, was *damnum absque injuria*. He had no legal claim upon the city for the construction of any sewer, to serve either as a drain to his premises or as an additional relief to the streets themselves; and hence the omission to build the Hennepin avenue sewer furnished him no just ground for complaint. His proper, if not sole, protection consisted in raising his own lot above the grade line of the street, or in the erection of such walls and embankments as would have effectually prevented any flow upon him from the street. This he could lawfully have done, as he possessed the common-law right of use and enjoyment, in respect to his lot, as fully and to the same extent as the city did in respect to its streets. Each had the right to use and improve, for any legitimate purpose, and in such manner as would protect against the incursion or accumulation of mere surface water. *Barry v. City of Lowell*, 8 Allen (Mass.) 127, 85 Am. Dec. 692; *Franklin v. Fisk*, 13 Allen (Mass.) 211, 90 Am. Dec. 194; *Turner v. Dartmouth*, 13 Allen (Mass.) 291; *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Wilson v. Mayor*, 1 Denio (N. Y.) 595, 43 Am. Dec. 719; *Mills v. Brooklyn*, 32 N. Y. 489; *Imler v. Springfield*, 55 Mo. 119, 17 Am. Rep. 645; *Hoyt v. City of Hudson*, 27 Wis. 656, 9 Am. Rep. 473."

In the case of *Stewart v. City of Clinton*, 79 Mo. 613, the court says: "It is assumed by the plaintiff that it was the duty of the city to keep a drain or gutter open while the work was being done, so to prevent the flow of the surface water of the street in and upon the plaintiff's premises, and that this was negligently permitted by the defendant." It was held that no such duty developed upon the defendant, citing with approval *Dillon on Munic. Corp.* § 799: "Even where the work of grading the streets is entered upon, there is not ordinarily, if ever, any liability to the adjoining owner growing merely from the non-action of the corporation in not providing for keeping surface water from property situate below the established grade of the street. The surface flow of the water along the street came in contact with the mouth of the pipe connecting plaintiff's cellar with the street, and thereby ran into the cellar. This is no

more than to say that when defendant altered the grade of its streets it became its duty to provide ditches or other conduits for the surface water flowing along the street, so as to prevent it from running into plaintiff's cellar, the servient property; and this, too, when the water found its way into his cellar by means of an artificial passway which he had constructed from his private property to the public street. This injury he could easily have prevented by closing up his pipes and providing other means of escape for water accumulating in his cellar otherwise than from the graded street. When he thus appropriated, uninvited, the public thoroughfare for an easement to drain his cellar upon, he did so subject to the paramount right of the municipality to change the grade of this highway to suit the public convenience, to which it was primarily dedicated."

In the case of *Freburg v. City of Davenport*, 63 Iowa, 119, 18 N. W. 707, 50 Am. Rep. 737, the court, citing 2 Dillon on Municipal Corporations (3d Ed.) §§ 1051, 1044, 1043, 1042, and 1041, says: "But since surface water is a common enemy, which the lot owner may fight by raising his lot to grade or in any other proper manner, and since the municipality has the undoubted right to bring its streets to grade, and has as much power to fight surface water in its streets as the adjoining private owner, it is not ordinarily, if ever, liable for simply failing to provide culverts or gutters adequate to keep surface water off from adjoining lots below grade, particularly if the injury would not have occurred had the lots been filled up so as to have been on a level with the street." In the case of *Morris v. City of Council Bluffs*, 67 Iowa, 343, 25 N. W. 274, 56 Am. Rep. 343, the principle is laid down that the owner of a lot below grade must take notice of any exposure created by bringing a street to grade, and must exercise reasonable diligence to protect himself from injury by an overflow of water by bringing his lot to grade.

In the case of *Bronson v. Borough of Wallingford*, 54 Conn. 513, 9 Atl. 394, the court says: "The intent charged we consider as an intent simply to change the grade, and not a malicious intent to injure the plaintiff. Surface water must be turned from the roadbed into drains and gutters, and at all times will flow in considerable quantity. It would be practically impossible for towns, cities, and boroughs in most cases to prevent such water from flowing onto the land of adjoining proprietors." In the case of *Aicher v. City of Denver*, 10 Colo. App. 413, 52 Pac. 87, there being what was termed a gulch or drain involved, and the facts being quite similar to this case, the court held: "Where one erects improvements on land which is below the grade which the city authorities established, the failure of such authorities to provide for disposition of surface waters does not, as a rule, impose any liability on the city." In the case of *Jordan v. Benwood*, 42 W. Va. 312,

26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859, there being a drain involved, and the facts similar to this case, the court held: "A city is not liable for damages to a lot owner because change of grade of a street prevents surface water of the lot from flowing off. It is not different, even if the surface water is, by reason of such change of grade, increased in quantity on the lot, if not cast in a mass or body on the premises. Nor is a city liable for mere surface water flowing from a street upon an adjoining lot." See, also, *Dudley v. Buffalo*, 73 Minn. 347, 76 N. W. 44; *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Carll v. Northport*, 11 App. Div. 120, 42 N. Y. Supp. 576; *Corcoran v. City of Benicia*, 96 Cal. 1, 30 Pac. 793, 31 Am. St. Rep. 171; *Rychlicki v. City of St. Louis*, 98 Mo. 497, 11 S. W. 1001, 4 L. R. A. 594, 14 Am. St. Rep. 651; *Imler v. Springfield*, 55 Mo. 119, 17 Am. Rep. 645; *Stewart v. City of Clinton*, 79 Mo. 612; *St. Louis v. Gurno*, 12 Mo. 414; *Miller v. Mayor of Morristown*, 47 N. J. Eq. 62, 20 Atl. 61; *Durkes v. Town of Union*, 38 N. J. Law, 21; *Lynch v. New York*, 76 N. Y. 60, 82 Am. Rep. 271; *Rutherford v. Village of Holley*, 105 N. Y. 632, 11 N. E. 818; *Wakefield v. Newell*, 12 R. I. 75, 34 Am. Rep. 598; *Yeager v. Fairmont*, 43 W. Va. 259, 27 S. E. 234; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859; *Roll v. Augusta*, 34 Ga. 326; *Bronson v. Wallingford*, 54 Conn. 513, 9 Atl. 393; *Clark v. City of Wilmington*, 5 Har. (Del.) 244; *Turner v. Dartmouth*, 13 Allen (Mass.) 291; *Emery v. Lowell*, 104 Mass. 13; *Hubbard v. Webster*, 118 Mass. 599; *Keith v. Brockton*, 136 Mass. 119; *Gannon v. Hargadon*, 10 Allen (Mass.) 106, 87 Am. Dec. 625; *Alden v. Minneapolis*, 24 Minn. 262.

In making the improvements complained of, the city as agent of the sovereignty was performing a public duty authorized by law, and obviously, so long as it was done with care and skill, there can be recovery for consequential damages only when authorized by statute. In this case there is neither any allegation in the pleadings nor contention in the proof of any negligence on the part of the city. The case of *Chicago, Rock Island & Pacific Ry. Co. v. Groves* (Okl.) 93 Pac. 755, is not applicable to the facts in this case. Even if it were, the drain or draw as shown in this record would not be termed a "waterway" or "water course" under the rule therein announced. There is nothing to show that the draw existed prior to the extension of the city limits over this area. But it does appear that this draw, drain, or ditch, as you may term it, changed its base, or had been changed by the proprietors, as improvements were made by such adjacent proprietors. A surface water channel or waterway must have some long prior existence, so as to show that it existed from permanent natural causes and not from changes made incident to the conditions of a city, before it can come within the rule of that case,

We conclude that it was the intention of the Legislature in section 443, Wilson's Rev. & Ann. St. 1903, to provide for compensation only for owners of abutting property having permanent improvements erected thereon, where change was made in a permanent grade previously established by lawful authority; and, compensation not being provided for such proprietors where the establishment of the original or first grades are made by such authority, the plaintiff was not entitled to recover in this case.

Judgment of the court below is affirmed. All the Justices concurring.

(20 Okl. 729)

KERKER et al. v. BOCHER et al.

(Supreme Court of Oklahoma. April 13, 1908.)

1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENTS.

Where the city council shall deem it necessary to pave any street, or any part thereof, within the limits of a city, for which a special tax is to be levied, and such council, by resolution duly passed, declares such improvement necessary, and causes the publication of same for four consecutive weeks in a proper newspaper, the owners of a majority of the lots or parts of lots liable to taxation therefor failing within 20 days thereafter to file with the clerk of said city protest against such improvements, and proceeds to cause such improvements to be done, without the adoption of an ordinance to that end, but by adopting plans and specifications, including an estimate of the cost of such improvement, and authorizing the clerk to advertise for bids therefor, the contract being accordingly let under competitive bidding, and afterwards by ordinance appraisers being appointed, and their report, after some amendments by the council, being adopted by ordinance, the abutting property owners, under such circumstances, can be estopped from questioning the validity of such assessment.

2. SAME—OBJECTIONS—WAIVER.

Abutting property owners, with knowledge that such paving is being done with the intention of levying a special tax upon them for payment of the same, and permitting such improvement to be done without objection to the council, and knowingly receiving the benefits, when afterwards they seek relief in equity to escape payment therefor, will be deemed to have ratified the same, and estopped from setting up any irregularity, except when it goes to the extent of jurisdiction.

3. SAME—REVIEW OF ASSESSMENT.

When the estimate of benefits is referred to a board of appraisers, and afterward approved by the council, the remedy of one who considers himself unfairly assessed is to apply for redress to such tribunal, and, failing so to do, he will not be permitted in an action in equity to overcome such finding, especially on review in the Supreme Court, when the referee found that there was no proof to show that appraisal or assessment in any way inequitable or unjust.

(Syllabus by the Court.)

Error from District Court, Pottawatomie County; B. F. Burwell, Judge.

Action by J. F. Kerker and others against C. J. Bocher and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

On the 6th day of September, 1904, this action was begun in the district court of Pot-

tawatomie county, Oklahoma Territory, seeking a temporary restraining order against the defendants, as mayor and city council of the city of Shawnee, to enjoin them to issue certificates or tax warrants against the several property of the plaintiffs in error, or any or either of them, abutting on Park street, until the further order of said court, and, further, to restrain the defendants C. J. Bocher and C. J. Becker, respectively as mayor and city clerk of said city, from attaching their official signatures and affixing the corporate seal of said city to such certificates or tax warrants in favor of W. M. Davis or his assigns against any property of said plaintiffs in error, and from delivering said certificates to said Davis, his assigns, and others, until a further order of said court. Said petition was supported by accompanying affidavits, and upon presentation to the county judge of Pottawatomie county the temporary injunction prayed for was granted, to become effective on the plaintiffs filing with the clerk of the district court a bond under the conditions as required by law in the sum of \$1,000, to be approved by the clerk, which bond was duly executed, filed, and approved. Afterwards, on the 14th day of July, 1905, plaintiffs filed their amended petition, praying as follows:

"That a temporary restraining order be issued to the defendants, as mayor and city council of the city of Shawnee, enjoining them from issuing certificates or tax warrants against the several property of these plaintiffs, or any or either of them, abutting on said Park street, until the further order of this court, and that the defendants C. J. Bocher and C. J. Becker, as mayor and city clerk of the city of Shawnee, be enjoined and restrained therein from attaching their official signatures and attaching the corporate seal of the city of Shawnee to certificates or tax warrants, in favor of said W. M. Davis or his assigns, against the property of these plaintiffs, and from delivering said certificates or tax warrants to said W. M. Davis, or his assigns, or at all, till the further order of this court. That the defendants, as mayor and city council of the city of Shawnee, be enjoined and restrained from levying a special tax or assessment against the property of these plaintiffs, or any of them, to pay said certificates or tax warrants issued or sought to be issued, and that the defendant C. J. Becker, as city clerk of the city of Shawnee, be enjoined and restrained from certifying any tax levy of a special tax or assessment made and levied to pay said certificates or tax warrants issued against the property of these plaintiffs, or any of them, abutting on Park street, until the further order of this court. That the defendants, as mayor and city council of the city of Shawnee, be enjoined and restrained from levying a special tax or assessment against the property of these plaintiffs, or any of them, to pay said certificates or tax warrants issued or sought

to be issued, and that the defendant C. J. Becker, as city clerk of the city of Shawnee, be enjoined and restrained from certifying any tax levy of a special tax or assessment made and levied to pay said certificates or tax warrants issued against the property of these plaintiffs, or any of them, abutting on Park street, until the further order of this court. That the defendants, as mayor and city council of the city of Shawnee, and C. J. Becker as city clerk of said city, be perpetually enjoined from signing, sealing, issuing, or delivering said certificates or tax warrants against the said property of these plaintiffs, or either of them, to said W. M. Davis, or his assigns, or at all. That the defendants, as mayor and city council of the city of Shawnee, be perpetually enjoined from levying a special tax or assessment against the said property of these plaintiffs, or any of them, to pay off and discharge the said certificates, or any part or installment thereof, and that the defendant C. J. Becker, as city clerk of said city, be perpetually enjoined from certifying any such levy to the county clerk of Pottawatomie county."

On the 27th day of July, 1905, defendants served upon the plaintiffs their answer to the amended petition and notices of motion to dissolve said temporary injunction; said answer having been duly filed by leave of court. Afterwards plaintiffs were permitted, by way of amendment, to add an additional paragraph to the first amended answer, said paragraph being in words and figures as follows: "Plaintiffs and each of them are ready and willing to pay all special assessments that are now or may hereafter become a legal charge against their property, or the property of any of them, to the full extent of the benefits resulting to their property, or the property of any of them, from such improvement, when the same shall have been ascertained by the court, or under its direction, and now here in court offer to pay the same." On the 15th day of September, 1905, by agreement, said cause was referred to J. H. Everest, Esq., to try and determine the issues of law and fact and report thereon to the court. Afterwards, on the 29th day of March, 1906, the said referee made his findings of fact and conclusions of law in words and figures as follows:

"That on September 7, 1903, defendants passed a resolution declaring it necessary to grade Park street, from north side of Main street to the north line of Dill street, as follows:

"Resolution to Grade Certain Streets and Avenues.

"Be it resolved by the mayor and councilmen of the city of Shawnee: First, that it is necessary to grade and improve certain following described streets and avenues of the city of Shawnee, to wit: Market street, from the north side of Main street to the south side of Dill street; Park

street, from the north side of Main street to the north line of Dill's addition to the city of Shawnee; Louisa street, from the north line of Main street to the north side of Dill's addition to the city; Ninth street, from Broadway to Kickapoo street; Highland avenue, from Broadway to Kickapoo street; Tenth street, from Broadway street to Kickapoo street; Ridgewood avenue, from Broadway to Kickapoo street; Dewey avenue, from Market street to Kickapoo street; Wallace avenue, from Market street to Kickapoo street; South Broad street, from south line of Choctaw, Oklahoma & Gulf Company's right of way to Bluff street; Dill street, from Kickapoo to Broadway. That if the owners of a majority of the lots or parcels of land liable to taxation for the above improvements shall not, within twenty (20) days after the completion of the publication of this resolution, file with the city clerk of said city their protest—if made against each street and avenue to be improved, must be separate—which shall be considered only against the street or avenue protested against, then the council of such city shall cause such improvements to be made, and contract therefor at the expense of the abutting lots, pieces, or parcels of ground, as provided in section 3, art. 2, c. 8, of 1901 Session Laws of Oklahoma Territory, and will issue certificates against such lots, pieces, or parcels of ground for the amount as provided by law.

"Adopted and approved this 2nd day of September, 1903.

"C. J. Bocher, Mayor.

"C. J. Becker, City Clerk."

"That said resolution was published in the official paper four consecutive weeks. That the mayor and council of the city of Shawnee have never passed, approved, and ordained an order, resolution, or ordinance providing for, and authorizing and directing, the grading and improvement of Park street, or any part thereof, other than as stated as finding 1. That on January 6, 1904, the mayor and council adopted plans and specifications grading Park street, which plans and specifications included an estimate of the cost of such improvement. That on April 19, 1904, the clerk was authorized to advertise for bids grading Park street. That on May 5, 1904, notice for bids for grading was given and published ten (10) days. On May 17, 1904, the following bid of W. M. Davis was accepted by the mayor and council:

"To the Honorable Mayor and Council of the City of Shawnee—Gentlemen: I herewith submit to you my bid as follows on the hereafter named streets: I agree to grade the said streets according to the plans and specifications of the engineer for the sum of 35 cents per cubic yard, to be paid for in tax warrants issued by the city council against the abutting lots as provided by law, city in no case to be liable for the payment of same,

and further agree that in any case any of the owners of the abutting property, or any piece or parcel liable to taxation for any of such work, may redeem the tax warrants at a cash discount of 40 per cent. on the same, at the completion of grading. This bid contemplates that there shall be a free haul and free fill, as specified by the city engineer. This bid applies to the following named streets, to wit: Park street, from Main to Kirk street, at 37 cents; Ridgewood street, from Kickapoo street to Broadway street; Hobson street, from Dexter street to Burns street; Beard street, from Dewey to Burns street; Dewey street, from Kickapoo street to Union avenue. I herewith hand you certified check for \$200 to comply with bid.

"Respectfully, W. M. Davis."

"Council Proceedings.

"May 17, 1904.

"Council met in regular session. Mayor Bocher presided. Bids on street grading were opened and read. Bidders are as follows: W. M. Davis, Park street, from Main street to Kirk street, at 37 cents per cubic yard, with a 40 per cent. discount for cash. On motion by Relley, seconded by Reid, that we award the contract to Mr. Davis, and that the city attorney be instructed to draw up a contract and bond, and the mayor and clerk be authorized to execute the same according to the plans and specifications. Carried. Motion by Pemberton, seconded by Harrison, that we reconsider the motion awarding the contract of street grading to Mr. Davis. Upon roll call the vote stands as follows: Harrison, Reid, Cade, Blakely, Farrall, Baumle, Keller, Timmons, and Pemberton, aye; Crisman, Jacobs, and Relley, nay. Motion by Pemberton, seconded by Cade, that we accept Mr. Cline's bid on street grading at 40 per cent. discount for cash, and that the contract be awarded him. Substitute by Relley, seconded by Jacobs, that we accept Mr. Davis' bid. Upon roll call the vote stands as follows: Reid, Cade, Farrall, Crisman, Baumle, Keller, Timmons, Jacobs, and Relley, aye; Blakely and Pemberton, nay; Harrison passed. Motion by Relley, seconded by Keller, that we award contract of street grading to Mr. Davis, and that the mayor and clerk be authorized to execute the contract and be required to give a \$2,000 bond. Carried.

"C. J. Bocher, Mayor.

"Attest: C. J. Becker, City Clerk."

"Minute Record No. 2, pages 478, 479.

"That on June 9, 1904, the mayor and clerk executed the following contract with W. M. Davis:

"Contract for Street Grading.

"Know all men by these presents, that this agreement, made and entered into this 9th day of June, 1904, by and between the city of Shawnee, Pottawatomie county, Oklahoma Territory, party of the first part, and

W. M. Davis, party of the second part, witnesseth, that whereas, the city of Shawnee did, by its mayor and councilmen, pass and adopt a resolution deeming and declaring it to be necessary to grade and thereby improve Park street, from Main street to Kirk street, * * * all of the same being within the limits of said city of Shawnee, and did duly advertise for bids for said grading on each of said streets separately, all of which was done under article 2 of chapter 8 of the Session Laws of 1901 of the territory of Oklahoma, and has accepted the bid of W. M. Davis, party of the second part, for said grading on each street separately at the sum of thirty-five cents per cubic yard, for all dirt and earth taken and removed from the cuts in said grading, with free haul for the same to the places where needed or disposed of in said grading, and with free fill for said grading, and provided that the owner of any lot or parcel of ground abutting on any of said grading shall be entitled to a discount from the contract price of forty per cent. thereof for the payment of cash therefor at any time before the certificates for said grading are issued and delivered to the contractor: Now, therefore, said party of the second part hereby agrees that he will perform said work and do said grading according to the profiles, plans, and specifications made by the city engineer and adopted by said city council and on file in the office of the city clerk of said city, and do the same at the prices named above in this contract, and that he will complete all of said grading on or before the 9th day of December, 1904, and that he will allow any lot owners a discount of forty per cent. from the contract price for the payment in cash at any time before the certificates for said grading are issued to said party of the second part. The said party of the first part agrees that it will proceed according to said statute to cause the benefits of said grading to be appraised as provided by law, and to review such appraisal and to assess the benefits of such grading by an ordinance against the lots and parcels of ground, as provided by law, and will issue certificates of such assessment as provided by statute, and deliver the same to the said party of the second part in a sum total amounting to the contract price, less cash payments, for said grading and improvements as before set forth, in full payment for said grading; the city of Shawnee assuming no liability therefor. The said party of the second part shall execute a bond forthwith to the city of Shawnee in the sum of two thousand dollars, with good and sufficient sureties, conditioned for the faithful performance and fulfillment of this contract according to its terms and tenor, and to hold said city harmless against all claims for damages by reason of negligence of the party of the second part in doing said work and grading, and against all claims of any subcontractors or laborers performing any part of such work or grading.

"In testimony whereof, the said parties have hereunto subscribed their names the day and year first above written.

"City of Shawnee,

"By C. I. Bocher, Mayor,

"Party of the First Part.

"Attest: C. J. Becker, City Clerk."

"Executed in duplicate.

"That no separate estimate of the cost of grading Park street was prepared, filed, and presented to the council prior to advertising for bids and letting the contract for the grading of said street, but said estimate was included in the plans and specifications shown at finding No. 4. That on June 21, 1904, the mayor and council took the following action adopting Ordinance 384, appointing appraisers to appraise the benefits to the property abutting on Park street, to wit:

"Council Proceedings.

"June 21, 1904.

"Council met in regular session, Mayor Bocher presiding. Councilmen present at roll call were Harrison, Reid, Blakely, Farrall, Crisman, Bauble, Keller, Jacobs, Timmons, and Pemberton. Cade and Relley absent. Minutes of the previous meeting read and approved as corrected. Ordinance 384, an ordinance appointing appraisers on Park street, was read. Motion by Crisman, seconded by Keller, that the words 'ten insertions' be stricken out, and insert 'two issues' in the weekly. Carried. Committee appointed Joe Farris, J. S. McIntyre, and J. Atterbury. Ordinance as amended was read and considered by sections, and as a whole council moved its adoption, all councilmen voting aye."

"That Ordinance 384 is as follows:

"Ordinance No. 384.

"An ordinance appointing three disinterested appraisers to appraise the benefits to all abutting property resulting from the grading and otherwise improving Park street from Main street to Kirk street, Ridgewood street from Kickapoo street to Broadway street, Hobson street from Dexter street to Burns street, Dewey street from Kickapoo street to Union avenue, Bell street from Ninth street to Woodland Park, and specifying the time and place for said appraisers to meet and begin said assessment.

"Be it ordained by the mayor and councilmen of the city of Shawnee, Oklahoma Territory:

"Section 1. That for the purpose of appraising the benefits to all of the abutting property resulting from the grading and otherwise improving Park street from Main street to Kirk street, Ridgewood street from Kickapoo street to Broadway street, Hobson street from Dexter street to Burns street, Dewey street from Kickapoo street to Union avenue, Wallace street from Kickapoo street to Union avenue, Bell street from Ninth street to Woodland Park, there be and there

is hereby appointed the following named disinterested appraisers, who are freeholders of the city of Shawnee, on the 14th day of July, 1904, at the hour of nine o'clock a. m., and after taking the oath to fairly and impartially perform their duties and appraise the benefits to all the abutting property resulting from said grading and improving said streets, they shall proceed from thence to view and appraise the benefits to each lot and parcel of ground as provided in section 2 of chapter 8 of the Session Laws of 1901 of the territory of Oklahoma. The engineer of said city shall accompany them, and furnish them with all contracts, estimates, and apportionments of costs necessary to enable them to intelligently discharge their duties, and the said appraisers shall embody their appraisal in a written report, with the lots and subdivisions in each one-fourth block separately stated in such report, and file the same with the city clerk of said city.

"Sec. 2. The said appraisers may adjourn from day to day until their labors are completed, and shall give any property owner a hearing with respect to his assessment, he so desiring to be heard.

"Sec. 3. Said appraisal and assessment shall be for the cost of making the improvement and doing the grading on said streets according to the contract, which shall include all other expenses incurred by the city of Shawnee in addition to the contract price of the work.

"Sec. 4. This ordinance shall be published for at least two weeks in the Shawnee Weekly Quill, a newspaper published in said city, and the city marshal of said city shall also post at the corner of each one-fourth block affected, in some conspicuous place, a printed copy of this ordinance at least twenty days in advance of the aforesaid meeting of said appraisers, and shall file an affidavit with the clerk of said city of having posted such copies of this ordinance, giving the date of such meeting.

"Sec. 5. That this ordinance shall take effect and be in force from and after its passage, approval, and publication as required by law.

"Passed by the council the 21st day of June, A. D. 1904, and approved by the mayor the 22d day of June, A. D. 1904.

"C. J. Bocher, Mayor.

"Attest: C. J. Becker, City Clerk."

"That Ordinance 384 was published and posted as required by law. That on July 18, 1904, the board of appraisers made and filed their report of their proceedings as such appraisers as follows:

"Shawnee, Oklahoma, July 26, 1904.

"To the Honorable Mayor and City Council of the City of Shawnee, Pottawatomie County, Oklahoma Territory:

"We, the undersigned, board of appraisers, who were on the 21st day of June, 1904, duly appointed by said mayor and city council

to assess the benefits to each lot, piece, and parcel of ground in each quarter block abutting on that part of Park street and Bell street which have been recently graded by the contractor therefor under and by virtue of the contract with said city, do hereby submit this our written report embodying our appraisal of the benefits to said parts or parcels of ground in each quarter block abutting on said part of said streets. Our said appraisal, showing the amounts separately assessed by us upon said lots and parcels of ground, is attached hereto and made a part of this report, and immediately follows our signature hereto, and is marked "Exhibit A." We were accompanied by said city engineer in the said view and appraisements, and were by said engineer furnished with all contracts, estimates, and apportionments of costs necessary to enable us to intelligently discharge our duties as appraisers. We met at the said city council chamber of said city on the 18th day of July, 1904, at 9 o'clock a. m. of said day, and severally took the oath required by section 6, chapter 8, of the Laws of Oklahoma Territory of 1901, and organized our said board by the election of said J. S. McIntyre, chairman, and J. W. Atterbury, secretary, of said board, and thereupon on said day entered upon the performance of our duties. We therefore continued our labors as such board from day to day and until the 26th day of July, 1904, at which last-named day we completed our work as such board of appraisers and filed this our report with the city clerk of said city.

"J. S. McIntyre, Chairman,

"J. W. Atterbury, Secretary,

"Joe Farris, Appraisers."

"Notice is hereby given that the city council of the city of Shawnee will meet on the 30th day of August, 1904, at 8 o'clock p. m., in the council chamber of said city council in said city, for the purpose of reviewing the report of the board of appraisers making assessments on the various lots, pieces, and parcels of ground charged with the cost of grading Park street from Main street to Kirk street and Bell street from Ninth street to Woodland Park in said city. The report of said appraisers is hereto attached and published herewith. At said meeting the mayor and council will hear and adjust any complaints and review the assessments made by said board of appraisers, as provided by law, and will review and correct, raise and lower, or readjust or reapportion, said assessment as provided by law, and said council will adjourn from day to day and from time to time until its labors are completed. At said meeting all parties in interest may appear and be heard.

"C. J. Becker, City Clerk."

"That said report was published in the official paper August 12, 1904, together with a notice that the council would meet August 30, 1904, to review such report. That on September 1, 1904, the mayor and council

took the following action in reviewing the action of the appraisers on Park street:

"Council Proceedings.

"September 1, 1904.

"Council met in adjourned session, Mayor Bocher presiding. Councilmen present at roll call were Reid, Cade, Blakely, Farrall, Crisman, Keller, Timmons, and Jacobs. Harrison, Baumle, Pemberton, and Relley, absent. That Ordinance No. 396, so far as same relates to Park street, is as follows: Ordinance No. 396, an ordinance revising, readjusting, and reapportioning the appraisalment on the lots, pieces, and parcels of ground abutting on Park street and Bell street, was read and considered by sections. Upon hearing all complaints, the councilmen moved its adoption, all councilmen voting aye.

"Ordinance No. 396.

"An ordinance revising, readjusting, and reappointing the appraisalment and assessment against lots in each quarter block abutting on Park street from Main street to Kirk street for the grading of said part of said street and other expenses incurred thereby, and levying taxes for the same on the lots benefited thereby in each quarter block abutting thereon.

"Be it ordained by the mayor and councilmen of the city of Shawnee:

"Section 1. That whereas, the board of appraisers heretofore appointed by an ordinance of said city to make the appraisalment and assessment against the lots and parcels of ground in each quarter block abutting on that part of Park street from Main street to Kirk street, * * * in the city of Shawnee, have made their appraisalment and filed their report for the grading and part of said street and other expenses connected therewith, which said reports, appraisements and assessments have been published as required by law, and the 30th day of August, 1904, having been fixed and designated by notice duly published as required by law for the mayor and councilmen of said city to hear and adjust any complaint as to such assessment and appraisalment, and to revise and readjust the same, and such hearing having been adjusted to this 1st day of September, 1904.

"Now, therefore, be it further ordained by the mayor and councilmen of the city of Shawnee:

"Sec. 2. That the aforesaid appraisalment and assessment, on complaint made by certain owners of lots affected thereby, be and the same is hereby revised, readjusted, and reapportioned so as to make the assessment of benefits to each of said lots and parcels of ground of the expenses of said grading of said part of said streets as follows, as respectively set opposite to said lots, the amount to be levied and assessed against

same for that purpose, to wit, in the city of Shawnee as shown by the original town plat.

Park Street from Main to Kirk Street.

Original Town Plat.

Block 21, lot 1.....	\$19 94
" " " 2.....	19 94
" " " 3.....	19 94
" " " 4.....	19 94
" " " 5.....	19 94
" " " 6.....	19 94
" " " 7.....	19 94
" " " 8.....	19 94

Cost of improving Park Street from Main Street to Kirk Street.

27,719 cu. yd. excavating at 37¢	
free haul and free fill.....	\$10,256 03
1,149 cu. yd. street railroad.....	536 13
Engineering, map, profile, and stake	50 00
Appraising	45 00
Printing	45 00
Typewriting	3 00

Total \$10,926 16

Appraisalment of Park Street.

Original Town Plat.

Block 21, lots 1, 2, 3, 4, 5, 6, 7, 8, each	\$ 19 94
Block 21, lot 10.....	25 57
" " " 11.....	20 51
" " " 12.....	15 63
" " " 13.....	19 36
" " " 14.....	31 00

Total \$503 13

"[Balance of detailed statement omitted.]"

"Notice is hereby given that the city council of the city of Shawnee will meet on the 30th day of August, 1904, at 8 o'clock p. m., in the council chamber of said city council in said city, for the purpose of reviewing the report of the board of appraisers making assessments on the various lots, pieces, and parcels of ground charged with the cost of grading Park street from Main street to Kirk street to Woodland Park in said city. The report of said board of appraisers is hereto attached and published herewith. At said meeting the mayor and council will hear and adjust any complaints and review the assessments made by said board of appraisers.

Block 21, lot 9.....	\$ 31 90
" " " 10.....	30 64
" " " 11.....	25 57
" " " 12.....	220 51
" " " 13.....	15 63
" " " 14.....	19 36

"[Balance omitted.]"

"That in taking a vote of the council on the passage of said Ordinance No. 384 appointing appraisers to appraise the benefits to the abutting property on Park street, the yeas and nays were not entered in the journal of the proceedings of the council, but said vote was taken by yeas and nays and entered in a record kept in connection with the journal for said purpose. That plaintiffs respectively own the property alleged in the petition.

That the board of appraisers appointed to appraise the benefits to the property abutting on said street resulting from such improvements did not determine the special benefit or benefits accruing to said lots or lots abutting on said street, resulting to said lot or lots, as a question of fact, but proceeded and apportioned the whole cost and expense of grading said street to the lots abutting thereon; but I do not find that said appraisalment or assessment is in any way inequitable or unjust. That the board of appraisers, in making the appraisalment and apportionment of the cost of the work of grading Park street, made such assessment on the basis of the contract price for such work. That there is no ordinance of the city of Shawnee fixing the compensation of the city engineer, nor providing extra or other compensation for the engineering work in the grading of streets. That said board of appraisers, in making the apportionment, divided the total cost as given by the engineer by the sum of the number of lineal feet on the two sides of Park street for the space improved, and got the flat rate per lineal foot, then multiplied this sum by the number of lineal feet in each block, which gave the sum for each block. Said board then deducted the sum of 20 per cent. from the sum charged to the blocks at south end of street, and added it to the blocks at the north end, and so on from the succeeding blocks. That said board of appraisers did not determine the benefit to or how much any particular lot or lots were benefited by such grading, nor the per cent. nor proportional benefits to said property. That the plaintiffs are citizens of Shawnee, and knew of said improvements, and permitted said work to be done without objection to the city council, and knowingly received the benefits thereof.

"Conclusions of Law.

"Upon the pleadings and issues in this cause, and upon the above findings of fact, I make, return, and file the following conclusions of law :

"(1) That before the mayor and council of the city of Shawnee could lawfully provide for the improvement of the street in controversy in this action, being a street of a city of the first class, and make the cost of such improvement a charge against the abutting property, said council must by resolution declare such improvement necessary, which resolution must be advertised for four consecutive weeks in some newspaper of general circulation in the city, and I conclude that the resolution of the council adopted and approved September 2, 1903, is a good and sufficient resolution for the purpose of providing for the grading of Park street from the north side of Main street to the north line of Dill addition to the city of Shawnee.

"(2) I conclude as a matter of law that it is not necessary, after the passage and publication of the resolution declaring it necessary

to grade and improve this street, and after the expiration of the time given for remonstrance against such improvement for the mayor and council to pass an ordinance authorizing such improvement to be made, but that said mayor and council can thereafter proceed to advertise for bids and let said contract.

"(3) I conclude as a matter of law that the method by which the board of appraisers appointed to assess the lots benefited by this grading arrived at said assessment was not the method prescribed by law, and that the report of said appraisers is not as full and complete as could be desired; but I conclude as a matter of law that the report of said board of appraisers, under the statutes of the territory of Oklahoma, is sufficient, and I further find that the failure of the plaintiffs in this action to appear before said council after due notice was given them, and object to the manner of such assessment, estops them from maintaining this suit to enjoin the collection of said taxes, it not appearing that the said assessment is inequitable, unequal, or unjust, or that any one of the plaintiffs have been injured by the method pursued in making said assessment.

"(4) I conclude as a matter of law that the fact that W. M. Davis provided for a discount of 40 per cent. for cash to said lot owners, who desired to take up their warrants before the same went into the hands of the county treasurer, and that said contract contained such provision, does not invalidate said bid or contract, nor render the assessment sought to be enjoined in this action illegal. The bid of W. M. Davis was the lowest bid, and was within the estimate furnished by the city engineer. The abutting lot owners have the opportunity to take advantage of the 40 per cent. discount if they desire.

"(5) I conclude as a matter of law that the assessment sought to be enjoined in this action is a valid assessment, and that the defendants are entitled to a judgment of the court in this case dissolving said injunction, and that the defendants should recover their costs herein expended."

Wood & Williams, for plaintiffs in error.
F. H. Reiley and W. B. Crossan, for defendants in error.

WILLIAMS, C. J. (after stating the facts as above). In the language of counsel, "the main contention of plaintiffs in error is that, before the cost of grading streets in cities of the first class in this territory [state] can be assessed against the abutting property and made a legal charge thereon, the improvement must be first authorized, ordered, and provided for by ordinance. Relying on this main contention, appellants in this particular case, in view of the proceedings or lack of proceedings of the mayor and council of the city of Shawnee, further contend that some affirmative action is neces-

sary, either by ordinance, order, or resolution." Plaintiffs insist that the act of 1901 (sections 443-453, Wilson's Rev. & Ann. St. 1903) cannot be reasonably construed as a complete statute upon the question of street improvements, independent of the provisions of chapter 12, Wilson's Rev. & Ann. St., insisting that the act of 1901, which is a later act, shall be construed as merely supplementary to the provisions of said chapter 12, *supra*. However, it is not necessary for the final determination of this cause to determine whether or not an ordinance should have been passed providing for and directing the details of the paving of these streets, after the adoption of the resolution declaring the necessity for the same, and causing the publication of the notice, and the failure to file protests.

Counsel have cited the case of *Newman v. City of Emporia*, 32 Kan. 457, 4 Pac. 816, as sustaining their contention that the adoption of the ordinance is necessary for the making of the improvements and levying the taxes, and that, such not having been done, such acts in having paving done were as to the plaintiffs absolutely void, and could not be made valid by subsequent acts of the mayor and council as to the parties affected. Section 385, Comp. Laws Kan. 1885 (chapter 19, art. 3, § 32), which is the identical provision that was in effect at the time the decision was rendered in the case of *Newman v. City of Emporia*, *supra*, provides: "The cities coming under the provisions of this act in their corporate capacities are authorized and empowered to enact ordinances for the following purposes, in addition to the other powers granted by this act: * * * To open and improve streets, avenues and alleys, make sidewalks and build bridges, culverts and sewers within the city; and for the purpose of paying for the same shall have power to make assessments in the following manner, to wit: First. For opening, widening and grading all streets and avenues and for all improvements of the squares and areas formed by the crossing of streets, and for building bridges, culverts and sewers, and footwalks across streets, the assessments shall be made on taxable real estate within the corporate limits of the city, not exceeding ten mills on the dollar, for these purposes in any one year. Second. For making and repairing sidewalks, macadamizing, curbing, paving and guttering, the assessment shall be made on all lots and pieces of ground abutting on the improvements, according to the front foot thereof." It is true that in the case of *Newman v. City of Emporia*, *supra*, this statute, which is very similar to section 370, Wilson's Rev. & Ann. St. 1903, was construed by the Supreme Court of Kansas as requiring an ordinance to be adopted before such improvements could be made. Such improvements under said provisions were *ultra vires* until the ordinance to that end was passed, and

when the mayor and council acted without an ordinance to that effect having been enacted they were without jurisdiction as to such matter, and the same could not thereafter be ratified. However, no such provisions were in force in Kansas as are contained in sections 415 and 443 to 453, inclusive, Wilson's Rev. & Ann. St. 1903.

The question necessarily arises in this case: Did and could the abutting property owners ratify the acts of the mayor and council of the city of Shawnee in having these improvements made? In the case of *Noel v. City of San Antonio*, 11 Tex. Civ. App. 580, 33 S. W. 266, the court says: "Recurring to the proposition that the city is estopped, the contract having been executed, from setting up its invalidity, it may be said that as a general rule the doctrine of estoppel applies to corporations and individuals. But it cannot be applied to render valid and binding a contract that the corporation was prohibited from making. The application of the doctrine of estoppel to municipal corporations is confined to cases in which they have the power to contract. But where the act undertaken was, in and of itself, ultra vires of the corporation, no act of that body can have the effect to estop it to allege its want of power to do what was undertaken." *Bigelow, Estop.* 406, 467; *State v. Murphy*, 134 Mo. 548, 31 S. W. 784, 35 S. W. 1132, 34 L. R. A. 369, 56 Am. St. Rep. 515; *Union Depot Co. v. City of St. Louis*, 76 Mo. 393; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 2 Sup. Ct. 221, 27 L. Ed. 413; *Davis v. Railroad Co.*, 131 Mass. 258, 41 Am. Rep. 221.

In case of *Zalesky v. Cedar Rapids*, 118 Iowa, 714, 92 N. W. 657, the court says (quoting from section 779 of the Iowa Code as amended by chapter 27, p. 14, Acts 28th Gen. Assem.): "They shall have power to provide for the construction, reconstruction and repair of permanent sidewalks upon any street, highway, avenue * * * within the limits of such city or town * * * and to assess the costs thereof on the lots or parcels of land in front of which the same shall be constructed. * * * This cannot be construed otherwise than to mean that the city council is thereby invested with all the necessary authority to make provision for carrying into effect the power granted. Now, municipal corporations make provision for carrying into effect or discharging the powers and duties conferred by law through the medium of an ordinance. * * * The appellants contend that, even conceding the defects to which attention has been called, the same were cured, and a valid levy of assessment accomplished, by virtue of the resolution of February 15, 1901, and the notice served pursuant thereto, and the further resolution of March 8, 1901. Section 836 of the Code is relied upon as a basis for such contention. Grant-

ing that even the chapter of the Code of which such section is a part has application to the matter of construction of sidewalks—a point we do not decide—still there is no merit in this contention of appellants. The defects which may be cured by a relevy of assessment are such only as inhere in the time or manner of the proceeding; the machinery of the law having once been properly put in motion. It was not intended that jurisdictional defects can be cured by proceedings therein directed. Under the ordinance in question the adoption of a resolution is a prerequisite to any further step being taken. Without that step there is no authority whatever to further proceed. The case is altogether different from one where, having authority to proceed, irregularities and defects in the subsequent proceedings thereafter occur which do not have the effect to take away any substantial rights of a party interested. While having reference to a different section of the statute, yet the principle announced in *City of Charlton v. Holliday*, 60 Iowa, 391, 14 N. W. 775, is applicable. That was a case in which recovery was sought under the provisions of section 479, Code 1873, which provides, in effect, that under certain specified conditions a recovery may be permitted for public improvements, notwithstanding informality and irregularity in the proceedings under which such improvements were made. In the course of the opinion it was said: "The irregularity or defect under which this section can be disregarded must, we think, be a mere error or omission to do something which in no manner affects the jurisdiction of the city. It is fundamental that, unless jurisdiction has been acquired, the proceedings of all courts are void, and this must be so as to municipal corporations." In that case, as in this, the lot owner had the right, under the ordinance, to construct the walk if he saw proper. But this, it is said, he could not do until one was ordered. "Under the ordinance it was essential that a resolution should be passed by the council, ordering the construction of the sidewalk in question. There could be no authority to make an assessment, and consequently no authority to reassess, especially as this was attempted to be done long after the walk had been actually constructed by the city."

In the case of *McLauren v. City of Grand Forks*, 6 Dak. 397, 43 N. W. 710, the court says: "The city council only had such authority as was conferred by the charter of said city, and could exercise the powers granted only in the manner and according to the conditions imposed by the law. They only had jurisdiction to act and bind the city by what they did while acting within the provisions of the law authorizing them to act at all. Except in the instances provided by the charter itself, the officers of the city were powerless to legally grade the street. The charter provides that when the mayor

and council shall deem it necessary to grade any street they shall declare by resolution that the grading of such street is necessary. It is only when necessary that the law contemplates such improvements shall be made, and whether or not the proposed improvement is necessary is to be determined by the mayor and council, and such determination is to be evidenced by a resolution to that effect. Until this is done they have no power to act, and are without jurisdiction in the premises. The lawmaking body evidently intended that before the mayor and council entered upon making improvements on behalf of the city, for the expense of which private property was to be burdened, the necessity therefor should be considered and determined by them in their official capacity, and the evidence preserved by proper record. This is an important provision prescribing the preliminary steps necessary when it is proposed to make public improvements, and, if disregarded or omitted, all subsequent proceedings are invalid, and of no effect. *Hoyt v. City of Saginaw*, 19 Mich. 39, 2 Am. Rep. 76; *White v. Stevens*, 67 Mich. 33, 34 N. W. 255. The other conditions imposed by the statute are equally important and necessary of performance. It having been determined that the proposed improvement is necessary, the resolution so declaring is to be published for a stated period, and within a limited time thereafter, defined by the charter, the owners of the property liable to assessment for the expenses of such improvement may protest against it. These provisions of the charter were intended to preserve to the owners of the property to be affected by the proposed improvement the right for any reason they may have to protest against the making of it and to demonstrate that it was not necessary; that the benefits which would flow from it were not commensurate with its costs, etc. The giving of the notice required by law was a step essential to be taken by the city authorities before they could legally enter upon the work of making the improvement. It was jurisdictional."

In the case of *Barker v. Commissioners*, 45 Kan. 696, 26 Pac. 591, the court says: "In view of other fatal defects it is not now necessary to pass upon the question as to whether or not the omission in the petition to state 'the time for which assessments in payment thereof are to be made,' as required by the second section of the act, is jurisdictional, or a mere irregularity that does not deprive the county board of the power to act. * * * The same facts are urged as an estoppel against the plaintiff in error as in the other two streets. Some of these facts relied on to estop him are sustained by evidence. The others are not. We have considered these findings in the Tenth street matter. They apply to all three of these streets taken together, and are not made specific as to each street. These attempts to exercise powers not granted in terms or fairly implied by the

act under the assessments levied on the land of the plaintiff in error for the improvement of Fifth street are void, and there are no sufficient facts pleaded or found to estop him from asserting the jurisdictional defects enumerated."

Section 680 of the Annotated Code of Iowa (1897) provides: "Municipal corporations shall have power to make and publish from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days." Section 810, Annotated Code of Iowa (1897) provides: "When the council of any such city shall deem it necessary, or available to make or reconstruct any street improvement or sewer authorized in this chapter, it shall, in a proposed resolution declare such necessity or advisability, stating the kind of material proposed to be used and the method of construction whether abutting property will be assessed, and in case of sewers, the kind and size, and what adjacent property is proposed to be assessed therefor, and in both cases designate the location and terminal points thereof, and cause twenty days' notice of the time when said resolution will be considered by it for passage to be given by four publications in some newspaper of general circulation published in the city, the last of which shall not be less than two nor more than four weeks prior to the time fixed for its consideration, at which time the owners of the property subject to assessment for the same may appear and make objection to the contemplated improvement or sewer and the passage of said proposed resolution, at which hearing the same may be amended and passed, or passed as proposed." Section 811 of the same Code further provides: "Upon compliance with the preceding section, the council may, by ordinance or resolution, order the making or reconstruction of such street improvement or sewer, but the vote shall be by yeas and nays, and entered of record, and the record shall show whether the improvement was petitioned for or made on the motion of the council." Section 407 of Wilson's Revised and Annotated Statutes of 1903 is substantially the same as section 680 of the Iowa Code, supra. In the case of *Martin v. City of Oskaloosa*, 126 Iowa, 685, 102 N. W. 530, the court says: "We are of the opinion, however, that no general ordinance was essential to enable the city to order the improvement and take the steps necessary to a valid assessment. It certainly cannot be true that where the entire procedure is regulated by statute, and nothing is left to be determined by general

ordinance, the city can derive any greater authority from an ordinance which simply reenacts the provisions of the statute. All that can be essential in such a case is that the city take the steps provided by the statute, and, if these steps are taken as required, the assessment will certainly be valid."

Section 76, c. 19, p. 176, of the General Statutes of Kansas of 1868, provides: "Whenever it shall become necessary in order to raise sufficient funds for the purchase of a school site or sites, or to erect a suitable building or buildings thereon, it shall be lawful for the board of education in every city coming under the provisions of this act, with the consent of the council, to borrow money, for which they are hereby authorized to issue bonds, bearing interest at the rate of not more than ten per cent. which bonds shall be redeemed in not more than twenty years from their date; and the said board of education is hereby authorized to sell said bonds at not less than seventy-five cents on the dollar." In the case of *Board of Education v. De Kay*, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573, Justice Brewer, speaking for the court, says: "Now, it is insisted that consent could only be given by an ordinance, and not by resolution, and in support thereof the case of *Newman v. Emporia*, 32 Kan. 456, 4 Pac. 815, is cited. * * * The general rule is that, where the charter commits the decision of a matter to the council and is silent as to the mode, the decision may be evidenced by a resolution, and need not necessarily be by an ordinance. * * * Nor is there anything in the case in 32 Kan. 456, 4 Pac. 815, in conflict with this. That simply holds that, when a charter holds that certain things be done by ordinance, they cannot be done by resolution. In this act incorporating cities of the second class there is nothing which either in terms or by implication requires that the consent of the city council be given only by ordinance. A resolution was, therefore, sufficient."

"Section 6 of the act to provide for work upon the streets, approved March 18, 1885 (St. 1885, p. 151, c. 153), which provided 'that the city council may by general ordinance prescribe general rules directing the superintendent of streets and the contractor as to the materials to be used, and the mode of executing the work on all contracts thereafter made,' is permissive, and not mandatory upon the city council, and the prescribing of general rules is not a condition precedent to the jurisdiction of the council to order a street improvement, where both the order and the contract for doing particular work sufficiently specifies the material to be used and the mode of doing the work." *Santa Cruz Rock Pavement Co. v. Heaton*, 105 Cal. 162, 38 Pac. 693.

In the case of *National Tube Works Co. v. City of Chamberlain*, 5 Dak. 54, 37 N. W. 761, the court says: "This is not strictly a question of ultra vires, for it is admitted

that the city council has the power, under the charter, to build and maintain a system of waterworks and contract for that purpose. But counsel for appellant insist that before such authority could be exercised it was necessary to pass an ordinance for that purpose. This might be true, if the city charter put such a limitation on the powers of the council on this subject, expressed or implied. After a careful examination of that instrument we find no such limitation, and therefore conclude that it was unnecessary that an ordinance should have been enacted. *Gas Co. v. San Francisco*, 9 Cal. 453; *Green v. City of Cape May*, 41 N. J. Law, 45; *City of Quincy v. R. R. Co.*, 92 Ill. 21; *Messenger v. City of Buffalo*, 21 N. Y. 196. But, conceding that an ordinance of the city council should have preceded this contract, and that there was, for this reason, a technical want of power to make it, still the appellant received and retained the property of the respondent, furnished at its instance and request, and enjoyed the use and benefit thereof. It cannot, therefore, be heard to object that it was not empowered to do what it promised in return simply because the manner of entering into the contract was not strictly in accordance with the mode prescribed by its charter, but not ultra vires as to its provisions. *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659; *Moore v. Mayor*, 73 N. Y. 238, 29 Am. Rep. 134; *Board, etc., v. Railway Co.*, 47 Ind. 407, 17 Am. Rep. 702. In the case last cited the court says: 'Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter or any statute prohibiting it, and the corporation by its promise induced a party, relying on the promise and in the execution of the contract, to expend money and perform his part thereof, the corporation is liable on the contract.'

There are authorities that go further in recognizing the doctrine of estoppel, the leading one of which is the case of *Tones' Executors v. City of Columbus*, 39 Ohio St. 231, 48 Am. Rep. 438, 3 Amer. & Eng. Corporation Cases, 656, wherein the court said:

"We have already seen that a petitioner for the improvement has the right to rely on the city council proceeding legally and regularly upon his petition. Certainly one who is not a petitioner has the same right. There can be no waiver of this defect, and no estoppel which will prevent him from asserting it after the work is completed, if he is ignorant of it before the work is completed, unless, indeed, circumstances exist which made it his duty to inform himself, or show his ignorance to be culpable. Just how this knowledge is to be shown it is not easy to say. That it may be shown by circumstances, in this as in any other case where knowledge is an essential element, is no doubt true. Infirmities in the public statute he may be presumed to know, but not in the proceedings of the coun-

cll or municipal officers, whose acts, as we have seen, he has the right to presume are regular. Undoubtedly those petitioning in this case for the privilege of the act, or voting for the commissioners, or acting as commissioners, or taking any active part under the statute in causing the improvement to be made, may be presumed to know that the improvement is being made, and that its cost is to be assessed under the provisions of the statute, upon abutting property. This presumption, in even these respects, cannot extend to those who have taken no such part, but are charged with silence only. When the above-named requirements are found, and it is shown that the property owner has been benefited by the improvement, at least to the extent that he has been thus benefited, he will be estopped from denying his liability to pay. It then became his duty to act upon his rights, before the city, for his benefit, expended its money in making the improvement upon the faith that he would pay his just share thereof. Had he spoken then, all that he now asserts as illegality would have been corrected, or the expenditure stopped; or, if not, then it was not at his peril that the expenditure was made. It was as much his duty under these circumstances to make known his objections and assert his rights as if he saw another person making improvements and expending money for his benefit under the erroneous impression that he was liable and expected to pay for the same. If, with knowledge of the facts, he failed to speak, but allowed the improvement and expenditure to be made, he would not be permitted to enjoy the benefits conferred and refuse to pay for them. He would be estopped to deny his liability to pay the fair value of what he received. There is no material difference, under these circumstances, whether the improvement is directly on the land of the owner, or upon the highway upon which such lands abuts, nor that the expenditure was made by the city and not by an individual. The presumption that the city was acting in good faith, the owner's knowledge that they were acting without authority, that the improvement was for his benefit, that it was made upon the faith that he would pay for it, demanded of him, in fairness, that he make known his rights and intentions then, or afterwards keep his peace. In either case, to the extent that the benefit has accrued to him, equity will require him to make compensation.

"Whether the assessment itself is to be considered a fair apportionment of the benefits conferred, even *prima facie* as against an owner estopped by his silence, or whether the limitation upon the power of assessment to 25 per centum of the value of the property, found in the municipal code, is applicable to this case, are questions which are not now material for us to consider. It is safe to assume, however, that no application of an equitable rule will be made that will operate

inequitably. It is not so much in cases of this kind that the estoppel, which arises from silence, gives validity to an invalid proceeding or contract, as that the party estopped will not be permitted to repudiate it, except on equitable terms. *Am. Dock & Imp. Co. v. School Trustees*, 35 N. J. Eq. 181. The inequity exists in claiming that the benefits which accrued to him thereby shall be enjoyed without compensation. The maxim, '*ex æquo et bono*,' should govern. * * * I am not quite able to see why, if inaction or silence, with knowledge, works an estoppel where a permanent improvement of a public street is made notwithstanding the tribunal had not jurisdiction to order it, by reason of the nonexistence of a condition precedent fact, it does not work an estoppel, although the tribunal had no jurisdiction to order the improvement, by reason of the unconstitutionality of the statute under which such order was made, unless, indeed, the acts are *per se* illegal or *malum prohibitum*. In either case there was a want of power in the tribunal *ab initio*. Where the infirmity of the act of the corporation is that it was *ultra vires*, but not prohibited by the charter or public law, an estoppel may arise, either from acts or inaction, which will prevent the corporation, a stockholder, or an individual dealing with it from asserting such infirmity. When, however, it is a question not between the corporation and individuals, but the public at large is interested, as in the case of an act *per se* wrong, or prohibited, no act can give it validity. See *Hitchcock v. City of Galveston*, 96 U. S. 341, 24 L. Ed. 659, and cases cited; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 184.

"In the latter case the rule is thus stated by Folger, J.: 'In the application of the doctrine of *ultra vires*, it has to be borne in mind that it has two phases—one where the public is concerned, and one where the question is between the corporate body and the stockholders in it, or between it and its stockholders, and third parties dealing with it, and through it with them. When the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent by the stockholders to the use of the unauthorized power by the corporate body will be of no avail. When it is the question of the right of the stockholder to restrain the corporate body within its express or incidental powers, the stockholder may in many cases be denied on the ground of his express assent, or his intelligent, though tacit, consent to the corporate action. A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal, or are *malum prohibitum*. Then no assent can validate them. It may do acts thus illegal, though there is a want of power to do them, which affect only the interest of the stockholders. They may be made good by the assent of the stockholders, so that strangers

dealing in good faith with the corporation will be protected in a reliance upon those acts. *Bissell v. Mich. So. R. R. Co.*, 22 N. Y. 269; 2 L. R. (Exch.) 390; *Whitney Arms Co. v. Barlow*, 63 N. Y. 63, 20 Am. Rep. 504; L. R. (7 Com. Pl.) 43; L. R. (H. of L.) 249. * * * And where third parties have dealt with the company, relying in good faith upon corporate authority to do an act, there is not needed that there be an express assent thereto on the part of the stockholders to work an equitable estoppel. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act, and, when harm would come to such third parties if the act were held invalid, the stockholders are estopped from questioning it. We suppose acquiescence, or tacit assent, to mean the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress, after the knowledge of the committal of it, whereby innocent parties have been led to put themselves in a position from which they cannot be taken without loss. It is the doctrine of equitable estoppel which applies to members of associated or corporate bodies, as well as to individuals."

"We presume the estoppel in such case would apply as well to third persons dealing with the corporation and receiving the benefit of the ultra vires act or contract as to members of the corporation, and would arise from the same facts. It may be suggested here that while there was a want of power to order this improvement under the act in question, and perhaps a total want of power to issue the bonds, there was ample power vested in the corporation to make the improvement and assess the cost of it under valid existing law; and, whatever may be said about the rights of the holders of the bonds thus issued without authority, it does not necessarily follow that the question between the city and the property holders, or the contractors doing the work, is the same. *Hitchcock v. City of Galveston*, supra. Several of the plaintiffs allege that they were married women, owning in their own right and as their separate property the lots of lands abutting upon the street upon which the assessment is charged. The improvement in question, being for the benefit of such separate property and relating thereto, and the benefits accruing therefrom attaching to such separate property, the rules heretofore announced apply to them as fully as if they were *femes sole*. As such owners they were vested with the full right to petition, to vote, and to act precisely as any other owner, and whatever would act as an estoppel, were they sole, will, with respect to such separate property, have the same effect notwithstanding their coverture."

Section 348, *Wilson's Rev. & Ann. St. 1903*, provides that "the powers granted to and conferred upon cities of the first class shall be exercised by the mayor and council of such cities as provided by law." Section 370,

Wilson's Rev. & Ann. St. 1903, provides that "cities coming under the provisions of this act in their corporate capacities, are authorized and empowered to enact ordinances for the following purposes, in addition to the other powers granted by law." One of those purposes is for bringing streets to grade, and for paving, macadamizing, curbing, and guttering all streets, avenues, and alleys, the assessment to be made for each block separately on all lots and pieces of ground, etc. Now, prior to the enactment of section 415, *Wilson's Rev. & Ann. St. 1903*, by the Legislature of Oklahoma Territory in the year 1895, the sole power to pave and macadamize streets was by virtue of the passage of an ordinance for that purpose; but since the enactment by the Legislature in 1895 of said section 415, *Wilson's Rev. & Ann. St. 1903*, identically the same as section 444 of *Wilson's Rev. & Ann. St. 1903*, it is provided: "When the city council shall deem it necessary to grade, pave, macadamize, gutter, drain or otherwise improve any street, alley, avenue or lane, or any part thereof, within the limits of the city, for which a special tax is to be levied as therein provided, such council shall by resolution declare such work or improvement necessary to be done, and such resolution shall be published for four consecutive weeks in some newspaper of general circulation in the city; and if the owners of a majority of lots or parcels of land liable to taxation therefor, shall not, within twenty days thereafter, file with the clerk of said city, their protest against such improvements, then such council shall have the power to cause such improvements to be made and to contract therefor and to levy the taxes as therein provided." The declaring by resolution and the publication of the same for four consecutive weeks in some newspaper of general circulation in the city is a condition precedent to jurisdiction, and, when that is done without protest on the part of the property owners to be affected, then the council shall have the power to cause such improvement to be made. Prior to the enactment of that section cities were authorized and empowered to enact ordinances for the purposes of paving, and, of course, when no ordinance was enacted, there was no power in the council to have it legally done. At that time the passage of the ordinance was a condition precedent to the mayor or council having jurisdiction or power to cause such improvements to be made. It would be the better practice for the council to direct all such acts by first passing an ordinance or resolution; but, as before stated, it is not necessary to determine as to whether or not an ordinance is required, in order to decide this case.

Section 444 further contains a proviso to the effect: "The property owners on any street of not less than two thousand feet in length, may, by petition signed by a majority of such property owners, request the

city council to pave such streets or part of street with any material used for standard paving, to be designated in such petition. And it shall thereupon be the duty of the city council to proceed to pave such street in accordance with the prayer of such petition, and no resolution or notice of intention to pave or publication thereof shall be necessary." This provision, when considered with the other sections of the act of the Oklahoma Legislature of March 5, 1901, strongly indicates that no ordinance was required after the resolution declaring the necessity therefor had been duly passed and publication thereof made, as provided by law. But how could the property owners be injured by the fact that no ordinance directing the paving to be done was passed? Had the ordinance been passed, how would it have benefited the abutting property owners? The declaring of the necessity by resolution and the publication of the same was for the benefit of the abutting property owners. So that if a majority of such property owners did not desire the improvement to be made, and were not willing to be taxed therefor, within 20 days they would be permitted to file with the clerk their protests and thereby arrest such improvement. In other words, said section 444, in providing for this resolution and the publication thereof, and for the filing of protest by the majority of abutting property owners, provided a referendum for such property owners as to such proposed improvement. And further on the proviso therein contained provides for an initiative; that is, where a majority of such property owners requested the city to pave such streets or parts of streets with any material used for standard paving by designating the same in such petition, that thereupon it be the duty of the city council to proceed to pave such street in accordance with the prayer of such petition, and that no notice of publication of the resolution should be necessary. This affords, as to the kind of material, the exercise of the principle of the initiative.

Section 445, Wilson's Rev. & Ann. St. 1903, provides that: "The abutting lots, pieces or parcels of ground shall be charged with the cost of making any improvements herein specified, to the centre of the block, where the abutting way is on the exterior of the block, and to the exterior of the block where the improvement is made on an alley or other public way in the interior of such block, each quarter block shall be charged with the due proportion of paving both the front and side streets of such block, together with the area found by intersections and alley crossings, which cost shall be apportioned among the lots and sub-divisions of such quarter block according to the benefits to be assessed to each lot or parcel. If any portion of the improved district shall not be platted into lots and blocks, the council shall include such ground in the proper quarter block district for the purpose of appraisalment and as-

essment as herein provided." When the resolution declaring the necessity of such improvements and notice was given, there could be no other presumption or fact carried to the abutting property owners than that such pavement, when done, should be paid by a special tax levied upon them. No protest of any kind was lodged with the clerk against such proposed improvement, and the referee found: "That the plaintiffs, as citizens of Shawnee, received notice of said improvement, and permitted said work to be done without objection to the city council, and knowingly received the benefits thereof." Under the authorities heretofore cited they are estopped, and will not be heard to question the authority to have such improvements made.

As to assessment: In the case of Barber Asphalt Paving Co., 181 U. S. 344, 21 Sup. Ct. 632, 45 L. Ed. 879, the court says:

"This array of authority was confronted in the courts below with the decision of this court in the case of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, which was claimed to overrule our previous cases, and to establish the principle that the cost of a local improvement cannot be assessed against abutting property according to frontage, unless the law under which the improvement is made provides for a preliminary hearing as to the benefits to be derived by the property to be assessed. But we agree with the Supreme Court of Missouri in its view that such is not the necessary legal import of the decision in Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. That was a case whereby, by a village ordinance apparently aimed at a single person, a portion of whose property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip condemned, but the cost and expenses of the condemnation proceeding, was thrown upon the abutting property of the person whose land was condemned. This appeared both to the court below and to a majority of the judges of this court to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power. This court, however, did not affirm the decree of the trial court awarding a perpetual injunction against the making and collection of any special assessments upon Mrs. Baker's property, but said: 'It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of the opening of the street as was

found upon due and proper inquiry to be equal to the special benefits accruing to the property. By the decree rendered the court avoided the performance of functions appertaining to an assessing tribunal or body, and left the subject under the control of the local authorities designated by the state.'

"That this decision did not go to the extent claimed by the plaintiff in error in this case is evident, because in the opinion of the majority it is expressly said that the decision was not inconsistent with our decisions in *Parsons v. District of Columbia*, 170 U. S. 45, 56, 18 Sup. Ct. 521, 42 L. Ed. 943, and in *Spencer v. Merchant*, 125 U. S. 345, 357, 8 Sup. Ct. 921, 31 L. Ed. 763. It may be conceded that the courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty, or property without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of *Norwood v. Baker*. But there is no such state of facts in the present case. Those facts are thus stated by the court of Missouri: 'The work done consisted of paving with asphaltum the roadway of Forest avenue, in Kansas City, 36 feet in width, from Independence avenue to Twelfth street, a distance of half a mile. Forest avenue is one of the oldest and best improved residence streets in the city, and all of the lots abutting thereon front the street and extend therefrom uniformly the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of pavement along its entire extent is uniform in distance and quality. There is no showing that there is any difference in the value of the lots abutting on the improvement.' What was complained of was an orderly procedure under a scheme of local improvements prescribed by the Legislature and approved by the courts of the state as consistent with constitutional principles."

In this case the procedure was inaugurated conformably to the Kansas City charter by the adoption of a resolution by the common council of the city declaring the work of paving the street, and with a pavement of a defined character, to be necessary, which resolution was first recommended by the board of public works of the city. This resolution was thereupon published for 10 days in the newspaper doing the city printing. Thereafter the owners of a majority of front feet on that part of the street to be improved had the right, under the charter, within 30 days after the first day of publication of such resolution, to file a remonstrance with the city clerk against the proposed improvement, and thereby divest the common council of the power to make the improvement, and such property

owners had the right, by filing in the same period a petition so to do, to have such street improved with a different kind of material or in a different manner from that specified in the resolution. In this instance neither such a remonstrance nor petition was filed, and the common council, upon the recommendation of the board of public works, enacted an ordinance requiring the construction of the pavement. The charter requires that a contract for such work shall be let to the lowest and best bidder. Thereupon bids for the work were duly advertised for, and, the plaintiff company being the lowest and best bidder therefor, a contract was on July 31, 1904, entered into between Kansas City and the plaintiff for the construction of said pavement. The contract expressly provides that the work shall be paid for by the issuance of special tax bills according to the provisions of the Kansas City charter, and that the city should not in any event be liable for or on account of the work. The cost of the pavement was apportioned and charged against the lots fronting thereon according to the method prescribed by the charter, which is that the total cost of the work shall be apportioned and charged against the lands abutting thereon according to the frontage of the several lots or tracts of land abutting on the improvement. The charge against each lot or tract of land was evidenced by a tax bill. The tax bill representing the assessment against each lot was by the charter made a lien upon the tract of land against which it was issued, and was prima facie evidence of the validity of the charge represented by it. Such lien can be enforced only by a suit in a court of competent jurisdiction, against the owners of the land charged. No personal judgment was authorized to be rendered against the owner of the land. The right was expressly conferred on the owner of reducing the amount of the recovery by pleading and proving any mistake or error in the amount of the bill, or that the work was not done in a good and workmanlike manner. The judgment was for the plaintiff for the amount due on the tax bill and for the enforcement of its lien. See statement of facts in *Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 58 S. W. 935, 54 L. R. A. 492.

Every person, as a member of a municipal community, thereby enjoying the incident benefits, takes notice of the accompanying obligations. Streets are to be laid out, graded, paved, and lighted. The constabulary must be maintained to enforce peace and preserve order. Sewerage systems and water supplies must be provided. No one is entitled to enjoy these advantages and to be permitted to successfully contend that the laws, ordinances, and resolutions under which such benefits and advantages are created, regulated, and controlled, are invalid, and thereby escape the resultant burdens. The citizen of the modern municipality and property owner thereof take notice of such necessities. He

owes his personal service to maintain order and promote the public good in his municipality, just as he owes to the nation his service to protect against hostile encroachments and invasion. No man can expect to have property in cities, abutting on public thoroughfares and streets, without bearing the burdens of special taxation to maintain grades, build sidewalks, and macadamize and pave the streets; and he acquires his property with the full knowledge of the fact that the legislative power of the state can be exercised to levy and provide for an assessment or special tax for such improvements. The legislative authority of the state, or, when properly authorized to be exercised, the municipality, may determine over what territory to apportion the burdens, and the whole subject of taxing districts belongs to the Legislature, and the authority may be left to local boards or bodies. *County of Mobile v. Kimball*, 102 U. S. 703, 26 L. Ed. 238; *Bauman v. Ross*, 107 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; *Shoemaker v. U. S.*, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170. Also it is within the power of the Legislature to conclusively determine in advance what improvements shall be taxed against certain districts, and it is presumed that the Legislature has determined in advance what property shall be benefited to the extent of the cost of such improvement. *French v. Barber Asphalt Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Paulsen v. City of Portland*, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637; *Meler v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955; *Cooley on Taxation* (3d Ed.) vol. 2, p. 1257; *Horton v. Town of Arondale*, 147 Ala. 458, 41 South. 935.

There is no proof offered by plaintiffs that their abutting property is assessed for a greater proportion than same would have been, had the question of benefits to such lots been fully inquired into by the appraising board of the city council. Their finding, when approved by the council, is presumed to be correct. *Cooley on Taxation* (3d Ed.) vol. 2, p. 1258. The referee's finding as to this matter was as follows: "But I do not find that said appraisal or assessment is any way inequitable or unjust." The burden is upon the party seeking relief to show that he is entitled to same and has adopted the appropriate remedy. *City of Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26; *McHenry v. Selva* et al., 99 Ky. 232, 35 S. W. 645; *Meler v. City of St. Louis* et al., 180 Mo. 391, 79 S. W. 955; *Matthews v. Kimball* et al., 70 Ark. 451, 66 S. W. 651, 69 S. W. 547; *Morse v. City of Omaha*, 67 Neb. 427, 93 N. W. 734; *Clinton v. City of Portland*, 26 Or. 410, 38 Pac. 407; *Portsmouth Savings Bank et al. v. Omaha*, 67 Neb. 50, 93 N. W. 231; *Cooley on Taxation*, p. 1255.

There appearing no reversible error in the record, the judgment of the lower court is affirmed. All the Justices concur.

MILWAUKEE GOLD EXTRACTION CO. v. GORDON et al.

(Supreme Court of Montana. May 18, 1908.)

1. PLEADING—ANSWER—SUFFICIENCY OF DENIAL.

Code Civ. Proc. 1895, § 690, provides that an answer must contain a general or specific denial of each material allegation of the complaint controverted by defendant, or of any knowledge or information thereof sufficient to form a belief. *Held* that, while the Code apparently contemplates that an assertion of a want of knowledge shall be in the form of a denial, an allegation that defendants "have not sufficient knowledge or information to form a belief as to the matters and facts alleged in the complaint" amounts to a denial, and is a substantial compliance with the provision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 244-252.]

2. CORPORATIONS—ACTIONS AGAINST—DENIAL—SUFFICIENCY—CORPORATE CHARACTER OF PLAINTIFFS.

The provisions of the section are applicable to any and every allegation in a complaint; and hence, in an action by a corporation, a necessary allegation in the complaint that plaintiff is a corporation may be put in issue by a denial in the answer.

3. EVIDENCE—PUBLIC RECORDS OF FOREIGN STATE—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. U. S. art. 4, § 1, provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that Congress may by general laws prescribe the manner in which such acts, etc., shall be proved and the effect thereof. Rev. St. U. S. § 906 (U. S. Comp. St. 1901, p. 677), provides that all records and exemplifications of books which may be kept in any public office of any state or territory not appertaining to a court shall be proved or admitted in any court or office in any other state or territory by the attestation of the keeper of the records and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district in which such office may be kept, or of the Governor or Secretary of State, the chancellor or keeper of the great seal of the state or territory, that the attestation is in due form and by the proper officers. Code Civ. Proc. 1895, § 3206, subd. 7, provides that certain official documents in a sister state may be proved by a copy certified by the legal keeper thereof, together with the certificate of the Secretary of State, judge of the Supreme, district, or county court, or mayor of a city of the state that the copy is duly certified by the officer having the legal custody of the original. A copy of the articles of incorporation of a company on file in the office of a county recorder in Arizona was certified by the county recorder and filed in the Secretary of the territory's office, but it did not contain a certificate of the judge of the court of the county or of the Governor or Secretary of the territory that the attestation was in due form by the proper officer. The Secretary of the territory made a certified copy of the copy he had on file, and transmitted it to the Secretary of State of Montana, his certificate reciting that he had thereunto set his hand and affixed his "official seal," and the certificate was followed by the word "seal," but it did not affirmatively appear that the seal used was the great seal of the territory. *Held*, that the copy was not admissible to prove the corporate existence of the company under the federal or state law either as a certified copy from the office of the county recorder or from the office of the Secretary of the territory.

4. SAME.

In the absence of a state statute defining the evidentiary value or effect of a copy of a record from another state, Rev. St. U. S. § 906 (U. S. Comp. St. 1901, p. 677), is binding upon the courts of the state, at least to the extent of defining the evidentiary value of such a copy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1660-1671.]

5. SAME—STATUTORY PROVISIONS.

Code Civ. Proc. 1895, § 3207, relating to proof of public records, refers to a public record of a private writing within the state, and not to proof of records of other states.

6. SAME—PRESUMPTIONS—CHARACTER OF SEAL.

There is no presumption that a seal used by the Secretary of a territory in certifying a public record is the great seal of the territory; and hence, where the statute requires the affixing of that seal to a copy of a record to admit it as evidence, the fact that the seal used is such must affirmatively appear.

7. SAME.

Const. U. S. art. 4, § 1, provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. Rev. St. U. S. § 906 (U. S. Comp. St. 1901, p. 677), provides that records and exemplifications of books which may be kept in any public office of any state or territory not appertaining to a court shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state or territory from which they are taken. Held that, as there is no common-law rule for granting charters to corporations, which are the creatures of law, and authorized by private statutes or general laws, and as courts of Montana do not take judicial notice of the statutory law of Arizona, a certified copy of the record of incorporation of a company in Arizona is not evidence in a Montana court of its lawful incorporation in Arizona, in the absence of proof that the laws of Arizona authorized its incorporation.

8. CORPORATIONS — ORGANIZATION—EVIDENCE —DE FACTO CORPORATIONS.

In order to prove that a corporation de facto exists, it must be shown that there is a law of the state or territory of the corporation's alleged existence authorizing the organization of such a corporation; that a bona fide attempt has been made to effect such an organization, and the actual user of the corporate powers or some of them, which might rightfully have been used had the corporation been regularly organized.

9. NEW TRIAL — PROCEDURE TO PROCURE — SPECIFICATIONS OF ERROR—NECESSITY.

Under Laws 1907, p. 89, amending Code Civ. Proc. 1895, § 1173, as amended by Laws 1905, p. 185, relating to the practice on motions for new trials, there is no statement on motion for a new trial, but the motion must be made upon affidavits or the minutes of the court, or upon a bill of exceptions settled as provided by section 1152, as amended by Laws 1905, p. 185, and a bill of exceptions is not required to contain any specifications of error.

10. APPEAL AND ERROR—RECORD—FAILURE TO INCORPORATE TESTIMONY.

Where testimony alleged to have been improperly excluded is not incorporated in the record on appeal, the question of its improper exclusion cannot be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2905-2909.]

11. MINES AND MINERALS — PATENTS — PROCEEDINGS ON ADVERSE CLAIM — RIGHT TO URGE INSUFFICIENCY OF DECLARATORY STATEMENT.

Where an adverse claimant to a mining claim fails to show any right to the ground in

controversy, he cannot object that the claimants are not entitled to a patent because of the insufficiency of their declaratory statement.

12. SAME — EVIDENCE—AMENDED DECLARATORY STATEMENTS.

The filing of amended declaratory statements of mining claims, authorized by Laws 1901, p. 56, does not create any right of possession or location in the premises claimed under the first location which did not exist prior to the filing of the additional statements; and hence, in a proceeding on an adverse claim, the admissibility of amended declaratory statements as evidence is not affected by the circumstance that they were filed subsequent to the commencement of the suit.

Appeal from District Court, Granite County; Geo. B. Winston, Judge.

Action by the Milwaukee Gold Extraction Company against George W. Gordon and another. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

D. M. Durfee and W. E. Moore, for appellant. Wingfield L. Brown and Rodgers & Rodgers, for respondents.

HOLLOWAY, J. This is an adverse suit, instituted by the Milwaukee Gold Extraction Company, a corporation, owning the Hannah, Alice, and Dixie quartz lode mining claims, all situate in Granite county, against the defendants Gordon and Doddington, the owners of the Maude S. claim. It is alleged in the complaint that the defendants made application for patent to their claim, and during the period of publication of their notice plaintiff filed in the local land office its protest and adverse claim, alleging a conflict between the surface area of defendants' claim and the surface areas of the claims owned by the plaintiff. It is alleged that this adverse was allowed, and that within 30 days thereafter this action was commenced. The defendants answered, admitting the making of their application for patent, and undertook to deny every other allegation in the complaint. They also set forth affirmatively the acts and things done by them in making and perfecting their location of the Maude S. claim and in representing the same. A reply was filed which puts in issue the affirmative allegations in the answer, and also pleads a forfeiture by defendants of any right which they may have had by virtue of the location of the Maude S. claim. Upon the trial the court excluded all testimony offered by the plaintiff, heard the evidence offered by the defendants respecting their claim, and made and had entered a judgment in their favor, from which judgment and an order denying it a new trial the plaintiff appeals.

Many specifications of alleged error are made by the appellant, but these may be grouped, as they present but few questions for determination. In paragraph 1 of the complaint it is alleged "that the plaintiff is a corporation duly organized under the laws of the territory of Arizona," etc. Paragraph 1 of the answer and the introductory clause

read as follows: "Come now the defendants, and answering the plaintiff's complaint filed herein, say: (1) That the defendants have not sufficient knowledge or information to form a belief as to the matters and facts set out in paragraph No. 1 of the said complaint, and therefore deny the same." Appellant contends that this statement in paragraph 1 of the answer is not sufficient to put the plaintiff upon proof of the fact that it was and is a corporation. Section 690 of the Code of Civil Procedure for 1895, among other things, provides: "The answer of the defendant must contain: (1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. * * *" It is said that, as defendants did not follow the language of the Code, they did not raise an issue upon the allegation in the first paragraph of the complaint. But we are not impressed with the argument; for, while the Code in section 690 above apparently contemplates that this assertion of a want of knowledge shall be in the form of a denial, we think the defendants complied substantially with the law in saying that they "have not sufficient knowledge or information to form a belief as to the matters and facts alleged in paragraph 1 of the complaint." In other words, we are unable to appreciate any difference in these two expressions: (1) I say that I have not sufficient knowledge or information to form a belief as to a particular allegation; and (2) I deny that I have any knowledge or information sufficient to form a belief as to a particular allegation. The Supreme Court of California, in *Hill v. Smith*, 27 Cal. 476, has held that two such expressions are identical in their meaning. Section 755 of the same Code seems to authorize, or at least to countenance, the form of denial adopted by the defendants. That section provides: "An allegation that the party has not sufficient knowledge or information to form a belief, with respect to a matter, must, for all purposes, including a criminal prosecution, be regarded as an allegation that the person verifying the pleading has not such knowledge or information." In order to give the plaintiff any standing in court it was necessary, since it was not a private person, to allege the character in which it appeared. The allegation that it was and is a corporation was a necessary one, and it certainly cannot be said that such an allegation in the complaint cannot be put in issue by a denial in the answer. In the case of *Martin v. Deetz*, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151, the following from *Oroville & V. R. R. Co. v. Plumas County*, 37 Cal. 360, is quoted with approval: "This provision (section 358, Cal. Civ. Code) does not go to the extent of precluding a private person from denying the existence de jure or de facto of an alleged corporation. It cannot be true that the mere allegation that a party is a corporation puts the question

whether it is such a corporation beyond the reach of inquiry in a suit with a private person. It must be a corporation either de jure or de facto, or it has no legal capacity to sue or be sued, nor any capacity of any kind. It is an indispensable allegation in an action by a corporation that the plaintiff is a corporation; and it results from the logic of pleading that the opposite party may deny the allegation." The provisions of our Code above, authorizing a denial of knowledge or information sufficient to form a belief, are applicable to any or every allegation in a complaint. That form of denial will raise an issue as to the corporate existence of a plaintiff as well as to any other fact pleaded in the complaint. The doctrine announced in 2 Beach on Corporations, § 869, and 5 Ency. Pleading & Practice, 87, cannot be applicable to such provisions of law as we have in section 690 above. That section does not authorize us to make an exception in favor of an allegation that the plaintiff is a corporation.

It is alleged that the plaintiff is a corporation organized under the laws of Arizona, and plaintiff undertook to prove this fact, and to that end introduced in evidence what it denominated a certified copy of the articles of incorporation of the company. From the paper offered it appears that the original articles of incorporation were filed in the office of the county recorder of Maricopa county, Ariz.; that the county recorder made a certified copy thereof, which was filed in the office of the Secretary of the territory; that the Secretary of the territory made a certified copy of the copy which he had on file in his office and transmitted it to the Secretary of State of the state of Montana, who filed the same in his office; and that finally the Secretary of State of Montana furnished the plaintiff a certified copy of the copy in his office, and that this was the paper offered in evidence. The body of the paper, which is in form the articles of incorporation of the Milwaukee Gold Extraction Company, has attached to it a certificate of the county recorder of Maricopa county to the effect that the same is a full, true, and correct copy of the original and the whole thereof. This is followed by the indorsement: "Filed in the office of the Secretary of the territory of Arizona this 25th day of February, A. D. 1901, at 3 p. m. C. H. Akers, Secretary of Arizona." This is followed by a certificate of the Secretary of Arizona to the effect that it is a true and complete transcript of the articles of incorporation of the Milwaukee Gold Extraction Company, which was filed in his office on the 25th day of February, A. D. 1901, at 3 o'clock p. m. This is followed by the indorsement: "Filed December 13, 1902, at 1 o'clock p. m. Geo. M. Hays, Secretary of State of Montana." And then follows the certificate of the Secretary of State of Montana to the effect that the paper is a correct transcript from the original on file in his of-

fice and of the whole of said original. Objection was made to the introduction of this paper upon the ground that it was not properly authenticated, and the objection was sustained. This ruling of the trial court presents one of the principal grounds of error relied upon.

Section 1, art. 4, of the Constitution of the United States provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." Conformably with this provision, the Congress in 1804 enacted what is now section 906, Rev. St. U. S. (U. S. Comp. St. 1901, p. 677), a part of which section is as follows: "All records and exemplifications of books which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory or in any such country by the attestation of the keeper of said records or books and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish or district in which such office may be kept, or of the Governor or Secretary of State, the chancellor or keeper of the great seal of the state or territory or country that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office that the said presiding justice is duly commissioned and qualified; or if given by such Governor, Secretary, chancellor or keeper of the great seal, it shall be under the great seal of the state, territory or country aforesaid in which it is made." But appellant contends that the state of Montana has by statute provided how proof of a public record may be made, and cites section 3207 of the Code of Civil Procedure of 1895. But this section clearly refers to a public record of a private writing within this state. *Western Iron Works v. Montana Pulp & Paper Co.*, 30 Mont. 550, 77 Pac. 413. If we have any statute upon the subject, it must be section 3206 of the same Code. After enumerating various other documents, that section in subdivision 7 provides: "Other official documents, may be proved as follows: * * *

(7) Documents of any other class in a sister state, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the Secretary of State, judge of the Supreme Court, district, or county court, or mayor of a city of such state, that the copy is duly certified by the officer having the legal custody of the original."

We need not decide, as it is not necessary, to what extent, if any, section 3206 above has supplemented or supplanted the provisions of section 906 of the United States Revised Statutes, for appellant did not comply with the terms of either statute. In the absence of a statute of this state defining the evidentiary value or effect of a copy of a record from another state, section 906 above is binding upon the courts of this state, at least to the extent of defining the evidentiary value of such a copy. If it was sought to prove the corporate existence of this company by the certified copy of the articles of incorporation from the office of the county recorder of Maricopa county, then there is absent the certificate of the judge of the court of that county, or of the Governor or Secretary of the territory, that the attestation is in due form and by the proper officer. If it was intended to rely upon the copy from the office of the Secretary of the territory, then it lacks the impression of the great seal of that territory. The certificate of the Secretary of the territory of Arizona concludes as follows: "In witness whereof I have hereunto set my hand and affixed my official seal"—followed by the word "seal." This record does not bear the impression of the seal, or indicate what it is. The seal used may or may not have been the great seal of the territory. There is not any presumption that it was such great seal (*Sisk v. Woodruff*, 15 Ill. 15), and since it is necessary that the fact be made to appear affirmatively that the statute has been complied with, there was a failure in this particular. This question has received consideration from many courts; but it is sufficient to cite in support of the ruling of the trial court in this instance *Parchen v. Peck*, 2 Mont. 567, where it is said: "The refusal of the court to admit in evidence the articles of incorporation is assigned as error. The laws of Iowa, under which it is claimed that the Northwest Transportation Company was incorporated, provides that a corporation shall be organized by articles of incorporation, which shall be recorded in the offices of the recorder and Secretary of State. Iowa Code, 1873, § 1060, p. 183. To entitle the records of these articles to be admitted in evidence in this territory, how should they be authenticated? There are no statutes of this territory providing in what manner a record of this character should be authenticated for this purpose. Then the laws of the United States upon this subject must be complied with. In addition to the attestation by the recorder of deeds of the county, where the corporation has its principal place of business, and the Secretary of State of Iowa, with the seal of said state, there should be to each attestation respectively 'a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the Governor, Sec-

retary of State, the chancellor or keeper of the great seal of the state, * * * that the said attestation is in due form, and by the proper officers.' Rev. St. U. S. § 906. No certificate by any of said officers is attached to the certificate or attestation of the said recorder or Secretary. The Secretary of State did not add any such certificate to his own attestation. The articles of incorporation were properly rejected." But if the attestation had been in due form, the trial court could not be put in error for excluding the paper; for, standing alone, it was insufficient for any purpose. In this country there is not any common-law rule for granting charters to corporations, which are the creatures of law, and are authorized either by private statutes or by general laws. *Savage v. Russell*, 84 Ala. 103, 4 South 235; *Florsheim & Co. v. Fry*, 109 Mo. App. 487, 84 S. W. 1023. If the certified copy had been admitted, the questions which would necessarily have suggested themselves at once would have been: Can a corporation be organized in Arizona for mining purposes? If so, how is it organized in that territory? Is the county recorder the proper custodian of the record of its organization or its articles of incorporation, and do the laws of Arizona authorize or require a certified copy of the articles of incorporation to be filed in the office of the Secretary of the territory? And even if these questions are all answered, a further one would have suggested itself, viz.: What use can be made in Arizona of a certified copy of a public record of that territory? Can it be used as evidence in the courts there? Section 906, Rev. St. U. S., further provides: "And the said records and exemplifications so authenticated shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory or country as aforesaid from which they are taken." In other words, if admitted in evidence, this certified copy of the articles of incorporation of the plaintiff company must have been given such faith and credit by the court in Granite county as it would be given by the courts in Arizona. But since there was not any effort made to show what the laws of Arizona are respecting the use of certified copies of public records there, the district court in Granite county could not have given any effect whatever to such evidence. The courts of this state do not take judicial notice of the statutory laws of Arizona (*McKnight v. Oregon Short Line R. R. Co.*, 33 Mont. 40, 82 Pac. 661), and therefore not any of the questions suggested above could be answered, in the absence of proof as to the provisions of the laws of Arizona respecting these subjects.

It may be said to be a rule, recognized by the courts generally, that in order to make proof of the corporate existence of a foreign corporation it is requisite that in addition to

the properly authenticated paper there must be evidence to show the laws of the foreign state authorizing the organization of such a corporation, providing the mode of its incorporation and the proper custodians of the paper offered in evidence. *Savage v. Russell* and *Florsheim & Co. v. Fry*, supra. In *Willcox v. Bergman*, 96 Minn. 219, 104 N. W. 955, 5 L. R. A. (N. S.) 938, this doctrine is succinctly stated as follows: "Our conclusion is that, to render certified copies of records from a sister state competent evidence in the courts of this state, it must be shown that the statutes of that state provided for and authorized the record to be made, and also the particular force and effect given to certified copies as evidence in the courts of that state." Of course the mere fact that the Secretary of State of Montana accepted and filed in his office the copy of the articles of incorporation from the office of the Secretary of the territory of Arizona cannot add anything to its value as evidence. Whether the copy filed is sufficient to show that the corporation, if properly organized, is authorized to do business in this state, is not before us for determination. But counsel for appellant rely upon *Hammer v. Garfield M. & M. Co.*, 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964, but an examination of the record in that case will disclose that the question of the due authentication of the paper used was not before the court and was not passed upon. The decision in that case must therefore be understood with reference to the particular matter before the court for determination. Counsel for appellant also cite a portion of section 7712 from *Thompson on Corporations*; but an examination of the text will show that it is based upon the decision in *Knapp & Co. v. Strand*, 4 Wash. St. 686, 30 Pac. 1063, and that case was decided upon a particular provision of the statute of Washington, and is not applicable here, where we have no such statute. But it is earnestly contended that, even though the court was correct in excluding the copy of the articles of incorporation, it erred in excluding plaintiff's offered proof that the plaintiff was and is a corporation de facto. This position, however, is untenable; for it is a well-settled rule that, in order to prove that a corporation de facto exists, these facts must appear: (1) That there is a law of the state or territory of the corporation's alleged existence authorizing the organization of such a corporation; (2) that a bona fide attempt was made to effect such organization; and (3) the actual user of the corporate powers, or some of them, which might rightfully have been used had the corporation been regularly organized. *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552; 10 Cyc. 252. The evidence offered by the plaintiff wholly failed to prove, or tend to prove, either the first or second of these prerequisites. Appellant also urges certain alleged errors of law occurring with respect to the prima

facie case made by the defendants. In this connection it is suggested by counsel for respondents that, since these alleged errors are not specified in the "bill of exceptions and statement on motion for a new trial," they cannot be considered on this appeal, and section 1173 of the Code of Civil Procedure of 1895, as amended by Laws 1905, p. 185, is cited; but that section of the Code was further amended in 1907 (Laws 1907, p. 89) so that now in our practice we do not have any such thing as a statement on motion for a new trial. A motion for a new trial must now be made upon (a) affidavits, (b) the minutes of the court, or (c) a bill of exceptions, settled as provided by section 1155; and a bill of exceptions is not required to contain any specifications of errors. Section 1152, Code Civ. Proc. 1895, as amended by Laws 1905, p. 185; *Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33. While appellant has designated its moving paper a bill of exceptions and statement on motion for a new trial, we treat it as a bill of exceptions only. Appellant seems to insist that, although the offered testimony may not have been sufficient for any other purpose, it was sufficient to show that at the time of the location of the Maude S. claim the particular ground in controversy here was not open, public land of the United States subject to mineral location, but was held and possessed by plaintiff or its predecessors in interest under the locations of the Hannah, Alice, and Dixie claims. But we cannot determine whether this is true or not. The bare possession of the conflicting area by naked trespassers or claimants attempting to hold under void locations would not be sufficient to withdraw the land from entry; and whether plaintiff or its predecessors in interest were in possession under valid mineral locations we are not able to determine, for appellant has omitted from the transcript the declaratory statements of these several claims, and we are therefore unable to say whether the area in conflict was or was not withdrawn from entry at the time of the location of the Maude S. claim.

It is impossible for this court to say whether certain offered evidence was improperly excluded, unless the record discloses the offered evidence. *Haupt v. Slimington*, 27 Mont. 480, 71 Pac. 672; *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 207; *Leggat v. Carroll*, 30 Mont. 384, 76 Pac. 805. With the failure of plaintiff to establish the fact that it was a corporation, either de facto or de jure, and its failure to present in the record the declaratory statements of its claims, fall a number of its other alleged errors predicated upon the rulings of the trial court in excluding offered testimony.

Objection is made to the sufficiency of the declaratory statement of the Maude S. claim, and to the introduction in evidence of an amended and also a second amended declaratory statement of that claim. We do not think that the original declaratory statement

of the Maude S. claim was absolutely void, but this is not material here, since plaintiff has failed to show that it had any right whatever to the ground in controversy so far as this record discloses. *Wilson v. Freeman*, 29 Mont. 470, 75 Pac. 86, 68 L. R. A. 833. Assuming, but not deciding, that the first amended declaratory statement was insufficient, there is not any contention made that the second amended declaratory statement is not complete; but the objection is urged that, since this second amended declaratory statement was not filed until the time of the trial of this case, it was not of any efficacy whatever. Our statute (Laws 1901, p. 56) authorizing the filing of amended declaratory statements is the same as a statute which has been in force in Colorado for many years (Gen. Laws 1877, p. 631, § 1823). In *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111, the Supreme Court of Colorado had under consideration the same question as is here presented, and after a somewhat extended reference to their statute, said: "The purpose of this additional certificate appears to be sufficiently expressed by the language of the act. It cannot create a right of possession or location in the premises claimed under the first location, which did not exist prior to the filing of such additional certificate. It can confer no additional right, and is therefore evidence of none as against any intervening or pre-existing right of another. It follows that, except as against such intervening rights, an additional certificate serves the same purpose, in its admission as evidence, as that of an original location certificate, and will relate back to the first location. The evident intent of the statute is that the additional certificate shall operate to cure defects in the original, and thereby to put the locator, where no other rights have intervened, in the same position that he would have occupied if no such defect had occurred. Such intent is in accord with the principle of all curative provisions of law. Without such result this provision of the statute would be ineffectual to confer any additional or other benefit than the provisions of section 2411, Gen. St. 1883, for an entire relocation of a mine as for an abandoned claim. From the foregoing view of the purpose and functions of a location certificate, original and additional, it does not appear that the admissibility in evidence of such additional certificate is affected by the circumstance that it was filed subsequent to the commencement of the suit, since it is not evidence of any after-acquired right or interest, but merely evidence relating to a right of possession which must have been acquired prior to the filing of such certificate, and prior to the acquisition of any intervening right of the controverting party." We content ourselves by saying that we adopt the view of the Colorado court.

We have reviewed in detail those specifications of error which appear to us to present

appellant's principal contentions. We have, however, examined the other specifications, but do not think that they raise any serious questions. At least they do not present any errors which ought to work a reversal of this judgment. The judgment and order are affirmed.

Affirmed.

BRANTLEY, C. J., and SMITH, J., concur.

STATE v. BRONZO.

(Supreme Court of Nevada. June 1, 1908.)

CRIMINAL LAW—APPEAL—PROCEEDINGS NOT IN RECORD—GROUNDS OF MOTIONS.

In a prosecution for murder, where the record on appeal only stated that the motions made by defendant as to the regularity of the grand jury were denied by the court, there being nothing to show upon what the court acted in denying the motions, and all presumptions being in favor of the proceedings below, it will be assumed that defendant's objections were not supported by evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3017.]

Appeal from District Court, Eureka County.

Martin Bronzo was convicted of murder in the second degree, and he appeals. Affirmed.

Henry K. Mitchell, for appellant. R. C. Stoddard, Atty. Gen., for the State.

SWEENEY, J. The defendant was indicted for the crime of murder, committed in the county of Eureka, and upon trial was found guilty of murder in the second degree, and sentenced by the judge of the district court of the Third judicial district of Nevada, in and for Eureka county, to imprisonment in the state penitentiary for 35 years. A motion in arrest of judgment and for a new trial were denied by the district court, and from such order the defendant appeals.

The only question presented upon this appeal is whether or not the grand jury which indicted defendant was legally impaneled. Counsel for the defendant challenged the panel of the grand jury upon several grounds. All that the record in this case shows is that the motions made by the defendant in reference to the regularity of the grand jury which indicted the defendant were denied by the court. There is nothing in the record showing upon what the court acted, and, as all presumptions are in favor of the regularity of the proceedings of the trial court, we are bound to conclude that the grounds of objection made by defendant's counsel were not supported by the evidence and were devoid of merit. *State v. Wilson*, 5 Nev. 43; *State v. Wallin*, 6 Nev. 280; *State v. Rigg*, 10 Nev. 288; *State v. Ah Hung*, 11 Nev. 428.

The judgment and order of the trial court are affirmed.

TALBOT, C. J., and NORCROSS, J., concur.

TONOPAH LUMBER CO. v. RILEY et al. (No. 1,744.)

(Supreme Court of Nevada. June 1, 1908.)

1. PLEADING—DENIAL OF GENUINENESS OF WRITTEN INSTRUMENT—ANSWER CONTAINING COPY OF INSTRUMENT—AFFIDAVIT.

Under Civil Practice Act, § 54 (Comp. Laws, § 3149), providing that when a defense to an action is founded upon a written instrument, and a copy thereof is contained in the answer, the genuineness and due execution of such instrument shall be deemed admitted, unless plaintiff files an affidavit denying the same, where a contract set up in defendant's answer did not appear upon its face to have ever been signed or executed by either of the parties, and did not purport to be a completed instrument, plaintiff was not required to file an affidavit denying its execution and genuineness, and could show the contract by oral testimony, as an instrument is genuine, within the statute, which is in fact what it purports to be, and is only executed when the parties thereto have signed and sealed and delivered it as prescribed by law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 864-871.]

2. WITNESSES—IMPEACHMENT—INCONSISTENT STATEMENTS—FOUNDATION OF IMPEACHING EVIDENCE.

In an action for the price of lumber, questions asked the president of plaintiff corporation relative to a former action of replevin to recover the lumber, to impeach his testimony because of certain declarations in the replevin pleadings, were properly excluded, where such pleadings were not then exhibited to the witness, and subsequently the papers in the replevin suit were introduced by defendants in evidence, from which it appeared that they were verified by another, and that the witness was at the time out of the state.

3. SAME—EXPLANATION OF IMPEACHING EVIDENCE.

In an action for the price of lumber, where the complaint and proceedings in a replevin suit were offered as impeaching evidence, a witness is properly allowed to explain his reasons for verifying the complaint in the replevin suit, by stating that it was made because of a conversation he had with plaintiff's president relative to the contract, and that the verification was made and the suit brought on the advice of counsel, as it was proper to relate the circumstances under which the alleged impeaching document was executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1261.]

4. SAME.

In an action for the price of lumber furnished defendants, evidence of a contract between a witness and defendants, offered for the purpose of contradicting the witness, was properly excluded, where the witness' attention was not called to the contract while testifying, and it did not appear that his testimony was inconsistent with the recitals in the agreement; the contract being otherwise inadmissible as containing self-serving declarations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1239, 1249-1251.]

5. EVIDENCE—DOCUMENTARY EVIDENCE—AUTHENTICATION—EXECUTION.

In an action for the price of lumber sold defendants, they offered in evidence a document, a copy of which was attached to their answer and alleged to be the contract entered into between the parties, the document being unsigned, and containing a provision that a written guaranty was to be attached thereto and made a part of the contract. Witnesses for defendant were permitted to testify that such a contract was made by the parties, and the court offered

to allow the contract to be admitted for the purpose of illustrating the testimony and showing the negotiations; but defendants insisted that it should be admitted as evidence of the contract which was made, and not for any other purpose. *Held*, that the court's offer to admit the alleged contract to explain the testimony was as liberal as defendants were entitled to.

6. APPEAL AND ERROR—EXCEPTIONS—SUFFICIENCY.

To entitle a party to have instructions reviewed, the particular error in each instruction must be pointed out in the exception, and exceptions taken to instructions on the ground that they were improper, and did not state the law, and were not applicable to the case, and were irrelevant, were too general for consideration on appeal, but an objection that the jury were instructed on a matter of fact was properly taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1621.]

7. SAME—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

Where there is a substantial conflict in the evidence, the Supreme Court will not disturb the verdict of the jury on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

Appeal from District Court, Nye County.

Action by the Tonopah Lumber Company, a corporation, against M. M. Riley and another, copartners under the name of the Casino Athletic Club. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. *Affirmed*.

Jas. F. Dennis and F. K. Murphy, for appellants. P. E. Keeler and L. A. Gibbons, for respondent.

PER CURIAM. This is an action brought by the plaintiff against the defendants to recover for lumber and building material sold and delivered to defendants by plaintiff for the sum of \$14,980.00, the payment of which it is alleged was to be guaranteed by Nye & Ormsby County Bank, and that the lumber and building material was to be paid for as follows: One-half of all the lumber delivered to defendants before December 15, 1906, was to be paid in cash on that date, and the balance for the lumber used in the completion of the building known as the "fight arena" was to be paid on January 2, 1907—and it is alleged that the defendants failed and refused to comply with the terms of the contract on December 15, 1906. For the failure by defendants to comply with the provisions of said contract, plaintiff elected to rescind the contract and sue for the reasonable value of the lumber delivered thereunder. In their answer defendants deny all the allegations of the amended complaint, and by way of further answer, counterclaim, and cross-complaint defendants allege that the parties hereto entered into a written contract to build a fight arena, a copy of which alleged written contract they attach to their answer, and under which they claim affirmative relief. The cause was tried with a jury, and a verdict rendered in favor of plaintiff for the full amount sued for, and judgment entered thereon accordingly. From the judg-

ment and an order denying a motion for a new trial, defendants appeal.

1. The first error assigned is in the overruling of defendants' objection to the introduction of oral testimony to support the cause of action set forth in plaintiff's complaint for the reason that plaintiff had filed no affidavit denying the due execution and genuineness of the alleged written contract set up in defendants' answer and counterclaim. Section 54 of the Civil Practice Act (Comp. Laws, § 3149) provides: "When the defense to an action is founded upon a written instrument, and a copy thereof is contained in the answer, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the plaintiff file with the clerk, five days after the service of the answer, an affidavit denying the same." The alleged contract set up in defendants' answer did not appear upon its face to have ever been signed or executed by either of the parties to the action, and did not purport to be a completed instrument. "An instrument is genuine which is in fact what it purports to be; and it is only executed when the parties thereto have signed, sealed, and delivered it in the mode presented by law." *Sloan v. Diggins*, 49 Cal. 38; *In re Garcelon's Estate*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 L. R. A. 134; *Rosenthal v. Merced Bank*, 110 Cal. 198, 42 Pac. 640. The Supreme Court of Idaho, considering the effect of a similar statute, say: "The due execution of an instrument goes to the manner and form of its execution according to the laws and customs of the county by a person competent to execute it. The genuineness of an instrument evidently goes to the question of its having been the act of the party just as represented, or, in other words, that the signature is not spurious, and that nothing has been added to it, or taken away from it, which would lay the party changing the instrument or signing the name of the person liable for forgery." *Cox v. N. W. Stage Co.*, 1 Idaho, 376, 380. The court did not err in overruling defendants' objection.

2. Error is assigned in the sustaining of an objection to a question asked the witness Revert, president of the plaintiff corporation, relative to a former action having been commenced in replevin to recover certain lumber delivered to the building. It was contended that the evidence was of an impeaching nature, presumably because of some written declarations contained in the replevin pleadings. The pleadings and records were not at the time exhibited to the witness. Subsequently the papers in the replevin suit were introduced by the defendants in evidence, from which it appeared they were verified by one A. J. Crocker, and that the witness Revert was at the time absent from the state. The ruling of the court was not error.

3. Error is assigned in the refusal of the court to strike out a portion of the answer of

the witness A. J. Crocker wherein he was explaining the reason he verified the complaint in the replevin suit. The witness stated that it was made because of a conversation he had had with Revert, the president of the company, relative to the proposed original contract, which conversation he detailed, and that it was upon advice of counsel. Defendants' counsel objected to this portion of the answer upon the ground that it was a hearsay declaration tending to excuse the plaintiff for a seeming inconsistent act with reference to the subject-matter of the action. We think the court did not err in its ruling. The complaint and proceedings in the replevin action were offered in the nature of impeaching evidence. Under such circumstances the witness may be permitted to relate the circumstances under which the alleged impeaching document was executed. Wigmore on Evidence, § 1044, says: "In accordance with the logical principle of relevancy, the impeached witness may always endeavor to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it. The contradictory statement indicates on its face that the witness has been of two minds on the subject, and therefore that there has been some defect of intelligence, honesty, or impartiality on his part; and it is conceivable that the inconsistency of the statements themselves may turn out to be superficial only, or that the error may have been based, not on dishonesty or poor memory, but upon a temporary misunderstanding. To this end it is both logical and just that the explanatory circumstances, if any, should be received." See, also, *Ferris v. Hard*, 135 N. Y. 354, 32 N. E. 129; *State v. Howard*, 43 Or. 166, 72 Pac. 880; *State v. Reed*, 62 Me. 146; *Stoudt v. Shepherd*, 73 Mich. 588, 41 N. W. 696; *Dole v. Wooldredge*, 142 Mass. 161, 7 N. E. 832; *Hoggan v. Cahoon*, 31 Utah, 172, 87 Pac. 164; 2 Elliott on Ev. (2d Ed.) § 931; 1 Greenleaf (16th Ed.) § 462.

4. Error is assigned in the refusal of the court to admit in evidence a certain contract entered into between the witness J. B. Murphy and the defendants on the 18th of December, 1906, offered upon the examination of defendant Riley. As the plaintiff corporation was not a party to this contract, its recitals could in no way be binding upon it. It was contended, however, that it was admissible for the purpose of contradicting the witness J. B. Murphy. The attention of the witness Murphy while on the stand was not called to this contract, nor was he asked with regard to any statements therein that were of a contradictory nature to his testimony. Besides it does not appear that the testimony of the witness Murphy was inconsistent with the recitals in the agreement. The contract offered in evidence contained numerous recitals that were self-serving declarations so far as defendants were concerned. Unless it clearly appeared that it was admissible for

the purpose of impeaching or contradicting a witness, it would have been highly improper to have admitted it. No showing having been made to authorize its admission for purposes of impeachment, the court did not err in excluding it.

5. Error is assigned in the refusal of the court to admit in evidence the unsigned document, a copy of which was attached to defendants' answer, and alleged to be the contract entered into between the parties, for the violation of which defendants claimed damages. The document was not only unsigned, but a provision was contained therein that the written guaranty of the Nye & Ormsby County Bank that defendants should comply with the terms of the contract was to be attached and made a part thereof. This was a very essential part of the contract, if it was a contract, according to its terms, and was lacking. Counsel for defendants claimed, however, that the parties had satisfactorily settled the question of guaranty in another way, and that this portion of the contract was in effect changed by oral agreement. Witnesses upon the part of the defendant had been permitted to testify that such contract was entered into between the parties. The court offered to allow the document to be admitted in evidence "for the purpose of illustrating the testimony and showing the negotiations." Counsel for defendants were unwilling that it go in under the limitations suggested by the court, and insisted on the offer that it be admitted "as evidence of the contract which was entered into, not for any other purpose." As the document was unsigned and incomplete according to its terms in the other respect mentioned, and the evidence was conflicting upon the question of whether it was in fact the intention of the parties to enter into a contract containing the terms and conditions of this unexecuted instrument, we think the offer of the court was as liberal as defendants were entitled to, and we find no error in the court's ruling.

6. Counsel for appellant assigns error in the giving of certain instructions to the jury. The only exception taken to the instructions given is in the following language: "Mr. Murphy: If your honor please, I would like to enter an exception to the giving of the instructions on the ground that the instructions given by the court of its own motion are improper, and do not state the law, and are not applicable to this case; and, in reference to the instructions offered and given on the part of the plaintiff, we take an exception to the giving of those instructions on the ground they do not contain the law, and are improper and irrelevant, and particularly with reference to the first instruction on the ground that it instructs the jury on a matter of fact." With the possible exception of the "first instruction" mentioned, the exception is too general to be availing. In order to entitle a party to an action to have the instructions reviewed, the particular error in each

instruction complained of must be pointed out in the exception. This is required in order that the court's attention may be specifically called to the alleged error, and that it may, if deemed erroneous, be corrected in time. *McGurn v. McInnis*, 24 Nev. 370, 53 Pac. 304, 56 Pac. 94; *Lobdell v. Hall*, 3 Nev. 520; *Sharon v. Minnock*, 6 Nev. 382; *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565; *Eldred v. County*, 33 Wis. 133; *Burnstein v. Downs*, 112 Cal. 197, 44 Pac. 557; *Holman v. Boston, etc., Co.*, 8 Colo. App. 282, 45 Pac. 519. The only instruction that might be deemed sufficiently excepted to is, we think, not objectionable as instructing the jury upon a matter of fact.

7. The assignment of error that the verdict of the jury is contrary to the evidence is, we think, not well taken. The most that can be said is that the evidence is conflicting. This court has repeatedly held that, where there is a substantial conflict in the evidence, it will not disturb the verdict of the jury or decision of the court.

The record contains a number of other minor assignments of error, in which we find no merit and deem unnecessary to consider at length.

No error appearing in the record, the judgment and order of the trial court is affirmed, and it is so ordered.

FOULGER v. McGRATH et al.

(Supreme Court of Utah. May 27, 1908.)

1. APPEAL AND ERROR—HARMLESS ERROR—NATURE AND FORM OF REMEDY.

Where a building contractor sued on an express contract for an agreed price for work, but with defendant's consent amended the complaint before the trial, by averring that such price was the reasonable value of the work, and the answer claimed that the reasonable value was less than that claimed by the contractor, and the case was tried on the theory that the action was based on quantum meruit, it was not prejudicial error to submit the case to the jury upon that theory, restricting any recovery to an amount not exceeding the contract price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4031.]

2. WORK AND LABOR—EFFECT OF EXPRESS CONTRACT.

Though a building contractor may not abandon a contract and recover more than the contract price upon a quantum meruit, where the stipulations have been departed from by consent of the parties, and it is doubtful whether the contract as a whole has been abandoned, he may sue upon a quantum meruit, leaving it to the owner to insist upon the contract to limit recovery to the stipulated price, or to claim damages for noncompliance with the contract, or the contractor may sue upon the contract and a quantum meruit in separate counts, or a contractor, on full performance by him, may sue to recover the amount due without specially declaring upon the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, § 23.]

3. CONTRACTS—SUBSTANTIAL PERFORMANCE.

Though a building contractor may not depart from the terms of a contract and recover as upon a quantum meruit, a substantial compli-

ance therewith in good faith entitles the contractor to recover on the contract, with a right to the owner to recoup any damages sustained through the contractor's failure to literally comply with the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1353.]

4. EVIDENCE—EFFECT OF OPINION EVIDENCE—CONFLICT WITH OTHER EVIDENCE.

Though a conclusion stated by a witness may sometimes support a finding and judgment, it cannot do so where it is contrary to the facts established.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2400.]

5. WORK AND LABOR—AMOUNT OF RECOVERY.

Though a building contractor suing on an express contract to recover for work can recover the full price, on showing compliance with the contract, and in the absence of proof of fraud, etc., on his part, where he relies on a quantum meruit, he can only recover the reasonable value of the work done, waiving any profits arising under the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, §§ 56, 57.]

6. SAME.

That the sum received from an insurance company by the owner of a building destroyed by fire to replace it exceeded the reasonable value of the new building does not entitle the contractor replacing the building to recover such sum in an action on a quantum meruit.

7. SAME—EVIDENCE—SUFFICIENCY.

Verdict, in an action by a building contractor to recover the reasonable value of work done, held excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, § 58.]

Appeal from District Court, Second District; J. A. Howell, Judge.

Action by Fred Foulger against John McGrath and another. The action was dismissed as to defendant John M. McGrath, and from a judgment for plaintiff, defendant Mary McGrath appeals. Affirmed on condition plaintiff consents to remit part of judgment; otherwise, reversed and remanded for new trial.

T. D. Johnson, for appellant. Joseph Chez, for respondent.

FRICK, J. This is an action to recover a balance alleged to be due for the construction of a certain building with additions thereto. The respondent substantially alleges in his complaint that in January, 1906, he and the appellant entered into a written agreement, whereby respondent agreed to build, replace, and repair the house, kitchen, and wash room of the appellant, which were damaged and partially destroyed by fire, for the agreed price of \$877, and which is the reasonable value thereof. The agreement is set forth in full in the complaint, and it is provided therein that respondent shall "build, replace, and repair the house, kitchen, and washroom and put all in good condition to the acceptance and approval of John McGrath and his wife for the sum of \$877, to be paid from the insurance money when it is handed over to them by the insurance company." It is further alleged that, in pursuance of said agreement, the respondent entered upon the

construction of said buildings and completed them in March, 1906; that the appellant received the money from the insurance company in February, 1906; and that appellant had paid for labor performed and material used in said buildings the sum of \$324.27, leaving a balance due to respondent of \$552.73, for which he demanded judgment. Appellant answered and set up various defenses. She alleged that the contract mentioned in the complaint was obtained by misrepresentation and fraud practiced upon her and her husband by respondent; that the price fixed in the agreement was agreed to by her and her husband solely upon the representation of the respondent that it was reasonable; that neither of them knew, or had any information with regard to, the value of the material and labor necessary to reconstruct said buildings, and relied wholly upon the statements of respondent with respect thereto; and that the buildings were not constructed with proper material, were not in good condition, and had not been accepted. The only other averments in the answer which we deem material, in view of the state of the record, are as follows: "Defendants allege that all the work done by plaintiff in repair of the said house was not and would not be reasonably worth to exceed the sum of \$400, even if the same had been done in a workmanlike way, and as in fact done it is reasonably worth, as defendants are informed and believed, and so allege the fact to be, not to exceed the sum of \$324, which last-named sum," it is alleged, was paid for labor and material by the appellant. A trial was had to a jury, which resulted in a verdict in favor of respondent for the sum claimed by him against the appellant, upon which the court entered judgment, and she alone appeals.

Just before the trial commenced, respondent's counsel, with the consent of appellant's counsel, amended the complaint by interlining the words which we have italicized above, and which are as follows, "and which is the reasonable value thereof," referring to the buildings that were constructed by respondent. With the complaint so amended, and without any objection, the parties proceeded with the trial, at which respondent's counsel proceeded upon the theory as if the action were based on quantum meruit, instead of upon an express contract. In view of this, respondent proved the reasonable value of the labor and material used in the construction of said buildings by himself and other witnesses, and upon cross-examination the reasonable value of all the material and the value and character of the work was gone into item by item by appellant's counsel. All this was done without objection by either party, and the case was tried upon the theory of reasonable value, although the contract was introduced in evidence. Appellant's counsel apparently relied upon this evidence of reasonable value, since he introduced no oth-

er evidence whatever in support of the averments in the answer. Respondent also introduced evidence tending to show that the buildings were completed, that they were in good condition, and that the workmanship and material were such as were usual in buildings of the character of those in question; and, further, that during the progress of the work no objection had been made by appellant or her husband to either of the workmanship or material, and that they had received the insurance money. It further developed at the trial that the appellant was the sole owner of the property, and that her husband had no interest therein. After respondent rested, appellant's counsel moved for a nonsuit in favor of both the appellant and her husband. The motion was confessed by respondent's counsel as to the husband, presumably upon the theory that the action was not upon the contract, but upon a quantum meruit merely against the real owner of the property for the reasonable value of the buildings. The court, accordingly, dismissed the action as against the husband, and overruled the motion as to the appellant. It is now asserted that this ruling constitutes error. We think, for the reasons hereinafter stated, that there was no prejudicial error in overruling the motion. In any event, the error, if such it was, is not, in view of the whole record, available to the appellant.

After overruling the motion for the nonsuit, and the appellant having offered no proof in support of her answer, the court submitted the case to the jury upon the theory outlined in the following instruction: "The court charges you that the only question for you to determine in this case is what the work and material which the plaintiff furnished to the defendant Mary McGrath in the construction and repair of the house in question herein is reasonably and fairly worth, taking into consideration the character of the work and material and all the circumstances surrounding the transaction. The court charges you that the plaintiff is entitled to recover in this action the reasonable value of such work and material as determined by the above instruction. The court charges you that, by the admissions in the complaint in this action, the plaintiff has already been paid the sum of \$324.27, and if you find from the evidence that the reasonable value of the work and material furnished by the plaintiff to the defendant Mary McGrath is less than that, or only equal to the amount already admittedly paid by the defendant, then the plaintiff is not entitled to recover in this action; but, if you find that the reasonable value of said work and material is greater than that amount, then the plaintiff is entitled to recover the difference between what you find was the reasonable value of the work and material furnished by the plaintiff, less the amount which it is admitted has been paid; but in no event can your verdict

be for more than \$552.73." Appellant excepted to this instruction, and now urges that the court erred in submitting the case upon the theory that the action was one as upon quantum meruit, and not upon an express contract.

If the complaint alone were considered, there would be some force to the contention that the action was based upon an express contract, and that the cause of action stated was one to recover the amount stipulated in the contract for the construction and completion of the buildings, less the amount paid by appellant; but when we consider the fact that respondent's counsel, with the consent of counsel for the appellant, made the amendment referred to in the complaint, and if, in connection with this, we consider that part of appellant's answer wherein she averred that the reasonable value of the buildings was much less than as claimed by respondent, and, further, that the cause was tried and all the evidence introduced was directed to the question of the reasonable value of the buildings, there is but little left for the contention to rest upon. Moreover, appellant practically abandoned all of the defenses set forth in her answer, except the one with regard to the reasonable value of the buildings, and this, so far as it was pursued by her, was done upon the cross-examination of respondent and his witnesses. The contention therefore now made by appellant that, in an action based upon an express contract, there can be no recovery as upon quantum meruit, is not applicable to the record in this case. Nor is the claim tenable that, where there is an express contract entered into between parties for the construction of a building, an action as upon quantum meruit to recover for labor performed and material furnished in erecting the building cannot be maintained. It is quite true that a party entering into a contract of this character may not abandon the contract and recover more than the contract price upon a quantum meruit; but there may be cases where the stipulations of the contract have been departed from either by the express consent of the parties or by implication through their conduct in making changes in materials, workmanship, or structure by reason of which it may become a matter of doubt whether the contract, as a whole, has been abandoned or not. In such cases the contractor may, in the first instance, sue as upon a quantum meruit, and leave it to the defendant to set up and insist upon the contract for the purpose of limiting the recovery to the price stipulated therein. The defendant may in such a case likewise insist that the stipulations of the contract remain in full force and have not been performed, and may demand damages for a noncompliance with the terms of the contract. The contractor may, however, in such cases, also base his action upon both the contract and upon a quantum meruit by

setting up the former in one count and the latter in another in his complaint. In all such cases a recovery by either party will be allowed in accordance with the facts developed at the trial and the law applicable thereto. Again, a contractor, in case the contract is fully performed, and nothing remains except to obtain payment, may sue to recover the amount unpaid without specially declaring upon the contract. These propositions have been discussed and passed upon many times by the courts, and are illustrated and applied in the following cases: *Todd v. Huntington*, 13 Or. 9, 4 Pac. 295; *Schwartzel v. Karnes*, 2 Kan. App. 782, 44 Pac. 41; *Board of Com'rs v. Gibson*, 158 Ind. 471, 63 N. E. 982; *Moore v. Gaus Sons' Mfg. Co.*, 113 Mo. 98, 20 S. W. 975; *Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025; *Wilson v. Smith*, 61 Cal. 209.

Undoubtedly, one may not depart from the stipulations of his contract, and then sue and recover as upon a quantum meruit. Neither is the contractor prevented from recovery upon a contract in case he has not literally complied with all the terms and conditions therein imposed. A substantial compliance, if made in good faith, and so as to make the thing contracted for useful and beneficial to the owner for the purposes for which it was intended and in compliance with the true intent and spirit of the contract, in most instances, is a sufficient compliance to permit a recovery upon the contract, with the right of the owner to recoup any damages he may have sustained by reason of the contractor's failure to literally comply with the terms of the contract. While the cases cannot all be reconciled, and the courts of some states adhere to one rule, while those of other states follow another, we think the trend of modern decision is to the effect as outlined above; but if we assume in this case that the complaint, when technically construed, declared upon an express contract, still, in view of the whole record, appellant was not prejudiced in any of her substantial rights. This is well illustrated in the case of *Burgess v. Helm*, supra, by the Supreme Court of Nevada, where the complaint was directly based upon an express contract; but the evidence, as in this case, was limited to and established a right of recovery upon a quantum meruit merely. In the syllabus of that case, which fairly reflects the decision of the court, the rule is stated thus: "Where an action is brought for the price of services fixed by an express contract, and there is only proof as upon a quantum meruit, the variance between the pleading and the proof may be disregarded, and a recovery by plaintiff sustained, unless the defendant was misled thereby in his defense." In *Abbott's Trial Evidence* (2d Ed.) 453, the author states the rule in the following language: "Under an allegation of a contract to pay a specified rate of compensation, plaintiff may prove

a promise to pay what the services were reasonably worth, or an implied promise to pay usual compensation. The variance is immaterial, if the defendant is not misled." It is sometimes asserted that this rule applies only to contracts for personal services. The Supreme Court of Missouri, however, in *Moore v. Gaus Sons' Mfg. Co.*, supra, clearly demonstrates that such is not the case, and that the rule applies to building and other similar contracts. No doubt, if upon the trial the evidence were objected to as not relevant under the issues, and if it is not admissible under the allegations contained in the pleadings, then the evidence should be excluded, and, if admitted in such a case over the objection of the defendant, it might constitute reversible error; but if the evidence is admissible under the allegations of the complaint, or is not objected to, then the rule above announced should be held to apply. In this case the record makes it too clear for controversy that appellant was not misled. Indeed, this was the theory of the only affirmative defense she relied upon at the trial. True, she insists that the respondent did not prove that the contract had been fully performed, and that the buildings were constructed and completed "to the acceptance and approval of herself and husband"; but the evidence is sufficient to authorize a recovery upon the theory upon which the case was tried and submitted to the jury by the court. In view of the whole record, we are persuaded that appellant was not prejudiced on the trial or by the submission of the case to the jury.

Appellant, however, further contends that, although it be held that the case was properly tried and submitted to the jury, nevertheless the verdict and judgment are not supported by the evidence, that they are contrary to law, and that the amount allowed by the jury is excessive. This contention, it seems to us, must, in part at least, be sustained. As we have seen, it is respondent's contention that the complaint, after the amendment, declared as upon quantum meruit, and not upon an express contract; that he tried the case and submitted it to the jury upon this theory. This contention we have attempted to sustain in what has been said. The question therefore arises: Is there any evidence from which the jury were authorized to find that the respondent was entitled to recover the amount found due by their verdict? In this regard the contractor who furnished the material and constructed the buildings testified as to the material and labor required in their construction, and that the buildings, after he had completed them, without painting and plumbing, and some other minor details, were of the reasonable value of \$324.25. In fact, the contract under which he agreed to do the work was for \$295 only. The difference between the two amounts last named was for some changes that were made by him. He also testified that there was some profit in

the contract for him, but that he did not figure up what it was. The value of all other labor and material, exclusive of the \$324.25, that was used in the building, after allowing for clearing away the debris of the old building after the fire, and including 10 per cent. on the whole amount as compensation to the respondent for overseeing the work, as he called it, amounted to the sum of \$289.35. This left a difference of \$263.40, between the \$552.73, claimed by respondent, and the reasonable value as testified to by him and his witnesses. When he was asked what this was for, he answered: "That \$263.40 was profit to me." It is true that there is one question in the record which called for a conclusion merely, wherein counsel asked respondent whether or not the buildings as completed were of the reasonable value of \$877, and respondent answered in the affirmative. While a conclusion may, under certain circumstances, constitute sufficient evidence to support a finding and judgment, this cannot be so in cases like the one at bar, where the facts established at the trial are clearly contrary to the conclusion relied upon. If respondent had based his right of recovery upon the contract, and he had shown such a compliance with its terms and conditions as we have before stated to be sufficient in the absence of established fraud or misrepresentation, he would have been entitled to recover the full contract price, and the question of profit or loss would have been entirely immaterial; but he did not choose to rely upon his contract, but sought to recover as upon quantum meruit, for the reasonable value for what he had done for appellant. This being so, he is limited in his recovery to the reasonable value, as he proved it to be. When he had done this, then there was a balance of \$263.40, for which he had done nothing at all which he called profit. To this so-called profit he was not legally entitled. If the evidence had shown that the reasonable value was equal to the contract price, then the respondent could have recovered the full amount. Again, if, as in some cases, there had been no proof of reasonable value, except the price fixed in the contract, that would be taken as the reasonable value; but the respondent could not sue as upon quantum meruit, for reasonable value, and then recover the profits he would have made upon the contract regardless of the reasonable value of what he had done. In suing as upon quantum meruit he waived the profits, if any, arising out of the contract, and was limited to the reasonable value, although such value was less than the contract price. In such a case the plaintiff surrenders his advantage to the defendant, in that the plaintiff may recover less than the contract price; but the defendant cannot be required to pay more than that price for the thing specified in the contract, and may himself be heard upon the question of reasonable value. The only ground upon which respondent based his claim for

the \$263.40 is that as adjuster for the insurance company he figured the loss to appellant at about \$877, and that the insurance company paid her that amount for the damage to the buildings by fire. He claimed that he had replaced and repaired the buildings. Hence he was entitled to the insurance money, and the jury gave it to him, regardless of the proof as to reasonable value. The mere fact that the appellant may not in good conscience have been entitled to the amount of insurance money she received for the damages to the buildings by the fire is not a valid reason why respondent should recover it back from her. Besides this there is \$96 figured to fill some openings in the new building, which by direction of the appellant were not filled; but as this was at her request, and as there were other matters which to some extent at least compensated for this, we would not be inclined to review the findings of the jury in this regard, even though we had power to do so. Upon the excessive allowance of the \$263.40 we are, however, compelled to pass judgment. There is absolutely no evidence to support the verdict for this amount. Indeed, the evidence is clearly to the contrary. The verdict and judgment to this extent therefore have no support.

In view of the whole record, we have concluded not to grant a new trial of the case unconditionally. In this respect we have concluded to do now what the trial court should have done in passing on the motion for a new trial, namely, to have required the respondent to remit from the amount of the judgment the sum of \$263.40, and, in case he refused to do so, to have granted a new trial.

It is therefore ordered that, in case the respondent shall file with the clerk of this court, within 20 days after notice of this decision, his consent to remit from the judgment the sum of \$263.40, as of the date the judgment was entered, the judgment will stand affirmed. Otherwise the judgment is reversed, and the cause remanded to the district court, with directions to grant a new trial. Either way, appellant to recover costs on appeal.

MCCARTY, C. J., and STRAUP, J., concur.

RAPHAEL v. WASATCH & J. V. R. CO.
et al.

(Supreme Court of Utah. May 27, 1908.)

APPEAL AND ERROR—RECORD—NECESSITY OF BILL OF EXCEPTIONS.

Where a judgment finding one guilty of contempt was based upon both oral and documentary evidence, but there is no bill of exceptions making such evidence a part of the record, there is nothing before the Supreme Court for review, except the findings, order, and judgment of the court in the contempt proceedings; and these, being regular, will be presumed to be supported by the evidence upon which they were based.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2433, 2434.]

Appeal from District Court, Third District; C. W. Morse, Judge.

Action by Russell Sage Raphael against the Wasatch & Jordan Valley Railroad Company and the Union Trust Company of the City of New York, individually and as trustees, and others. From a judgment finding Joseph Martin, plaintiff's attorney in the action, guilty of contempt, said attorney appeals. Affirmed.

Joseph Martin, in pro. per. Van Cott, Allison & Riter, for respondents.

FRICK, J. On September 23, 1907, Hon. C. W. Morse, one of the district judges of Salt Lake county, duly made and caused to be entered an order appointing one Chester Martin receiver in the above-entitled action, with power, among other things, to sell certain property. Thereafter, and on the same day, the judge aforesaid by a supplemental order vacated and set aside the order of appointment made as aforesaid. Thereafter Joseph Martin, Esq., the attorney for the plaintiff in the above-entitled cause, in disregard of the supplemental order vacating the original order appointing the receiver, proceeded to execute the original order by advertising the property authorized to be sold under the original order for sale, and by otherwise exercising the authority conferred upon the receiver by such original order, all of which was seemingly done on behalf of the receiver. Such interference being made to appear, the said C. W. Morse, as judge of the district court, and from whom the original order and also the supplemental order of vacation emanated, cited the said Joseph Martin to appear before said district court and show cause, if any he had, why he should not be punished as for contempt of court. A hearing was had, at which quite a number of witnesses were sworn and testified, and documentary evidence was also introduced in support of the alleged contempt, and also in favor of Mr. Martin's contentions. The court, in passing upon all the evidence, found that the acts of Mr. Martin were without justification, and adjudged him guilty of contempt. The judge, however, imposed no other penalty upon Mr. Martin, except that he pay the costs of the contempt proceedings, and he was restrained from taking any further action under the original order. Mr. Martin now presents what he calls a record of the contempt proceedings for review on appeal.

From the foregoing it appears that the district court based its order and judgment in the contempt proceedings upon both oral and documentary evidence. No bill of exceptions making this evidence a part of the record was ever settled or allowed. Therefore there is nothing before this court for review, except the findings, order, and judgment of the court in the contempt proceedings. All these are regular, and are presumed to be

supported by the evidence upon which they are based. Under the finding of the court appellant was clearly in contempt, and the judgment of the court to that effect was therefore the only one that could be rendered.

There being no error made apparent from the record, the judgment of this court is likewise inevitable, which is that the order and judgment of the district court be, and the same hereby is, affirmed, at appellant's costs.

McCARTY, C. J., and STRAUP, J., concur.

McLEOD v. PACIFIC STATES TELEPHONE & TELEGRAPH CO.

(Supreme Court of Oregon. May 26, 1908.)

1. TELEGRAPHS AND TELEPHONES—DELIVERY OF MESSAGES—NEGLIGENCE—"TELEGRAPH"—"TELEPHONE."

In determining the liability of a telephone company for negligence in the transmission or delivery of a message, a telephone company will be treated as a telegraph company; "telegraph" including any apparatus for transmitting messages by means of electric signals and a "telephone" being a "telegraph."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6893, 6897.]

2. SAME.

Where the liability of a telephone company for negligence in the transmission or delivery of a message is based on contract, the liability is limited to the person for whose benefit the contract is made; but, where the liability is ex delicto, the company is liable to the addressee or person called to the phone by a patron for any negligence in the transmission and delivery of a message or call, when the company had notice from the message or otherwise at the time that such addressee or person had an interest therein.

3. SAME.

Where the request by a patron of a telephone company is for an office or the phone of a particular person, the company has performed its duty when it has made connections with such phone, and it is not responsible for the identity of the person answering, or the messages passing between such person and the patron; but where the company carelessly connects the patron with the wrong phone, and there is no contributory negligence on the part of the patron, the company may be liable, and, where the company contracts to produce at its own office a certain individual to answer a call, it is bound to exercise reasonable care to produce the proper person, and is liable to such person for negligence, where it had notice of his interest.

On petition for rehearing. Denied.

For former opinion, see 94 Pac. 568.

MAKIN, J. The motion for rehearing does not raise any new or different questions from those submitted at the original argument and passed upon by the court, but it questions the correctness of the conclusions reached. The point emphasized by the motion is that the company should not be held liable in damages to the addressee for negligence in the transmission or delivery of a message, unless the addressee was the primary beneficiary therein. In considering the liability of telephone

companies, we are almost exclusively confined for precedents to decisions relating to telegraph companies, and so far as the courts and text-writers have expressed themselves they treat them as similar, in their general features, both as to duties and liabilities. Anderson's Law Dictionary says that telegraph includes any apparatus for transmitting messages or other communications by means of electric signals. Under "telephone" he says: "A telephone is a telegraph." See, also, Jones, Teleg. & Teleph. Cos. c. 1; Crosswell, Elec. §§ 13-18; and note to Cent. Union Teleph. Co. v. Falley, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114, 128.

For the purpose of the consideration of this motion it may be taken as conceded that the telephone company is responsible to the addressee of a message where he is the primary beneficiary in it, if the company is advised of that fact, either by the terms of the message itself or otherwise (Frazier v. West. Union Tel. Co., 45 Or. 414, 78 Pac. 330, 67 L. R. A. 319); and the only question open for discussion is whether it is liable to the addressee in case he is not the primary beneficiary, but has a beneficial interest in it. The cases are practically uniform in holding that the remedy of the addressee of a message is in tort, except in cases where he is the principal of the sender (Postal Tel. Cable Co. v. Ford, 117 Ala. 672, 23 South. 684), though some base recovery upon other grounds. See a discussion of this subject in Crosswell, Elec. §§ 456, 457, 460, et seq., where the cases are cited. The only person having contractual relations with the company is the sender, or a person for whose benefit he makes the contract, and in the great majority of cases the addressee cannot rely upon any contractual relation. The basis of his right is ex delicto, namely, that the company, in the exercise of a public franchise, and in the performance of duties of a public character incident thereto, is liable to the public for the performance of those duties with reasonable care and diligence; and in such a case the company is responsible to the addressee for negligence in the transmission and delivery of a message it has contracted to deliver to him. Crosswell, Elec. §§ 460-462; Jones, Teleg. & Teleph. Cos. § 557; Cent. Union Tel. Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035; Hellams v. West. Union Tel. Co., 70 S. C. 83, 49 S. E. 12; Green v. West. Union Tel. Co., 135 N. C. 489, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955; New York & W. Ptg. Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; Smith v. West. Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126; West. Union Tel. Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; West. Union Tel. Co. v. Longwill, 5 N. M. 308, 21 Pac. 339; McPeck v. West. Union Tel. Co., 107 Iowa, 356, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205. The defendant's liability upon the contract is limited to the person for whose bene-

fit the contract is made; but, where the liability is *ex delicto*, it may extend to any one who is injured by the negligence of the company, and therefore there may be a liability to different individuals for the same tort. Gray, *Comm. by Teleg.* § 67, and *Croswell, Elec.* § 457, quoted in *Frazier v. Northwestern Teleg. Co.*, 45 Or. 414, 419, 78 Pac. 330, 67 L. R. A. 319, to the effect that the right of the addressee of a message to recover for a breach of the contract will be confined to cases where he is the sole beneficiary thereof, are discussing the remedy on the contract, and not the remedy in cases of tort or liability for negligence. *Croswell*, at section 457, just preceding the language quoted in *Frazier v. Northwestern Teleg. Co.*, *supra*, and as the basis of that language, says: "This same class of cases is also sustained by the courts on the principle which is law in a few states that a person for whose benefit a contract is made may maintain an action to compel the performance of it"—while at section 471 he says it is well settled in the United States that the addressee of a message may sue in tort for negligence in the transmission or delivery of the message; his action being based upon the default of the telegraph company in the performance of its duty at common law. Gray denies this remedy at section 66, but he is not supported by the authorities in this country. To create a liability upon the company in favor of the addressee, who is not the person for whose benefit the contract is made, for negligence in the transmission and delivery of a message, that is, to create a liability in tort, it is necessary that the addressee have some interest in the message, and that such interest be disclosed by the terms of the message, or otherwise communicated to the company. *West. Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37; *West. Union Tel. Co. v. Schriver et al.*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678.

It was urged in some of the cases we have examined that, the remedy being in tort for breach of a public duty, notice to the company of the plaintiff's interest in the message would be unnecessary, and recovery might be had for any damage suffered. This position is taken by the editors of the *Columbia L. Rev.* vol. 5, p. 170, in referring to the case of *Frazier v. Northwestern Teleg. Co.*, 45 Or. 414, 78 Pac. 330, 67 L. R. A. 319, and applies the general rule as to liability for torts, citing *West. Union Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877, and *Pollock, Torts* (6th Ed.) 532. But the liability for a tort in such a case as this does not rest alone on the negligence of the company, but is so far dependent upon the original contract for transmission as to limit the remedy to cases in which the company had notice of the plaintiff's interest. *Frazier v. Northwestern Teleg. Co.*, *supra*; *Smith v. West. Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; 27 Am. & Eng.

Ency. Law, 1059, where many cases are cited; *Jones, Teleg. & Teleph. Cos.* § 480; *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252; *West. Union Tel. Co. v. Wood*, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; *West. Union Tel. Co. v. Pearce*, 82 Miss. 487, 34 South. 152; *Butner v. West. Union Tel. Co.*, 2 Okl. 234, 37 Pac. 1087; 6 *Cur. Law*, 1674; *West. Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37; *West. Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Hadley v. West. Union Tel. Co.*, 115 Ind. 191, 15 N. E. 845. Bearing these distinctions in mind will explain much apparent conflict in the decisions. In *West. Union Tel. Co. v. Schriver*, 141 Fed., at page 548, 72 C. C. A., at page 606, 4 L. R. A. (N. S.) 678, in an opinion by Sanborn, circuit judge, rendered in 1905, he says: "When the opinions in them [cases referred to] are carefully read and analyzed, they recognize and affirm the rule that a company owes a duty and incurs a liability to those parties only of whose interest it has notice, and for those injuries only which it might reasonably anticipate." It divides the cases into four classes: (1) Those which assert a duty and liability to the undisclosed principal of the sender; (2) those which recognize a duty and liability to a person who appears on the face of the message to be its beneficiary, although neither the sender nor the addressee; (3) those which deny any duty or liability to those who do not appear from the message to have any interest in it; and (4) the decisions which deny any liability to the undisclosed principal of the addressee. He cites many cases under this classification. We think the conclusion is unavoidable that the telephone company is liable to the addressee or person called to the phone by a patron for any negligence in the transmission and delivery of a message or call when the company had notice from the message or otherwise at the time of the transmission that such addressee had an interest therein, and such liability is not contractual but in tort; and that being the ground of the liability, it is not necessary that the addressee be the primary beneficiary in the message, but it extends to the addressee if he has any interest.

The suggestion in the motion that the result of the decision in this case imposes on a telephone company unreasonable liability because of the nature of the business and ease with which mistakes may be made we have not overlooked in this consideration. When the request by a patron is for an office or the phone of a particular person, the company has performed its whole duty when it has made connection with such phone, and it is not responsible for the identity of the person answering or the messages passing between them; but, if it carelessly connects the patron with the wrong phone, and there is no contributory negligence on his part, it may be liable. See note to *Planter's Cotton Oil Co. v. West. Union Tel. Co.*, 126 Ga. 621, 55

S. E. 495, 6 L. R. A. (N. S.) 1180, generally as to identity in conversation. But where the company contracts to produce at its own office a certain individual to answer a long distance or any call, as in this case, it is bound to exercise reasonable care to produce the proper person, and is liable to such person for negligence in that regard, if it had notice of his interest. Central Union Tel. Co. v. Falley, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114, 128, note; Central Union Tel. Co. v. Swoveland, 14 Ind. App. 341, 350, 42 N. E. 1035.

Therefore the motion will be denied.

STUBBS v. CONTINENTAL TIMBER CO.
(Supreme Court of Washington. May 20, 1908.)
PROCESS—SERVICE BY PUBLICATION—SUMMONS—SUFFICIENCY.

A summons, served by publication, which required defendant to appear and answer within 60 days after a date given, was not fatally defective, because omitting the words "after the date of the first publication of this summons, to wit," which precede the actual date given in the form of a summons served by publication as prescribed by Ballinger's Ann. Codes & St. § 4878 (Pierce's Code, § 336), since that section requires a substantial and not a literal compliance with the form prescribed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 129-130.]

Mount and Crow, JJ., dissenting.

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by William H. Stubbs to quiet title against the Continental Timber Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

H. H. Field and Frank C. Owings, for appellant. Revelle, Revelle & Revelle, for respondent.

FULLERTON, J. In October, 1904, one George P. Rossman began an action in the superior court of King county against the respondent and others to recover upon an account for legal services rendered a brother of the respondent. At the time of commencing the action he sued out a writ of attachment, and caused the same to be levied on certain real estate belonging to the respondent, situated in Thurston county. Personal service could not be had upon the respondent, and the following summons was served by publication: "The State of Washington to William H. Stubbs, Defendant: You are hereby summoned to appear within sixty days after the 16th day of December, 1904, and defend the above-entitled action in the above-entitled court, and answer the complaint of the plaintiff, and serve a copy of your answer upon the undersigned, attorneys for the plaintiff, at their office below stated; and in case of failure on your part so to do judgment will be rendered against you according to the demand of the complaint,

which has been filed with the clerk of said court. That plaintiff's cause of action against you is for services rendered by him at the request of you and your codefendants in the defending of your brother, Fred R. Stubbs, at Tacoma, Washington, on the 12th day of September, 1904, and for moneys paid out by the plaintiff in said case at your request. The total amount claimed by the plaintiff is \$378." The respondent made default, and judgment was taken against him for the sum recited to be due in the summons, under which judgment the attached real property was sold by the sheriff pursuant to statute. The appellant is the owner by mesne conveyances of the title so acquired. The respondent conceived that the proceedings leading up to the sale were void, having the effect only of casting a cloud upon his title, and he began the present action to remove the cloud and otherwise quiet his title to the premises. The trial judge held that the judgment under which the property was sold was void for want of the service of a sufficient summons, and entered a judgment in accordance with the prayer of the complaint, being the judgment from which this appeal is taken.

There is but one question presented by the record, namely, the sufficiency of the published summons. The statute prescribing what the published summons shall contain provides, among other things, that it "shall require the defendant or defendants, upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of such summons." And the form given, to which the summons as published must substantially comply, is as follows: "In the Superior Court of the State of Washington for the County of —, —, Plaintiff, v. —, Defendant. No. —. The State of Washington to the Said (naming the defendant or defendants to be served by publication): You are hereby summoned to appear within sixty days after the date of the first publication of this summons, to wit, within sixty days after the — day of —, 1—, and defend the above-entitled action in the above-entitled court, and answer the complaint of the plaintiff, and serve a copy of your answer upon the undersigned attorneys for plaintiff—, at his (or their) office below stated; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, which has been filed with the clerk of said court. (Insert here a brief statement of the object of the action.) — Plaintiff's Attorneys. P. O. address: — County — Washington." Ballinger's Ann. Codes, & St. § 4878 (Pierce's Code § 336). The published summons, it will be noticed, while sufficiently regular in other respects, omits the words "after the date of the first publication of this summons, to wit," which precede the actual date given, as prescribed in

the form, and it is this omission that is thought to render the summons void.

We are of the opinion, however, that the omission is not fatal to the judgment. No doubt it was the purpose of the framers of the statute to provide a summons so definitely worded that the defendant summoned would know with certainty the time within which no default could be entered against him; but the wording of the statute makes it clear that they did not intend to prescribe a particular form of words with which the idea should be expressed, to the exclusion of all others. The requirement is that the summons shall be substantially in the form given, not that it shall be a literal transcript of that form. The summons published is as definite as the prescribed form in fixing the time within which the defendant must appear. It summons the defendant to appear within 60 days from a given date, and this is all that form given does or can do. In point of definiteness it adds nothing to the summons to insert, preceding the date, the words, "after the date of the first publication of this summons, to wit." These words but describe an event which may or may not have happened on the date given. To ascertain that fact the defendant must resort to the initial copy of the paper in which the summons is being published, or he must inspect the proofs of publication after they are returned and filed in court. The same sources of information are equally open to him, whether the words omitted here are or are not included in the summons as published. The insertion of the words, therefore, cannot instruct, nor can their omission mislead, the defendant; and, since only a substantial compliance with the statute is required, it would seem to be sacrificing the substance to the shadow to hold that the omission of the words is fatal to a judgment entered thereon.

The cases cited from this court to sustain the trial court, viz., *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043, *Smith v. White*, 32 Wash. 414, 73 Pac. 480, *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536, *Young v. Droz*, 38 Wash. 648, 80 Pac. 810, *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640, and *Owen v. Owen*, 41 Wash. 642, 84 Pac. 606, will be found on inspection to have no bearing on the question here suggested, and we refrain from commenting upon them.

The judgment is reversed and remanded, with instructions to enter a judgment in favor of the defendant to the effect that the plaintiff take nothing by his action.

HADLEY, C. J., and RUDKIN and DUNBAR, JJ., concur.

MOUNT, J. (dissenting). The conclusion reached by the majority upon the point discussed is probably correct; but the statute (section 4878, *Ballinger's Ann. Codes & St.*

[*Pierce's Code*, § 336]) requires a published summons to "contain a brief statement of the object of the action." The object of the action in *Rossman v. Stubbs* was to obtain a judgment for money, and also to enforce such judgment against certain attached real estate. There is no intimation in the summons that the action is for anything more than to recover a personal judgment of \$378. Upon the face of the summons that action was in personam, upon which no valid judgment could be entered. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Cosh-Murray Co. v. Tutlich*, 10 Wash. 449, 38 Pac. 1134. In order to be effective as a notice, the published summons should have stated the object, which would have shown jurisdiction in the court. The summons as published was not only insufficient under the statute, but was misleading. It is true this particular question is not made in the briefs, but it is apparent on the face of the record. The judgment, in my opinion, should be affirmed.

I therefore dissent.

CROW, J. I concur with Judge MOUNT.

STATE v. PARMETER.

(Supreme Court of Washington. May 23, 1908.)

CRIMINAL LAW — APPEAL — DISMISSAL FOR FAILURE TO PROSECUTE APPEAL—STATUTORY PROVISIONS.

Const. art. 1, § 22, provides that in criminal prosecutions the accused shall have the right to a speedy trial. *Ballinger's Ann. Codes & St.* § 6911 (*Pierce's Code*, § 1531), provides that if a defendant, whose trial has not been postponed upon his application, is not brought to trial within 60 days after the indictment found or information filed, the court must order it to be dismissed, unless cause to the contrary is shown. *Ballinger's Ann. Codes & St.* § 912 (*Pierce's Code*, § 3467), provides that appeals from the police court to the superior court may be taken as an appeal from a justice's court, and that the bond by appellant shall be conditioned that he will appear and prosecute his appeal. *Ballinger's Ann. Codes & St.* §§ 6763, 6764 (*Pierce's Code*, §§ 3082, 3083), direct that if appellant fails to prosecute his appeal he shall be defaulted, and the superior court may award sentence against him as though convicted in that court. An accused was convicted and fined in police court after a speedy trial before a jury, and upon filing an appeal bond was discharged from custody. Subsequently, and without demanding a trial in the superior court, he moved for a dismissal on the ground that more than 60 days had elapsed since taking the appeal without a postponement on his application. *Held*, that he was not entitled to a discharge, since he had a speedy trial in the lower court and had appealed for his own benefit, and since he did not diligently prosecute it he could not invoke the statute in his behalf.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 14, *Criminal Law*, §§ 1297-1304.]

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Glen Parmeter was convicted of a violation of a city ordinance, and appealed to the superior court. From an order sustaining a motion to dismiss the cause for failure to prose-

cute, the state appeals. Reversed and remanded, with instructions to reinstate and proceed with the trial.

Marquis S. Shields and R. E. Taggart, for the State. J. C. Cross and A. Emerson, for respondent.

CROW, J. This action, which is a prosecution of Glen Parmeter for the violation of an ordinance of the city of Aberdeen, was originally commenced in the city police court, where, upon trial before a jury, the defendant was convicted and fined. On July 18, 1907, he appealed to the superior court for Chehalis county, and upon filing an appeal bond was discharged from custody. On September 21, 1907, the defendant served and filed in the superior court an application for the dismissal of the action, on the ground that more than 60 days had elapsed since the taking of his appeal and that the trial of the cause had not been postponed on his application. This motion being sustained, judgment was entered discharging the defendant, exonerating the sureties on his appeal bond, and taxing the costs against the city of Aberdeen. The plaintiff has appealed.

This action, prosecuted for the violation of a city ordinance, although conducted in the name of the state of Washington, was commenced in the police court of the city of Aberdeen, which had original jurisdiction. In that court the respondent was promptly tried and convicted. He appealed, and now contends that he was entitled to be discharged, and to a dismissal of the action by the superior court, under section 6911, Ballinger's Ann. Codes & St. (section 1531, Pierce's Code) reading as follows: "If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his application, be not brought to trial within sixty days after the indictment is found or the information filed, the court must order it to be dismissed, unless good cause to the contrary be shown." The Bill of Rights of the state Constitution (article 1, § 22) provides that in criminal prosecutions the accused shall have the right to a speedy trial; and section 6911, Ballinger's Ann. Codes & St., supra, was enacted for the purpose of enforcing such right. The respondent has already been awarded a speedy trial before a jury in the court of original jurisdiction. His appeal removed the cause to the superior court, and was taken for the sole purpose of obtaining another trial and securing his discharge, if acquitted. Under these circumstances he should at least have demanded such trial in the superior court before seeking a dismissal and discharge under the statute. Section 912, Ballinger's Ann. Codes & St. (section 3467, Pierce's Code), provides that appeals from the police court to the superior court may be taken as an appeal is taken from a justice's court; and sections 6763, 6764, Ballinger's Ann. Codes & St. (sections 3062, 3063, Pierce's Code), define the method of taking such ap-

peals in criminal actions. The former section by express terms provides that the bond to be given by the appellant shall be conditioned that he will appear in the superior court and there prosecute his appeal; while the latter directs that, if he shall fail to enter and prosecute his appeal, he shall be defaulted of his recognizance, and the superior court may award sentence against him for the offense whereof he was convicted, in like manner as if he had been convicted in that court. In view of these sections, it is not necessary for us to determine whether the respondent, after conviction in the police court, could be discharged for unnecessary delay of proceedings and the want of a speedy trial, after he had on appeal demanded trial in the superior court; it not being shown that he ever made any such demand. On the record before us we are of the opinion that he was not entitled to a discharge, for the reason that he had been awarded a speedy trial in the police court, that the appeal was taken by him after such trial for his own benefit, and that thereafter he should have diligently prosecuted the same by demanding the new trial to which he was entitled in the superior court. Having failed to do this, he was in no position to invoke the statute in his behalf, and demand his discharge and dismissal of the action.

He contends, however, that the superior court, in making the order of dismissal, properly relied on the *Murphy Case*, 7 Wash. 257, 34 Pac. 834, as holding that the statute applied when a new trial had been granted after conviction, and that the 60 days should begin to run from the date of the order granting the new trial. We do not regard that holding as applicable to the facts now before us. In that case the superior court had original jurisdiction and granted the new trial. Here it obtained jurisdiction by appeal. The respondent had been convicted in the police court. No order awarding him a new trial had been made in that or any other court. He was entitled to trial in the superior court only by reason of his appeal, if diligently prosecuted. Failure upon his part to so prosecute the same would authorize the superior court to award sentence against him without further trial, in like manner as if he had been there convicted.

The judgment is reversed, and the cause remanded, with instructions to reinstate the action and proceed with the trial.

HADLEY, C. J., and MOUNT, ROOT, FULLERTON, and RUDKIN, JJ., concur.

O'CONNOR et al. v. BURNHAM.

(Supreme Court of Washington. May 25, 1908.)

1. LOGS AND LOGGING—LIEN ON LOGS AND LUMBER—STATUTES.

One employed by the owner to cut timber into logs for the immediate manufacture by the owner into lumber is entitled to a lien for the

agreed compensation per 1,000 feet, board measure, on the lumber, as authorized by Ballinger's Ann. Codes & St. § 5931 (Pierce's Code, § 6083), giving a lien on lumber for work in manufacturing timber into lumber, and is not limited to a lien on the logs under section 5930 (Pierce's Code, § 6082) giving a lien on logs for work in securing logs, nor can the owner defeat a lien on the lumber on the ground that he is liable, if at all, as an eloigner.

2. SAME.

One employed by the owner to cut timber into logs for the immediate manufacture by the owner into lumber at an agreed compensation per 1,000 feet, board measure, payable on the 15th day of each month for the logs delivered the previous month, may, on the refusal of the owner to pay for logs delivered until certain timber should be cut, cease work and enforce a lien on the manufactured lumber for the work done.

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by James O'Connor and another against H. A. Burnham and another. From a judgment for plaintiffs, defendant H. A. Burnham appeals. Affirmed.

Troy & Falknor, for appellant. Chas. D. King and Byron Millett, for respondents.

MOUNT, J. This action was brought to foreclose a lien upon certain lumber. At the trial the court found in favor of the plaintiffs, and entered a decree foreclosing the lien for the amount, \$241.40, besides attorney's fees and costs. The defendant, H. A. Burnham, has appealed.

The facts are in substance that on October 19, 1906, the appellant was the owner of certain standing timber in Thurston county, and operating a sawmill on the Des Chutes river near the standing timber. On that day the appellant employed the respondents to cut a certain portion of that timber into saw logs and place the logs in the river. The employment was oral. The agreement was that the respondents should furnish men and teams and place the logs in the river at \$4 per 1,000 feet, board measure; that the appellant should pay for the work on the 15th of each month for the logs delivered in the river during the previous month. The logs were floated down to the mill and immediately cut into lumber. Between the 19th day of October, 1906, and the 19th day of December of the same year the respondents placed in the river 296,584 feet of logs, upon which the appellant paid the respondents \$940, leaving the balance unpaid. About the 15th of December some dispute arose as to the measurement of the logs and the amount claimed to be due, and appellant refused to pay for certain logs theretofore delivered into the river until certain timber should be cut. Respondents thereupon ceased to work, and filed the lien notice which is now being foreclosed.

It is claimed by the appellant that the respondents are contractors, and are therefore not entitled to claim of lien, under section 5931, Ballinger's Ann. Codes & St. (Pierce's Code § 6083), upon lumber manu-

factured from the logs; that respondents were entitled to claim a lien only upon the logs under section 5930, Ballinger's Ann. Codes & St. (Pierce's Code, § 6082). This question was directly passed upon in *Robins v. Paulson*, 30 Wash. 459, 70 Pac. 1113, where we held that persons cutting the logs in the woods for the manufacture of lumber were entitled to a lien upon the finished product at the mill. In the case of *Graham v. Gardner*, 45 Wash. 648, 89 Pac. 171, we held that persons employed in the woods cutting logs at a fixed price per 1,000 were not entitled to a lien upon the mill where the logs were manufactured into lumber. Some things were said in that case which may be at variance with the holdings in *Robins v. Paulson*, supra, and cases therein cited, but it was not our intention to overrule those cases.

Appellant also argues that he must be held as an eloigner, if he may be held at all; but what we have said above disposes of this contention. There is no element of eloinment in this case. The respondents cut and delivered the logs to the appellant, who manufactured them into lumber at the mill. The logs were the property of the appellant at all times. The appellant simply hired the respondents to go into the timber and cut and deliver the logs to the mill, there to be manufactured into lumber immediately.

It is next claimed that the respondents did not perform the contract by keeping appellant supplied with logs sufficient to keep the mill going, and that appellant was damaged thereby. The evidence is in direct conflict as to whether the respondents agreed to cut sufficient logs to keep the mill running; and we are of the opinion that the evidence is insufficient upon this point to base a finding of damages upon. The evidence shows that the capacity of the mill was much greater than the ability of respondents to supply logs. No complaint was made that logs were not supplied fast enough until about the time respondents ceased to work. We are also of the opinion that the respondents were justified in ceasing to work by reason of the refusal of appellant to make the payments as agreed upon.

We find no error in the record, and the judgment must therefore be affirmed.

HADLEY, C. J., and ROOT, CROW, RUDKIN, FULLERTON, and DUNBAR, JJ., concur.

ROGERS v. MINNEAPOLIS THRESHING MACH. CO.

RUSSELL & CO. v. SAME.

(Supreme Court of Washington. May 28, 1908.)
APPEAL AND ERROR—AFFIRMANCE—SUPERSEDEAS—JUDGMENT ON BOND.

A mortgagee having been awarded a third lien on foreclosure, he appealed from the whole

judgment, and gave a bond to supersede the judgment providing for satisfaction and performance of the judgment appealed from if it should be affirmed. *Held*, that the appeal could not be regarded as taken merely to determine the priority of liens, and therefore involved only a part of the judgment, and hence, on affirmation, judgment was properly rendered on appeal against the appellant and the sureties on the bond for the full amount of the judgment below as expressly authorized by Ballinger's Ann. Codes & St. § 6523 (Pierce's Code, § 1071).

Appeal from Superior Court, Douglas County; R. S. Steiner, Judge.

Actions by M. J. Rogers against Lewis Badger and others, and by Russell & Co. against the same defendants, in which the Minneapolis Threshing Machine Company, having been awarded a third mortgage lien on the property in controversy, appealed from "the whole of the judgment," and prayed for an order fixing the amount of a bond to supersede the judgment and the whole thereof. A bond was subsequently given pursuant to such order conditioned as an appeal and supersedeas bond for the satisfaction and performance of the judgment appealed from in case it should be affirmed. The judgment having been affirmed, judgment was rendered on appeal against appellant and its sureties on the bond for the whole amount of the judgment. On motion to modify. Denied.

J. D. Campbell and J. B. Campbell, for appellant. Danson & Williams, for respondents.

HADLEY, C. J. The original opinion in this cause will be found reported in 92 Pac. 774. By reference thereto it will be seen that the action was brought to foreclose mortgages; there being three mortgages held respectively by three parties covering the same land, all involved in the issues. It was found by the trial court that all the mortgages were entitled to foreclosure. Personal judgment was entered against the mortgagors for the respective amounts and in favor of the respective mortgagees, and foreclosure was awarded as to all. But it was decreed that the mortgage of M. J. Rogers is a first lien, that of Russell & Co. a second lien, that of Minneapolis Threshing Machine Company a third lien, upon the property, and that said liens should be satisfied from the sale of the property in the order above named. The Minneapolis Threshing Machine Company appealed. The notice of appeal described the appeal as being from "that certain final judgment rendered and entered in this cause on the 1st day of April, 1907, and from the conclusions of law made and rendered herein by the superior court of Douglas county, Wash." Application was also made to the court, asking that the amount of a supersedeas bond on appeal should be fixed. The application described the appeal as being from "the whole of the judgment," and the court entered an order

fixing the amount of the bond required "to supersede said judgment and the whole thereof" at \$6,300. A bond was given by the appellant in the full sum of \$6,500, conditioned as an appeal and supersedeas bond, with the United States Fidelity & Guaranty Company as surety. The judgment of the trial court was affirmed by this court, and judgment was entered here against the appellant and the surety and in favor of the two respondents for the respective sums rendered in their favor against the mortgagors below. The appellant has now moved to modify the judgment entered here so as to provide for the recovery from appellant and its surety of costs only.

Appellant contends that the record indicates that the appeal was taken merely to determine the priority of liens, and that it, therefore, involved a part of the judgment only. We think it is manifest from what we have above stated from the record that the appeal was from the entire judgment, and that the bond stayed all proceedings thereunder. It is argued that, as there was no money judgment entered against appellant below, there can be no judgment entered against it and the surety here, and the case of *Titlow v. Cascade Oatmeal Company*, 16 Wash. 676, 48 Pac. 406, is cited. Judgment was sought in that case here against the appellant and his surety for the full amount of the judgment affirmed, but was denied. The appeal was, however, expressly taken from a portion of the judgment only, and any stay of proceedings which resulted was merely incidental thereto. Here, however, the appeal was expressly taken from the whole judgment, the amount of the bond necessary to stay the whole judgment was asked and fixed, and the bond upon its face shows that it was given for that purpose, a fact known at the time to both the appellant and its surety. The bond in all respects complies with the requirements of section 6506, Ballinger's Ann. Codes & St. (Pierce's Code, § 1053), where it is sought to stay the whole judgment. The same section provides that, if it is intended to stay proceedings on only a part of the judgment, the bond shall be so varied as to secure the part stayed alone. Such was not done here, but proceedings under the whole judgment were entirely stayed. Respondents were not only precluded from effecting a sale of the mortgaged premises, but they were also prevented from enforcing their respective shares in the personal judgment by means of ordinary execution. The bond expressly provided for the satisfaction and performance of the judgment appealed from in case that judgment should be affirmed by this court, and by the terms of section 6523, Ballinger's Ann. Codes & St. (Pierce's Code, § 1071), it was proper under such circumstances to enter judgment here against both the appellant and surety for the full amount of the judgment below. In view of the statutory provisions, the bond

became in the nature of a contract agreeing that judgment might be at once entered here against both appellant and the surety in the event of an affirmance. The consideration for such agreement was the benefit to be derived from a stay of all proceedings meanwhile.

The motion is denied.

FULLERTON, RUDKIN, CROW, DUNBAR, ROOT, and MOUNT, JJ., concur.

CROWLEY et ux. v. TAYLOR et al.

(Supreme Court of Washington. May 29, 1908.)

1. TRIAL—CONDUCT OF TRIAL—REMARKS OF JUDGE.

In a suit to recover money alleged to have been lost at gambling, a statement of the judge in his instructions that "this is an action to recover money lost at gambling" did not constitute a comment upon the testimony, and was not an assumption that money had been lost.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 409, 410.]

2. APPEAL AND ERROR—HARMLESS ERROR—MENTION OF COURT OF DEFAULT OF CODEFENDANT.

Where the complaint showed the action to be against two defendants, it was not prejudicial error for the court to instruct that one of the defendants had failed to answer, and that a default had been taken against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4218-4228.]

3. SAME—INSTRUCTIONS.

In a suit to recover money alleged to have been lost at gambling, the court charged that the jury, in order to find for plaintiff, must be satisfied by a preponderance of the evidence that persons resorted to "The Oxford" (defendants' place of business) for the purpose of wagering money at gambling games maintained there by defendant. *Held*, that if the charge was erroneous for the reason that it was immaterial whether the gambling occurred in such a place or elsewhere, it was not prejudicial to defendant, since in that event the jury were required to find more facts than were necessary to exist to return a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4031.]

4. GAMING—ACTION TO RECOVER LOSSES—OWNERSHIP OF MONEY LOST.

In an action by husband and wife to recover money lost by the husband at gambling, it is not essential that the money lost should have belonged to either the husband or wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 60.]

5. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—INCONSISTENT STATEMENTS OF PARTY—DISCRETION OF COURT.

The granting of a new trial for newly discovered evidence of statements of a party inconsistent with his testimony rests largely in the discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 221, 222.]

6. APPEAL AND ERROR—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action to recover money alleged to have been lost at gambling, the exclusion of evidence that the place where the money was alleged to have been lost was maintained as a public gambling resort, in which defendant operated a large number of prohibited gambling games, was harmless error as against plaintiff, where

the jury found for plaintiffs as to the fact of gambling and loss of money, since the evidence, while material on those questions, had no bearing upon the amount of recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4187-4193.]

7. TRIAL—PROVINCE OF JURY—CONFLICT IN EVIDENCE.

Where there is a conflict in the evidence, it is for the jury to say what the facts are.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 342, 343.]

8. SAME.

For a like reason, the exclusion of the record of the plea of guilty, and sentence of one of the defendants in a criminal proceeding for conducting a gambling resort at the place in question, was not prejudicial to plaintiffs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4187-4193.]

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by James Crowley, Sr., and wife, against George Taylor and another. Judgment for plaintiffs for less than sum claimed. Defendant Taylor appeals, and plaintiffs file cross-appeal. Affirmed.

Vance & Mitchell, for appellant. R. H. Fry, for respondents.

ROOT, J. This was an action by plaintiffs to recover the sum of \$600, claimed to have been lost by plaintiff James Crowley at gambling in defendants' saloon. The defendant Rogers made no answer to the complaint, and a default was taken against him. The trial was had against defendant Taylor before the court and a jury, and resulted in a verdict and judgment for plaintiffs in the sum of \$305.62. From this judgment each party has appealed.

We will first consider the appeal of defendant Taylor. His first assignment of error is upon the action of the court in using this language in its instructions to the jury, to wit: "This is an action to recover money lost at gambling." Defendant urges that this was assuming that money had been lost, and constituted a comment upon the testimony by the court. Considering the connection in which the language was used, we do not think it should be given this construction. It was not a comment, and we do not think it could have been so construed by the jury.

Defendant next complains of an instruction, wherein the jury were told that the defendant Rogers had failed to answer, and that a default had been taken against him. As the complaint showed the action to be against two defendants, it was undoubtedly proper for the court to mention why one of the defendants was no longer in the case. We do not think defendant was prejudiced by this action.

Defendant complains that the jury were told that, in order to find for plaintiff, "they must be satisfied by a preponderance of the evidence that persons resorted to and visited the place known as 'The Oxford' (defend-

ants' business place) for the purpose of wagering money at gambling games maintained, conducted, opened, and carried on at said place by defendants." Defendant urges that it was immaterial whether the gambling occurred in such a place or elsewhere. If this contention be true, it would seem that the jury were called upon to find more facts than were necessary to exist, in order to return a verdict against the defendant. If this was error, it would seem to be the plaintiffs, rather than the defendant, who would have cause to complain thereof.

It is further contended that the court erred in refusing to give an instruction requested by the defendant, to the effect that the jury could not return a verdict in favor of plaintiffs, if they found that the money lost by Crowley was not the property of himself or wife. We think this instruction was properly refused. It is urged that the motion for new trial should have been granted, and especially upon the showing of new evidence as to alleged statements of plaintiff James Crowley inconsistent with his testimony. The granting of a motion for new trial upon such grounds is largely in the discretion of the trial court, and we are not convinced that the showing made in this case was such as to render the denial of the motion an abuse of discretion.

Several other errors are assigned, but an examination of them fails to reveal any grounds justifying a reversal of the judgment.

We will now notice the cross-appeal of plaintiffs. They urge that the trial court erred in excluding evidence to show that the Oxford saloon was maintained as a public gambling resort, in which defendants operated a large number of prohibited gambling games. We think this evidence was admissible, but that its exclusion does not constitute reversible error, for the reason that the rejected evidence had no bearing upon the amount of the recovery. As to the fact of gambling and loss of money, the jury found for plaintiffs; consequently the latter were not injured by the exclusion of this evidence, which was doubtless material upon those questions, but had no bearing upon the amount of recovery.

Plaintiffs urge that their motion for a directed verdict at the close of the trial should have been granted. We think not. There was a conflict in the evidence, and as to what it established, and it was for the jury, taking the evidence as a whole, to say as to what were the facts.

What we have here said also applies to the assignment of error upon the action of the court in denying plaintiffs' motion for a judgment notwithstanding the verdict, and as to their motion for a new trial.

It is further urged that the court was in error in excluding the record of the plea of guilty and sentence of defendant Taylor in a criminal proceeding, wherein he pleaded

guilty to conducting a gambling resort at The Oxford on September 1, 1904. It is unnecessary to pass upon this question, as the error, if it was an error, could not have been to the prejudice of plaintiffs, as the jury found in their favor, except as to the amount, and the question as to this could not have been legally affected by the proffered evidence.

Finding no error in the record, the judgment of the superior court is affirmed.

HADLEY, C. J., and RUDKIN, MOUNT, CROW, and DUNBAR, JJ., concur.

FOSS INVESTMENT CO. v. ATER (DARLING, Intervener).

(Supreme Court of Washington. May 26, 1908.)

1. SPECIFIC PERFORMANCE—BROKERS—REAL ESTATE AGENTS—AUTHORITY—EVIDENCE.

In a suit to specifically enforce a contract made by a real estate agent, evidence considered and held to show that the agent had authority only to act as selling agent for the owner to find a purchaser ready, willing, and able to buy, but had no authority to execute to the purchaser a contract of sale binding on the principal.

2. BROKERS—IMPLIED AUTHORITY.

A real estate agent, authorized only to find a purchaser ready, willing, and able to buy, has no authority to execute a contract of sale to such proposed purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 13.]

3. SAME—AGENT FOR BOTH PARTIES—EFFECT.

Since an agent to sell cannot himself become purchaser, directly or indirectly, without the knowledge and consent of the principal, a real estate agent, who is owner of all the shares of a corporation except two, cannot, without the knowledge of the principal, sell to the corporation, and, if he does, the contract is voidable at the principal's option.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 24.]

4. VENDOR AND PURCHASER—CONTRACT—OFFER AND ACCEPTANCE—MEETING OF MINDS.

The owner of property offered to sell it at \$800 net, and the party receiving the offer telegraphed in reply: "Offer accepted. Lot sold. Send abstract"—and the owner then wired: "Awaiting guarantee \$800 cash net. I will send abstract." The purchaser, through the broker, then deposited in the bank at his residence, distant from that of the principal, \$800, and the bank wired notifying the principal of the deposit, who thereupon wired back: "The lot is sold." Held, that there was no meeting of minds to make an enforceable contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 17-19.]

5. SPECIFIC PERFORMANCE—REAL ESTATE AGENTS—AUTHORITY—EVIDENCE.

In a suit to specifically enforce a contract made by a real estate agent, evidence considered and held to show that the agent had no authority to make a contract of sale binding on the principal without his approval, and that a sale made by a subagent was made without the knowledge and consent of the principal, and hence was not binding on the principal.

6. BROKERS—DELEGATION OF AUTHORITY.

Where a real estate agent has authority only to sell property, he cannot delegate authority to subagents to make a contract of sale which will bind the principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 7.]

7. SAME—RATIFICATION OF CONTRACT.

A broker, having authority to sell property, procured a deed from the owner with the name of the grantee blank for the represented purpose of looking up the title. A subagent of the broker had found a purchaser and made a contract of sale of the property, communicating the fact to the broker, but the owner never knew of the offer or of the attempted sale by the subagent. *Held*, that the giving of the blank deed did not ratify the sale by the subagent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 29.]

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by the Foss Investment Company against Emma J. Ater for specific performance of a contract for sale of real property, in which O. E. Darling intervened, asking specific performance of another contract for sale of the same property. From a judgment for defendant, plaintiff and intervener appeal. Affirmed.

Boyle, Warburton, Quick & Brockway, for appellant. H. G. & Dix H. Rowland, for intervener. Fogg & Fogg, for respondent.

CROW, J. Action by the Foss Investment Company, a corporation, against Emma J. Ater to enforce specific performance of a contract, by which it is alleged the defendant agreed to sell certain real estate to the plaintiff. O. E. Darling, by complaint in intervention, also sought to enforce the specific performance of a separate and distinct contract, by which he alleged the defendant covenanted to sell the same real estate to him. The defendant denied the making of either contract. Pending the action the real estate was by agreement sold, all the parties stipulating that its proceeds should be awarded to the one succeeding in this litigation. From a judgment in favor of the defendant, the plaintiff and intervener have appealed.

There being two appellants, we will in this opinion allude to the respective parties as plaintiff, defendant, and intervener. The alleged contracts severally pleaded by the plaintiff and intervener being distinct and separate, the trial judge heard and determined the issues as to each of them separately, and we will consider the appeals in the same manner. On the issues arising between the plaintiff, Foss Investment Company, and the defendant, Emma J. Ater, findings were made and entered from which it appears: That the plaintiff, Foss Investment Company, was and is a corporation. That Louis Foss & Co. was and is a copartnership firm consisting of Louis Foss and W. D. E. Anderson, each with a one-half interest, engaged in the real estate business in the city of Tacoma. That in October and November, 1905, the defendant Emma J. Ater, then residing in New York City, was the owner of lot 5 in block 7,522, Tacoma Land Company's addition to Tacoma, Wash. That in October, 1905, Louis Foss wrote Emma J. Ater on a letter head of Louis Foss & Co. as follows: "Emma J. Ater—

Dear Madam: I can sell your lot on No. 5, block 7,522. Please give me your best price, and I can dispose of it if the price is reasonable. Yours truly, Louis Foss." That the defendant answered as follows: "Louis Foss & Co., Tacoma, Wash.—Gentlemen: Your favor referring to sale of lot 5, block 7,522, is just received. I will take \$800.00 net for the lot. I shall be glad to hear from you as soon as possible, as there are now prospective buyers. Very truly, Emma J. Ater. November 3, 1905." That on November 10, 1905, the defendant received at her residence in New York City the following telegram: "Emma J. Ater, No. 32 West 38th St., New York City. Offer accepted. Lot sold. Send abstract. Will forward deed for your signature. Answer. Louis Foss & Co." That in response thereto she sent, on or about November 10, 1905, the following telegram: "Louis Foss & Co., 320 Washington Bldg., Tacoma, Wn. Awaiting guarantee eight hundred cash net. I will send abstract. Emma J. Ater." That afterwards, on the evening of November 11, 1905, the defendant Emma J. Ater received at her residence in New York City a telegram from the Pacific National Bank of Tacoma, reading as follows: "John has deposited \$800, eight hundred dollars, to be paid you on examination of title. Send abstract to us. Wire acceptance." that at the time the telegram was sent it read "Foss" instead of "John." That the words "wire acceptance" were added to the telegram by the bank at the direction of Louis Foss for the purpose of ascertaining whether the deposit in the Pacific National Bank at Tacoma was acceptable to the defendant Ater. That the defendant Emma J. Ater immediately answered the last telegram as follows: "The lot is sold." That at the time the bank sent its telegram to Emma J. Ater it also wrote her as follows: "Emma G. Ater, 32 West 38th Street, New York City—Dear Madam: We inclose herewith confirmation of telegram sent you to-day, and beg to advise you we are holding \$800 to be paid over to you on the examination and satisfactory title to the property referred to in your telegram to Mr. Foss. Upon examination of this title, and if found clear, we will forward deed for you to sign in care of the Chase National Bank of New York City, who will notify you to call and sign the deed, and they will pay you the money. Kindly forward abstract at your earliest convenience." That thereupon Louis Foss sent to Emma J. Ater a deed to be executed by her, and so notified the bank. Whereupon the cashier of the bank wrote her as follows: "Emma G. Ater, 32 West 38th Street, New York City—Dear Madam: Mr. Foss was in this morning and informed me he had sent you a blank warranty deed. This is not in accordance with the arrangement made by the bank, and when we have the abstract examined and find that the property is clear and you can give a good deed, we will forward deed, as per our letter of yesterday,

to the Chase National Bank of New York City, where the money will be paid to you upon your signing and acknowledging a satisfactory deed." That both of the above letters were received by the defendant in due course of mail about five days after their date. That on November 12, 1905, the defendant received from Louis Foss & Co. a telegram as follows: "Property sold to Foss Investment Co. Suit will be commenced unless you execute deed. Answer"—which she immediately answered by telegram as follows: "Deed executed before guaranty received." That the defendant Emma J. Ater never had any oral communication with Louis Foss or Louis Foss & Co. or the Foss Investment Company relative to the lot, nor did she communicate with them in any manner except by letter or telegram. That she had no knowledge, notice, or information that Louis Foss or Louis Foss & Co. had attempted or pretended to sell, or enter into any contract of sale for, the lot, except as shown by the above letters and telegrams. That she never heard of the Foss Investment Company until she received the telegram of November 12, 1905, threatening suit, above set forth. That she had no notice, knowledge, or information as to who were the stockholders in the Foss Investment Company, or as to the relations existing between the company and Louis Foss and Louis Foss & Co. That she never authorized Louis Foss nor said Louis Foss & Co. to make any contract of sale. That she did not intend or contemplate that they or either of them would attempt to make a contract of sale, but that they would at most find a purchaser ready, able, and willing to take the lot at the price of \$800 cash net to her. That she did not give Louis Foss or Louis Foss & Co. any exclusive agency to sell. That at all times during the communications between Louis Foss and Louis Foss & Co. and the defendant above named Louis Foss was a member of the firm of Louis Foss & Co., was president and manager of the plaintiff corporation Foss Investment Company. That he held 998 of the 1,000 shares of the capital stock of the Foss Investment Company. That his wife and daughter each held one of the two remaining shares. That Louis Foss, Louis Foss & Co., and Foss Investment Company at all times during the months of October and November, 1905, had their place of business in the same office. That they were all managed by Louis Foss. That the deposit of \$800 with the Pacific National Bank of Tacoma consisted of two personal checks made by Louis Foss. That any profit which might have resulted from the purchase of the lot by the plaintiff would have inured to the benefit of Louis Foss, his wife and daughter. That all arrangements and negotiations between Louis Foss, Louis Foss & Co., and the Foss Investment Company relative to the transaction were carried on by Louis Foss personally, acting in his several capacities as Louis Foss, as a member of the firm of Louis Foss & Co., and

as president and manager of the Foss Investment Company. That on or about June 11, 1906, all the parties to this action made and entered into a stipulation for the sale of the lot for the sum of \$5,000, the proceeds to be deposited in court, to abide the result of this action, and to be paid to the successful party, and that the lot was then sold for that price.

The first question with which we are met is whether these findings are sustained by the evidence. As to the sending and receipt of the telegrams and letters above mentioned there is no dispute. Although much conflict arose upon other questions of fact, we have concluded after a careful examination of all the evidence that the findings made by the trial judge are supported by its clear preponderance. One of the controlling issues between the plaintiff and defendant is whether Louis Foss, in initiating and conducting the foregoing correspondence with Mrs. Ater, was acting as her selling agent or as purchasing agent for the plaintiff corporation, Foss Investment Company. The trial court, in its conclusions of law, held that he was selling agent for the defendant; that while he was acting as her agent he was, without her knowledge or consent, also acting for himself personally, for the partnership firm of Louis Foss & Co., of which he was a member, and for the plaintiff, Foss Investment Company; and that the defendant Emma J. Ater was not bound by his acts in making the attempted sale. Upon the entire record we feel compelled to sustain this holding. Our view is that the first letter written to the defendant by Louis Foss on October 26, 1905, in which he said, "I can sell your lot," was well calculated to convey to her mind the idea that he only intended to act as her selling agent in finding a purchaser, provided she quoted a reasonable price. He did not advise her that he himself was an intended buyer, nor did he intimate to her that he was acting for himself or any other person in purchasing the lot. The correspondence must have indicated to the defendant that he was acting as her selling agent only, and we hold that as to her he was such agent. This being the fact, he had authority to find a purchaser ready, willing, and able to buy at the defendant's price and upon her terms for cash, but did not have authority to execute to such proposed purchaser a contract of sale that would be binding upon her. *Carstens v. McReavy*, 1 Wash. St. 359, 25 Pac. 471. Louis Foss was selling agent for the defendant, who, as his principal, was entitled to the full benefit of his knowledge, services, and ability. He knew the property was rapidly advancing in market value, but failed to communicate such fact to Mrs. Ater, she being a nonresident and in ignorance of the true situation. About seven months later the lot sold for \$5,000, an advance of 525 per cent. The plaintiff is now endeavoring to obtain this advance which would enure to the

practical benefit of Louis Foss, the agent. He being the selling agent for Mrs. Ater, and at the same time agent for the alleged purchaser, as president and manager of the plaintiff corporation which he substantially owned and controlled, and having failed to disclose such relations to Mrs. Ater, the alleged contract was at her option avoidable. An agent to sell cannot himself become the purchaser directly or indirectly without the knowledge and consent of his principal. Louis Foss, defendant's agent, was so closely identified with, and in such complete control of, the plaintiff corporation, that practically he would have become the sole beneficiary of all profits and benefits that might accrue to the plaintiff as purchaser.

It is not contended, nor is it shown, that Mrs. Ater ever authorized Louis Foss to execute any contract of sale, and we fail to see how it can be successfully contended that any contract was entered into between the plaintiff and defendant which can be specifically enforced in this action. The negotiations, which were made exclusively through the medium of letters and telegrams, fall short of a completed, enforceable contract. In response to the first letter written by Mr. Foss the defendant advised him that her selling price would be \$800 net, and thereupon he wired her: "Offer accepted. Lot sold. Send abstract. Will forward deed for your signature." This answering wire did not advise the defendant who it was that had accepted her offer. She knew nothing of the personality or financial responsibility of the proposed purchaser. Even though her letter of November 3d be construed as an offer to take \$800 net for the lot, such offer could only be accepted by tendering the money. No such tender was made. Mr. Foss' telegram saying "offer accepted" was not, without any tender, such an acceptance as would convert her offer into a binding contract of sale. *Sawyer v. Brossart*, 67 Iowa, 679, 25 N. W. 876, 56 Am. Rep. 371; *Sands & Maxwell Lumber Co. v. Crosby*, 74 Mich. 313, 41 N. W. 809; *De Jonge v. Hunt*, 103 Mich. 94, 61 N. W. 341. Not having received the cash or any tender thereof, Mrs. Ater, who knew of other intending purchasers, wired Louis Foss & Co.: "Awaiting guarantee eight hundred cash net. I will send abstract." This wire shows that she was adhering to her original proposition, the substance of which was to sell for cash only, and that cash was necessary to complete the purchase and bind any bargain. Foss did not then remit the cash to her, but took it upon himself to deposit it with the Pacific National Bank in Tacoma. At his request the bank then wired the defendant for her acceptance of such guaranty. She never made or indicated any acceptance of the same. On the contrary she by wire immediately advised Mr. Foss that the lot was sold, thus terminating the negotiations. The correspondence between the parties conducted in contemplation of a proposed sale by Mrs.

Ater never culminated in an enforceable contract upon her part. Her original offer must be construed as one to sell for \$800 cash net to her in New York. The only attempted acceptance of such offer was communicated by a wire reading "offer accepted," which was transmitted to New York without any tender of cash to complete the acceptance or bind the proposed bargain. No contract was thereafter completed by the subsequent letters and telegrams. Mrs. Ater immediately demanded a guaranty for the \$800, but Mr. Foss, without authority from her, deposited his checks in the Pacific National Bank of Tacoma. At his request the bank cashier added to the telegram advising Mrs. Ater of the deposit the words "wire acceptance." These words amounted to a recognition by Foss and the cashier of the fact that Mrs. Ater had the right to and might accept or reject such proposed guaranty. She was entitled to, and could have demanded, a tender, deposit, or payment of the money or guaranty in New York City. It may have been, and probably was, the intention of Foss to comply with such demand. The negotiations, however, were still pending, and the evidence is that, before any agreement as to the details of payment, tender, or guaranty was made, the negotiations ceased, and Mrs. Ater advised Foss that the lot had been sold. These facts, which are without substantial dispute, dispose of the plaintiff's contention for the existence of a valid contract of sale. The negotiations were never completed. The minds of the parties did not finally meet on the necessary terms and conditions of the proposed sale.

On the issues between defendant Mrs. Ater and the intervenor, O. E. Darling, the trial judge made findings of fact from which it appears: That about October 24, 1902, the defendant Mrs. Ater in writing listed the lot here involved and other property with one W. M. Ostrander, a real estate broker in Philadelphia, Pa., as follows: "I have this 24th day of October, 1902, placed in the hands of W. M. Ostrander, of Philadelphia, Pa., for sale of my property located in Tacoma, Wash., consisting of 20-acre building site, 10-acre farming land and one building lot, said property to be sold for the sum of twelve thousand dollars (\$12,000). I agree to pay unto the said W. M. Ostrander a commission of two per cent. (2 per cent.) of selling price when sale and settlement are made, less the sum of twenty dollars (\$20), which I have already paid him as a retaining fee. I reserve the right to withdraw the property from the said W. M. Ostrander's hands at any time. I further agree that, if the sale of this property be effected by myself or by any person other than the said W. M. Ostrander, I will immediately notify the said W. M. Ostrander of the fact, and will give him the name of the purchaser or purchasers of this property. In witness whereof I have hereunto set my hand and seal the day

and year above written. [Signed] Emma J. Ater." That on October 25, 1905, W. G. Peters & Co., real estate brokers in Tacoma, Wash., executed and delivered to the intervener, O. E. Darling, a purported written contract wherein they, as agents, agreed to sell lot 5 in block 7,522 to O. E. Darling for the sum of \$725, which was increased by a modification of the writing to \$800. That the contract so executed is the contract of sale sought to be enforced by the intervener in this action. That the defendant never had any communication with W. G. Peters & Co. or O. E. Darling. That on November 6, 1905, W. G. Peters & Co. sent the following telegram to W. M. Ostrander: "Offer Ater seven hundred fifty; obtain her contract; wire confirmation"—to which Ostrander replied as follows; the reply being received by Peters & Co. about November 12, 1905: "In reply to your telegram, I am sending New York representative in today to interview the owner of the lot, and hope to have a telegram in your hands confirming a sale at \$750." That on November 9th Ostrander sent the following telegram to W. G. Peters & Co.: "Close deal for Ater lot at seven fifty net." That on the same day he also wrote W. G. Peters & Co. as follows: "Nov. 9, 1905. Messrs. W. G. Peters & Co., 402 Chamber of Commerce, Tacoma, Washington—Dear Sirs: Confirming my telegram of even date will say that Mrs. Ater today accepts an offer that will enable me to deliver the property to you at \$750 net. If you will send me the name of the bank to which the deed can be forwarded for settlement, I will have the proper instrument executed and send it to you at once. I trust this matter can be closed promptly, now that I have Mrs. Ater in shape to do business. I remain, very truly yours, W. M. Ostrander, President." That W. G. Peters & Co. replied as follows: "Nov. 11, 1905. W. M. Ostrander, Philadelphia, Pa.—Dear Sir: In accordance with your telegram of the 9th inst., would say that he have closed the sale of the Ater lot 5, block 7,522, and presume, of course, that they have an abstract of title, and therefore kindly request them to send same to you, which please forward to me. As soon as the title has been examined, or perhaps before, we will send you the deed for execution, with instructions as to drawing on us, with deed attached. We trust you have a contract with her which is binding, so that we will have no delay in closing the sale. Yours very truly, W. G. Peters & Co." That on November 13, 1905, Ostrander wrote W. G. Peters & Co. as follows: "Nov. 13, 1905. W. G. Peters & Co., Tacoma, Washington—Gentlemen: We have received from Mrs. Ater today her abstract of title covering lot 5, block 7,522, and notice that the deed is executed in your favor, and is held by our New York office ready for a settlement, which we can make on a basis of \$750 net to us. If you will advise us the name of the

bank through which you want the settlement made, I will forward at once the deed and abstract, with proper instructions. We secured these papers at the cost of a good bit of effort, there being another agent in the field who offered her \$800 for the same property, and under the circumstances it would be a very great favor if you would so arrange matters that a settlement could be made within thirty days' time. I am, with regards, yours very truly, W. M. Ostrander, President,"—to which W. G. Peters & Co. replied as follows: "Nov. 18, 1905. W. M. Ostrander, Philadelphia, Pa.—Dear Sir: Yours of the 13th inst. received and contents noted. We inclose a deed for the signature of Mrs. Ater, which kindly have executed, as we do not desire the title to pass to us, but to the purchaser of the property, who is named as grantee in the deed inclosed. The deal will be promptly closed as soon as the title has been examined, which will only take a few days, after the receipt of the paper. Kindly draw on us for \$750 through the Pacific National Bank of Tacoma. Trusting you will promptly attend to this, we remain, yours truly, W. G. Peters & Co." That on November 21, 1905, Ostrander also sent the following letter to W. G. Peters & Co.: "Nov. 21, 1905. W. G. Peters & Co., 402 Chamber of Commerce, Tacoma, Washington—Gentlemen: I am sending forward to-day to the National Bank of Commerce, Tacoma, the deed and abstract for the Emma J. Ater lot, this being No. 5, block 7,522, Tacoma Land Company's first addition. The bank will have instruction to deliver the same to you upon the payment of \$750 net, and will allow sufficient time for examining and continuing the abstract to determine title. You will find upon examination of the deed that this has been executed in blank; that is, the grantee's name is omitted. The deed was prepared in this way so that you could make an early settlement and fill in the name of the purchaser when you are ready to complete the deal. We are sending the papers forward in order that as early a settlement as possible can be effected, and would advise you to make every effort to have the purchaser take up the matter at once. We have experienced considerable difficulty in getting this deed from the former owner; and since we have had it she claims that she has had several offers, one of them for \$1,000, and that her agent in Tacoma is threatening service and attachments which may tie up the deal unless your purchaser can act promptly. Hoping that you will make every effort to secure action before any difficulty arises, I remain, yours very truly, W. M. Ostrander, President." That on November 10, 1905, one Wm. C. Moore, the New York representative of Ostrander, pursuant to his instructions, went to defendant at her residence in New York City, and offered her \$700 for the lot, stating that sum to be the best price obtainable. That the de-

defendant was never informed by Peters & Co. or by Ostrander or by his New York representative that a contract of sale had been entered into with O. E. Darling for \$800. That she never authorized or approved any such sale. That she did not know until after the commencement of this action that the alleged written contract of sale had been entered into. That on or about November 10, 1905, the defendant, at the request of Mr. Moore, signed a deed for the lot, without the name of any grantee written therein. That the deed was signed by her on the statement of Moore that it was necessary to enable them to make proper search of the title. That she at the time received from Moore a written certificate to the effect that she would be paid the purchase price on approval of the title. That afterwards the defendant, without any notice or knowledge that Ostrander or any one else had pretended to make or enter into a contract of sale with the intervener, Darling, paid to Mr. Moore, as representative of Ostrander, \$100 for the return of the blank deed, which she had theretofore signed, and in which no grantee's name had yet been inserted, and surrendered the certificate which had been given her when the deed was signed. That she never authorized Peters & Co. or W. M. Ostrander to enter into any contract of sale with the intervener or with any one else, and that the agreement with Darling was never submitted to her. That her approval thereof was never asked or obtained.

These findings, which are clearly sustained by the evidence, support the final judgment entered against the intervener. It nowhere appears that Peters & Co. had any authority to enter or execute any written contract of sale on behalf of the defendant with the intervener, Darling; nor that the agent Ostrander had authority to enter into any such contract or to authorize Peters & Co. to do so. The evidence shows that Ostrander never claimed any such authority. All that he did when he received an offer for the lot was to open negotiations with the defendant by submitting other offers to her for acceptance or refusal. The alleged written contract executed by Peters & Co. expressly recited that it was made subject to approval and ratification by the owner of the property. The undisputed evidence shows that it was never submitted to her for approval, and that she had no knowledge of its existence at any time prior to the commencement of this action. The intervener contends that the court erred in excluding certain letters which he offered in evidence for the purpose of showing certain authority in Peters & Co. as subagents appointed by Ostrander. Without discussing these offers in detail, we hold the letters were immaterial, and that no prejudicial error was committed in this regard. Ostrander had no power to appoint subagents and delegate to them authority to execute a written contract

of sale which would be binding upon the defendant. The intervener further contends that Mrs. Ater executed the blank deed as a conveyance to any purchaser who might be secured by Ostrander, and not as a conveyance to Ostrander himself; that by such deed she ratified the contract of sale made by Peters & Co. as agents, and that, even though Peters & Co. were not her subagents, she thereby accepted their offer made to Ostrander. These contentions cannot be sustained. The deed was never sent to Peters & Co. Mrs. Ater never knew of the offer made by them. They were attempting to make the sale to Darling for \$800. This fact was never communicated to her by them or by any other person. She did not ratify a contract the terms of which were unknown to her. We approve the findings made by the trial court, and hold that they sustain the final judgment.

The judgments entered against the plaintiff and the intervener are in all respects affirmed.

HADLEY, C. J., and MOUNT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

STATE ex rel. LACK v. MEADS.

(Supreme Court of Washington. May 28, 1908.)

COURTS—APPEAL — MANDAMUS—AMOUNT IN CONTROVERSY.

An appeal from a judgment dismissing a mandamus proceeding to compel a city comptroller to issue his warrant for the payment of a claim against the city for \$140.75 will be dismissed; the amount in controversy being insufficient to sustain the appellate jurisdiction of the court.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Mandamus by the state, on relation of P. H. Lack, against John F. Meads. From a judgment dismissing the writ, the latter appeals. Dismissed.

L. C. Whitney, for appellant. C. M. Riddell, J. W. Quick, and C. E. Dunkleberger, for respondent.

PER CURIAM. Some time prior to the 11th day of May, 1907, the city of Tacoma purchased sand and gravel from one C. D. Elmore of the value of \$140.75, for which amount a claim was presented to the city council. After the presentation of the claim, but before its allowance, the claim was assigned to the relator Lack. After the assignment to Lack the city council allowed the claim as presented, and credited the amount on an unpaid judgment held by the city against Elmore. The relator thereupon demanded a warrant for the amount of the claim from the city comptroller, and upon the refusal of that officer to issue the warrant this action was brought in mandamus to compel such issuance. From a judgment

dismissing the mandamus proceeding, this appeal is prosecuted.

The respondent has moved to dismiss the appeal for the reason that the original amount in controversy is not sufficient to bring the case within the appellate jurisdiction of this court. We so held in *State ex rel. Plaisie v. Cole*, 40 Wash. 474, 82 Pac. 749, and *State ex rel. Ide v. Coon*, 40 Wash. 682, 82 Pac. 993.

On the authority of these cases, the appeal must be dismissed, and it is so ordered.

HUTCHINSON et ux. v. MT. VERNON WATER & POWER CO.

(Supreme Court of Washington. May 28, 1908.)

1. PLEADING—CAUSES OF ACTION—SEPARATION—ELECTION.

Where, in an action to establish plaintiffs' right to the waters of a spring, plaintiffs claimed the water as riparian owners on the water course, as appropriators, and also under a contract with defendants, the cause of action was single and indivisible, so that plaintiffs were not required to separately state a cause of action based on each ground, and to elect on which they intended to rely.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1199–1209.]

2. COMPROMISE AND SETTLEMENT—CONTRACT—CONSIDERATION.

Where a contract providing for distribution of the waters of a spring between plaintiff and defendant was entered into in good faith, for the purpose of adjusting and placing beyond dispute the rights and claims of the respecting parties to the water, and plaintiff's claim was at least doubtful, the settlement of the dispute constituted a sufficient consideration for the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Compromise and Settlement, §§ 35–50.]

3. WATERS AND WATER COURSES—RIGHTS OF OWNERS—CONTRACT—FORFEITURE.

Where a contract for the settlement of disputed rights to a water course provided that, in case of forfeiture of defendant's rights, plaintiff's rights should be substantially the same as those guaranteed by the contract, the question of forfeiture was not material.

4. DAMAGES—BREACH OF CONTRACT—INJURY TO CROPS—EVIDENCE.

In an action for injury to crops by defendant's withdrawal of water needed, and to which plaintiffs were entitled, for irrigation, evidence that the net value of plaintiffs' crop raised in each of certain specified years was less by a stated sum than it would have been had plaintiffs been furnished water as agreed was competent, and showed substantial damage from defendant's breach of contract.

Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Suit by H. R. Hutchinson and wife against the Mt. Vernon Water & Power Company. Judgment for plaintiffs for less than the relief demanded, and both parties appeal. Modified and affirmed.

Willis B. Herr and Thomas Smith, for plaintiffs. Million, Houser & Shrauger, for defendant.

RUDKIN, J. The plaintiffs are the owners of a small tract of land in the vicinity of Mt.

Vernon, in Skagit county, devoted largely to farming and gardening. On the 6th day of August, 1901, the plaintiff H. R. Hutchinson filed in the office of the county auditor a notice of appropriation of the water of a certain spring situated on lands now owned by the defendant, and flowing through a ditch or brook over and across the lands of the plaintiffs, to the extent of 432 cubic inches per second of time, for the purpose of irrigating the lands above described. Since the filing of this notice the plaintiffs have diverted and used the water flowing from the spring for irrigation and domestic purposes to the extent of their appropriation, except in so far as their right to such use has been interfered with by the acts of the defendant. Some time prior to the 29th day of October, 1902, the defendant was incorporated for the purpose of supplying the inhabitants of the town of Mt. Vernon with water for domestic purposes, and on the latter date the plaintiffs and the defendant entered into a written contract defining and regulating the rights of the respective parties to the use of the water flowing from the spring in controversy. This contract recited the filing of notice of appropriation by the plaintiffs as above set forth, the filing by the defendant of a water right on the water flowing from the same spring in excess of the plaintiffs' claim, should there be any such excess; that the defendant was about to erect a water system under a franchise from the town of Mt. Vernon, and was desirous of securing water for its system from the spring; and that there was a question whether the spring would furnish sufficient water to irrigate the plaintiffs' land and supply the proposed water system. It was therefore agreed between the parties that the defendant might use sufficient of the water flowing from the spring to supply its system, but should at all times permit a sufficient overflow through the usual course or channel to irrigate the garden and celery garden of the plaintiffs to the extent of their appropriation as theretofore made; that, if the supply was not sufficient for the needs of both parties, the defendant should pump water from the Skagit river in sufficient quantities to make up the deficiency in the plaintiffs' appropriation, and discharge the same into the usual water course running from the spring; that the defendant should lay a pipe line from its reservoir to the plaintiffs' premises, and furnish water for certain purposes free of cost; that the plaintiffs did not relinquish any of their rights as appropriators; that a forfeiture might at any time be declared for the failure of the defendant to comply with the provisions of the contract; that, in case of forfeiture, the defendant would permit water to flow from the spring in its usual channel sufficient in quantity to supply the needs of the plaintiffs and to the extent of their appropriation; and that the contract should

continue in force for the period of 30 years. The defendant thereafter installed its water system and for some time complied with the provisions of the above contract, but during the years 1904, 1905, and 1906 the quantity of water permitted to flow through the plaintiffs' premises was materially less than called for by their appropriation and their agreement with the defendant. This action was instituted for the purpose of establishing the right of the plaintiffs to the use of the water in controversy, for an injunction, and for damages. From a judgment awarding a permanent injunction as prayed and for nominal damages, both parties have appealed, the plaintiffs from that portion of the judgment denying them substantial damages, and the defendant from the entire judgment. Inasmuch as both parties have appealed, we will refer to them as designated in the court below.

In their complaint the plaintiffs based their right or title to the water on three grounds: (1) As riparian owners on the water course through which the water flowed; (2) as appropriators; and (3) under the contract as above set forth. The defendant moved the court to require the plaintiffs to separately state their several causes of action, and later to require the plaintiffs to elect on which of their several causes of action they intended to rely. These motions were properly denied. In actions to recover or establish rights in property, each independent source through which a plaintiff claims does not constitute a separate cause of action. The ultimate facts upon which the plaintiffs relied for a recovery in this case were their right or title to the water, and the defendant's wrongful interference therewith. This cause of action was one and indivisible, regardless of the sources through which the plaintiffs might claim. The answer of the defendant attacked the plaintiffs' right as riparian owners and as appropriators on the ground that there was no water course to which riparian rights could attach, or from which an appropriation could be made. The answer further attacked the contract set forth in the complaint on several grounds: (1) Because the contract was executed in the name of the corporation without its authority; (2) because there was no consideration therefor; (3) because the contract had been forfeited and terminated by the act of the plaintiffs; and (4) because of a settlement and adjustment of all rights growing out of the contract.

The court below held that the rights of the parties were fixed by the contract, and, if this conclusion is correct, we need not consider the rights of the plaintiffs as riparian owners or appropriators, except in so far as such rights may constitute the consideration for the contract itself. The objection that the contract was not executed by authority of the corporation finds no support in the record and was abandoned at the trial. The claim that there was no consideration for the

contract is equally without merit. The contract was manifestly entered into in good faith, for the purpose of adjusting and placing beyond dispute the rights and claims of the respective parties to the water now in controversy; and the general rule in regard to such settlements in this: "The rule is well settled that an agreement of compromise is supported by a sufficient consideration where it is in settlement of a claim which is unliquidated, where it is in settlement of a claim which is disputed, or where it is in settlement of a claim which is doubtful. There are cases to the effect that, in order to support a compromise in avoidance of litigation, the claim must be an actual one, founded upon a colorable right about which there is room for honest doubt and actual dispute, and with some legal or equitable foundation, and not one which is without foundation, and is known to be so, or is in its nature an illegal claim out of which no cause of action can arise in favor of the person asserting it. The usual test, however, as to whether a compromise and settlement is supported by a sufficient consideration is held to be not whether the matter in dispute was really doubtful, but whether or not the parties bona fide considered it so, and that the compromise of a disputed claim made bona fide is upon a sufficient consideration, without regard to whether the claim be in suit or not. The law favors the avoidance or settlement of litigation, and compromises in good faith for such purposes will be sustained as based upon a sufficient consideration, without regard to the merits of the controversy or the character or validity of the claims of the parties, and even though a subsequent judicial decision may show the rights of the parties to have been different from what they at the time supposed. The real consideration which each party receives under such a compromise is, according to some authorities, not the sacrifice of the right, but the settlement of the dispute." 8 Cyc. 505 et seq. This rule is amply sustained by the authorities, and the testimony brings the case at bar clearly within it. The contract recites the right or title under which the plaintiffs claim, and that such right or title is prior and superior to that of the defendant. The proof clearly shows that the contract was entered into in good faith for the purpose of adjusting and settling disputed claims, and that the claim of the plaintiffs was at least doubtful. Further than this we are not required to go. The claim of forfeiture is not sustained by the testimony, but, in any event, the contract provided that the rights of the plaintiffs after forfeiture should be substantially the same as those guaranteed by the contract, so that the question of forfeiture is not material. The claim that there was a subsequent settlement and adjustment of all differences growing out of the contract is not sustained by the testimony, and, upon the entire record, we are sat-

issued that the judgment of the court below is clearly right, in so far as the appeal of the defendant is concerned.

The plaintiffs have appealed from the refusal of the court to award them more than nominal damages. On the question of damages, the court made the following findings:

"(4) That plaintiffs' lands hereinbefore described lay about a quarter of a mile south of said spring, and about nine acres of the same are in a high state of cultivation, and for a number of years last past have been used for gardening and the raising of celery and general gardening, and for such purposes during the dry season of the year require irrigation in order to produce crops of such character."

"(8) That during the years 1904, 1905, and 1906 the defendant, in violation of the terms of said agreement, failed and refused to furnish the water needed by plaintiffs, and at their request, either for purposes of irrigation, or domestic purposes, or for their stock, and failed to supply said water during the dry season of said years, as provided in said contract, to the full amount required and requested by said plaintiffs, said amount so required and requested not being in excess of the amount of said appropriation, and a short time prior to the bringing of plaintiffs' action said defendant entirely repudiated said contract and does now repudiate the same, and refuses to carry out the terms thereof and supply plaintiffs with water, according to its terms and conditions, either for irrigation purposes or for domestic use. That during said periods defendant appropriated substantially the whole of the waters of said spring to its own use, and now threatens to continue to do so, in violation of said agreement."

"(7) That during the years 1904, 1905, and 1906 the defendant, during a portion of the cropping season of said years, failed and refused to furnish the water as required by plaintiffs in pursuance of the terms of said contract upon their request, and, by reason of such failure, the celery and other garden products of said plaintiffs failed to properly mature, and they sustained damages each of said seasons by reason thereof, but the court finds that the evidence in the case is insufficient to enable the court to fix the amount, or make any estimate as to the damages sustained, for the reason that the evidence introduced in support thereof was not competent or proper evidence, and formed no basis for the court to make any independent estimate as to the damages sustained. The court therefore finds that plaintiffs are only entitled to recover in this case nominal damages, in the sum of \$5. That, if the evidence is competent and legally sufficient as proof of damages, then the court finds that thereunder plaintiffs would be entitled to recover damages for the three years 1904, 1905, and 1906 in the total sum of \$2,160. To all of

which defendant excepts and its exception is by the court allowed. To the court's finding that the proof of damages is insufficient to establish any damages other than nominal damages plaintiffs except, and their exception is by the court allowed."

The conclusion of the court that the testimony was not competent to show more than nominal damages is in our opinion erroneous. The proofs clearly show that the crops were materially damaged during each of the years 1904, 1905, and 1906 for lack of water, and the court so found. One of the plaintiffs testified to the character of the crops grown, the injury to the crops for lack of water, and that the net value of the crop for 1904 was \$600 less than it would have been had the plaintiffs been furnished water under the contract as agreed; that the net loss for 1905, was \$700, and for 1906 \$860. These several items doubtless made up the \$2,160 referred to in the court's findings. This testimony was clearly competent, and showed substantial damages. The finding or conclusion of the court "that, if the evidence is competent and legally sufficient as proof of damages, then the court finds that thereunder plaintiffs would be entitled to recover damages for the three years 1904, 1905, and 1906 in the total sum of \$2,160," is peculiar to say the least. Whether the testimony was competent presented a question of law, but whether it was legally sufficient as proof presented a question of fact upon which the court below should have found. While we are satisfied that substantial damages resulted to the plaintiffs, we are not willing to accept the estimate of one of the parties as to these damages where such estimate is largely a matter of opinion.

We are convinced, however, that the plaintiffs suffered damages in at least the sum of \$500 on account of the deprivation of water for the years referred to through the wrongful acts of the defendant, and the judgment will be modified accordingly. As thus modified, the judgment must be affirmed, and it is so ordered. The plaintiffs will recover their costs on appeal.

HADLEY, C. J., and FULLERTON, DUNBAR, CROW, MOUNT, and ROOT, JJ., concur.

IN RE MOFFITT'S ESTATE. (S. F. 4,896.)
(Supreme Court of California. May 20, 1908.)
CONSTITUTIONAL LAW—VESTED RIGHTS—ESTATES AND INTERESTS IN PROPERTY.

The inheritance tax law, declaring that all property, which shall pass by will or by the intestate laws, shall be subject to the tax therein prescribed, is not, where applied to tax the surviving wife's share of the community property, in violation of any provision of the Constitution of 1849 or 1879, or of Const. U. S. art. 1, § 10, or the Fourteenth amendment, since under Const. Cal. 1849, art. 11, § 14, requiring the Legislature to pass laws defining

the wife's right in the community property, and the laws passed in pursuance thereof, the interest of the wife is a mere expectancy, like the interest of an heir in the property of his ancestor.

On petition for rehearing. Petition denied. For former opinion, see 95 Pac. 653.

PER CURIAM. Upon petition for rehearing it is urged that the decision in this case fails to dispose of the federal question, which appellant presented in argument. To the decision rendered the following is therefore added and made a part thereof:

Appellant further shows that the community property here under consideration was acquired under the Constitution of 1849, and the laws referable thereto. That Constitution, after defining the separate property of the wife, declared (article 11, § 14): "Laws shall be passed more clearly defining the rights of the wife in relation, as well to her separate property, as to that held in common with her husband." Upon these facts appellant argues that the Constitution of 1849, together with the laws passed in conformity with its direction, "conferred upon the wife an equal interest with her husband in the common property," and it is said that while the Constitution of 1879 is silent upon the matter of the community property, nevertheless, neither that Constitution nor any new laws passed under it can deprive the wife of her interest in the community property, guaranteed and secured to her by the Constitution of 1849, and the question is asked: "Shall this court do what the Legislature cannot do and take from her a vested right?" Appellant's counsel answer this question to their own satisfaction by invoking the aid of article 1, § 10, and amendment 14, § 1, of the Constitution of the United States.

It cannot be doubted, indeed it is conceded, that the Constitution of 1849, in speaking of property "held in common with her husband," does not refer to tenancies in common, as known to the common law, but does mean property of the character, now universally designated "community property." Thus the declaration of the Constitution of 1849, above quoted, amounts to no more than a mandate to the Legislature to define and prescribe the rights of the wife in the property of the community. The Spanish-Mexican civil law was, of course, the law in force in California at the time of its cession by Mexico to the United States, and it was the design of the Constitution of 1849 to preserve, so far as might be, to the wives of the inhabitants of the new state (most of whom were at that time former citizens of Spain or Mexico) the rights to the community property which they had enjoyed under the Mexican rule. But even under the Spanish-Mexican civil law the wife had no vested estate in the community property. She had rights which may be loosely described as "vested," in the sense that the

person to whom the rights belonged was not doubtful or uncertain, but positive and known. In this sense her rights were vested, but those rights never amounted to an estate. She became vested with an estate only (under certain contingencies) upon the dissolution of the marriage, or upon the death of the husband, otherwise, as sums up Ballinger, after review of the system, "her interest seems to be a mere expectancy during coverture, similar to that under the French system." Ballinger on Community Property, p. 29. And, says the Supreme Court of Louisiana (Boyer's Succession, 36 La. Ann. 506): "The wife has, during the marriage, no vested proprietary interest in any property composing the community, but only on inchoate right which entitles her to the hope or expectation that, if she survives her husband, she can receive or own one-half of the property that may be left after payment of the community debts." And, again, says Platt (Property Rights of Married Women; see Fallbrook Ir. Dist. v. Abila, 106 Cal. 362, 39 Pac. 794): "The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property vests in the husband, and for all practical purposes he is regarded by law as the sole owner." But passing from the enunciations of these writers, learned in the law on the subject, we may come directly to the declarations and adjudications of our own court under the Constitution of 1849 and the laws passed in accordance with its mandate, and we find Chief Justice Field, whose study of this Spanish-Mexican system was as profound as his mastery over it was complete, declaring "the interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor." Van Maren v. Johnson, 15 Cal. 308. Soon thereafter Mr. Justice Cope, speaking for the court in Packard v. Arellanes, 17 Cal. 525, says: "So long as the community exists her interest is a mere expectancy, and possesses none of the attributes of an estate, either at law or in equity. This was held in Van Maren v. Johnson, before referred to, where the interest of the wife was compared to that which an heir may possess in the property of his ancestor. This same doctrine prevails in Louisiana, and appears to be an established principle of the civil and Spanish law." And, again, Mr. Justice Thornton, speaking for the court in Greiner v. Greiner, 58 Cal. 119, says: "The interest of the wife during the same period [coverture] was a mere expectancy, like the interest which an heir may possess in the property of his ancestor."

It is thus apparent that the construction put upon the Constitution of 1849, and the laws passed thereunder, is identical with that declared in Estate of Burdick, 112 Cal. 387, 44 Pac. 734, and Spreckels v. Spreckels.

kels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170. The Constitution of 1879 does not, as did the Constitution of 1849, command the Legislature to pass laws defining the wife's rights in the community property because, as for 30 years those laws had been upon the statute books, and as the rights under those laws had been from a very early date judicially determined and settled, no need existed in the new Constitution to call for legislative action upon the matter. For these reasons it is impossible to perceive where or how the inheritance law under consideration does violence to any provision of the Constitutions of California of 1849 or 1879, or to any provision of the Constitution of the United States.

Rehearing denied.

153 Cal. 382

CASTRO v. ADAMS et al. (S. F. 4,722.)

(Supreme Court of California. April 27, 1908.

Rehearing Denied May 27, 1908.)

1. ADVERSE POSSESSION—ACTUAL POSSESSION—EVIDENCE.

In an action to quiet title to land, it appeared that in November, 1853, plaintiff conveyed the land by deed, at which time he lived in his "adobe house," and that at the time of the trial in September, 1891, he lived in the same house, and that besides himself and his brother there were in 1853 other persons "in possession of a portion of this ranch." There was given in evidence a petition of plaintiff and another filed with the board of land commissioners in May, 1852, which alleged that they were in 1852 in possession of the ranch, and a decree of the land commission of July 3, 1855, confirming the claim of the petitioners under a Mexican grant. The ranch comprised some 20,000 acres, and there was nothing to show that the house was situated on the ranch, or, if it was, that plaintiff ever occupied any of the land outside the house. *Held*, that the evidence was insufficient to show title to the ranch by adverse possession at the time of the trial.

2. QUIETING TITLE—ACTIONS—LACHES.

A mortgage for the purchase price of property provided that the price was to be paid as soon as it should be realized by sales of the land made by the mortgagors, and that they should pay to the mortgagees the proceeds of sales until the whole sum was paid. No time was prescribed within which sales were to be made. *Held*, that the law implied an understanding that it should be within a time that would be reasonable under the circumstances, and in an action by the holder of the mortgage to recover the land after a delay of over 35 years, where it is alleged that the land was sold to about 200 persons, some of whom are unknown, but it does not appear from the pleadings or evidence when the sales were made, and no explanation is made of the inability to be more explicit as to the conveyances, their dates, parties, prices realized, and the disposition of the purchase money, or any circumstances excusing the delay in bringing suit, equity will refuse to grant relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 63.]

3. TRUSTS—VIOLATION OF TRUST.

Where owners of land conveyed it and received a mortgage for the purchase money, which was to be repaid as the mortgagors realized from sales of the land, if a constructive trust in the land was established in favor of

the mortgagees, it arose because of the existence of confidential relations among the parties and the violation of the agreement to carry out an express parol trust to sell the land and pay part of the proceeds to the mortgagees, and the breach of the agreement would start the statute of limitations as to the constructive trust, which would begin to run against its enforcement after the expiration of a reasonable time for the sale of the land.

Department 1. Appeal from Superior Court, Contra Costa County; J. V. Coffey, Judge.

Action by Victor Castro against Edson Adams and others, in which Clinton C. Tripp filed a cross-complaint. Judgment of nonsuit against plaintiff and cross-complainant, and they appeal separately. Pending appeal, plaintiff died, and his executrix was substituted. Affirmed.

Richard P. Henshall and Galpin, Elkins & Frost, for appellants. Charles E. Wilson and W. S. Tinning, for respondents.

SHAW, J. This action was begun on August 8, 1888. The amended complaint states a cause of action against a large number of persons, to quiet title to a tract of land, comprising a Mexican grant known as "Rancho el Sobrante." It alleges that the plaintiff is in possession and is the owner in fee of the lands. Clinton C. Tripp filed a cross-complaint, alleging that he is the owner and holder of a mortgage upon the land for \$40,000, executed by former owners in November, 1853, which is due and unpaid, and asking for a foreclosure thereof. The complaint and cross-complaint were each unverified, and the respective adverse parties thereto answered by a general denial and also set up the several statutes of limitations which the respective defendants deemed a bar to the action. The cause came on for trial. The plaintiff and cross-complainant each introduced evidence and rested, whereupon, on motion of the adverse parties, the court gave judgment of nonsuit against both the plaintiff Castro and the cross-complainant Tripp. The appeals from this judgment are taken by Tripp and Castro separately. The judgment was rendered on September 25, 1891, but for some unexplained reason it was not entered until March 21, 1906. Victor Castro had died in the meantime, and the appeals in his behalf are taken by Julia B. Galpin, as executrix of his will and as his successor in interest. A bill of exceptions showing the evidence taken at the trial was settled and filed on September 12, 1893.

The plaintiff offered evidence tending to show that prior to November, 1853, he and one Juan Jose Castro were the owners of the land, under a grant of the Mexican government made in 1841, and that proceedings were pending before the United States land commissioners, in 1853, to have their grant confirmed and obtain a patent for the land from the United States. He then introduced a deed executed on November 23, 1853, by

himself and Juan Jose Castro, whereby they conveyed the lands to John B. Frisbie and Ramon De Zaldo. He also introduced another instrument, executed on the same day as the deed, by Frisbie and De Zaldo to the two Castros, purporting to mortgage to the Castros the same land to secure the payment of the sum of \$40,000 by them to the Castros as soon as that sum should be realized from sales of the land to be made by the said mortgagors. Tripp claims as the holder of this instrument.

The motion for nonsuit as to the plaintiff was upon the ground that the evidence was insufficient to establish title in him. The only title he ever had was conveyed to Frisbie and De Zaldo by the deed above mentioned. The instrument executed on the same day by Frisbie and De Zaldo to him and Juan Jose Castro was merely a mortgage and vested no title or interest in the land in the mortgagees. This proposition was settled by the decision in the case of *Adams v. Hopkins*, 144 Cal. 32, 77 Pac. 712, a case to which the present appellants were parties and in which they asserted the same rights in this land under the same instruments. There is no evidence sufficient to show that any title or interest in the land ever thereafter became vested in the plaintiff.

In the briefs it is asserted that there was evidence that he was in possession at the time the action was begun, and it is suggested that this possession is *prima facie* evidence of title. The plaintiff testified that in November, 1853, at the time the deed was executed, he lived in a house on the San Pablo Road in Contra Costa county, which he described as "my adobe house," and that, at the time of the trial, in September, 1891, he lived in the same house, and that "besides myself and my brother, Juan Jose Castro, there were in 1853 other parties in possession of a portion of this ranch." There was also given in evidence a petition of plaintiff and Juan Jose Castro, filed with the board of land commissioners in May, 1852, which alleged that they were then in possession of the ranch, and a decree of the land commission, made July 3, 1855, confirming the claim of the petitioners under the Mexican grant. This was all the evidence tending to show title by possession. The statement of Castro as to present possession was a mere incidental remark, and referred only to a house in which he lived on the San Pablo Road. The ranch comprised some 20,000 acres, and there is nothing to show that the house was situated on the ranch, or, if it is situated thereon, that he ever occupied a foot of the land outside of the house. The petition to the land commissioners and the decree of that board were introduced to show a confirmation of the title under the Mexican grant, and not to establish possession. It is not shown who were parties to the proceeding, and the decree would not be evidence of possession

against persons who were not parties. The statements in the petition refer only to the possession in 1852, and not afterward. The trial took place nearly 40 years after that date. There is no presumption that he continued in possession after making the deed of November 23, 1853. It is clearly apparent from all these circumstances, and from the entire case as presented by the record, that there was no real attempt in the court below to show title by proof of possession. The evidence on the subject is much too vague and shadowy to justify a reversal of the judgment of nonsuit. The nonsuit was properly granted as to the plaintiff.

The nonsuit as to Tripp was granted on the ground that the evidence showed no title in him, that his right to foreclose the mortgage of Frisbie and De Zaldo, conceding him to be the holder thereof, was barred by the statute of limitations, and that the evidence showed that he was not the owner or holder of the mortgage. The mortgage set forth in the cross-complaint provided that the \$40,000 was to be paid "as soon as the same shall be realized from sales made by" the mortgagors of the ranch lands, and that the mortgagors should pay over to the Castros the proceeds of sales from the ranch, until the whole sum was paid. Any sum of money received upon a sale of any part thereof was due to the Castros as soon as it was received by Frisbie and De Zaldo. No time was prescribed wherein sales were to be made by them. The law would imply an understanding that it should be within a time that would be reasonable under all the circumstances. The cross-complaint alleges that Frisbie and De Zaldo "subsequently" made conveyances whereby they conveyed the property to the numerous defendants, some 200 in all, some of whose names were unknown, and it does not state when these conveyances were made, whether in separate tracts to the respective defendants, or jointly to all by several conveyances of different interests; nor does it give any explanation of the cross-complainant's inability to make more explicit statements as to the conveyances and parties, the dates when they were made, the prices realized and the disposition of the purchase money, or any circumstances which would excuse the delay in bringing the action. The evidence is also devoid of any such explanation. There was a delay of over 35 years. If it is conceded, or assumed, in the absence of such explanations, that a reasonable time might have extended to a period as long as five years after the execution of the instrument, the statute would begin to run at the end of that time, and the action would have been barred seven times over by the statute of limitations. Both the cross-complaint and the case as established on the trial indicate that the suit is a stale demand upon which equity should refuse to grant any relief.

It is argued that the transaction, as ex-

plained by Castro, was of such a nature that a constructive trust in the land was established in his favor. This, if true, would not avoid the bar of the statute nor remove the laches. If a constructive trust arose at all by virtue of that transaction, it was because Frisbie and De Zaldo occupied fiduciary or confidential relations toward Castro and violated an agreement to execute an express parol trust to sell the land and pay a part of the proceeds to Castro. Equity might raise a constructive trust in favor of Castro, upon the failure of the grantees in the deed to perform the void parol trust, if confidential relations did exist as claimed. But, in such case, the breach of the parol agreement would at once set in motion the statute of limitations as to the constructive trust. They would be required to sell the land within a reasonable time. Their conceded failure to pay over the money within the extreme period of 35 years, with no showing of any reason for the delay, in connection with the averment that they sold all the property at some indefinite time after the inception of the trust, furnished at least presumptive evidence that the constructive trust and the obligation to pay had arisen, and that the bar of the statute of limitations and of the equitable doctrine of laches began to run against the enforcement of it many years before the period prescribed by the statute and the rules of equity.

There is no evidence in the record that the patent for the ranch from the United States was ever issued in pursuance of the decree of confirmation. The case is therefore to be decided upon the basis of the equitable rights and titles of the appellants, without regard to the issuance of such patent. The arguments based upon the fact that the patent was of recent issue are without foundation and must be dismissed without further consideration.

All the rights involved and asserted by the appellants here were asserted by them in an action in the same court, to which they were parties, for the partition of the same land, entitled *Adams v. Hopkins*. The complaint in that action was filed in 1888, a few days before the beginning of this action. That action was tried and an interlocutory decree of partition was made and entered therein denying any relief to the appellants in this action. They appealed from that decree to this court. The same points and questions that are presented upon these appeals were presented upon the appeals in that case, were elaborately argued, and were given prolonged consideration by this court; a rehearing having been twice granted in the case. It was finally decided adversely to Castro and Tripp on all points, and the judgment was finally affirmed on July 1, 1904. *Adams v. Hopkins*, supra.

The judgments of nonsuit are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

153 Cal. 411

WENDLING LUMBER CO. v. GLENWOOD LUMBER CO. (S. F. 4,607.)

(Supreme Court of California. April 27, 1908.
On Rehearing, May 27, 1908.)

1. APPEAL AND ERROR—SCOPE OF REVIEW— GROUNDS OF MOTION FOR NEW TRIAL—EX- CEPTIONS TO RULE.

If an order granting a new trial was warranted on any ground on which the motion was based, it will be affirmed on appeal, notwithstanding the order was not based on that ground, except when the trial court expressly excludes the ground of insufficiency of evidence as a basis for its action, in which case, if the evidence is conflicting, that ground cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3409-3413.]

2. SALES—VALIDITY—FRAUD—EFFECT.

Where a sale of personal property is procured by fraud, the ownership of the property is not changed, no title passes to the buyer, and the seller retains his right to the property, unless, after discovering the fraud, he assents and ratifies the act of sale, either positively, or by such delay as would authorize the inference of assent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 65-85, 115-117.]

3. SAME—REMEDIES—FORM.

Where property is purchased by fraud, the defrauded party has a remedy, either by trover, replevin in the detinet, trespass, or replevin in the cepit, at his election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 890.]

4. SAME—RESALE BY FRAUDULENT PURCHASER—EFFECT.

One acquiring property from a fraudulent purchaser, under circumstances preventing him from being a purchaser in good faith for a valuable consideration, is in no better position than the original fraudulent purchaser, and the defrauded party has the same remedy against him as against the original purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 607, 608.]

5. TROVER AND CONVERSION—PLEADING—NECESSARY ALLEGATIONS.

In actions for the conversion of personal property procured by fraud, it is unnecessary to allege the fraud, but it is sufficient to declare generally, and if the action is brought on the theory that the seller is the owner and entitled to possession, and that defendant unlawfully withholds possession, or has converted it to his own use, the general allegations of ownership and right to possession and unlawfully withholding or conversion are sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 197, 198.]

6. REPLEVIN — PLEADING—ISSUES—FRAUDULENT PURCHASE.

A plaintiff is not required to anticipate any defense, and the fact that defendant holds property because of a valid sale, or because acquired through a bona fide purchase from a fraudulent vendee, is a matter of defense in an action of replevin, and may be met by proof that the sale was void because of fraud, without any allegation of fraud in the complaint.

7. TRIAL—RECEPTION OF EVIDENCE—ORDER OF PROOF.

Where plaintiff in an action of replevin alleges his ownership and right to possession of property, which defendant claims to own, through a valid sale or a bona fide purchase from a fraudulent purchaser, though proof of fraud in the illegal sale is not a part of plaintiff's prima facie case, and is available only in reply, it is a mere matter of order of proof,

and admission of evidence of fraud in the sale in support of plaintiff's case is not error.

8. APPEAL AND ERROR—MOTIONS FOR NEW TRIAL—INSUFFICIENCY OF EVIDENCE.

To justify the Supreme Court in interfering with an order granting a new trial, on the ground of insufficiency of evidence, the case must be such as to require a holding that a verdict for the moving party would not have found sufficient legal support in the evidence; for if the evidence would have supported such a verdict, the trial court has absolute discretion, and it is his duty to grant a new trial if he is not satisfied with the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3860-3876.]

9. SAME—MOTION GRANTED BY OTHER THAN TRIAL JUDGE.

The fact that the judge who heard and granted a motion for a new trial was not the one who presided at the trial does not affect the power of the Supreme Court, in relation to an order granting a new trial, in the case of insufficiency of evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3860-3876.]

10. SALES—FRAUDULENT PURCHASE—BURDEN OF PROOF.

In replevin by a seller, the burden of proving fraud in procuring the purchase is upon plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 122.]

11. FRAUD—EVIDENCE—PRESUMPTION.

Except where confidential relations are involved, the presumption of law is in favor of honesty and fair dealing, and the evidence in support of a claim of fraud must do more than to create a suspicion thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 46, 56.]

Department 1. Appeal from Superior Court, Santa Clara County; Hiram D. Tuttle, Judge.

Action by the Wendling Lumber Company, a corporation, against the Glenwood Lumber Company, a corporation. From an order granting a new trial, plaintiff appeals. Affirmed.

Louis H. Brownstone and B. A. Herrington, for appellant. Jackson Hatch and Walter H. Linforth, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from an order granting defendant's motion for a new trial, in an action for damages for the alleged conversion of certain lumber. The order granting the new trial was made by the successor of the judge who presided at the trial of the cause, and was expressly made upon the grounds that the evidence was insufficient to sustain the verdict, and that the jury did not follow the instructions of the court. Defendant claims that the order granting a new trial was correctly made, for a reason not specified therein, viz., that the trial court erred in admitting certain evidence. It is true, as claimed by counsel, that in our review of the order we are not confined to the grounds specified therein by the court granting the motion, but will affirm the order, if it was correctly made, upon any ground upon which the motion was based (see *Weisser v. Southern Pac. Ry. Co.*, 148 Cal. 428, 83 Pac. 439, and cases there cited),

the only limitation being that where the trial court has in its order expressly excluded the ground of insufficiency of evidence as a basis for its action, we will not consider that ground, if the evidence was conflicting. We are therefore called upon to determine whether the trial court erred in admitting the evidence referred to. The complaint was in the form ordinarily used in an action for the conversion of personal property, simply alleging the ownership and right to possession by plaintiff of the property on a day named, the wrongful deprival and conversion to its own use of said property by defendant on that day, the market value of said property, a demand for the return of the property, and a refusal by defendant to comply therewith, the consequent damage, and nonpayment of any part thereof. By its answer defendant simply denied each of the allegations of the complaint, except the one as to the value of the property, which it admitted, to the extent of \$4,856.40, which was the amount of the verdict.

The theory of plaintiff's case was that one J. H. Routt, not a party to this action, had obtained such property from plaintiff, by means of certain false representations, willfully made for that purpose, relying upon which plaintiff sold and delivered the property to Routt, that defendant received the property from Routt without giving any valuable consideration therefor, and with full knowledge of the fraud by means of which the same had been obtained, and that plaintiff, upon discovering the fraud, at once repudiated the sale, and, treating it as void because of the fraud, commenced this action for the wrongful conversion of the property. Over the objection of defendant plaintiff was permitted to introduce evidence in support of this theory. It is the admission of this evidence that is alleged to have been erroneous. The objection urged is that, no fraud being alleged in the complaint, the evidence of fraud was incompetent under the pleadings, defendant resting upon the general rule that where fraud is relied on by a party, he must allege it. We are satisfied that this rule is not applicable here. It appears to be thoroughly established that, where a sale of personal property is procured by fraud, the ownership of the property is not changed, and no title passes to the vendee, and the vendor retains his right in the property, unless, after discovering the fraud, he assents to and ratifies the act of sale, either positively or by such delay as would authorize the inference of assent. See *Butler v. Collins*, 12 Cal. 457, and *Amer v. Hightower*, 70 Cal. 440, 11 Pac. 697, and authorities therein cited. As was said in *Butler v. Collins*, supra, and approvingly quoted in *Amer v. Hightower*, supra, "the civil remedies of the party defrauded are clear, viz., trover or replevin in the detinet, or trespass or replevin in the cepit, at his election." One who acquires the property

from the fraudulent vendee under such circumstances that he cannot be held to be a purchaser in good faith and for a valuable consideration is in no better position than the fraudulent vendee, and the defrauded party has the same remedies against him that he had against such fraudulent vendee. See *Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118. It seems clear that in an action brought upon the theory that the vendor is the owner and entitled to the possession of the property, and that the defendant unlawfully withholds possession thereof, or has converted the same to his own use, the general allegations of ownership and right to possession, and unlawful withholding or conversion are sufficient, and will render admissible proof of any facts sustaining such claim. It is elementary that a plaintiff is not required to anticipate in his complaint any defense that may be made by the defendant. See *Canfield v. Tobias*, 21 Cal. 349. The fact that a defendant owns and holds the property claimed because of a valid sale, or because he acquired the same from a fraudulent vendee, in good faith and for a valuable consideration, is purely a matter of defense, and when in such an action a defendant asserts any such claim, plaintiff can meet it by proof that such sale was void because of fraud, without having made any allegation of fraud in the complaint. This is illustrated by the case of *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630, an action to quiet title to land, where the defendant set up in defense an agreement of sale, and plaintiff was allowed to introduce evidence in rebuttal, showing that such instrument was obtained by fraud, without having alleged fraud in the complaint. The court, after saying that plaintiff could not know, when filing the complaint, that the defendant would answer, nor that, if he did, he would claim under the instrument in question, said that the principle governing the case was that stated in *Sterling v. Smith*, 97 Cal. 343, 32 Pac. 320, as follows: "No doubt, when a cause of action rests upon fraud, the facts constituting the fraud must be set up in the complaint; but such was not the case here, for the necessity of proving fraud appeared only after the answer of the defendant. And a plaintiff is in that position with respect to all new matters set up in the answer." The same is, of course, true as to the matters disclosed by evidence, in behalf of a defendant, properly given under denials contained in the answer. It is not correct to say, in a case of the character before us, that the plaintiff's cause of action rests upon fraud. It rests upon his ownership of the property, and the conversion thereof by defendant, and fraud comes in only in reply to the defense that defendant is the owner by reason of an alleged sale by the plaintiff. Technically, proof of fraud as to such sale was not a part of plaintiff's *prima facie* case, and was available only in reply to any claim of defendant based on the sale, but this was

a mere matter of order of proof. It is the general rule that, in actions for the conversion of personal property, where the property has been procured by fraud, it is not necessary to allege the fraud, but it is sufficient to declare generally that the property was wrongfully converted. See 21 *Ency. of Plead. & Prac.* 1087; *Salisbury v. Barton*, 63 Kan. 532, 66 Pac. 618; *Pekin Plow Co. v. Wilson*, 66 Neb. 115, 92 N. W. 176; *Hunter v. Hudson River Co.*, 20 Barb. (N. Y.) 493; *Bliss v. Cottle*, 32 Barb. (N. Y.) 323; *Benesch v. Waggener*, 12 Colo. 534, 21 Pac. 706, 13 Am. St. Rep. 254. In our own case of *Amer v. Hightower*, *supra*, which was an action in replevin, the complaint was apparently destitute of allegation of fraud, and the judgment for defendant was reversed, because of the rejection, by the lower court, of evidence offered by the plaintiff tending to show fraud on the part of defendant in obtaining a bill of sale for and possession of the property. See, also, *Nudd v. Thompson*, 34 Cal. 39; *Summerville v. Stockton Mill Co.*, 142 Cal. 547, 76 Pac. 243; *Conner v. Bludworth*, 54 Cal. 685. If *Burris v. Adams*, 96 Cal. 664, 31 Pac. 565, and *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458, are at all inconsistent with the views herein expressed, in so far as they are so inconsistent they have been modified by *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630. The other cases relied on, with the exception of *Virginia Timber, etc., Co. v. Glenwood Lumber Co.* (Cal. App.) 90 Pac. 48, were clearly cases where the plaintiff's causes of action or the defendant's defense strictly rested on fraud, and the general rule requiring the allegation of the facts constituting the fraud was applicable. *Albertoli v. Branham*, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200, and *Wetherby v. Straus*, 93 Cal. 283, 28 Pac. 1045, are fair examples of this class of cases, each being a case where the claim of the defendant conceded the validity and completeness of a transfer as between the parties thereto, and it was sought to set the transfer aside or have it declared void in favor of creditors, on the ground that it was made with fraudulent intent. An action brought for the purpose of having a specified conveyance annulled on the ground of fraud would doubtless fall in the same class, but this is not such a case. The decision of the District Court of Appeal in *Virginia, etc., Co. v. Glenwood, etc., Co.*, *supra*, is precisely in point, but we are unable to accede to the views of the learned District Court of Appeal therein expressed.

We cannot hold, however, that the trial court was not warranted in granting a new trial on the ground of insufficiency of evidence to sustain the verdict. To justify any interference of this court with an order granting a new trial on the ground of insufficiency of evidence, the case must be such as to compel us to hold that a verdict in favor of the moving party would not have found sufficient legal support in the evidence given on the trial.

If the case be one where a verdict in favor of such moving party would have had such support, the judge of the trial court is vested with absolute discretion in the matter, and, as has been heretofore said by this court, it was his duty to grant a new trial if he is not satisfied with the verdict (*Condee v. Gyger*, 126 Cal. 546, 59 Pac. 261); and this court will not interfere with the action of the trial court in such cases, even if it believes that the weight of the evidence was the other way. The fact that the judge who heard and granted the motion was not the judge who presided at the trial in no degree extends our power in the matter (*Churchill v. Flournoy*, 127 Cal. 355, 362, 59 Pac. 791). The burden was on plaintiff, of course, to establish the fraud on the part of Routt in the purchase of the lumber. The presumption of the law, except where confidential relations are involved, is in favor of honesty and fair dealing, and the evidence in support of the claim of fraud must do more than to create a mere suspicion thereof. See *Levy v. Scott*, 115 Cal. 42, 46 Pac. 892; *Casey v. Leggett*, 125 Cal. 671, 58 Pac. 264. The fraud in this case consisted of various alleged misrepresentations of fact, said to have been material, and upon the faith of which plaintiff claims to have acted in parting with the lumber. We have examined the evidence in regard to these alleged representations; and, so far as they may reasonably be held under the evidence to have been material, we find no reason to doubt that a verdict acquitting Routt of fraud would have had sufficient legal support. It would serve no useful purpose to here enter into an analysis of the evidence, and it is sufficient to say, as has been clearly stated in other cases, that the most that can be said for plaintiff's claim in this regard is that the case presented was one where the evidence on the subject of fraud was conflicting, and the decision of the trial court in the matter is conclusive upon us.

The order granting a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

On Rehearing.

PER CURIAM. In denying a rehearing it is proper to state that what is said in the opinion relative to want of title in the vendee, where a sale of personal property is obtained by fraud, was said entirely with relation to the respective rights of the vendor and vendee. That title passes in such a case, in the sense that the vendee, in good faith, and for a valuable consideration of the fraudulent vendee, takes a good title, cannot be disputed. But as between the vendor and fraudulent vendee, or any person taking from such fraudulent vendee with notice of the fraud or without consideration, the sale may, at the election of the vendor, promptly made, be treated as an absolute nullity.

7 Cal. App. 685

PEOPLE v. EMMONS. (Cr. 52.)

(Court of Appeal, Third District, California.
March 12, 1908. Rehearing Denied by
Supreme Court May 11, 1908.)

1. CRIMINAL LAW—APPEAL—REVIEW—BILL OF EXCEPTIONS.

To be reviewable on appeal any exception taken in a criminal case must be properly authenticated in the bill of exceptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2807.]

2. SAME—WAIVER OF OBJECTIONS—FAILURE TO EXCEPT.

By failing to except to a ruling accused is deemed to waive any objection thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2656.]

3. BRIBERY—FACTS CONSTITUTING OFFENSE—STATE SENATOR.

An indictment for bribery alleging that accused asked and received a bribe as a member of a state senate committee, promising that his official action, vote, and opinion as state senator should be influenced thereby in connection with an investigation by such committee of building and loan associations, shows a public offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bribery, §§ 1-3, 5-8.]

4. CRIMINAL LAW—TRIAL—ORDER OF PROOF.

In a trial for bribery, wherein it was the people's theory that accused and others conspired to extort money from associations for immunity from investigation, declarations by a co-conspirator were admissible against accused, though the conspiracy was not shown until later; the order of proof being within the trial court's discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1012, 1013, 1611.]

5. SAME—EVIDENCE—WRITTEN STATEMENT OF WITNESS—COMPELLING PRODUCTION BY ADVERSE PARTY.

It was not an abuse of discretion in a criminal trial to refuse to require the district attorney to produce a writing containing oral statements made by a witness for the people, where it had only been partly read to the witness, he had not sworn to it, and did not know in whose possession it was, though the writing might have assisted accused in cross-examining witness and in attempting to lay a foundation for his impeachment, especially since no prejudice to accused is shown.

6. SAME—APPEAL—OBJECTION NOT URGED BELOW.

Accused having failed to move to strike out the unresponsive part of an answer, may not complain thereof on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2672-2674.]

7. BRIBERY—EVIDENCE—CONSPIRACY.

In a trial for asking and receiving a bribe as a state senator, wherein it was the people's theory that accused and others conspired to extort money from associations for immunity from investigation, witnesses for the people could testify what they did after conversations with a co-conspirator; the testimony not being improper as self-serving or hearsay, but being admissible on the issue whether the witnesses were real or feigned accomplices and to trace the money received as a bribe; the people contending that the witnesses were not accomplices, but that they were engaged in a scheme to expose the conspirators, while accused claimed they had a motive in discouraging an investigation of the associations, and were actual participants in the bribery.

8. CRIMINAL LAW—FEIGNED ACCOMPLICES.

One who feigns to be an accomplice in the commission of an offense to detect the offender need not take an officer of the law into his confidence to avoid an imputation of criminal intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 71, 79.]

9. SAME—CRIMINAL INTENT—NECESSITY.

Where persons did not suggest nor encourage a conspiracy by state senators to extort a bribe, but laid a trap to apprehend and punish the conspirators on learning of the conspiracy, they were guilty of no offense in feigning to be accomplices.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 21, 79.]

10. WITNESSES—IMPEACHMENT—CREDIBILITY—EVIDENCE—ADMISSIBILITY.

In a trial for asking and receiving a bribe to secure to certain associations immunity from legislative investigation, accused could not show what an association's books showed respecting dealings of one of its officers with it as affecting the credibility of witnesses for the people; the officer not testifying, and not appearing to have influenced any witness, and no witness appearing to have a motive to prevent a disclosure of the association's affairs.

11. SAME—FOUNDATION.

If accused sought to discredit the people's witnesses on the ground of their interest or bias, he should have laid a foundation by suitable cross-examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1200.]

12. CRIMINAL LAW—NEW TRIAL—SEPARATION OF JURY—EFFECT.

A conviction of bribery should not be set aside because, after the court had made an order requiring the jury to be kept together, as expressly authorized by Pen. Code, § 1121, the jury were allowed to separate during the trial, on accused's showing that a juror was seen talking to an outsider and was heard to say, "Well, ask him," that a deputy sheriff and another juror were seen in a store together, and afterwards drove away together, and that another juror was seen in a crowd at a park separated from the other jurors, where counter affidavits showed that the separations were for innocent purposes, and that the jurors did not discuss the case with outsiders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2257-2262.]

13. SAME—PREJUDICE—BURDEN OF PROOF.

Where a jury separates without leave of court after a criminal case has been submitted to them, the burden is upon the prosecution to show that accused has not been prejudiced thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2385.]

14. SAME—USE OF INTOXICANTS.

Evidence held insufficient to show that jurors in a criminal case were guilty of misconduct by excessive drinking of intoxicants during the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2386.]

15. SAME—APPEAL—ESTOPPEL TO ASSERT ERROR.

One may not complain of error in an instruction given at his request.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3007-3009.]

16. SAME—INSTRUCTION NOT SUSTAINED BY EVIDENCE—REFUSAL PROPER.

An instruction not sustained by evidence is properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1985.]

17. SAME—PROMINENCE TO SPECIFIC TESTIMONY.

An instruction that, if a certain witness for the people was induced to testify by any promise of immunity from prosecution, etc., the jury should consider such facts in determining the weight to be given to his testimony, was properly refused as calling attention to particular testimony, especially since the court fully and clearly directed the jury as to its duty in determining the credibility of the witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1969-1973.]

18. SAME—INSTRUCTIONS COVERED BY INSTRUCTIONS GIVEN.

Instructions are properly refused where they are covered by those given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

19. SAME—NEW TRIAL—DISQUALIFICATION OF JUROR.

Pen. Code, § 1181, subd. 3, authorizes a new trial after conviction for misconduct of the jury preventing a fair trial. A juror stated on his voir dire that he never discussed the case on trial, excepting with his family, and that he had no opinion as to accused's guilt. Held that, on motion for a new trial, accused could not show that the juror, before being sworn as a juror, had stated that accused was guilty and ought to be punished, since the proof was addressed to the juror's qualifications, and not to any misconduct within such statute, which relates only to one's conduct while acting as a juror, and since disqualification of a juror is not a ground for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2226, 2238-2247.]

20. SAME—REVIEW—PRESUMPTIONS.

In support of the trial court's action in denying a new trial on the ground of a juror's disqualification by having expressed an opinion to witness before the trial that accused was guilty, the District Court of Appeal must presume in the absence of a contrary showing that when accused examined the juror on his voir dire he knew what he could show by witness, and that by failing to present the facts before the trial he waived them.

21. SAME—GROUNDS FOR SUSTAINING DECISION NOT CONSIDERED.

The District Court of Appeal must sustain a ruling of a court of record, if proper, regardless of the form of the objection.

22. SAME.

On reviewing the denial of a new trial asked because of the disqualification of a juror, the District Court of Appeal cannot consider an affidavit filed upon suggestion of diminution of the record, stating that accused did not learn of the disqualification until after verdict, where it is not authenticated in any manner by the trial judge, and does not appear to have been used on the motion for new trial.

Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

E. J. Emmons was convicted of asking and receiving a bribe, and he appeals from the judgment and an order denying a new trial. Affirmed.

Grove L. Johnson, Rowen Irwin, and H. L. Partridge, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. By an indictment found by the grand jury of Sacramento county defendant was charged with the crime of "asking and receiving a bribe," committed in January,

1905, while he was a state senator of the Thirty-Second senatorial district and a member of the senate committee on commissions and retrenchment. The money was sought and received by appellant, so it is alleged, under a promise and agreement that his official action, vote, and opinion as such senator should be influenced thereby in connection with an investigation by said committee of certain building and loan associations. Defendant was convicted and sentenced to the penitentiary for the term of five years. He appeals from the judgment and the order denying his motion for a new trial.

For the reason that the record discloses no exception to the ruling of the court we are precluded from considering the question involved in the motion to set aside the indictment and the challenge to the panel of the grand jury. Any exception taken, in order to be reviewed, must be properly authenticated in the bill of exceptions, and, if the defendant does not save an exception to the ruling of the court, the objection is deemed to have been waived. *McCartney v. Fitz Henry*, 16 Cal. 185; *Keeran v. Griffith*, 34 Cal. 590; *Lee v. Murphy*, 119 Cal. 304, 51 Pac. 549, 955; *People v. Trask* (Cal.) 93 Pac. 891. In the last case it is said: "Defendant having reserved no objection to the action of the court above set forth, we are not called upon to determine whether the course adopted by the court was erroneous or not." That an exception is required to the ruling of the court in disallowing a challenge to the panel and in denying the motion to set aside the indictment is provided in sections 1170 and 1172 of the Penal Code. The point was made by the Attorney General in his brief, and it is passed by without notice in appellant's closing brief for the reason, we assume, that its conclusiveness is recognized by defendant and his learned counsel. At any rate we must presume in favor of the action of the court below that no exception was taken, and we are not at liberty to follow the interesting discussion of the method by which the grand jury was selected, and of the qualification of certain of its members in which counsel have indulged.

No authority is cited in support of appellant's contention that the demurrer to the indictment should have been sustained. It is declared simply that "an inspection of the indictment, together with the demurrer, will serve to call the attention of the court to the faults of said indictment better than any argument in this brief." We do not agree with appellant that the court committed error in overruling the demurrer, but we do not deem it necessary to elaborate our views, as the question has been virtually foreclosed by the decision of this court in the case of *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370, in which the Supreme Court denied a rehearing, wherein it is said: "It is unnecessary to insert a copy of the indictment, or to consider its sufficiency in this opinion,

for such sufficiency was carefully considered in another proceeding, and a copy of the indictment is contained in the decision therein filed. Application of *Bunkers*, 1 Cal. App. 61, 81 Pac. 751." In the latter decision it is said: "We think the indictment here is sufficient to charge bribery, as defined in subdivision 6 of section 7 and section 86 of the Penal Code. Nor can we see how the district attorney could have well stated with greater particularity the acts of which the crime alleged is predicated." The two indictments are in the same language. In fact the prosecution is based upon the theory of a conspiracy on the part of *Bunkers*, appellant, and two other senators to use their official positions to extort money from certain building and loan associations for immunity from investigation, said conspiracy culminating in the receipt by each of the conspirators of the sum of \$350 upon a common understanding and agreement as to said investigation. In each case the demurrer was properly overruled.

That there may be no misunderstanding of the position of appellant as to certain rulings of the court during the trial, we quote from his brief as follows: "The defense at the trial was based upon the falsity of the testimony that was offered for the prosecution, and the further fact that the testimony so offered was the result of a conspiracy on the part of Grange, Corbin, and others to evade a thorough examination of the Continental Building & Loan Association because of the fact that the affairs of said association had been theretofore conducted in a manner detrimental to the stockholders of that institution, and that Corbin had been in the past using the funds of the association for his own private purposes. The evidence was offered for the purpose of showing, first, the animus of the witnesses against the defendant; and, second, for the purpose of affecting their credibility before the jury."

* * * The further defense was made that there was no conspiracy as alleged by the prosecution and attempted to be shown by them." With the foregoing statement in view, we proceed to notice all the exceptions of appellant argued by him, which we consider worthy of specific attention. The first of these is based upon the order overruling an objection to the following question addressed to the witness *Bunkers*: "Now, then, what was the conversation between you and *Jordan* on the train?" The contention is that no conspiracy had been shown, and, hence that the evidence sought to be elicited was within the rule excluding hearsay testimony; but the answer is that the order of proof is within the discretion of the court, and that subsequently other evidence was received that *Jordan* was a co-conspirator.

No error was committed by the court in refusing to direct the district attorney to produce a certain writing containing a statement of the witness *Bunkers*. The statement

was not signed by Bunkers. It had not been read over to him. He had heard read only a portion of it. He had not sworn to it, and did not know in whose possession it was. What is said in *People v. Glaze*, 139 Cal. 157, 72 Pac. 966, is in point here: "The statement could not have been used in evidence except for the purpose of impeaching the witness by showing thereby that he had made statements out of court inconsistent with the testimony given by him in the trial. The only statements that can be used for that purpose, if in writing, are statements made by the witness himself, either directly in his handwriting or over his signature, or indirectly by his adoption or admission of the correctness of a written report of his statements made by some other person. He cannot be held responsible for a statement taken down by another purporting to be a report of his oral declarations, unless he has been made acquainted with the contents of such statement, and directly or indirectly admitted that it was correct. Unless it is shown that there is good reason to believe that the document when produced would be admissible in evidence for some purpose in the case, the court need not compel its production." It may be that the statement would have been of assistance to defendant in his cross-examination of the witness Bunkers in an effort to lay a foundation for the latter's impeachment, but that is not a sufficient reason for interfering with the discretion of the trial court exercised in denying the request, especially as there is no showing that defendant suffered prejudice thereby.

Appellant complains of the action of the court in allowing witness Grange to testify to a declaration made by Jordan to the effect that defendant was trying to get evidence to enable him to have a warrant issued for the arrest of Gavin McNab and Washington Dodge. But it is apparent that the objection to the question, "State the conversation that took place at that time between you and him in regards to this matter, if anything," was properly overruled for reasons already stated. The court could not anticipate what the answer would be, and a portion of it was certainly responsive and material. The appellant should have moved to have the objectionable portion stricken out, if he so desired, but, having failed to do so, it is too late now to complain. *People v. Lawrence*, 143 Cal. 155, 76 Pac. 893, 68 L. R. A. 193.

Certain witnesses were allowed to testify as to what they did after conversations with Jordan, and it is insisted that this was error, "for the reason that all of this was done without the knowledge of the defendant, and in such a manner that the defendant could not have known anything about it, and it was not in furtherance of any conspiracy that the defendant was alleged to be engaged in." This testimony, however, was admissible on the question of whether these witnesses were real

or feigned accomplices, and also to trace the money that was received as a bribe. *People v. Northey*, 77 Cal. 632, 19 Pac. 865, 20 Pac. 129, and *People v. Bunkers*, supra. It was contended by the prosecution that these witnesses did not suggest, advise, or encourage the commission of the crime, and had no criminal intent, but were engaged merely in a scheme to detect, expose, and punish the senators. On the other hand, defendant insisted that they had a motive in discouraging the investigation of the building and loan associations, and were actual participants in the bribery. Their acts and declarations during the pendency of the negotiations were therefore important as throwing light upon this issue, and were not self-serving or hearsay, as they are justly considered by the decisions to be within the rule of *res gestæ*. We do not understand that it is necessary for a feigned accomplice to take into his confidence an officer of the law, or suffer the imputation of criminal intent. If he did consult an officer, it would be a circumstance in favor of innocence, but it is not the exclusive method by which he may show his freedom from participation in the crime. We think the evidence is sufficient to support the conclusion that these witnesses were not accomplices, and that they did not suggest nor encourage the commission of the crime, but that, after being informed of the purpose of the conspirators, they laid a trap for their apprehension and punishment. In this they did nothing against the law, and their conduct was not opposed to sound public policy. Nor does it follow, as contended by appellant, that no crime was committed by him, even if he received the money with a felonious intent. Some decisions are cited apparently to that effect, but the question has been set at rest here by the *Bunkers Case*, supra.

Among the points to which most importance seems to be attached by appellant is that growing out of the testimony of one W. J. Palethorpe, a witness for the defense. It is contended that his examination was confined within limits too narrow; it being restricted to the time of the examination by him of the books of the Continental Building & Loan Association during the months of November and December preceding the holding of the alleged investigation by the committee of which the defendant was a member. The particular question to which the objection was sustained, and of which ruling appellant complains, is as follows: "What, if anything, did the books of the Continental Building & Loan Association show with reference to the dealing of William Corbin with the association, and with reference to the condition of his accounts with that association in the year 1902?" The general objection was made, and also that it was too remote and not redirect examination. The last ground was undoubtedly well taken, but we think also the court's action was right for other reasons. The evidence was offered to show a motive for oppo-

sition to an investigation or the association on the part of certain persons who occupied prominent positions therein, or, in the language of appellant's counsel, "it necessarily would affect the minds of these people, and cause them to oppose an inquiry, to oppose an investigation, and to form a conspiracy and a plot to prevent an investigation." The purpose, then, was to affect the credibility and impeach the testimony of witnesses for the prosecution, and thereby reduce the effect of the evidence against defendant. It would make no difference how anxious certain persons were to prevent an investigation if that anxiety did not affect the evidence in the case on trial. Any reason for opposing said investigation would be entirely immaterial unless it could be seen that it might be of importance in determining whether any witness told the truth. How could any transaction of Mr. Corbin in 1902 with the association affect the credibility of any witness against the defendant? If Mr. Corbin had testified, there might be some ground for appellant's contention; but Mr. Corbin was not a witness in the case, nor was there any effort made to show that he had influenced any witness to testify, nor that any witness had a motive for preventing a disclosure of the affairs of the association. In the argument in favor of the admissibility of the evidence it was not claimed even that evidence would be offered to show how Mr. Corbin's interest in the investigation would be connected with the interest that any witness might have in coloring his testimony. There was indeed some intimation by counsel that Mr. McNab was concerned in concealing the said transactions of Mr. Corbin, but no evidence was offered to that effect, and it finds no support in the record. As far as disclosed by the proceedings the testimony sought to be elicited might relate as well to any other stockholder as to Mr. Corbin or to a stockholder in any other corporation. The contention really amounts to this: Mr. Corbin had certain transactions with the corporation in 1902 which he did not care to have made public; therefore he was interested in preventing an investigation. Hence we must assume that he entered into a conspiracy with some of the witnesses to commit a crime in order that a disclosure might not be made, and also that the testimony in the case has been affected by such conspiracy, or at least by Mr. Corbin's concern about the investigation. We cannot indulge in any such speculation.

Again, if it was sought, as claimed by appellant, to discredit any witness by showing his interest or bias, there is authority for holding that the proper foundation should have been laid by suitable cross-examination of said witness. The rule is so stated in *People v. Delbos*, 146 Cal. 734, 81 Pac. 131, as follows: "It was proper to impeach the motives of the prosecuting witness by proof that she had instituted the prosecution for the purpose of extorting money from the de-

fendant; but, in order to lay the foundation for such impeachment, the prosecuting witness should first be directly asked if she had not begun the prosecution for that purpose." But aside from the foregoing, assuming that it was proper to show Mr. Corbin's interest in the investigation, the line of inquiry was indulgently permitted by the court to be pursued sufficiently for that purpose. The fact sought to be shown would have been simply cumulative. It is due the witness, however, to say that in cross-examination he declared: "I told Mr. Corbin on several occasions that the Continental was an enormously large corporation, and, from what I could see, was financially sound."

The claim is made that the verdict should have been set aside on account of the separation of the jury during the trial. The court had made an order requiring the jury to be kept together, as provided in section 1121 of the Penal Code. The affidavits introduced by appellant upon this ground are to the effect that one of the jurors was seen talking with some one not a juror in the hallway of the courthouse, and that he was heard to say: "Well, ask him." And again, a deputy sheriff in company with one of the jurors was seen in a store on K street. After a time the officer came out alone and got into a buggy. The juror shortly after came out of the store unattended and got into the buggy, and they drove away together. Again, one of the jurors was seen standing in a crowd of people at Oak Park for some little time separated from the other jurors. The counter affidavits show that a deputy sheriff took one of the jurors to said store on K street to enable him to make a purchase; that they remained together while in the store; that said deputy sheriff walked out a few feet ahead of the juror to untie the horse; that no word was spoken about the case, and said juror had no communication whatever with any one except in reference to his purchase; furthermore, that the jurors were not allowed to separate at Oak Park, and not one of them had any communication about any matter connected with the case. The affidavits of the prosecution indeed are to the effect that whatever separation occurred was only for a few minutes, was for an innocent purpose, and was not the occasion for any communication at all concerning the case on trial.

Appellant cites *People v. Maughs*, 149 Cal. 253, 86 Pac. 187, as authority for his claim that the separation was fatal to the verdict. That case, however, is not in point. The difference between that and this is clearly seen in the following statement by Mr. Justice Henshaw: "After the jury had been impaneled and sworn and had been placed in charge of the sheriff, and the sheriff had been sworn to take charge of the jury under section 1121 of the Penal Code, the court allowed eight of the jurors to separate and go to their homes, while the remaining four

were retained in the sheriff's custody." It is properly said that "there is absolutely no warrant in the law for the course adopted, and the order permitting the jury to separate was error—indeed, error of such nature that the brief of the state offers no word in extenuation or justification of it." But even in that case it is not intimated that the error would have been prejudicial if the evidence had shown that during the separation the jurors had no communication whatever with any one concerning the case.

But there are decisions of our Supreme Court directly upholding the ruling of the trial court that the alleged separation did not demand a new trial. In *People v. Symonds*, 22 Cal. 349, it is held that: "The mere fact that the jury in a criminal case separate without permission of the court does not require that a new trial should be granted. The presumption that the jury may have been subject to improper influences which attaches to the fact of such separation may be removed by an affirmative showing that no injury to the defendant resulted therefrom." In *People v. Bemmerly*, 98 Cal. 301, 83 Pac. 264, the facts are stated as follows: "It appears that after an adjournment upon one of the days while the cause was on trial certain of the jurors, while upon the street in company with the sheriff, joined a crowd of people who were listening to the utterances of a street fakir, and were for a few minutes out of the sight or custody of the sheriff; that on a Sunday which intervened during the trial eight of the jurors, in company with a deputy sheriff, attended church separately from the remaining four, and that some of the other four listened to the singing and preaching of the Salvation Army in the streets of Woodland; that one of the jurors, in the company of a deputy sheriff, visited his place of business without being accompanied by the others; that individual jurors were several times during the trial separated from the body of jurors for a few minutes at a time, and occasionally were out of sight of the officer who had them in charge and at times engaged in conversation with other persons." It is apparent from the foregoing statement that the appellant there made a much stronger showing than the appellant here. But the court declared: "We cannot hold that these facts constituted such misconduct as to justify setting aside the verdict. The direction to the sheriff to keep the jury together * * * was for the purpose of having the trial conducted in an orderly and discreet manner, and was evincive of the desire of the court to prevent the jury from being affected by any improper influences. The ultimate object of these instructions was not to keep the jury together, but to prevent them from improper intercourse with others, and their being kept together was merely a means of accomplishing the ultimate purpose. * * *

The mere fact that the direction

of the court was violated does not give to the defendant the right to have the verdict set aside. He must show as fully as if the direction had not been given that one or more of the jurors was influenced in his verdict by some outside influence during or in consequence of such separation." We are not required in the case at bar to hold that the burden was upon defendant to show that the jurors were improperly influenced, because the prosecution assumed the burden of showing that the defendant was not prejudiced by the separation of the jury, and offered sufficient evidence to justify a finding to that effect. In *People v. Adams*, 143 Cal. 209, 76 Pac. 954, 66 L. R. A. 247, 101 Am. St. Rep. 92, the distinction is shown between a separation during the progress of the trial and one after the cause is submitted to the jury. It is there said: "As to the former there is no law requiring the jury to be kept together, although the court may order them to be so kept; and it is not necessary in the case at bar to consider the significance of a violation of such an order. But it is provided in the Penal Code (section 1128) that after the jury have finally retired for deliberation they must be kept together; and one of the express grounds for a new trial is 'when the jury has separated without leave of the court after retiring to deliberate upon their verdict' (section 1181)." The distinction is an important one, and it has been overlooked in some of the decisions. Whatever may be the rule in the former case, whenever the jury separates without leave of court after the case is submitted the burden should be cast upon the prosecution to show that the defendant has not been injured thereby. But as we have seen, the separation of which complaint is made here occurred before the case was submitted, and the showing by the appellant was exceedingly meager, and its effect was entirely overcome by the evidence for the people.

Appellant inveighs especially against the conduct of the majority of the jurors in partaking too freely of intoxicating liquors during the trial of the case. If the affidavits for appellant were not controverted, we should be constrained to hold that some of the jurors drank to excess, and more than is consistent with that clarity of judgment and equipoise of conscience essential to a proper discharge of the important duties of a juror. But the counter showing was amply sufficient to justify the court in finding that not one of the jurors was under the influence of liquor at any time, and no intoxicants at all were consumed after the jury had retired to deliberate upon a verdict. The character of the showing made by the people is illustrated by the following quotation from the affidavit of Mr. Chambers, the deputy sheriff who had charge of the jury: "Dr. G. C. Simmons instructed affiant that all of said jury who had been accustomed to the use of al-

coholic liquors must, during the progress of said trial, and while they were in charge of said sheriff, be permitted to have their usual rations of liquor, or that said jurors would suffer severe illness." He then details the times and occasions when liquor was consumed, and states that at no time did any of said jurors take more than one drink, and that of a very moderate quantity; that at no time did any member of the jury show in the slightest the effects of liquor; "that affiant was constantly in attendance upon said jury during the time of their deliberation on a verdict; that at no time from the time said jury retired from the courtroom to deliberate upon their verdict up to the time that they returned their verdict into court and were discharged was any member of said jury permitted to have any liquor of any kind, and during said time none of said jurors indulged in any liquor." There is not a particle of evidence that the trial judge or the attorneys noticed any evidence of intoxication on the part of any of the jurors at any time, and, unless we are prepared to hold that the consumption of any quantity of liquor by a juror disqualifies him, we must uphold the ruling of the court below. Indeed said ruling, under the showing made, is in strict accord with decisions of the Supreme Court. *People v. Deegan*, 88 Cal. 602, 28 Pac. 500; *People v. Bemmerly*, supra; *People v. Van Horn*, 119 Cal. 333, 51 Pac. 538; *People v. Sullivan*, 129 Cal. 557, 62 Pac. 101.

The court committed no error in giving the instruction as to the corroboration of an accomplice. Appellant selects one sentence therefrom, and makes it the basis of the criticism that "it is not the law that proving the identity of the defendant, namely, that he is the man charged with the offense, is sufficient. Much more than that is needed." The instruction treats of the two phases of the question separately, to wit, the commission of the offense and the identity of the one committing it, and it is neither "misleading" nor "improper"; and besides it appears to have been given at the request of appellant, and hence he cannot complain.

The court was justified in refusing the following instruction: "If the jury believe from the evidence herein that the witness Harry Bunkers was induced or influenced to become a witness and testify in the case by any promise of immunity from prosecution or punishment, or by any hope held out to him that if he testified against the defendant he would not be prosecuted for any perjury committed by him, then the jury should take such facts into consideration in determining the weight which ought to be given to such testimony thus obtained. Such testimony should only be received by the jury with caution, and scrutinized with care." There is no evidence in the record that any promise was made to the witness that he would not be prosecuted for perjury if he would testify

in the case. Hence the instruction was properly refused for that reason. It is true that there is some evidence that Bunkers was promised immunity from prosecution for perjury—obviously referring to the testimony he gave at the trial of his own case—if he would make a statement to the district attorney, but that is entirely different from the hypothesis assumed in the instruction. Again, the practice by specific instructions of calling the attention of the jury to the testimony of a particular witness should not be encouraged. It is better, as was done here, to instruct the jury as to the principles of law involved, and leave their application to the facts—where it belongs under our system—to the jurors themselves.

The court fully and clearly directed the jury as to its duty and power of judging the evidence and determining the credibility of witnesses; for example: "You will weigh carefully the testimony of each and all of the witnesses in the case, and give to the same just such credit as you conscientiously believe it entitled to; and, in considering what weight you will give to the testimony of any and all the witnesses in the case, you will consider the character and appearance of the witnesses upon the stand, the consistency and reasonableness of their statements, their apparent interest and desire to tell the truth, their feelings, motives, and conduct so far as made known to you by the evidence during the course of the trial of this case." After hearing that and the other instructions given, if any juror would not understand that it was his duty to consider any promise of immunity made to a witness as affecting his credibility he would be incapable of enlightenment.

As to the other criticisms of the action of the court in reference to instructions, we deem it sufficient to say, in the language of *People v. Bunkers*: "The instructions requested by the defendant and refused by the court were either erroneous or inapplicable, or were fully covered by other instructions. The charge read as a whole was full, fair, and comprehensive, and the appellant certainly has no cause to complain that the law was not fully and clearly stated to the jury." The only other matter that we deem worthy of notice arises from the ruling of the court upon the following question addressed to one Patrick Kelly in support of the motion for a new trial: "State whether or not you had a conversation with him (Mr. Amariah Johnson, one of the jurors) last February, 1905, in this city concerning the charge against the defendant?" The general objection was made to the question, and the district attorney urged that, "if offered for the purpose of showing bias or prejudice on the part of juror Johnson, they are precluded from showing such fact at this time; that the bias or prejudice of any juror who may be sworn to try a criminal case cannot be shown for the first time on motion for a new

trial." The defendant offered to prove by the witness that he had a conversation with the said Johnson before he was sworn as a juror in which the latter stated that he had attended the examination before the senate committee which investigated the charge, and that all these senators, including the defendant, were guilty and ought to be punished, and that every one of them should be convicted, and that he was certain of their guilt." The said juror had stated on his voir dire that all he knew about the case was what he read in the Sacramento Union; that he attended the meeting of said senate committee one night, but that he was up in the gallery and could not hear anything that was said; that he had never discussed the matter with any one except the members of his own family; and that he had no opinion about the case.

The attack of appellant is really addressed to the qualification of the juror, although it is claimed that his declarations under oath, in view of his alleged statements to the witness Kelly, amount to such misconduct as to entitle appellant to a new trial. But it is clear that such misconduct, as far as the rights of appellant are concerned, is unimportant, except as it relates to the qualification of Johnson as a fair, unbiased juror. It is clear that the "misconduct" of a juror which is a ground for a new trial is misconduct while he is such juror, and has no reference to what he does before he is sworn to try the cause. Subdivision 3 of section 1181 of the Penal Code makes that plain as follows: "When the jury * * * has been guilty of any misconduct by which a fair and due consideration of the case has been prevented." Hence, if appellant's objection to juror Johnson amounts to anything, it goes to his qualification, and not to his misconduct as a juror.

But, whatever may be the rule in other jurisdictions, it has been decided in this state that the qualification of a juror is not a ground for a motion for a new trial. In *People v. Azoff*, 105 Cal. 635, 39 Pac. 61, it is said: "If public policy prohibits the jury from impeaching their verdict by their affidavits, it must follow that the same policy will prevent its being done by statements made by the jurors." To the same effect are *People v. Soap*, 127 Cal. 411, 59 Pac. 771; *People v. Dobbins*, 138 Cal. 604, 72 Pac. 339. In *People v. Fair*, 43 Cal. 137, the question is elaborately discussed, and it is held that: "The fact that a juror had formed and expressed an unqualified opinion of the guilt of the accused is not, under our practice, ground for a new trial, when the objection is taken for the first time after the trial, upon affidavits showing disqualification." In *People v. Boren*, 139 Cal. 215, 72 Pac. 901, it is said: "Another ground upon which it is contended a new trial should have been granted is that an uncle by marriage of the district attorney was a member of the trial

jury, that this fact was unknown to the defendant or his counsel until after the trial, that defendant's peremptory challenges had not been exhausted, and that, if these facts had been known, defendant would have challenged him peremptorily. These facts appear by affidavit, but constitute no ground for a new trial. Section 1181 of the Penal Code specifies the only grounds upon which a new trial may be granted, and this objection is not included in the grounds there stated. An objection to a juror must be taken before the juror is sworn to try the cause; but the court may for cause permit it to be taken after the juror is sworn and before the jury is completed."

Again, if the practice for which appellant contends should be tolerated, as it tends strongly to jeopardize the practical administration of justice and open wide the door to fraud and perjury, it should be permitted only after a satisfactory showing of diligence and good faith on the part of appellant. Even if it were a ground for a new trial, the court would not be justified in considering it unless it was shown that at the time of the examination of the juror the fact concerning the disqualification was not known to defendant nor his counsel. We must infer, of course, in support of the action of the court, that appellant knew at the time he examined the juror Johnson of what he proposed to show by the witness Kelly, and that, by his failure to present the facts before the trial, he waived them. *People v. Staples*, 149 Cal. 405, 86 Pac. 886. It is of no concern that the district attorney did not make this specific objection, as we are required to sustain the ruling of a court of record, if proper, regardless of the form of the objection. *Spotswood v. Spotswood*, 4 Cal. App. 711, 89 Pac. 362.

Appellant, upon suggestion of diminution of the record, was permitted to file in this court his affidavit, which appears to have been filed in the office of the county clerk of Sacramento county October 24, 1905, in which he sets out that he "did not learn of the alleged misconduct of the juror A. Johnson until after the trial ended and the verdict had been rendered in the above-entitled action." It is obvious that this is an attempt to amend the bill of exceptions; but, admitting that we could consider the said affidavit, it is not authenticated in any manner by the trial judge, nor is there anything to indicate that it was used upon the said motion for a new trial.

We have given all the points made by appellant careful consideration but we are entirely satisfied that the record discloses no prejudicial error.

The defendant was fairly tried and justly convicted, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 728

BRISTOL v. HERSHEY. (Civ. 458.)

(Court of Appeals, Second District, California.
March 23, 1908. Rehearing Denied by Supreme Court May 14, 1908.)

1. MORTGAGES—FORECLOSURE BY ACTION—CERTIFICATE OF SALE—RECORDING.

Under Code Civ. Proc. § 400, providing simply that a duplicate of a certificate of sale on mortgage foreclosure shall be filed, and not requiring it to be recorded, where such a certificate is defective, in that the premises sold are incorrectly described, it may be corrected, and the original defective certificate filed need not be altered, but a corrected certificate may be refiled.

2. SAME—REDEMPTION—PERSONS ENTITLED TO REDEEM—JUNIOR MORTGAGEE.

A junior mortgagee, not having asked or received any affirmative relief in an action to foreclose a first mortgage, may, before the time of redemption expires, institute an action in foreclosure and obtain an appropriate decree and a sale thereunder, and having exercised this right and received a certificate of sale, as the holder of such certificate, becomes a successor in interest of the mortgagor, and entitled to redeem.

3. SAME—EFFECT OF REDEMPTION—SUBROGATION TO RIGHTS OF MORTGAGEE.

Where a junior mortgagee, as holder of a certificate of sale issued on a foreclosure of her own mortgage, exercised her right to redeem from the foreclosure sale on a first mortgage, she became subrogated to all of the first mortgagee's rights, to whom a certificate of sale had been issued on the sale under her first mortgage, to the same effect as though the first mortgagee had assigned to her the certificate of sale.

4. SAME—ASSIGNMENT OF CERTIFICATE OF REDEMPTION—EFFECT.

Where a first mortgagee took an assignment of a certificate of redemption issued to a junior mortgagee on redemption from the sale to the first mortgagee under such first mortgage, the first mortgagee acquired all rights held by the junior mortgagee thereunder, including the rights to which the junior mortgagee was subrogated on redemption from the sale under the first mortgage.

5. SAME—EFFECT OF REDEMPTION BY JUNIOR MORTGAGEE.

Code Civ. Proc. § 703, making the effect of a redemption from a mortgage foreclosure sale by a successor in interest holding the legal and equitable title an extinguishment of the sale, does not apply to extinguish the sale on a first mortgage on redemption by a junior mortgagee holding but the equitable title under a certificate issued on a second sale under such junior mortgage, since in such case the junior mortgagee redeems from the previous sale in his own interest and adversely to the mortgagor.

6. SAME—ORAL AGREEMENT TO EXTEND TIME OF REDEMPTION—VALIDITY.

An oral agreement to extend the time of redemption from a mortgage foreclosure sale is valid, and needs no consideration in its support, if the debtor is lulled into a false security, and thereby permits the time for redemption to expire.

7. SAME.

A mortgagee agreed to extend the time of redemption beyond the statutory period, on condition that the mortgagor pay a specified amount per month, or a sum equal to interest on all sums due the mortgagee under the sale. The mortgagor did not claim to have paid the monthly installments, or to have tendered payment thereof; the nearest approach to an allegation in reference thereto being a statement that she was prepared to make the first payment, which fact did not appear to have been communicated to the mortgagee, nor any tender to have been made in connection therewith. During the an-

swing 22 months, there was no offer or tender to pay any of these monthly payments, between which dates there was a great increase in the value of the property; nor was there any allegation of any fact which would excuse performance on the mortgagor's part. Civ. Code, § 1439, requires one who seeks to enforce a contract to show that he has complied with the conditions on his part to be performed. *Held*, that the mortgagor was not entitled to enforce the agreement to extend the time for redemption.

8. SAME.

The fact that, long after the mortgagor's default, the mortgagee paid the mortgagor a thousand dollars, with a statement that the property "was growing more valuable and in time I shall doubtless dispose of it, and I am willing that you should share in advance in what it may produce," in no event would have any effect to change or alter the rights of the parties theretofore attaching.

9. SAME.

The receipt of a sheriff's deed by the mortgagee could not be construed as a notification on the mortgagee's part that she would not carry out her agreement with the mortgagor to extend the time of redemption from the mortgage sale, so as to excuse performance by the mortgagor of her agreement to make payments of interest.

10. SAME.

Taking possession of a part of the mortgaged premises by the mortgagee did not have the effect to excuse performance by the mortgagor of her agreement to make payments of interest, if the time for redemption from the sale under the mortgage was extended, where at the time the mortgagee took possession the mortgagor was already in default.

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Jennie Bristol against Mira Hershey. Judgment for defendant, and plaintiff appeals. Affirmed.

Noleman & Smyser, for appellant. Lynn Helm, and E. S. Williams, for respondent.

ALLEN, P. J. Appeal by plaintiff from a judgment of the superior court of Los Angeles county in favor of defendant rendered upon a hearing sustaining the demurrer to the second amended complaint without leave to amend.

It appears from the second amended complaint that on August 1, 1902, defendant, Hershey, obtained a decree foreclosing a first mortgage executed by plaintiff on certain real estate, in which proceeding one Wills, the holder of a junior mortgage was made a party, but to whom no affirmative relief was granted by the decree; that under this decree, on September 24, 1902, the premises were sold to Hershey for the full amount found due, together with accrued interest and costs; that the certificate of sale issued to Hershey was defective in that the premises sold were incorrectly described; that in such form the certificate was recorded in the recorder's office of Los Angeles county, but not indexed; that subsequently the certificate was corrected, but the record thereof was not altered; that afterwards, in December, 1902, Wills, the holder of the junior mortgage, brought an independent ac-

tion against plaintiff in foreclosure, and such proceedings were had that on February 12, 1903, the premises were sold under the Wills decree and a certificate in due form issued to her; that thereafter, on March 3, 1903, Wills redeemed the premises from the previous sale to Hershey by paying to the sheriff the full amount due Hershey; that in such redemption the said Wills presented with the other instruments required by law the certificate so issued to Hershey as altered and corrected; that a certificate of redemption in due form was issued by the sheriff to Wills, but not filed for record or recorded; that defendant, Hershey, on August 24, 1903, acquired by purchase from Wills the certificate so issued to her; that thereafter, on September 20, 1903, four days before the time for redemption had expired under the sale to Hershey, plaintiff entered into an oral agreement with Hershey, whereby it was agreed that plaintiff was to pay to Hershey \$50 per month, or a sum equal to interest upon all sums due Hershey under the sale, such payments to be made monthly, commencing January 1, 1904, in consideration of the prompt payment of which Hershey agreed that plaintiff might retain possession of the premises, and the right of redemption and the right to pay the full amount of the decree was to be extended two or three years; that if said monthly payments were promptly made plaintiff could pay to Hershey the full amount of all indebtedness, and all liens, decrees, and obligations in favor of Hershey and against said real estate would thereby be canceled and discharged; that plaintiff, relying upon said agreement, made no effort to redeem within such intervening four days; that afterwards, in December, 1903, defendant Hershey notified plaintiff to vacate the premises, and on or about January 1, 1904, took possession of a part thereof, but plaintiff has retained possession of the remainder; that on December 30, 1903, Hershey took out a sheriff's deed; that on November 2, 1905, plaintiff offered to pay Hershey the full amount of all claims due her, which she refused to accept, but thereafter, in 1906, paid into a bank for plaintiff's use a thousand dollars, upon a written statement that she was willing that plaintiff should share in the advance in the value of the property.

There is nothing in the point that the record of the original defective certificate was not altered, or that a correct certificate was not recorded. The statute does not require that the certificate issued by the sheriff shall be recorded, but simply that it be filed. Section 700, Code Civ. Proc. No reason is suggested why the clerical error of the sheriff in the issuance of the certificate might not be corrected, and a correct certificate refiled. The complaint does not negative the refile of a corrected certificate. Wills, being a junior mortgagee, and having asked and received no affirmative relief in

the original action, was at liberty before the time of redemption expired to institute her original action in foreclosure and obtain an appropriate decree and a sale thereunder. Having exercised this right and having received a certificate of sale regularly issued to her on account thereof, as the holder and owner of such certificate, she became a successor in interest of plaintiff and entitled to redeem. *Pollard v. Harlow*, 138 Cal. 302, 71 Pac. 454, 648. When she as such holder of the certificate so exercised this right of redemption from the Hershey sale, she became subrogated to all of Hershey's rights to the same effect as though Hershey had assigned to her the certificate of sale. *White v. Costigan*, 134 Cal. 88, 66 Pac. 78. When Hershey took an assignment of the Wills certificate, she acquired all rights held by Wills thereunder, including the subrogated rights. Had a stranger purchased this certificate from Wills, no one would question the extent of the interest acquired by an assignment of the Wills certificate. No reason suggests itself why Hershey by a purchase of such certificate could not and did not acquire the same rights guaranteed to any other purchaser.

The contention that the redemption by Wills extinguished the sale theretofore made to Hershey cannot be maintained. The effect of a redemption by a successor in interest, holding the legal and equitable title, is a restoration to the original estate (section 703, Code Civ. Proc.), but this does not apply to one holding, but the equitable title under a certificate issued upon a second sale. In such cases the holder of the junior certificate redeems from the previous sale in his own interest and adverse to the debtor and holder of the legal title, and it is not a redemption in the interest of the judgment debtor or for the judgment debtor, and the effect of which is not to restore the estate to the judgment debtor, nor to extinguish the original sale from which the redemption is had. There being no extinguishment of the Hershey sale, it follows that at the expiration of 12 months from the date thereof, as against the judgment debtor, the complete legal and equitable title vested in Hershey as the owner and holder of the Wills certificate with its subrogated rights, unless her oral agreement was such as to estop her to claim the same. The oral contract to extend the time for redemption was valid, and needed no consideration in its support, if the debtor was lulled into a false security and thereby permitted the time for redemption to expire. *Schroeder v. Young*, 161 U. S. 342, 16 Sup. Ct. 512, 40 L. Ed. 721. This oral agreement conferred the right and privilege of redemption beyond the statutory period upon a condition precedent, namely, that the judgment debtor should pay the interest on all sums due Hershey, in any event to the extent of \$50 per month. Plaintiff does not claim to have

paid or tendered payment thereof. The nearest approach to an allegation in reference thereto is a statement that on January 1, 1904, she was prepared to make the first payment. This fact does not seem to have been communicated to defendant, nor any tender or offer to pay made in connection therewith. During the ensuing 22 months intervening between January 1, 1904, and November 2, 1905, there was no offer or tender to pay any of these monthly payments, between which dates a great increase in the value of the property ensued. Nor is there any allegation in the complaint of any fact which would excuse performance upon plaintiff's part. The receipt of a sheriff's deed cannot be construed as a notification upon defendant's part that she would not carry out her agreement. There was nothing in the agreement which prohibited her from taking out the deed at any time after the time redemption had expired. No new title was conveyed by the deed. It is evidentiary purely in its character, and whatever of title was acquired by Hershey was the result of failure to redeem within the statutory or agreed period, and not because of the issuance of the deed.

Construing the pleading most strongly against the pleader, as is our duty, she retained possession of all the premises until after January 1, 1904, after which date she was in default under her agreement in the payment of interest, and being thus in default the taking of possession by defendant of a portion thereof would not have the effect to excuse performance on plaintiff's part of her contract. While the tenor of all decisions, wherein has been involved the right of redemption after the statutory period based upon an agreement, has been extremely liberal in protecting the redemptioner's rights, yet in no case called to our attention has it been held that a redemptioner may violate the agreement under which he claims and still have a decree giving effect to the violated agreement. He who seeks to enforce a contract must show that he has complied with the agreements and conditions of the contract on his part to be performed. Section 1439, Civ. Code.; *Cameron v. Burnham*, 146 Cal. 584, 80 Pac. 929. This proceeding being one in equity to enforce a right under an agreement violated by the plaintiff, we do not think that she is entitled to any relief under the allegations of the complaint.

We attach no importance to the fact that in July, 1906, long after the plaintiff's default, the defendant paid to plaintiff a thousand dollars, upon the statement that the property "was growing more valuable, and in time I shall doubtless dispose of it, and I am willing that you should share in advance in what it may produce." The only proper construction to be given to such statement is to the effect that this thousand dollars represented the amount which the de-

fendant was willing that the other party might share in the transaction, and its receipt and retention by the plaintiff, under the circumstances, would indicate plaintiff's acquiescence in the equitable character of defendant's offer. In no event, however, could it have any effect to change or alter the rights of the parties theretofore attaching. Judgment affirmed.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 727

OCCIDENTAL REAL ESTATE CO. v. GANTNER & MATTERN et al. (Civ. 443.)

(Court of Appeal, First District, California. March 18, 1908. Rehearing Denied April 15, 1908.)

1. APPEAL AND ERROR—RECORD—SETTLED STATEMENT—CONCLUSIVENESS.

A settled statement, on appeal from an order vacating a verdict and granting a new trial, which, after reciting the rendition of the verdict, states that the same was vacated and a new trial granted by the court on its own motion, is conclusive that the order was made by the court on its own motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2850-2855.]

2. NEW TRIAL—PROCEEDINGS TO PROCURE—MOTION.

A colloquy between an attorney and the court immediately on the return of the verdict, wherein the attorney asked the court to vacate the verdict and grant a new trial and called its attention to Code Civ. Proc. § 662, authorizing the court, on its own motion, to vacate a verdict and grant a new trial where there has been a plain disregard of the instructions or of the evidence, cannot be taken as a formal motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 250-253.]

3. APPEAL AND ERROR—REVIEW—GROUNDS OF DECISION—GRANT OF NEW TRIAL.

Where an order by the court, on its own motion, vacating a verdict and granting a new trial, can be sustained on either ground allowed under Code Civ. Proc. § 662, authorizing the court, on its own motion, to vacate a verdict and grant a new trial where there has been a plain disregard of the instructions or a plain disregard of the evidence, the order must be upheld on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3408-3430.]

4. LANDLORD AND TENANT—RENT—PAYMENT—WHAT CONSTITUTES—"UNLAWFUL DETAINMENT."

The fact that a tenant each month tendered one month's rent, which was refused, there being no pretense that the tenant deposited the rent in any bank for the landlord, as provided by Civ. Code, § 1500, did not entitle him to refuse payment and to retain possession of the premises after the landlord served him with the notice authorized by Code Civ. Proc. § 1161, subd. 2, providing that a tenant is guilty of unlawful detainer where he continues in possession, after default in payment of rent, and three days' notice requiring its payment or possession of the property shall have been served on him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 855, 1076.]

For other definitions, see Words and Phrases, vol. 3, pp. 7189, 7324.]

5. NEW TRIAL—GROUNDS—PASSION OR PREJUDICE OF JURORS.

Where plaintiff, in unlawful detainer, on the undisputed facts was entitled to a verdict for the possession of the premises and for rent, and the court might properly have directed a verdict for plaintiff, and a verdict for defendant could only be rendered in plain disregard of the evidence, the court was justified in assuming that a verdict for defendant was rendered under the influence of prejudice within Code Civ. Proc. § 662, authorizing the court, on its own motion, to vacate a verdict and grant a new trial where there has been such a plain disregard of the evidence as to satisfy the court that the verdict was rendered under the influence of passion or prejudice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 135-149.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Occidental Real Estate Company against Morris Levy and Gantner & Mattern. From an order vacating a verdict for defendants and granting a new trial, Levy appeals. Affirmed.

Devoto & Richardson, for appellant. Hillier, Mann & O'Brien, for respondent Real Estate Company. Edmund Tauzsky, for respondent Gantner & Mattern.

HALL, J. This is an action for unlawful detainer, brought against defendant Morris Levy after default in the payment of rent and three days' notice in writing demanding its payment and possession of the premises, under subdivision 2, § 1161, Code Civ. Proc. Gantner & Mattern (a corporation) was made defendant because in possession of a portion of the premises as a subtenant of defendant Levy. The jury rendered a verdict in favor of defendant and against plaintiff, which the court at once upon its own motion vacated, and granted a new trial, and from this order defendant Levy has appealed to this court.

We say the court upon its own motion vacated the verdict and granted a new trial advisedly, for although the statement of the case upon appeal shows that the attorney for the plaintiff asked the court to make such order, and called its attention to the provisions of section 662, Code Civ. Proc., under which such power is granted to the court, the settled statement, after reciting the fact of the rendition of the verdict by the jury in favor of defendant and against plaintiff, concludes as follows: "Thereupon the court vacated the verdict and granted a new trial, on its own motion, on the ground that there had been such a plain disregard by the jury of the instructions of the court and the evidence in the case, as to satisfy the court that the verdict was ordered [rendered] under a misapprehension of such instructions under the premises of section 662 of the Code of Civil Procedure of this state." This is conclusive upon us that the order was made by the court upon its own motion, and the contention of appellant that the order was made upon the motion of plaintiff cannot be sustained. The

colloquy that took place between the attorney for the plaintiff and the court immediately upon the return of the verdict cannot be regarded as a formal motion for a new trial on the part of plaintiff, but was simply the calling of the court's attention to its power under section 662, Code Civ. Proc. *Anglo-Nevada Assurance Corporation v. Ross*, 123 Cal. 520, 56 Pac. 335.

It is also contended by appellant that the court erred in vacating the verdict upon its own motion. The facts of the case as shown by admissions and uncontradicted evidence are as follows: On the 1st day of November, 1906, appellant leased the premises in suit from one Dana for a period of two years from said date at a rental of \$100 per month, payable in advance each month, and took possession under said lease. Dana subsequently granted the premises to plaintiff. For each of the ten months beginning May, 1906, and ending with February, 1907, defendant sent a check for the sum of \$100 to the landlord or his or its agent, which was in each instance refused and returned to defendant. On the 21st day of February, 1907, there being ten months' rent due and unpaid, plaintiff gave three days' notice in writing to defendant, requiring its payment or possession of the premises, and served a copy thereof on the subtenant as well. This notice was in all respects correct in form and correctly stated the amount then due and unpaid. Defendant did not pay such rent or any part thereof, or surrender possession, and on the 26th day of February, 1907, this action was brought. Upon this state of the case the court might properly have directed the jury to find a verdict in favor of plaintiff for the possession of the premises and the sum of \$1,000, unpaid rent. The court, however, submitted the case to the jury under some general instructions, and, upon the return of a verdict against plaintiff and in favor of defendant, on its own motion vacated the verdict. In this the court committed no error. Section 662 of the Code of Civil Procedure gives power to the court on its own motion to vacate a verdict and grant a new trial "where there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice." In other words, there are two sets of circumstances under which the court of its own motion may vacate a verdict: (1) Where there has been a plain and palpable disregard of the instructions; and (2) where there has been a plain and palpable disregard of the evidence. *Townley v. Adams*, 118 Cal. 382, 50 Pac. 550; *Mizener v. Bradbury*, 128 Cal. 340, 60 Pac. 928; *Eades v. Trowbridge*, 143 Cal. 25, 78 Pac. 714. By the terms of the order entered by the court it would seem that the learned judge of the trial court based the order upon the theory that the jury had

plainly disregarded the instructions of the court. But because of the vagueness of the instructions it is very doubtful if it can be said that the jury was guilty of a "plain disregard of the instructions." The court simply read a portion of subdivision 2, § 1161, Code Civ. Proc., erroneously omitting the part requiring a three days' notice in writing to pay the rent or to surrender possession, and section 1500, Civ. Code, relating to the extinguishing of a pecuniary obligation where an offer of payment is not accepted. The court did not, however, clearly tell the jury under what circumstances or conditions the plaintiff would be entitled to recover.

Nevertheless, if the order of the court can be sustained upon either ground allowed under section 662, the order of the court must be upheld. *Townley v. Adams*, supra. See, also, *Miller v. Wade*, 87 Cal. 412, 25 Pac. 487; *Estate of Yoakam*, 103 Cal. 503, 37 Pac. 485. The jury brought in a general verdict for the defendant. This necessarily carried with it an implied finding that some fact essential to plaintiff's recovery did not exist. Yet upon the record before us every fact essential to a recovery by plaintiff was admitted or proven without contradiction. Indeed, the only contention of defendant seems to be that because he had each month tendered the rent for that month this action will not lie. But the tender each month did not pay the rent. There is no pretense that defendant deposited the rent in any bank for plaintiff as provided in section 1500, Civ. Code. On the 21st day of February, 1907, defendant was in possession of the premises in suit as a tenant of plaintiff, and there was then due and unpaid from defendant to plaintiff for the rental of said premises the sum of \$1,000. It was admitted that on this day plaintiff made written demand on defendant, requiring him within three days to pay such \$1,000, or to surrender possession of the premises. This demand was in all respects sufficient in form, and was duly served, both on defendant and his subtenant, on the 21st day of February, 1907. Defendant in no respect complied with the demand, but without the consent of the plaintiff retained the possession of the premises, and five days later this action was brought. About the foregoing facts there is no dispute or contradiction. Upon the facts above stated plaintiff was clearly entitled to a verdict for the possession of the premises and for \$1,000 as rent money. The court might properly have directed the jury to find such a verdict. A verdict for the defendant could only be rendered in plain and palpable disregard of the evidence. The fact that defendant each month tendered one month's rent did not entitle him to refuse payment and to retain possession of the premises after plaintiff served him with the written notice authorized by subdivision 2, § 1161, Code Civ. Proc. "Notwithstanding the refusal of a valid tender, if the creditor subsequently demands payment, and the debtor fails to pay,

the tender has not been kept good, and the debtor loses the benefit of the tender." 28 Am. & Eng. Ency. of Law, 41, citing many cases.

The jury plainly and palpably disregarded the evidence, and the court for this reason was justified in assuming that the verdict was rendered under the influence of prejudice.

The order is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

(78 Kan. 213)

MAYNES v. SHULSKEY et al.

(Supreme Court of Kansas. May 9, 1908.)

APPEAL—REVIEW—FINDING OF COURT.

Findings and judgment of the trial court are conclusive on appeal on disputed questions of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

Error from District Court, Doniphan County; William I. Stuart, Judge.

Action by Thomas B. Shulskey and others against John Maynes. Judgment for plaintiffs, and defendant brings error. Affirmed.

W. F. Means and Ryan & Ryan, for plaintiff in error. J. J. Baker and C. W. Reeder, for defendants in error.

PER CURIAM. A number of citizens of Doniphan county formed themselves into an association for the purpose of erecting and operating a telephone system for their own use. The organization was not incorporated. The members were jointly interested in the system. Each contributed to the construction and maintenance of the main line and central office. Each owned his own phone and the wire by which it was connected with the main line. In the briefs the parties call themselves partners. As a part of the initiatory steps taken to organize the company, names of persons along the proposed line who were interested in the enterprise were obtained, from which the membership was to be secured. Several of these, however, subsequently withdrew and were dropped. The plaintiffs remained on the list and perfected the organization by fixing the duties and liabilities of each member. John Maynes, the plaintiff in error, was one of the original promoters of the association; but, refusing to agree to or comply with the subsequent requirements adopted, he did not become a member of the company as finally organized. After the main line was partially constructed, and poles and other material were distributed, he insisted upon being recognized as a partner and that he be permitted to connect with and use the line. To enforce this recognition he proceeded to erect, with the material belonging to the association, a wire from his residence which he threatened to connect with the main line. The company

thereupon commenced this action in the district court of Doniphan county to enjoin him from carrying out his threat. A temporary injunction was obtained at the commencement of the action, which was afterwards made permanent. The defendant, being dissatisfied, brings the case here for review.

Several assignments of error have been presented, but they are all based upon the claim that the evidence did not justify the findings and judgment of the court. The case was tried to the court without a jury. The only controversy on the trial was whether or not John Maynes was a member of the association. Many witnesses were examined upon this question, and from the evidence produced, which was conflicting, the court decided that John Maynes was not a member, and that his attempt to make forcible use of the telephone system was wrongful. The finding and judgment of the trial court are conclusive here upon disputed questions of fact. *Briggs v. Brown*, 53 Kan. 229, 36 Pac. 334. There was ample evidence presented to sustain the conclusions of the court.

We are unable to find error in any respect, and therefore the judgment is affirmed.

(78 Kan. 212)

DEMPSTER MILL MFG. CO. v. FALKENBERG.

(Supreme Court of Kansas. May 9, 1908.)

CORPORATIONS — ACTIONS — TRIAL — QUESTION FOR JURY — CORPORATIONS — DOING BUSINESS.

Whether a foreign corporation was actually engaged in business within the state, in contemplation of law, without having obtained a license so to do, was a question of fact, and not of law; and it was error to take it from the jury.

Error from District Court, Sumner County; C. L. Swarts, Judge.

Action by the Dempster Mill Manufacturing Company against John Falkenberg. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

J. A. Burnette, for plaintiff in error. F. A. Dinsmoor, for defendant in error.

PER CURIAM. The plaintiff is a Nebraska corporation, with its principal place of business at Beatrice, Neb., and sold through its traveling agent a number of grain drills to the defendant. This action was brought to recover the purchase price of the drills. The defense relied upon was that the plaintiff, being a foreign corporation and having failed to obtain a license to do business within the state, could not maintain the action. The cause came on for trial before the court and a jury. The defendant took the burden of proof, and offered evidence in support of his defense. At the close of the testimony the plaintiff demurred to the evidence. The court refused to rule upon the demurrer, but dismissed the cause on the ground that the evidence showed that plaintiff had been doing business within the state without hav-

ing complied with the law. Whether the plaintiff was actually engaged in business within the state, in the contemplation of the Bush law, was a question of fact, and not of law. It was therefore error for the court to take the question from the jury and decide it.

The judgment will be reversed, and the cause remanded for another trial.

(77 Kan. 637)

HARRISON v. SCOTT et al.

(Supreme Court of Kansas. April 11, 1908. Rehearing Denied May 15, 1908.)

1. CORPORATIONS — INSOLVENCY — CONTRIBUTION BETWEEN STOCKHOLDERS — EXPENSES.

Before a stockholder of an insolvent corporation is entitled to contribution from the other stockholders for costs and expenses incurred in defending litigation, it must appear that the defense inured to their benefit, and that the costs and expenses were paid to relieve his co-stockholders of a common burden.

2. SAME.

A stockholder of an insolvent corporation is not entitled to contribution from his co-stockholders for costs and expenses incurred in defending an action brought against him to recover upon his double liability, where it appears that the only defense urged was personal to himself and in no way benefited his co-stockholders.

3. LIMITATION OF ACTIONS — PROCEEDINGS AT LAW — TOLLING STATUTE.

In order that the pendency of other proceedings will have the effect to toll the statute of limitations upon a cause of action, the proceedings must be such as prevent the enforcement of the remedy by action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 514, 515.]

4. SAME.

The statutes of limitation will run upon a cause of action in favor of a stockholder of an insolvent corporation for contribution from his co-stockholders, based upon a claim in his favor against the corporation, notwithstanding the pendency of an action against him upon his double liability in which he seeks to offset the same cause of action.

(Syllabus by the Court.)

Error from District Court, Shawnee County; A. W. Dana, Judge.

Action by T. W. Harrison against Frank C. Scott and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Geo. E. Overmyer and T. W. Harrison, for plaintiff in error. Ferry & Doran, J. S. Dean, Whitcomb & Hamilton, and Quinton & Quinton, for defendants in error.

PORTER, J. The plaintiff sued defendants for contribution. The petition set up three causes of action. Separate demurrers were filed to each. The demurrer to the first was overruled, and those against the second and third were sustained. The plaintiff complains.

The Topeka Capital Company was organized in 1890 as a corporation under the laws of Kansas. Plaintiff and defendants were stockholders. The company became insolvent, and in November, 1895, ceased doing business. On May 8, 1900, the Remington Paper Com-

pany recovered a judgment against it in the district court of Shawnee county for \$10,160.84, and afterwards brought an action upon the judgment in the United States Circuit Court against the plaintiff to recover upon his double liability as a stockholder. In June, 1904, judgment was recovered against him for \$5,500, with interest and costs. An appeal was taken, and the litigation continued until 1907, when the plaintiff satisfied the judgment by paying the sum of \$6,113.77. These facts were set up in the first count of the petition, a demurrer to which was overruled.

In the second count plaintiff sought contribution from the defendants for the sum of \$1,220, costs and expenses paid by him in defending the action in the federal courts. The demurrer to the second count was rightly sustained. In order to entitle plaintiff to contribution from the other stockholders on account of money expended in payment of the costs of litigation it should appear from his petition that the costs were incurred for the benefit of his co-stockholders. The action in which the costs were paid was against the plaintiff upon his double liability as a stockholder, based upon a judgment against the corporation. If he had defended on the ground that the judgment was not a valid judgment, this might have inured to the benefit of the other stockholders, and the costs would probably have been chargeable against them in an action for contribution. Costs and expenses incurred by him in bona fide effort to defeat the claim in whole or in part as against the company would have been as much for their benefit as his, but it is neither asserted as a fact that these costs were thus incurred, nor does this appear as a necessary inference from the facts stated. So far as appears from the petition itself, all of the defenses interposed by the plaintiff were personal to himself, and neither directly nor indirectly benefited the other shareholders. It is not claimed that the judgment against the company was modified in any respect, and it appears that the balance of the judgment which was not paid by the plaintiff continued as much a liability of the corporation and indirectly of the other stockholders after the defense made by plaintiff as it was before. The reasonable inference from the averments of the petition appears to be that the defense made by him was solely in his own behalf; that, while he was sued for \$9,000, and the judgment recovered against him was only for \$5,500, the reduction was of no benefit to the defendants. The right to contribution between co-obligors implies the payment by one of a burden common to both. It does not appear from the petition that the payment of these costs relieved the defendants of a common burden. "Where judgment is recovered against one of several co-obligors, a judgment debtor is not entitled to contribution from his co-obligors for costs, for in such a case it is not considered that

he has discharged a common burden." 9 Cyc. 797. To the same effect is *Boardman v. Paige*, 11 N. H. 431, and *Knight v. Hughes*, 3 C. & P. 467.

The claims set up in the third count were barred by the statutes of limitation. This appears upon the face of the petition, and the demurrer was therefore rightly sustained. This cause of action is made up in part of a judgment in plaintiff's favor against the Topeka Capital Company, which was rendered December 2, 1897. It is alleged that the company ceased doing business in November, 1895, and that execution was issued and returned unsatisfied December 13, 1897. This action was brought January 29, 1906. The other part of the cause of action consists of an account amounting to \$4,600, which is claimed to be due the plaintiff from the Topeka Capital Company. The last item of the account is a charge made November 10, 1900. Plaintiff contends that the effect of the statutes of limitation was suspended by reason of the fact that this judgment and the account were in litigation until the termination of the proceedings against him in the United States court. It appears by the petition that in the action brought by the Remington Paper Company to recover upon his double liability he set up as an offset his own judgment against the company and this account. The federal court, however, refused to allow either as an offset in that action. It is a general rule that the statute of limitations will not run against a cause of action while it is in litigation, but the litigation must be such as prevents the owner of the claim from enforcing it against the debtor. The Topeka Capital Company was not a party directly or indirectly to the action between the Remington Paper Company and the plaintiff in the federal court, nor were any of the defendants parties. The pendency of that litigation, therefore, could not prevent him from enforcing his claim against the defendants. Instead of asserting his claim against them he attempted to obtain credit for it by way of an offset in an action between himself and a third party. In *Delay v. Yost*, 59 Kan. 496, 53 Pac. 482, it was held that a right of action on a replevin bond accrues when the plaintiff fails to comply with the judgment rendered against him, and the fact that he instituted a proceeding in error to reverse the judgment will not prevent the running of the statute upon the cause of action; and in *McDonald v. Symms*, 64 Kan. 529, 67 Pac. 1111, where the action was conversion, it was held that proceedings in error to reverse an order discharging an attachment upon the same property will not suspend the statute. The decision of the federal court refusing Mr. Harrison the right to offset his claims against the company did not involve his right to maintain an action against the defendants upon the judgment or upon the account. The validity of his claim was not involved, but merely the right to use it as

an offset and a defense in that action. The rule with reference to the effect on the statute of limitations of the pendency of legal proceedings is stated in 25 Cyc. 278 in the following language: "Where a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right." The plaintiff was not prevented from exercising his legal remedy upon this cause of action by the pendency of the proceedings in the federal court against him. The result of that proceeding had no effect whatever on his right of action upon the judgment and account, and it necessarily follows that the statute continued to run notwithstanding the litigation between him and the Remington Paper Company.

From what has been said, the conclusion follows that the judgment must be affirmed.

(77 Kan. 648)

KANSAS BUFF BRICK & MFG. CO. v.
STARK et al.

(Supreme Court of Kansas. April 11, 1908.
Rehearing Denied May 15, 1908.)

1. MASTER AND SERVANT—INJURIES TO EMPLOYEE—FAILURE TO GUARD MACHINERY.

The violation of duty imposed by chapter 356, p. 540, Laws 1903, known as the factory act, is prima facie sufficient to establish the liability of the owners of manufacturing establishments for injuries to an employé resulting therefrom.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where such liability is claimed under this statute, contributory negligence of the injured party is an affirmative defense to be established by evidence, and the doctrine of the assumption of risk is not available as a defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 544-546.]

(Syllabus by the Court.)

Error from District Court, Wilson County; L. Stillwell, Judge.

Action by Eli Stark and Mary M. Stark against the Kansas Buff Brick & Manufacturing Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

This was an action brought by Eli Stark and Mary M. Stark, husband and wife, against the Kansas Buff Brick & Manufacturing Company to recover damages for the death of their son Arthur, who was killed while in the employ of the company. Plaintiffs recovered a judgment, and the company brings the case here for review.

The action was founded upon chapter 356, p. 540, Laws 1903, portions of which are as follows:

"All * * * belting, shafting, * * * and machinery of every description used in a manufacturing establishment shall, where practicable, be properly and safely guarded, for the purpose of preventing or avoiding the death of or injury to the persons employed or

laboring in any such establishment; and it is hereby made the duty of all persons owning or operating manufacturing establishments to provide and keep the same furnished with safeguards as herein specified." Section 4.

"If any person employed or laboring in any manufacturing establishment shall be killed or injured in any case wherein the absence of any of the safeguards or precautions required by the act shall directly contribute to such death or injury, the personal representatives of the person so killed, or the person himself, in case of injury only, may maintain an action against the person owning or operating such manufacturing establishment for the recovery of all proper damages. * * *" Section 5.

The petition alleged that the company had failed to provide a guard rail, or other protection for the line shaft in its building and the belting used in connection therewith, and that the deceased while performing his duty was caught in some manner by the unguarded shaft or belting and instantly killed. The company answered, first by a general denial, and, second, by pleading the contributory negligence and assumption of the risk by the deceased. A reply was filed denying generally the allegations of the answer. The evidence showed that the deceased was caught in the line shaft running through the room about three feet above the floor. It was his duty to keep the shale from clogging in a spout descending from a screen above and close to the shaft; also to keep the material property divided between two mixers about 12 feet away, into which it was carried after leaving such spout. In performing these duties he used a stick with which he loosened the shale by rapping upon or thrusting it into the spout as might be necessary to keep the shale moving. There were three pulleys upon this shaft within 5 feet of this spout, one of them quite close to it, all carrying belts to drive the machinery above and below this room. He was last seen standing near the mixers, and a minute or two later his body was seen whirling about the shaft, and when the machinery was stopped was found on the floor near by, some of the witnesses say within a foot from where he would stand to loosen the shale, others say about 5 feet away from that spot. The pulley 5 feet away bore marks of blood, and the belt was dislocated. There was no eyewitness of his first contact with the machinery, or to see how he was caught by it or at what precise place. There were no guard rails, boxing, or other barriers to prevent contact with the shaft, pulleys or belting. The deceased had previously been employed in the yard, but two days before had been assigned to this work in the machinery room.

Ziegler & Dana, for plaintiff in error, J. K. De Moss, for defendants in error.

BENSON, J. (after stating the facts as above). The jury, in answer to special ques-

tions, found that it was practicable to box or safeguard the machinery in question, that the company was negligent in failing to do so, and that such negligence was the proximate cause of the injuries.

The defendant company alleged error in the refusal of the court to sustain its demurrer to the evidence, in overruling its motion for judgment, and in denying a new trial. It further insists that the negligence of the deceased directly contributed to the injuries from which he died, and that the proximate cause of the injuries was such contributory negligence and not the unguarded machinery. The mere fact that this young man was working in the presence of unguarded machinery and amid obvious perils, plainly apparent to his senses, does not prove that his death was caused by his own want of care, but, whether he in fact exercised proper care for his own safety was a question for the jury, and could not be determined by the court, unless the facts were such that reasonable minds would not differ with respect to his negligence. *Cummings v. Railroad Co.*, 68 Kan. 218, 74 Pac. 1104. The findings disclose the violation of a duty imposed by statute, and this is prima facie sufficient to establish liability for the injuries resulting therefrom. *Madison v. Clippinger*, 74 Kan. 700, 88 Pac. 260; *Fowler Packing Co. v. Enzenperger* (Kan.) 94 Pac. 994 (March 7, 1908). It is true that contributory negligence is a defense where liability is claimed under this statute. *Madison v. Clippinger*, supra. This, however, is an affirmative defense (*Railroad Co. v. Lee*, 66 Kan. 806, 72 Pac. 286), and the verdict failed to establish it in this case.

The defendant also complains of the refusal of the court to instruct the jury to the effect that it was the duty of the deceased to make use of his senses to discover the dangers about him, and to exercise reasonable care to keep away from the shaft, and that, failing to do so, he could not recover. On this subject the court gave the following instruction: "I have just indicated to you in general terms that if the evidence discloses that the deceased was himself guilty of ordinary negligence contributing to his own death that then the defendant is not liable in this action. On that head you are further instructed generally that it was the duty of the deceased to exercise ordinary care and prudence while working in the brick plant for his own safety and protection, and, if he failed to do so, and consequently was killed, then the defendant is not liable, and that is so regardless of the question as to whether the machinery of the defendant should have been safeguarded as heretofore indicated in these instructions or not. The court cannot say to you as a matter of law whether in anything the deceased may have done or failed to do in his acts and conduct connected with his death he was or was not guilty of ordinary negligence, but that is

a question of fact, and solely for your determination." This was a fair statement of the rule, and we think sufficient.

The defendant asked the court to instruct the jury that the deceased assumed the risk of dangers from unguarded machinery open and obvious to his senses. This was refused, and an instruction was given to the effect that assumption of risk was not a defense in such cases. This was in accordance with the decisions of this court, and is the correct rule. *Western Furniture & Mfg. Co. v. Bloom* (Kan.) 90 Pac. 821, 11 L. R. A. (N. S.) 225.

Complaint is also made of the refusal of the court to submit various special questions designed to show the knowledge of the deceased of the condition and operation of the unguarded machinery. There was no question of the knowledge of the deceased of these conditions. They were open and obvious, and he was in the enjoyment of the ordinary faculties. These facts must be considered as admitted, and special findings thereon were unnecessary. Still, as he did not assume these risks, the fact that they were so known and apparent did not bar a recovery, if the deceased was not wanting in proper care in the situation in which he was placed. The defendant asked this question: "Were any of the employés of the defendant guilty of negligence which contributed to or was the approximate cause of the injury to the deceased?" The court changed it thus: "Was the defendant guilty of negligence which contributed to or was the approximate cause of the injury to the deceased?" This was a proper correction. The statute imposed the duty upon the corporation to safeguard its machinery, and the failure to do so was the fault of the corporation itself. It was not claimed that the machinery was guarded in any way, but that it was not practicable to do so. It was therefore immaterial what officer or officers or employés were responsible for the neglect.

It is argued that this shaft and its pulleys and belts, although unguarded, were not dangerous to this employé while in the discharge of the particular duties devolving upon him; that no duty required his approach to the machinery near enough to become entangled in or caught by it. This, however was a question of fact exclusively. His work was in the presence of this swiftly revolving shaft, with three pulleys and belts within five feet. In this situation he was required to reach over or above the shaft or near to it to thrust his stick into the mass to keep it moving in the spout, then to turn to the mixers close by, and so, attending to the spout and the mixers, give such heed to all his duties as would keep the work in progress without obstruction. In some way, the precise details of which are unknown, he came into contact with the machinery, and lost his life.

In the absence of any finding by the jury of negligence on his part, the general verdict,

having been approved by the trial court upon sufficient evidence, must be sustained.

The judgment is affirmed.

(77 Kan. 642)

ATCHISON, T. & S. F. RY. CO. v. STONE
et al.

(Supreme Court of Kansas. April 11, 1908.
Rehearing Denied May 15, 1908.)

MASTER AND SERVANT—INJURY TO EMPLOYÉ
—DANGEROUS APPLIANCES.

A railroad company is not liable for injuries received by one of its employes which result from the use by him of a defective appliance, when the defect is known to such employé, or is of such a character as to be discoverable by mere casual observation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

(Syllabus by the Court.)

Error from District Court, Ford County;
E. H. Madison, Judge.

Action by E. C. Stone and Mary E. Stone against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Charles E. Stone, an unmarried young man about 21 years of age, was employed by the Atchison, Topeka & Santa Fé Railway Company at Dodge City as water changer. He had been employed at that business about 13 days, but was familiar with its duties. Before being employed as water changer he had been a "roustabout" in the roundhouse at that place about three years. On July 10, 1905, engine 531 came in from a trip, and Stone was directed to change the water in it, and he proceeded to do so; but while engaged in that duty he was fatally scalded, and died six days thereafter. The parents of the deceased commenced this action in the district court of Ford county to recover damages for the loss of their son, claiming that the railroad company was negligent in failing to furnish proper appliances with which to do the work required of the deceased. The history of the transaction from which the circumstances relied upon by the parents must be gathered is, in substance, as follows: On each side of a locomotive engine, below the boiler, and back of the drive wheels, there is what is called a "blow-off cock," consisting of a short metal tube with inside threads projecting from the side of the engine. In order to let the water out of the boiler what is known as a "blow-off pipe" is attached to the blow-off cock above described, the valve in the latter is opened, and the hot water and remaining steam escape through the blow-off pipe into the ash pit beneath the engine. The blow-off pipe is attached to the boiler by screwing one end of it into the blow-off cock. Blow-off pipes are kept together at the roundhouse near hostler's office, and water changers go there and take one when necessary for use, and return it when the work is finished. On the day in question, after

Stone had been at his engine, he was seen running away screaming for help. The blow-off cock on his engine was open, the steam and water escaping, and his clothes were saturated with scalding water. A blow-off pipe was found further west, about 10 feet on the ground, as stated by one witness, and by another, about 4 feet west, and directly under the blow-off cock. The threads of the blow-off pipe which screw into and fasten it to the blow-off cock and the boiler were worn, bent, and defective. The blow-off pipes were furnished by the company, and the parts which screwed into the blow-off cock were usually kept in stock, where they could be obtained by the employes as needed; and whenever one is needed it is the duty of the employé to apply for one. The defective condition of the blow-off pipe was apparent to any one upon examination. The threads were so worn that the grooves were not very plain. On trial the jury returned special findings of fact, which read:

"Question 1: How old was Charles E. Stone on the 22d day of July, 1905, the day upon which it is claimed he died? Answer: Twenty-one years, six months, and a few days.

"Question 2: Did Charles E. Stone receive the injuries complained of on the 16th day of July, 1905, at the roundhouse of the defendant company in Dodge City, Kan.? Answer: Yes.

"Question 3: If you answer the last-above question 'Yes,' please state for what length of time just prior thereto said Charles E. Stone had been in the employ of the defendant at its roundhouse in Dodge City, Kan. Answer: Last employment was about thirteen months.

"Question 4: During the time Charles E. Stone had been in the employ of the defendant company at its roundhouse in Dodge City, Kan., had he been employed and working in and about locomotive engines and other work required in said roundhouse? Answer: Yes.

"Question 5: At the time of receiving his injuries was Charles E. Stone a water changer for the defendant company at its roundhouse in Dodge City, Kan.? Answer: Yes.

"Question 6: If you answer the last-above question 'Yes,' please state for what length of time just prior to July 10, 1905, said Charles E. Stone had been engaged as such water changer. Answer: Fourteen days and five hours.

"Question 7: During the time said Charles E. Stone had been employed as a water changer in the engines of the defendant company at Dodge City, Kan., had he changed the water in from five to seven engines each day during such time? Answer: Yes; or assisted to do so.

"Question 8: Was Charles E. Stone familiar with the manner and the means to be used in changing the water in locomotive engines for the defendant company on the 16th day of July, 1905? Answer: Yes.

"Question 9: Was the boiler of the engine

No. 531 washed out on the 16th day of July, 1905? Answer: No.

"Question 11: Did Charles E. Stone in the performance of his duty as a water changer change the water in engine No. 531 on the 16th day of July, 1905? Answer: Attempted to do so.

"Question 12: Was a blow-off pipe used in changing the water in engine No. 531 on the 16th day of July, 1905? Answer: In the attempt to change the water the blow-off pipe was used.

"Question 13: Among the duties attending the changing of water in engine No. 531 did Charles E. Stone procure for his use a blow-off pipe? Answer: Yes.

"Question 14: If you answer the question last-above asked 'Yes,' please state if Charles E. Stone placed the same in position in said engine. Answer: Yes.

"Question 15: Did Charles E. Stone, on July 16, 1905, turn or adjust the blow-off pipe on engine No. 531? Answer: Yes.

"Question 16: From what place did Charles E. Stone obtain the blow-off pipe used in changing the water in engine No. 531, if he obtained and used such pipe for such purpose? Answer: In the corner by hostler's office.

"Question 17: Was the blow-off pipe used by said Stone, if he used one, selected by him from several lying in a pile near the hostler's office? Answer: Took it from the corner where they were kept.

"Question 18: Did any one order or direct Charles E. Stone to change the water in engine No. 531 on July 16, 1905? Answer: Yes.

"Question 19: If you answer the last-above question 'Yes,' please state who so ordered or directed him in that particular? Answer: He received his orders from the head hostler in the roundhouse.

"Question 20: Were the threads of the blow-off pipe worn on July 16, 1905? Answer: Yes.

"Question 21: If you answer the last-above question 'Yes,' please state if the worn condition of the threads of said blow-off pipe were open and obvious? Answer: Yes; if their attention had been called to it.

"Question 22: Could any one by merely looking discover that the threads of the blow-off pipe were worn? Answer: Yes; if their attention had been called to it.

"Question 23: Was the worn condition of the threads of the blow-off pipe so obvious and plain to be seen that anybody upon a casual look and inspection would observe the same? Answer: If their attention had been called to it.

"Question 24: Were the blow-off pipes under the supervision and direction of the boiler washer and water changer? Answer: No.

"Question 25: Was the boiler washer on duty at the roundhouse of defendant at Dodge City, on July 16, 1905? Answer: No.

"Question 26: Did the boiler washer or

Charles E. Stone or any other person give any notice to the defendant of the worn condition of the blow-off pipe prior to the injury of Charles E. Stone? Answer: No.

"Question 28: If Charles E. Stone had looked and casually inspected the threads of the blow-off pipe when he obtained and used the same in changing the water in engine No. 531, could he have observed and known the condition thereon? Answer: Yes; if his attention had been called or directed to it.

"Question 29: If you find that the defendant was guilty of any negligence which was the proximate cause of the injury to Charles E. Stone, please state fully in what particular it was negligent, and who, if any one, was guilty of such negligent acts. Answer: Defendant, by neglecting to keep new blow-off pipes in storehouse, and the blow-off pipe in use was unsafe and insufficient, and that the condition of the threads of said blow-off pipe had existed for such a length of time prior to said injury that the condition was known to the defendant, or would have been known to the defendant had it exercised reasonable care concerning the same.

"Question 30: Did Charles E. Stone ever make any complaint to the defendant company of the condition of the blow-off pipe which was used on engine No. 531 on July 16, 1905? Answer: No.

"Question 32: If you find Charles E. Stone selected the blow-off pipe in question and arranged it on engine No. 531, please state if in doing so he used his own judgment and discretion. Answer: He took the blow-off pipe from corner where kept, and for the latter part of question our answer is 'Yes.' "

The jury returned a verdict for the plaintiff, and the railway company brings the case here for review.

W. R. Smith, O. J. Wood, and A. A. Scott, for plaintiff in error. A. B. Reeves and B. F. Milton, for defendants in error.

GRAVES, J. (after stating the facts as above). The plaintiffs are prevented from recovery in this case because of the contributory negligence of the person injured. The facts found by the jury clearly indicate that Charles E. Stone was fully aware of the defective condition of the blow-off pipe when he used it. While there is no direct evidence of this fact, it is beyond the range of reasonable possibility that it could escape his notice. He, better than any other person, had an opportunity to see and know its condition. He had it in his hands and screwed it into the blow-off cock. Its defective condition was open to the casual observation of any person. His duty and safety both required him to examine as to its sufficiency. If he did not know, then his want of knowledge was the result of gross negligence, and is unavailing. It was his duty to select a good blow-off pipe, if there was one; and, if not, then it was his duty to apply to the hostler

for one which was not defective. Not having done this, his use of the defective pipe was voluntary and at his own risk. He was familiar with the work and aware of its danger. It has long been settled by the decisions of this state that a person cannot voluntarily and recklessly place himself in danger, and then shift the responsibility after an injury has been received. *Jackson v. K. C., L. & S. K. R. Co.*, 31 Kan. 761, 3 Pac. 501; *Rush, etc., v. M. P. Ry.*, 36 Kan. 129, 12 Pac. 582; *A., T. & S. F. Ry. v. Schroeder*, 47 Kan. 315, 27 Pac. 965; *Clark v. M. P. Ry. Co.*, 48 Kan. 654, 29 Pac. 1138; *S. K. Ry. Co. v. Moore*, 49 Kan. 616, 81 Pac. 138; *S. K. Ry. Co. v. Drake*, 53 Kan. 1, 35 Pac. 825; *M., K. & T. Ry. Co. v. Puckett*, 62 Kan. 770, 64 Pac. 631; *Walker v. Scott*, 67 Kan. 814, 64 Pac. 615; *Lanyon v. Bell*, 64 Kan. 739, 68 Pac. 609; *Gillaspie v. United Ironworks Co. (Kan.)* 90 Pac. 760; *Railway v. Welkal*, 73 Kan. 763, 84 Pac. 720. The facts having been fully found by the jury, judgment follows.

The judgment of the district court is reversed, with directions to enter judgment for the defendant.

(78 Kan. 82)

PIPER v. PIPER et al.

(Supreme Court of Kansas. May 9, 1908.)

TRUSTS — RESULTING TRUSTS—EVIDENCE TO ESTABLISH—PAROL.

Facts from which a trust by implication of law arises may be established by parol evidence or by proof partly in parol and partly in writing, and where the claim is that the purchase of the land was made by and for the benefit of several, and the conveyance taken in the name of only one, any writing prepared at the time, as well as the negotiations of the parties, their acts and conduct, and all the circumstances in connection with the transaction tending to prove a trust, may be shown in evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 129-133.]

(Syllabus by the Court.)

Error from District Court, Labette County; Thos. J. Flannely, Judge.

Action by Arch Piper, as guardian for Priscilla J. Lanham, an incompetent person, against John F. Piper and others. Judgment for defendants, and plaintiff brings error. Reversed.

A. D. Neale, for plaintiff in error. E. L. Burton and W. G. Glasse, for defendants in error.

JOHNSTON, C. J. In an action brought by Arch Piper, as guardian for Priscilla J. Lanham, a person of unsound mind, against John F. Piper and Angeline Summers, he alleged that Mrs. Lanham was the owner of an undivided one-fourth interest in a half section of land formerly owned by their father, John F. Piper, Sr. In one count he asked for the possession of the land, and also \$500 as damages for being kept out of possession and for rents and profits. In another count the plaintiff states the way in which his ward

derived her interest in the land, alleging, in substance, that in 1897, John F. Piper, Sr., having died, George Bennett, the administrator of the Piper estate, was about to sell the land under the direction of the probate court; that an agreement was made between the heirs of John F. Piper, Sr., that the land should be purchased for their benefit, and the title thereto taken in the name of the defendant, John F. Piper; that to obtain the money with which to purchase the land the heirs procured a loan for which they gave a note, and to secure its payment a mortgage upon the land was also executed; and that it was agreed that, if the rents and profits were insufficient to pay the interest on the mortgage, each heir should share in paying the deficiency, and that, if any one of them failed to pay his pro rata share, his interest would cease and become the property of the remaining purchasers. It was alleged to have been the understanding that all of the heirs were to be included in the transaction, and that a written agreement was prepared and signed by some of the parties, but plaintiff was unable to state whether all in fact did sign it, as the writing was taken and retained by the defendant Piper. What purported to be a copy of the agreement, so far as it was executed, was set forth, but it appeared not to be signed by the defendant or by several other of the heirs. It was further alleged that one of the heirs lost her interest by failing to pay a share of the charges against the land, and that another had assigned her interest to the defendant. The plaintiff asked the court to determine the respective interests of the parties in the land and make a partition among them. In his answer, aside from other averments and defenses, John F. Piper admitted the purchase of the land from the administrator, and also that there had been negotiations looking to the purchase of the land and holding the same for the benefit of all of the heirs, but that the agreement was never consummated, as all of the heirs did not enter into the contract, and he alleged that, while the plaintiff had made some payments towards the excess of the charges over the rents and profits of the land, they were received with the understanding that the contract would be completed, which was never done, and that plaintiff had failed to pay other and later deficiencies, and that the defendant tendered the money received from plaintiff under the proposed agreement. On the trial of the issues, the verdict was against the plaintiff, and he complains mainly of rulings on the admission of testimony.

The plaintiff offered proof of conversations between some of the heirs and John F. Piper as to the purchase of the land, the placing of the title in the name of Piper, and that he should hold the land in trust for the heirs, and also of admissions by Piper that he had taken and was holding the land in trust for the others. Testimony was excluded

ed which tended to show that, when Piper and another applied for the loan with which to buy the land, it was then stated that the land was to be conveyed to Piper, who was to hold it for the benefit of the heirs, and that the party from whom the money was obtained insisted that all of the parties interested in the land should sign the notes and coupons. The record discloses that most of the heirs did sign the notes and coupons given to obtain the purchase price of the land. The testimony tended to show a resulting trust and should have been admitted. While it is required that trusts concerning lands shall be in writing, signed by the party creating the same, an exception is made as to those arising by implication of law. Gen. St. 1901, § 7875. If by agreement and without fraudulent purpose the plaintiff and other heirs paid the consideration of the purchase, or of certain interests in the land, and vested the title in Piper, who was to hold the land for their use and benefit, a trust resulted by operation of law in their favor, and the fact that some of the agreements and elements of the trust are not in writing does not prevent its enforcement. *Franklin v. Colley*, 10 Kan. 260; *Fink v. Umscheld*, 40 Kan. 271, 19 Pac. 623, 2 L. R. A. 146; *Barlow v. Barlow*, 47 Kan. 676, 28 Pac. 607; *Rayl v. Rayl*, 58 Kan. 585, 50 Pac. 501; *Lyons v. Berlau*, 67 Kan. 426, 73 Pac. 52; *Reemsnyder v. Reemsnyder*, 75 Kan. 565, 89 Pac. 1014; Gen. St. 1901, § 7882.

Every agreement and circumstance tending to show that Piper was acting as trustee and holding the land for the heirs, or some of them, was competent. The trust relation may be founded partly on writings and partly on oral agreements, as well as in the conduct of the parties and the circumstances in connection with the matter. So testimony of the signing of the notes and coupons upon which the money to buy the lands was borrowed, and also the writing acknowledging the receipt of money for the purchase of an interest of one of the heirs, was admissible. Testimony, too, of the admissions of Piper, whether oral or in writing, that he was acting in the capacity of a trustee, should have been received. Any act of his in recognition of the trust while holding the land, such as the receipt of money from the plaintiff and others in payment of a proportionate share of the charges upon the land where they exceeded the rents and profits derived from it, as well as his purchase of the interests acquired by some of the heirs under the trust agreement, would tend to establish the trust, and was therefore admissible. Some testimony of that character was admitted, but much that was material and competent was excluded. An objection to some of the testimony excluded was that the witness occupied the privileged relation of attorney, but the ruling of the trial court was not placed on that ground. Later in the trial some testimony, similar to that excluded, appears to

have been received, but not in such a way, or to such an extent, as to cure the error that had been committed.

It is argued that plaintiff based his right of recovery upon a written agreement, and for that reason defendant's admissions and the conversations that were had outside of that writing were not competent testimony. Plaintiff did set forth a purported writing signed by some of the heirs, but not signed by the defendant, and which upon its face appeared to be incomplete. There was an averment, too, that plaintiff was unable to state whether all of the parties had signed it, as the writing had been taken and retained by Piper, but that the terms written in it had been fully accepted and agreed upon by all of the parties. The signing of this paper by plaintiff did not preclude proof of all of the circumstances including the writing itself which tended to show a trust in the land, and that which was offered did not contradict the terms embodied in the writing. If the transaction had the elements of a resulting trust, the failure to complete the contract, showing the terms agreed upon at the time the land was purchased, will not defeat the trust. The trial court properly advised the jury that, in ascertaining whether the land was purchased by Piper as trustee for the others, or solely upon his own account, they might "take into consideration any writing that may have been drawn up at the time, the conversations of the parties, their acts, conduct, and all of the circumstances in connection with the matter."

The exclusion of testimony which came within this rule requires a reversal of the judgment and the remanding of the case for another trial.

(77 Kan. 629)

KNIGHTS OF MACCABEES OF THE WORLD v. NELSON.

(Supreme Court of Kansas. April 11, 1908.
Rehearing Denied May 15, 1908.)

INSURANCE—LIFE INSURANCE—APPLICATION—
AMENDMENT OF BY-LAWS—DEATH BY SUICIDE.

In the written application for membership to an insurance association was the following: "This application and the laws of the Supreme Tent now in force, or that may hereafter be adopted, are made a part of the contract between myself and the Supreme Tent, and I, for myself and my beneficiary or beneficiaries, agree to conform to and be governed thereby."

In the certificate issued to him in which the association undertook to pay a certain amount to his beneficiary upon his death occurred the following:

"Provided he shall have in every particular complied with the laws, rules, and regulations of the order governing members and their beneficiaries which are now in force, or may hereafter be adopted by the Supreme Tent, or the subordinate tent to which he belongs. * * *

A by-law of the association in force at the time of the issuance of the certificate contained the following:

"But no benefit shall be payable on account of the death of any member while engaged in a

mob, * * * or by reason of death, the result of suicide, within two years after admission."

Thereafter, and some years before the death of the member, the association regularly amended its by-laws to read as follows:

"No benefits shall be paid on account of the death of a member when death was the result of suicide, whether the member taking his life was sane or insane at the time, provided that in case of suicide twice the amount of all assessments or month rates paid to the Supreme Tent by such member shall be paid back to the beneficiary named in the certificate, or to the person found to be entitled to receive the same, * * * which amount shall not exceed the face of the certificate * * * and such amount shall be the full amount that can be claimed in such case."

Held, that in such case the amendment to the by-laws is reasonable and is valid, and the member having come to his death by suicide, the beneficiary is entitled to recover upon the benefit certificate only twice the amount of all assessments or month rates paid to the Supreme Tent by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1835.]

(Syllabus by the Court.)

Error from District Court, Atchison County; R. F. Hudson, Judge.

Action by Anna Nelson against the Knights of the Maccabees of the World. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Plaintiff in error is a fraternal insurance association. In 1892 Andrew Nelson, the deceased husband of the defendant in error, was admitted to membership in the association, and received a certificate or policy of insurance, by the terms of which the association agreed to pay the amount of one assessment, not exceeding \$2,000, to his beneficiary, upon certain conditions, at his death. The defendant in error was named as his beneficiary. Nelson died November 17, 1905, and proof of his death was duly made, as was also a demand for payment of the indemnity of \$2,000 by the beneficiary. The association claimed that Nelson died by his own hand; that under the provision of the by-laws in force at the time of his death his beneficiary was entitled to only twice the amount paid as dues by Nelson during his lifetime, which sum was \$768. A compromise was effected, and the association paid Mrs. Nelson \$1,000. Thereafter she brought suit against the association for the additional \$1,000, claiming that the compromise had been procured by fraud, which the defendant denied. A trial was had upon the issues substantially according to the facts as set forth, and Mrs. Nelson recovered the full amount she claimed, and the association brings the case here for review.

Waggener, Orr & Challis (D. D. Aiken, of counsel), for plaintiff in error. C. D. Walker and J. L. Berry, for defendant in error.

SMITH, J. (after stating the facts as above). The association assigns numerous errors in the introduction of evidence, in the overruling of its demurrer to plaintiff's evi-

dence, and in the giving a refusal of the instructions. The association does not question but that one assessment would have aggregated the amount of \$2,000, and it was admitted on the argument of this case that Nelson came to his death by suicide. In their briefs counsel for each party have concurred in the statement that the case here should be determined upon the contract of indemnity. It is said in the brief of the defendant in error: "We insist, in the second place, that the only dispute between the parties was as to the legal effect of admitted facts. * * * If the plaintiff's construction of the contract is law, the defendant owed the plaintiff on the death of Andrew Nelson, on compliance by her with the conditions of the policy, \$2,000 on a contract obligation. If, under the law, the defendant's contention as to what constituted the contract is correct, the defendant owed the plaintiff according to the terms of the contract as contended for by it \$738. In neither event could there be any dispute as to the amount of the obligation." We fully agree with counsel in their statement of the status of the case here, and that the contract itself under the admitted facts is determinative of our decision. We shall therefore ignore the detailed specifications of error by which practically the same question is repeatedly raised, and shall proceed to the discussion and determination of the rights of the parties under the contract.

In the application of Andrew Nelson for admission to the order and for the contract of endowment occurs the following: "I hereby declare that the above are fair and true answers to the foregoing questions, and I hereby agree that these statements in the application and the laws of the Supreme Tent of the Knights of The Maccabees of the World now in force, or that may hereafter be adopted, shall form the basis of this contract of endowment. * * * This application and the laws of the Supreme Tent now in force, or that may hereafter be adopted, are made a part of the contract between myself and the Supreme Tent, and I, for myself and my beneficiary or beneficiaries, agree to conform to and be governed thereby."

The portion of the certificate material in this consideration reads: "This certifies that Sir Knight Andrew Nelson has been regularly admitted in and is recognized as a member in good standing of Atchison Tent Number 2, located at Atchison, Kan., and that, in accordance with and under the provisions of the laws governing the order, his legal beneficiary named herein is entitled to receive one assessment on membership, but not exceeding in amount the sum of \$2,000, and the said sum will be paid as a benefit to Anna Nelson, his wife, upon satisfactory proof of his death, together with the surrender of this certificate, provided he shall have in every particular complied with the laws, rules, and regulations of the order govern-

ing members and their beneficiaries which are now in force, or may hereafter be adopted by the Supreme Tent, or the subordinate tent to which he belongs has not obtained his membership by fraud or misrepresentation as to his age, physical condition, or occupation when admitted to membership." Section 183 of the by-laws of the association, which was in force at the time the certificate was issued to Nelson, provides, among other things, the following: "But no benefit shall be payable on account of the death of any member while engaged in a mob, * * * or by reason of death, the result of suicide, within two years after admission."

In May, 1895, a new by-law (section 173) was adopted in lieu of or as an amendment to the foregoing, which latter section contains the following provision among others: "And no benefit shall be paid on account of the death or disability of any member while engaged in a mob, * * * or when death was the result of suicide, within one year after admission, whether the member so taking his own life was sane or insane at the time."

In August, 1901, the association again amended its by-laws and adopted the following section relating to suicide, which section was in force up to the time of the death of Nelson and the trial of the case: "Section 432. No benefits shall be paid on account of the death of a member when death was the result of suicide, whether the member taking his life was sane or insane at the time, provided that in case of suicide twice the amount of all assessments or month rates paid to the Supreme Tent by such member shall be paid back to the beneficiary named in the certificate, or to the person found to be entitled to receive the same, which amount shall not exceed the face of the certificate, and such amount shall be the full amount that can be claimed in such case."

It is contended on the part of the association that the payment of the benefit is governed by the by-law adopted in 1901, which was in force at the time of Nelson's death. On the other hand, Mrs. Nelson contends that the by-law in force at the time the certificate issued was a part of the contract, and that the association could not change the contract without the personal consent of Nelson to his prejudice or the prejudice of his beneficiary. An imposing array of authorities is cited in support of each of these propositions respectively, but the question is hardly an open one in this court. In *Miller v. National Council*, 69 Kan. 239, 76 Pac. 831, Mr. Justice Greene, speaking for the court in a case relating to the change of the rate of the monthly assessments, says: "The important question in this case is, did the association, with the consent of the plaintiff, reserve the power so to alter or amend its by-laws subsequently to the issuance of the plaintiff's certificate as to increase the amount of its monthly assessments? The plaintiff's certificate is not his entire contract, and therefore

not determinative of his rights and duties. It is not complete in itself. Some of the conditions and agreements which made his contract must be looked for elsewhere. The certificate does not contain a statement of what his rate of assessment is, only when it shall be paid. To supply these omissions we must look to the by-laws of the association, his application, and certificate. * * * The condition in the plaintiff's certificate that he should in every particular while a member of the order comply with all the laws, rules, and requirements thereof was a consent on his part, not only to comply with the laws then in force, but also to comply with all reasonable rules and regulations that might be made thereafter in the interests of the association. Every person joining an association obligates himself, without so expressing it, to conform to, comply with, all its existing laws; and, if the provision in the plaintiff's certificate means anything, it is that he agreed to comply with all the laws then in force or subsequently to be enacted by the National Council." In that case, as in this, it was shown that the supreme body of the organization had power at its annual meetings to change the by-laws of the association.

The defendant in error attempts to discriminate between the *Miller Case* and the case at bar, and says that the provision in the policy requiring the member to comply with all the reasonable rules and regulations of the association applies to the question decided in the *Miller Case*, to wit, the power to increase the amount of the monthly assessments so far as reasonably necessary to enable it to comply with its contracts, but does not apply to the present case where the by-law undertakes to decrease the endowment to be paid upon the death of the member occurring by suicide after the lapse of more than two years. It cites in support of this contention *Court of Honor v. Updegraff*, 68 Kan. 474, 75 Pac. 477. In that case a by-law of the association provided in substance that the order would not pay benefits of members who committed suicide whether sane or insane, with specific exceptions. But in all cases not within the said exceptions the amount of money contributed to the benefit fund by such members should be returned and be paid to the beneficiary out of said fund in lieu of the benefit. A section of the constitution of that order which was in force at the time the certificate was issued, and at the date of the holder's death provided: "After two years certificates of membership shall be uncontestable for any cause except fraud, violation of the constitution or laws of this order, or failure to pay assessment for benefit and general funds as provided by the laws." The decision in that case is, in effect, the determination of which of two conflicting provisions shall govern, that is, whether the provision in the certificate itself which rendered it incontestable after two years was rendered void by the provision

of the by-law relating to suicide; and the court decided that the incontestable provision in the constitution, made a part of the certificate, governed and upheld the claim of the beneficiary. The rule is that, where the member of such an organization consents that he and his beneficiaries shall be governed by the laws, rules, and regulations of the association in force and existing at the time the certificate issues, or which may be thereafter adopted, is conclusive upon himself and his beneficiaries as to all reasonable changes which may be made therein.

In *Ritter v. Mutual Life Ins. Company*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693, it is held in substance that, where an assured, holding an ordinary policy of life insurance, comes to his death by suicide while sane, and there is no incontestable provision in the policy and no provision whatever in regard to suicide, the policy is issued upon the common expectancy of life, and if the insured, by his own act, attempts to hasten the maturity thereof, the policy becomes void. The risk assumed by the insurer is therein compared to the risk under a fire insurance policy where there is no provision relating to the effect of an assured destroying his own property by fire. In which cases of course it is universally held that the contract of indemnity cannot be enforced. It is also said in the *Ritter Case*, *supra*, that to allow an insured or his beneficiaries to recover an indemnity upon a death resulting from suicide is against public policy, and that, if a policy were written with the express provision that, if the insured should come to his death by his own hand, the insurer would pay the indemnity to his beneficiary or estate, the contract would probably be void as against public policy.

The question, then, for our determination, is whether the change made in the by-laws of the association is a reasonable change. In 1892 when the certificate in this case was issued the association expressly provided that it would not pay any indemnity in case the holder of the certificate came to his death by suicide within two years. In 1895 it is to be presumed the association found it necessary and expedient to change the rules, and to provide that no indemnity would be paid if the holder of the certificate came to his death by suicide within one year. Again, in 1901 the association found it expedient to change its by-laws, and provided that no benefits should be paid on account of the death of a member when death was the result of suicide, but that it would pay the beneficiary, in the case of suicide, twice the amount of all assessments or month rates paid to the Supreme Tent by the member, not exceeding the face of the certificate. This latter change accords with public policy in removing the inducement which a member might possibly have to benefit his beneficiary by his own suicide, and the provision to pay double the amount the association has received by rea-

son of his membership and the issuance of the certificate does not seem to be unreasonable. While this provision of the by-law was not in existence at the time the member took out his certificate, or for a large portion of the time that he was paying assessments according to his contract, it must be held that by his contract he consented to all reasonable changes in the by-laws of the association. It is right and reasonable that all life insurance organizations should decline to contract for the payment of any indemnity where death results from suicide. The by-law adopted by this association, however, is, from a financial standpoint, more fair. It provides for the return of twice the amount it has received.

The conclusion to which we have arrived makes it unnecessary to consider the objection made by Mrs. Nelson that the settlement was procured by fraud or unfair means; our conclusion being that she has already received more than the association was obliged to pay. If we should assume, as we do not, that the settlement was procured by unfair means, she is not prejudiced thereby.

The judgment of the court below is reversed, and the case is remanded, with instructions to enter judgment in favor of the defendant below.

HENDERSON et al. v. BELDEN.

(Supreme Court of Kansas. May 9, 1908.)

EJECTMENT — PLEADING — PETITION—SUFFICIENCY.

In view of sections 24 and 29 of the act relating to wills (sections 7961, 7966, Gen. St. 1901), the former providing that authenticated copies of wills executed and proved according to the laws of another state may be admitted to record in the probate court of any county of this state where any property to which it relates is situated, and shall thereupon have the same validity as domestic wills, and the latter that no will shall be effectual to pass real or personal estate unless it shall have been duly admitted to probate or recorded as provided in said act, a petition in ejectment is demurrable which bases the plaintiff's right to recover upon an allegation that real property in Kansas was devised to him by a will which had been duly admitted to probate in another state, but is silent as to any record thereof having been made here.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; William G. Holt, Judge.

Ejectment by R. L. Henderson and others against J. S. Belden. Judgment for defendant, and plaintiffs bring error. Affirmed.

Haywood & McLane, and Miller, Buchan & Miller, for plaintiffs in error. J. W. Jenkins, S. A. Handy, Milton Moore, and Horace S. Kimball, for defendant in error.

MASON, J. This proceeding is brought to reverse a ruling sustaining a demurrer to a petition which is substantially one in ejectment. The plaintiffs claim title as devisees in a will duly probated in Maryland. The

petition does not allege, however, that the will has ever been admitted to probate or record in this state. The Kansas act relating to wills contains these provisions (sections 7961, 7966, Gen. St. 1901):

"Authenticated copies of wills executed and proved according to the laws of any state or territory of the United States, relative to any property in this state, may be admitted to record in the probate court of any county in this state where any part of such property may be situated; and such authenticated copies so recorded shall have the same validity as wills made in this state in conformity with the laws thereof."

"No will shall be effectual to pass real or personal estate unless it shall have been duly admitted to probate or recorded as provided in this act."

It is manifest that the words "or recorded" in section 7966 have reference to the recording of foreign wills provided for in section 7961. The plaintiffs suggest no other interpretation of the statute, but contend that as against a demurrer the allegation of their petition that the owner of the land "devised" it to them must be held to imply that whatever steps were necessary to make the devise effectual were taken, including the probate and recording of the will. Possibly a broad general allegation that the owner devised the land to the plaintiffs might have been entitled to receive this very liberal construction. But the plaintiffs set out specifically a part of the court proceedings upon which they must rely (the original probate of the will); and it cannot be presumed in their behalf that other proceedings had been had (a supplementary probate and record in this state) which they do not mention. As these considerations compel an affirmance of the judgment, it is unnecessary to determine any of the other questions discussed in the briefs.

The judgment is affirmed.

SAINDON v. MORRELL et al.

(Supreme Court of Kansas. May 9, 1908.)

APPEAL AND ERROR—REVIEW—INSUFFICIENT DAMAGES.

Where, in an action to recover damages for an assault and battery, the amount of recovery has been determined by the verdict of a jury, and the verdict has been approved by the overruling of a motion for a new trial, *held*, this court will not reverse the judgment for the reason only that the evidence may seem to justify the recovery of a larger sum.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3944, 3945, 3993.]

(Syllabus by the Court.)

Error from District Court, Graham County; Charles W. Smith, Judge.

Action by John Saindon against Joseph Morrell and others. Judgment for plaintiff. From an order denying a new trial because of the insufficiency of the damages, plaintiff brings error. Affirmed.

F. D. Turck, for plaintiff in error.

SMITH, J. Plaintiff in error brought this action to recover damages alleged to have been sustained in the sum of \$1,885 by an assault and battery. On the trial to a jury, after instructions by the court had been given, a verdict for the plaintiff was returned in the sum of \$15. Plaintiff filed a motion for a new trial, which was overruled, and judgment was rendered in accordance with the verdict. The only error assigned is the overruling of the motion for a new trial.

It is urged that the jury could not have come to the conclusion that the plaintiff was damaged only in so small an amount except by disregarding the instructions of the court and by discarding the evidence of several undisputed witnesses. The instructions only limited the amount of recovery to the amount claimed in the petition. If, as a proposition of law, all the undisputed testimony of the witnesses was to be taken as true, we should not hesitate to say the plaintiff was entitled to a much larger verdict and judgment, approximating perhaps the full amount claimed. Such, however, is not the law. It is the province of the jury to determine, in the first instance, the credibility of the witnesses produced before it, and what their testimony proves, even though the witnesses were not contradicted. *Harrod & Hanlan v. Latham Mer. & Com. Co.* (Kan.) 95 Pac. 10 (March, 1908); *Jevons v. Railroad Co.*, 70 Kan. 491, 78 Pac. 817; *Railroad Co. v. Geisler*, 68 Kan. 281, 75 Pac. 68; *Avery v. Railroad Co.*, 73 Kan. 563, 85 Pac. 600; *Watkins v. Merchandise Co.* (Kan.) 92 Pac. 1102. Upon a motion for a new trial, upon the ground that the verdict is not supported by the evidence, being presented, it becomes the duty of the trial judge to reconsider and weigh the evidence according to the verdict, and give it such weight as he deems it entitled to. In this case the amount of damages the plaintiff was entitled to recover was a question of fact for the jury to determine. The jury pronounced its conclusion thereon by its verdict, and the trial court has approved the verdict, and has rendered judgment for the amount specified therein. The judgment will not be reversed because the evidence would seem to justify a larger amount of damages.

The judgment is affirmed.

SAUNDERS v. ROBISON et al.

(Supreme Court of Idaho. May 21, 1908.)

1. WATERS AND WATER COURSES — WATER RIGHTS—PLACE OF USE FOR MINING PURPOSES—ESTOPPEL.

Where one claiming the right to the use of the waters of a stream has made his appropriation and diversion on one branch or fork of the stream, and a subsequent appropriator makes his appropriation and diversion lower down the stream and below the forks of the stream, such subsequent appropriator cannot be injured and has no cause of complaint on account of the prior appropriator conveying the waters of the fork or branch of the stream on which he made his appropriation to the other branch of the stream for use on his placer mines, for the reason that the subsequent locator gets the full benefit of all the waters left after they have been used by the prior appropriator.

2. SAME—AGREEMENT AS TO DIVERSION—ESTOPPEL.

Where prior and subsequent locators of the waters of a stream have misunderstandings and differences with reference to the right to divert the waters of a stream and convey them to distant points for use, and they reach an agreement and understanding whereby each shall be permitted to construct his diverting works and ditches, and in reliance thereon they do construct such works and expend money thereon, each will thereafter be estopped from denying the right of the other to divert and use the waters in accordance with such agreement or understanding.

(Syllabus by the Court.)

Appeal from District Court, Boise County; Geo. H. Stewart, Judge.

Action by John E. Saunders against R. S. Robison and others to enjoin defendants from diverting the waters of a certain stream. Judgment for defendants, and plaintiff appeals. Affirmed.

Hawley, Puckett & Hawley, for appellant. H. L. Fisher and Wyman & Wyman, for respondents.

AILSHIE, C. J. This is an appeal from a judgment and order denying a motion for a new trial. The action was commenced by plaintiff to enjoin defendants from interfering with his use of the water of Boyle's Gulch, which is a small stream tributary to Wolf creek near Placerville in Boise county. The complaint alleges that the plaintiff, Saunders, owns certain placer mining property situated along Boyle's Gulch above the entrance into Wolf creek, and that he is entitled to 600 inches of the flow of the stream for use on his placer mines under an appropriation dating from December, 1885. The defendants denied the plaintiff's right and priority, and asserted an appropriation and priority to all the waters of the stream, superior and paramount to the right and interest of the plaintiff. The trial resulted in a judgment in favor of the defendants.

The principal argument by the appellant in this court is the right of a prior appropriator of the waters of a stream in this state for mining purposes to subsequently change the place of use of such waters to the injury or prejudice of a subsequent appro-

priator who has been diverting the waters from the stream at a point below the prior and senior locator and appropriator. The principal facts in the case essential to a determination of this appeal are as follows: Prior to the year 1870 one McDewitt acquired the right to the use of a part of the waters of the left or west fork of Boyle's Gulch, and he conveyed that part of the water of the left-hand fork belonging to him through and by means of a ditch, and used and applied the same on his placer grounds in the east or right-hand fork of that stream. This ditch extended from the left fork around the point of the hill to the right fork, a distance of some 700 or 800 feet. In the year 1870 one Weiss made an appropriation of some 700 inches of the waters of the left fork of this gulch, which he thereafter used in placer mining on grounds situated in the gulch of the west fork of this stream. By the year 1883 Weiss had acquired by purchase or otherwise all of the placer grounds and water rights previously owned by McDewitt, together with all other claims in both forks of Boyle's Gulch. He subsequently used all of the waters on his claims situated on the left fork of the stream, and so continued to use and apply the waters down to the year 1901, at which time his grounds were worked out and exhausted. In the latter year Weiss leased and subsequently sold all of the placer grounds and water rights to the defendants and respondents Wood and Robison. In the year 1885 Saunders made an appropriation of the waters of Boyle's Gulch, and diverted the same at a point below the forks thereof, where he constructed a dam and ditch, and began using and applying the waters in working out his placer property which was situated immediately below the Weiss property. Saunders continued so to use the waters thus appropriated and diverted down to the year 1900.

The troubles which led up to this lawsuit began about the year 1901. Saunders concluded that he wanted to divert the water for use on his placer claim at a point up the west fork of the gulch, and below the property owned by the defendants. He accordingly began the construction of a dam across the stream and at once met with a protest from the respondents, who notified him that they were going to convey the waters of that stream through a ditch over into the east fork, where they would use it on their placer property. Saunders stopped work on the dam for a time, but after Weiss left the neighborhood the dam was completed, and the water was diverted and used by Saunders in the year 1901. In 1902 respondents began making their survey and clearing away the brush for the purpose of constructing a new ditch from the west fork of this stream around the hill to the east fork, for the purpose of conveying the water and using it on the east branch of the stream. About the same time it appears that Saunders began

constructing a dam on the east fork of the stream below the respondents' property, for the purpose of taking up the water and conveying it around to the west fork for use on his property. While both parties were thus engaged in the work of constructing means for diverting this water, they had a conversation over the matter, and it seems that respondents protested against appellant constructing the dam below their dump, on the ground that it would fill up the stream and interfere with their dump privileges. After going over the matter together, it seems that appellant advised them that it was his purpose to construct a gate in his dam so as to enable him to sluice out the tailings from time to time, and that upon his assuring respondents of this purpose, they withdrew any further objection to his constructing the dam. At the time of this interview appellant informed the respondents that, if they made objection to his damming the east fork of the stream and taking the water after they had used it, he would, on the other hand, insist on their conveying the water from the west fork to the east fork of the stream through the old ditch that had been constructed prior to 1870, and which had been used up to and including the year 1870. It seems pretty clear from the record that an understanding was reached by the parties at this interview, and that both parties thereafter went ahead and constructed their ditches and diverting works with an understanding that each would consent to and approve the action of the other in that respect. Accordingly the respondents seem to have thereafter expended the sum of about \$1,000 in building their ditch and penstock and other works in connection therewith. The trial court found that the appellant, Saunders, has an appropriation of 600 inches of water from Boyle's Gulch, dating from December, 1885. The court also finds that the respondents' grantors and predecessors in interest appropriated and diverted 700 inches of water from Boyle's Gulch in the year 1870, and are entitled to have their appropriation date from that year. While the court does not say in so many words that the appropriation was made from the main gulch, he does find that it was taken from "Boyle's Gulch"; while in finding No. 6 the court found that respondents and their grantors owned and possessed placer mining claims situated in both the "west fork of Boyle's Gulch" and in the "east fork of Boyle's Gulch." These designations of the particular fork of the gulch being contained in finding 6, and immediately followed by finding 7, which designates the water appropriation as being made on "Boyle's Gulch," would indicate that the court intended to find that the appropriation was made from the main stream or gulch. The facts as found in the record, however, disclose without conflict that the appropriation of 1870 was made from the west fork of the gulch

at considerable distance above the point where appellant made his appropriation and diversion in 1885. It is therefore clear that any change of the place of use of the water by respondents from the west fork to the east fork could not prejudice or injure appellant for the reason that his appropriation and point of diversion was below the forks of the stream and from the main stream or gulch, and that he could therefore catch all the waters of the stream at his headgate and point of diversion, whether they came down the east or the west fork of the stream. If, on the other hand, appellant seeks to establish a new and independent right by reason of an appropriation and diversion occurring in 1901, then we must answer that the findings of the court do not justify that contention, nor is the evidence in the record sufficiently clear and conclusive on that point to establish his right of recovery as against the right and claim of respondents. There is another reason, however, that appears in this record, which we think would preclude either of the parties to this action from questioning or disputing the right of the other to maintain his dam or diversion works and ditch or canal, as the same appear to have been constructed. At the time both of them were locating the lines of their ditches and their points of diversion, the one from the east fork and the other from the west fork, and while some differences existed between them, they appear to have had a meeting of minds on the subject of their differences, and accordingly each proceeded to the construction of his works with the consent and approval of the other. If that be true, as it appears to be, then after a reliance on that understanding and the expenditure of money in constructing the ditches and dams, with the full knowledge of each other, neither one would thereafter be heard to question or dispute the right of the other. In this view of the case, the judgment of the trial court should be affirmed.

As to the contention made by respondents to the effect that one who has appropriated water for mining purposes may change the place of use to any place or ground that he may desire, irrespective of the damage or injury such change may inflict or entail upon subsequent appropriators below him, we reserve our opinion. As we view the case, it is not essential to its determination that we pass upon that question of law. We are not prepared at this time to give that proposition the sanction of this court, and we consequently refrain from giving any other expression on the subject.

The judgment of the lower court will be affirmed, and it is so ordered. Costs in favor of the respondents.

SULLIVAN, J., concurs. STEWART, J., having tried the case in the lower court, took no part in this decision.

SMITH v. AMERICAN FALLS CANAL & POWER CO.

(Supreme Court of Idaho. June 5, 1908.)

1. APPEAL AND ERROR—DISMISSAL.

Where an appeal has not been taken from the judgment within one year after the entry of such judgment, such appeal will be dismissed upon motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1926, 1927.]

2. SAME—DENIAL OF NEW TRIAL.

Where an appeal is taken from an order denying a new trial, after the expiration of one year from date of judgment, and proper diligence is not shown in prosecuting such appeal, the same will be dismissed upon proper motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1926, 1927.]

3. SAME—LACHES OF APPELLANT.

The law contemplates and requires that a motion for a new trial shall be heard at the earliest practicable period, and, in bringing said motion on to be heard, counsel are required to prosecute with diligence the steps necessary to prepare such motion for hearing; and where it is shown that 16 months have expired between the date of judgment and the hearing of the motion for a new trial, where no excuse is shown for the delay, the appeal from the order will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1926, 1927.]

4. SAME—STATEMENT FOR NEW TRIAL.

If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the Supreme Court to prove the same. If, however, the failure to settle such statement is not the fault of the trial judge, but is the fault of counsel preparing the same for settlement, the want of diligence may be ground for dismissing the appeal from the order denying the motion for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2749-2752.]

(Syllabus by the Court.)

Appeal from District Court, Bingham County; J. M. Stevens, Judge.

Action by J. W. Smith against the American Falls Canal & Power Company. Judgment for plaintiff, and defendant appeals. Motion to dismiss sustained.

An action to recover debt and foreclose a mechanic's lien for labor, alleged to have been performed upon a canal system. Motion to dismiss the appeal from the order overruling the motion for a new trial.

William A. Lee and Hansbrough & Gagon (Richards & Haga, of counsel), for appellant. F. S. Dietrich and John W. Jones, for respondent.

STEWART, J. On July 11, 1906, the plaintiff recovered a judgment against the defendant in the district court for Bingham county. A statement on motion for a new trial was afterwards prepared and settled by the trial judge and filed in said court on the 6th day of November, 1907. An order was made and filed by the trial judge on November 9, 1907, overruling the defendant's motion for a new trial. A notice of ap-

peal from the judgment, and from the order overruling the motion for a new trial, was served and filed in said court on November 21, 1907. The transcript on appeal was filed in this court on January 15, 1908.

Counsel for respondent files two motions in this court: (1) To dismiss the appeal from the judgment, for the reason that the appeal was not taken until more than one year had elapsed after the entry of said judgment or decree. As seen from the above statement, the judgment was entered on July 11, 1906. The notice of appeal from the judgment was served and filed on November 21st, 1907, more than 16 months after the entry of the judgment. This motion was confessed upon the argument, and the appeal from the judgment was ordered dismissed. *Marchand v. Ronaghan*, 9 Idaho, 95, 72 Pac. 731; *McCrea v. McGrew*, 9 Idaho, 382, 75 Pac. 67.

Respondent also filed a second motion to dismiss the appeal from the order overruling the motion for a new trial, for the reason that the motion for a new trial was not passed upon within one year from the rendition of the judgment, and no satisfactory showing has been made accounting for such delay. The judgment was entered on July 11, 1906. The statement was settled by the trial court on November 6, 1907. The motion for a new trial was presented to the court some time between November 6 and November 9, 1907, and upon the latter date, about 16 months after the rendition of said judgment, was overruled. In explanation of the delay, counsel for appellant filed an affidavit of Wm. A. Lee, one of the appellant's counsel, in which it is stated that the reporter furnished a transcript of the evidence about of the 15th of October, 1906; that counsel for appellant prepared its statement or bill of exceptions, and served the same on counsel for respondent on November 21st, and thereupon counsel for respondent was given 30 days to prepare amendments thereto; that the amendments were prepared and served about the 21st of December, and consisted, as shown in the affidavit of counsel for appellant, of about 23 pages of closely typewritten matter, consisting of 238 separate proposed amendments, which counsel for appellant were unwilling to accept, and on the 31st day of December returned the same to the clerk for delivery to the judge for settlement, and advised the court that counsel for appellant were ready and willing to attend, at any time or place, to aid in the settlement of said proposed amendments; that in February, 1907, affiant counsel for appellant, who resides in Salt Lake City, Utah, having been advised that the district court was in session at Blackfoot, attended the same for the purpose of having said statement settled, and appeared in open court, and requested that the settlement of said statement be taken up,

but said court was engaged in the trial of jury cases until the end of the term, and was unable to take up said statement at that time; that again, in May following, affiant counsel for appellant went to Blackfoot for the sole purpose of again moving for the settlement of said statement, but found the court engaged in the trial of cases and unable to reach said settlement, and, both parties being present, it was agreed that defendant's counsel should go through said amendments and indicate such amendments as he was willing to accept, and report the same in writing within 20 days, and thereafter plaintiff's counsel should do likewise; that an order was entered to that effect; that defendant's counsel reported in writing to the court and to plaintiff, and requested that said statement be settled at once; and that following this record counsel for defendant continued upon every possible occasion to urge its settlement, and signified their willingness to aid the court in such labor.

In opposition to this affidavit, John W. Jones, counsel for respondent, files an affidavit, in which he alleges that the proposed amendments and the statement were filed prior to January 1, 1907; that during the time from January 1, 1907, to the 11th day of July, 1907, affiant repeatedly urged upon counsel for appellant the necessity of an early disposition of the motion for new trial in this action, and counsel for plaintiff held himself in readiness at all times to take up and dispose of said matter, and, upon one occasion, William A. Lee, of counsel for appellant, and affiant considered together the right of respondent to prevail with reference to a large number of said proposed amendments to the statement, and agreed upon the allowance of certain amendments, and thereafter the said William A. Lee left the matter of the disposition of the remaining proposed amendments in an unsettled condition, and nothing was done with reference thereto for a long time; that upon several occasions this affiant made arrangements with the judge of the district court for the hearing of the disposition of said matters, but was unable to get the matter before the court; that, as counsel for respondent, he waived many of the proposed amendments in said statement in order to expedite the settlement of the statement; and that no engrossed statement was ever filed or presented to the said district court upon said motion for a new trial, but the amendments allowed were made by interlineation.

This latter affidavit is not contradicted in any way by appellant. The record then discloses that the amendments to the proposed statement consisted of 238 separate proposed amendments. This, of itself, indicates that counsel for appellant may have overlooked a careful preparation of the proposed statement. Of course, this court cannot say

whether or not these proposed amendments to the statement were proper and justified, or not; but, in this connection, it may serve a purpose to suggest that counsel, in preparing statements or bills of exception, should attempt earnestly to embrace therein everything and every part of the testimony and record required to properly present to the appellate court the question under contest, and not leave this labor for respondent. This causes delay. Counsel were unable to agree as to the amendments, and the statement and proposed amendments were lodged with the clerk of the district court for the judge on the 31st day of December, 1906. Counsel for appellant seems to have permitted matters to remain in this condition until some time in February, 1907, when counsel attended a session of the district court of Bingham county, for the purpose of having the statement settled; but that the court was engaged in the trial of jury cases, and was unable to settle the same at that time. The same fact was stated with reference to another effort in May. At both of these visits the trial court was engaged in the trial of cases, and unable to settle the same.

It is rather strange that counsel for appellant became diligent only at times when the trial court was engaged in other business. It was not necessary for the court to be in session in order to settle a statement, and the trial court was not obligated to discontinue the trial of a case in order to settle a statement. Rev. St. 1887, § 4442, provides: "The application for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court, and in other cases, after the affidavits, bill of exceptions, or statement, as the case may be, are filed, and may be brought to a hearing upon motion of either party." Rev. St. 1887, § 4441, provides that: "The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made," etc. Under the statute, where a motion for a new trial is to be heard on a statement, the moving party must serve the proposed statement on the adverse party, and, if the same is not agreed to, the latter must, within a certain time, serve his proposed amendments. If the amendments are adopted, the statement is engrossed accordingly. If not adopted, the moving party must present the statement and amendments to the judge. It is the duty of the judge to fix a time to settle the statement after the same and the amendments proposed have been filed with the clerk. If he should neglect or refuse to do so, the party desiring the statement settled may apply to this court and have the bill settled,

under the provisions of section 4432, Rev. St. 1887. See, also, *Dernham v. Lleuallen*, 4 Idaho, 528, 43 Pac. 74.

In the present case, the proposed statement was served, and also the amendments, and there the proceedings end for 10 months. It was the appellant's duty, who was prosecuting the appeal, to have the statement settled in a reasonable time, and in the manner provided by the statute, and, in the absence of a showing fully explaining the long delay in having said statement settled, and the motion for a new trial heard and determined at the earliest practicable period, the appeal from the order will be dismissed where the appeal is taken from the order more than one year after the judgment. *McCrea v. McGrew*, 9 Idaho, 382, 75 Pac. 67; *Doon v. Tesh*, 131 Cal. 406, 63 Pac. 764; *Descalso v. Duane*, 98 Cal. xvii, 33 Pac. 328. While the statute fixes no time within which a motion for a new trial must be heard, yet the statute does require that notice of intention to move for a new trial shall be served within 10 days after the decision of the court, and that the application for a new trial shall be heard at the earliest practicable period after the notice of motion. This contemplates that the party intending to move for a new trial shall, with diligence, prosecute such motion. The fact that judgment was rendered in July, 1906, and the statement was not settled until November 6, 1907, does not show diligence on the part of the appellant to bring about a hearing upon his motion for a new trial, and fails to show that the appellant is prosecuting the appeal in good faith. *McCrea v. McGrew*, 9 Idaho, 382, 75 Pac. 67. The statute contemplates that a party against whom a judgment has been rendered, who desires to have the same reviewed in the appellate court, shall prosecute the appeal with diligence, in order that the same may be speedily settled and litigation ended. *McCrea v. McGrew*, 9 Idaho, 382, 75 Pac. 67. If it develops, in an effort to secure the settlement of a statement, that the fault for the delay is with the trial judge, the appellant is afforded a complete remedy by the statute; but if counsel for appellant presents a defective or insufficient statement, and imposes upon the respondent the necessity of preparing practically a new statement, and imposes upon the trial court the duty of going through the proposed statement and amendments and drafting a new statement, this fact alone shows lack of diligence and good faith in prosecuting such appeal, in the absence of a showing by affidavit or otherwise that counsel has exercised reasonable diligence in an effort to have such statement settled within a reasonable time, and that the fault was with the court and not with counsel.

After this motion was argued and submitted, and the court decided the matter orally, Richards & Haga, appearing as counsel for appellant, filed a motion, asking this court to vacate the former order dismissing

the appeal and to reinstate said case, and filed an additional affidavit of William A. Lee, and also an affidavit of J. H. Richards. An examination of these affidavits, however, does not change the mind of this court, or show that the appellant has prosecuted this action with that diligence contemplated and required by the statute.

The motion to dismiss the appeal from the order denying a new trial is sustained, and the motion to reinstate the appeal is also denied. Costs awarded to respondent.

AILSHIE, C. J., and SULLIVAN, J., concur.

RAICHE v. MORRISON.

(Supreme Court of Montana. June 1, 1908.)

1. PLEADING—STATEMENT OF CONCLUSIONS AND SURPLUSAGE—METHOD OF ATTACK.

A motion to strike, and not a demurrer, is the proper method of attacking a pleading defective for stating conclusions or containing surplusage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 411, 414.]

2. SAME—CONCISENESS AND CLEARNESS.

A complaint alleged that defendant sold plaintiff corporate stock for \$1,000, agreeing to repurchase it at the end of three years for \$1,720, as evidenced by a memorandum set out; that before the expiration of the three years plaintiff notified defendant that he would accept defendant's offer made in the agreement to repurchase; that at the end of the period plaintiff tendered defendant the certificate representing the stock, duly indorsed with an assignment thereof to defendant, demanding \$1,720, but that defendant refused to accept it or pay that sum, or any part of it, to plaintiff's damage in the sum of \$1,720—sufficiently complies with Code Civ. Proc. § 671, requiring a complaint to state the facts constituting the cause of action sued on in ordinary and concise language.

3. CORPORATIONS—STOCK—SALE—CONTRACTS—BREACH—PLEADING.

The complaint stated a cause of action, showing defendant's refusal to perform his contract to repurchase, and not full performance by both parties.

4. CONTRACTS—ESSENTIAL ELEMENTS—MUTUALITY.

Mutuality of obligations is an essential element of a contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 21–40.]

5. CORPORATIONS—STOCK—SALES—OPTION.

Defendant's agreement with plaintiff on selling him stock for \$1,000 to repurchase it at the end of three years for \$1,720 constituted an option to plaintiff.

6. PLEADING—ADMISSION BY DEMURRER.

Defendant's general demurrer to the complaint admitted the allegations thereof to the effect that plaintiff paid defendant a valuable consideration for an option to sell to defendant at the end of three years and at a fixed price stock bought by plaintiff from defendant, estopping defendant from urging on the demurrer that the agreement lacks mutuality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 525–534.]

Appeal from District Court. Chouteau County; John W. Tattan, Judge.

Action by J. A. Raiche against J. R. Morrison. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Sands & O'Keefe, for appellant.

HOLLOWAY, J. This is an action for damages for the breach of a contract. The complaint alleges: That on the 18th day of September, 1903, in consideration of the sum of \$1,000 paid by plaintiff to defendant, the defendant sold and delivered to plaintiff 20 shares of the capital stock of the Minneapolis & Montana Live Stock Company, and agreed with the plaintiff to repurchase said shares of stock from plaintiff at the expiration of three years for the sum of \$1,720, this latter agreement being evidenced by a memorandum as follows: "Harlem, Montana, September 18, 1903. Three (3) years from date I promise to pay to J. A. Raiche seventeen hundred and twenty dollars (\$1,720) for twenty shares of Minneapolis & Montana Live Stock Company. J. R. Morrison. Witnesses: Hunter Hardaway, John L. Resler." That before the expiration of the three-year period plaintiff notified defendant that he would accept the offer of defendant made in the agreement to repurchase, and at the expiration of the period tendered to defendant the certificate representing the 20 shares of stock, duly indorsed with an assignment of the certificate to the defendant, and thereupon demanded \$1,720, the price agreed upon, but that defendant refused to accept the certificate, and declined to pay to the plaintiff the said sum or any part of it; and that by reason of the premises the plaintiff has been damaged in the sum of \$1,720, for which amount, with interest, judgment is demanded. To this complaint the defendant interposed a demurrer, the first ground of which is that the complaint does not state facts sufficient to constitute a cause of action. The second is not a ground of demurrer recognized by our Code (Code Civ. Proc. § 680), but is in the nature of an argument in support of the first ground, to wit, that the alleged contract lacks mutuality. The third ground of demurrer attacks the complaint for ambiguity. Neither the fourth, fifth, nor sixth so-called grounds is a ground of demurrer recognized by the Code above. The fourth is also in the nature of an argument in support of the first, and is to the effect that the complaint shows full performance of the contract by both parties to it. The fifth attacks the complaint upon the ground that it contains conclusions of law; and the sixth upon the ground that it contains allegations which are surplusage. This demurrer was sustained, and plaintiff, electing to stand on his complaint, suffered judgment to be entered against him, from which judgment he appeals.

We may dispose of the fifth and sixth grounds by saying that, if the complaint was defective in the particulars mentioned (and

we do not say that this complaint is defective), it could not be attacked by demurrer, but might be reached by a motion to strike. Bliss on Code Pleading, § 423. We do not think there is any merit in the third ground. It occurs to us that the pleader has obeyed the mandate of the Code (Code Civ. Proc. § 671) in stating the facts of his case in ordinary and concise language, and has so clearly expressed himself that there cannot be any doubt as to the precise nature of his complaint. Neither is there any merit in the so-called fourth ground of demurrer. Instead of the complaint showing full performance by both parties, there are clear allegations of a refusal on the part of the defendant to perform his contract to repurchase the shares of stock. The first ground of the demurrer, which is in terms a general demurrer, of course does not specify any particulars in which the complaint is insufficient, and, as there has not been any appearance in this court by the respondent, we are unable to know what, if any, particular defect his counsel may have had in mind. We have carefully examined the complaint, and are unable to find any defects in it. We think it clearly states a cause of action. But it may be, and doubtless was, the principal contention of counsel for defendant that the contract lacks mutuality. It is a general rule of law, recognized by the courts and text-writers, that one essential element of a contract, using the term generally, is mutuality of obligations, as is said in 9 Cyc. 327: "There are many cases in which, although the offer is definite enough, yet the acceptor by merely accepting has really himself promised nothing in return, has not made himself liable for anything, so that, although one is bound, the other is not, and the engagement lacks what is called mutuality. In such a case there is not an enforceable agreement. The most frequent example of this principle is when one offers to supply another with such goods of a certain kind as he may choose to order or may 'wish' during a certain time and the other accepts the offer. Here there is no consideration for the promise or offer, for the promisee has not bound himself to anything, and has incurred no legal liability at all. The correct view of the case is that there is no agreement binding on the promisor, but simply an offer on his part which may be accepted by giving an order until such time as it is actually withdrawn or expires by limitation of time." But the same authority, on page 334, states the further general rule that: "When there is an agreement founded on a consideration, it is not invalid for want of mutuality because one party has an option while the other has not, or, in other words, because it is obligatory on one and optional with the other. Thus a person for a sufficient consideration may bind himself to buy at a fixed price all the wheat that another may bring to his warehouse during a certain time.

So want of mutuality cannot be set up as a defense by the party who has received the benefit, simply because it was left optional with the other party as to whether he would enforce his right." Abundant authorities are cited in support of the text, and we think there is little, if any, diversity of opinion upon the question.

The contract for the breach of which this action is brought is an option contract, or an option as defined by the authorities generally. 21 Am. & Eng. Ency. Law (2d Ed.) 924. It is true that the plaintiff did not bind himself to sell the shares of stock to defendant; but he alleges in his complaint that he paid a valuable consideration to defendant for the option to sell within a given time at a fixed price, and this allegation is admitted by the demurrer. Under these circumstances the defendant will not be heard to say that the engagement lacks mutuality.

We are of the opinion that the complaint is not open to any of the attacks made upon it.

The judgment is reversed, and the cause is remanded to the district court, with directions to vacate the judgment and the order sustaining the demurrer, and to enter an order overruling the demurrer.

Reversed and remanded.

BRANTLY, C. J., and SMITH, J., concur.

MCGILLIC v. CORBY et al.

(Supreme Court of Montana. June 1, 1908.)

1. MUNICIPAL CORPORATIONS — OFFICERS — COMPENSATION — ACTING MAYOR — VALIDITY OF ORDINANCE.

Comp. St. 1887, div. 5, c. 22, § 368, provided that the president or vice president of the city council while performing the duties of mayor should be styled the acting mayor, and any acting mayor performing the duties of a mayor for a period longer than 60 days should be entitled to the salary of the mayor. *Held*, that the right of an acting mayor to the mayor's salary depended upon his performing the duties of the office for periods longer than 60 days, and hence an ordinance passed in pursuance of the act providing that the president or vice president of the council while performing the duties of mayor should be styled the acting mayor, and should be entitled to the salary of the mayor, omitting the limitation imposed by the statute as to length of service, was void as directly contravening the provisions of a statute.

2. SAME.

The ordinance being void at the time of enactment was void for all time, though a later statute (Pol. Code 1895, § 4783) changed the law, omitting any provision on the subject of the acting mayor's compensation.

3. STATUTES—CONSTRUCTION—CURATIVE ACTS.

Pol. Code 1895, § 5035, relating to the organization of municipalities, and providing that cities organized under the act shall be the identical corporations theretofore existing, and that the act should not operate to repeal or affect any ordinance or by-law theretofore passed and unrepealed, but that so far as not in conflict with the act they should remain in full force, is not curative in character, but intended simply to preserve the statu quo of all municipal corporations in existence at the adoption of the Code of 1895.

4. SAME.

Even if it be held to be a curative provision, it could not give validity to the ordinance which had no validity at its enactment.

5. OFFICERS — COMPENSATION—QUANTUM MERUIT.

The right of a public officer to compensation for the performance of duties imposed upon him by law does not rest upon contract, but is incident to the right to hold office, and, unless compensation is allowed by law, he is not entitled to payment as upon a quantum meruit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 132.]

6. MUNICIPAL CORPORATIONS — POWERS — MODE OF EXERCISE PRESCRIBED.

When a power is conferred upon a municipal corporation, and the mode in which it is to exercise it is prescribed, such mode must be pursued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 152.]

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Action by Barney McGillic against Joseph A. Corby and others, as officers of the city of Butte, for an injunction. There was a judgment denying the injunction, and plaintiff appeals. Reversed and remanded, with instructions to grant the injunction.

T. F. Nolan, for appellant. Edwin S. Booth and Wm. E. Carroll, for respondents.

BRANTLY, C. J. Action for an injunction. During certain periods in the years 1906 and 1907 Hon. John MacGinniss, the mayor of the city of Butte, was absent from the city. James Doull, a member of the city council, having been elected president thereof under authority of section 4783, tit. 3, art. 3, c. 3, Pol. Code 1895, performed the duties of mayor. He thereupon presented his claim to the city for such services during three periods, to wit: For 3 days during September, 1906; for 51 days covering the time from November 22, 1906, to January 12, 1907; and 10 days during April, 1907. On September 11, 1907, the council ordered a warrant drawn for payment to him of \$275.55; this sum being the amount the mayor received during the same period, upon a salary fixed by ordinance at \$2,000 per annum. This action was brought by the plaintiff, a resident taxpayer of the city, to perpetually enjoin the defendants, the mayor, clerk, and treasurer, as disbursing officers of the city, from the issuance and payment of the warrant; it being alleged that it is their intention to issue and pay it, and thus make an unauthorized use of the funds of the city. Upon application the district court issued an order to defendants to show cause why the relief prayed for should not be granted. In the meantime, and until a hearing could be had, the defendants were restrained from proceeding. At the hearing it was made to appear that the council ordered the payment of the claim under authority of an ordinance of the city passed and approved on June 27, 1888, defining the powers and duties of the mayor, section 10 of which declares: "In the absence

of the mayor from the city, or from his inability from any cause to discharge the duties of his office, the president of the council shall exercise all the powers and discharge all the duties of the mayor. In case of absence or inability of the mayor and president of the council, the vice president shall preside and discharge the duties of said president. The president or vice president of the council while performing the duties of mayor shall be styled the acting mayor. Any acting mayor shall be entitled to the salary of the mayor." The court thereupon dissolved the restraining order, and denied the injunction. The plaintiff has appealed.

Contention is made by counsel for appellant that the ordinance referred to is void, and furnished no authority under which the defendants could lawfully act. The respondents contend that the ordinance is a valid exercise of power by the city council, under the general laws in force at the time of its enactment; and, further, that even if it be held to be void, the council may nevertheless lawfully pay to an acting mayor the reasonable value of his services in that behalf. The questions submitted, therefore, are whether the provision of the ordinance quoted is void, and, if so, whether the council may lawfully pay the reasonable value of the services. The ordinance was passed and approved under authority of section 368, c. 22, div. 5, Comp. St. 1887. It is therein declared: "At the first meeting of the council in each year they [the city council] shall proceed to elect by ballot from their number a president and vice president. * * * The president of the council or vice president while performing the duties of mayor, shall be styled the acting mayor, and acts performed by him while acting as mayor aforesaid, shall have the same force and validity as if performed by the mayor. Any acting mayor performing the duties of a mayor for a period longer than sixty days shall be entitled to the salary of the mayor." The evident meaning of this provision is that if, during any period longer than 60 days, it became necessary for the acting mayor to perform the duties of the mayor, he should receive compensation for his services, and not only so, but that this compensation should be the salary which otherwise, during the same period, the mayor himself would have received. If he served for a period of 60 days or less, he was not entitled to compensation, the apparent purpose being that absence or disability of the mayor from whatever cause should not add to the expense of administration, and therefore, that in case of absence or disability for a period longer than 60 days he should draw no salary, but for such period it should go to the acting mayor. In enacting the ordinance the council proceeded upon the theory that it had the authority under the statute to appropriate the salary of the mayor to compensate the acting mayor whenever the latter was absent or disqualified, whether

for a longer or shorter period than 60 days; for the language is, "any acting mayor shall be entitled to the salary of the mayor," omitting entirely the limitation imposed by the statute under the authority of which it was enacted. The ordinance is inconsistent with and directly contravenes the provisions of the statute, in that the statute did not authorize any provision for compensation for periods of 60 days or less, and in that it deprived the mayor of his compensation without warrant of law. It is therefore void. "Statute law and by-laws are intended to meet different wants and exigencies, and to serve different purposes. The former, when general in its nature and operation, is intended to furnish a rule for the government of the people of the state everywhere. The latter, made by the corporation under derivative authority, are local regulations for the government of the inhabitants, or the regulation of the local concerns of the incorporated place; and of course they must be void, unless specially authorized by the charter or organic act of the corporation, whenever they are repugnant to, or inconsistent with, the general law of the land. No implied power to pass by-laws, and no express general grant of the power, can authorize a by-law which conflicts with the statutes of the state, or with the general principles of the common law adopted or in force in the state." Section 366, 1 Dillon's Mun. Corp. Much less can an ordinance which directly contravenes the provision of the law creating the municipality be held to be valid. Since the ordinance was void at the time of its enactment, it was void for all time; for though the law covering the same subject has been changed, as will be observed by an examination of section 4783, supra, and does not now contain any provision on the subject of compensation of the acting mayor, this does not affect in anywise the validity of the ordinance. The change in the organic law could not give it validity. Nor was it given validity by any provision in section 5035, Pol. Code 1895. This section is not curative in character, but was intended simply to preserve the status quo of all municipal corporations in existence at the time of the adoption of the Code of 1895. Even if it be held to be a curative provision, it could not give life to what had no life, nor render valid that which had no validity. In *re* McFarland's Estate, 10 Mont. 445, 26 Pac. 185; *State v. Evans*, 15 Mont. 539, 39 Pac. 850, 28 L. R. A. 127, 48 Am. St. Rep. 701; *Davidson v. Wampler*, 29 Mont. 61, 74 Pac. 82; *Ex parte Sweetman* (Cal. App.) 90 Pac. 1069; *Horr & Bemis Mun. Pol. Ord.* § 138.

May the defendants, as disbursing officers of the city, lawfully pay the allowance on the theory that Doull, having performed the services, is entitled to what they are reasonably worth? This query must also be answered in the negative, unless there be some provision of the municipal act itself, or some

ordinance enacted under authority granted by it, permitting payment to be made. The right of a public officer to compensation for the performance of duties imposed upon him by law does not rest upon contract, but is incident to the right to hold office; and, unless compensation is allowed by law, he may not lawfully demand payment as upon a quantum meruit for services rendered. No provision of the municipal act has been called to our attention which authorizes the council to make any allowance for the services in question, or, indeed, for any services rendered to the city by any officer, except by ordinance. Section 4740 of the Political Code of 1895, after enumerating the officers which a city of the first class, to which Butte belongs, must or may have, declares: "The city council may by ordinance prescribe the duties of all city officers and fix their compensation, subject to the limitations contained in this title." This grant of power is subject, not only to the express and implied limitations found elsewhere in the title, but contains in itself a limitation as to the mode in which the power granted may be executed. It is a familiar rule of construction that, when a power is conferred upon a municipal corporation, and the mode in which it is to exercise it is prescribed, such mode must be pursued. 20 Am. & Eng. Ency. Law (2d Ed.) 1142. Under the provisions of section 4783, supra, the council may or may not elect a president. When elected, he must be held to know whether provision has been made for his compensation. If none has been made in the mode prescribed by law, then he is entitled to none, and has no legal claim against the city. It is not claimed that there is any other ordinance under which the defendants assumed to act. Therefore, in undertaking to make him an allowance under the guise of a claim for services rendered to the city, the council was doing no more than making a gift to him of so much of the funds belonging to the city.

In our opinion the council acted without authority, and the defendants, the disbursing officers of the city, had no authority to make payment. The result is that the court was in error in refusing the injunction. Accordingly the order is reversed, and the cause is remanded, with direction to grant the injunction.

Reversed and remanded.

HOLLOWAY and SMITH, JJ., concur.

(43 Colo. 348)

LA FITTE v. SALISBURY et al.

(Supreme Court of Colorado. May 4, 1908.)

1. JUDGMENT — REVIVAL — VACATING — WANT OF NOTICE — COMPLAINT — SUFFICIENCY.

Where plaintiff, in an action to have a revival of a judgment set aside, alleged that judgment revived against plaintiff was revived by defendant as an assignee on a forged assignment, and that plaintiff did not learn of the re-

vival of the judgment, and that no assignment of the original judgment had been made until long after the revival, the complaint was insufficient to show that no process was issued and served upon her in the revival proceedings, and, as plaintiff must have known whether or not she was served with process, the averment in her complaint on that subject should have been positive and unequivocal.

2. SAME — REVIVAL BY ASSIGNEE — ISSUES.

In an action to revive a judgment by one pretending to be an assignee of the original judgment, one of the issues involved is whether plaintiff is the assignee of the original judgment holder.

3. SAME — EFFECT OF REVIVAL.

The effect of a judgment reviving a former judgment does not differ from other judgments as an adjudication of all questions necessarily involved, and in such proceedings the judgment debtor must interpose such defenses as he may have, or they will be forever barred by the judgment of revivor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, §§ 1641, 1642.]

4. SAME — ACTIONS TO SET ASIDE JUDGMENT — COMPLAINT — SUFFICIENCY — FRAUD.

Where a complaint, in an action to set aside a revival of a former judgment in the name of a pretended assignee of the original judgment creditor, alleged that the assignment was a forgery, but did not show that the judgment debtor was prevented from presenting such claim to the court in the revival proceedings, it was insufficient to state a cause of action on that ground, since cases where relief from a judgment can be granted on the ground of fraud are those where the unsuccessful party has been prevented from fully exhibiting his case without fault on his own part.

5. EXECUTION — SALES — CREDIT — ACTIONS FOR RELIEF — COMPLAINT — SUFFICIENCY.

Where plaintiff alleged that a certain note belonging to her had been sold under an execution on a judgment against her, but no credit was ever given on the judgment on account of the sale, and that subsequently real estate belonging to her was sold under the same judgment, and asked that she have a decree allowing credit for the value of the note, but there was no statement that the sheriff's return did not exhibit the amount realized on the sale of the note, and it did not appear from the complaint that the amount realized from the two sales exceeded the judgment and costs, or that the judgment creditor was making any claim against her on account of the judgment, the complaint did not state facts entitling her to relief.

6. JUDICIAL SALES — VACATING — GROUNDS — INADEQUACY OF PRICE.

Ordinarily, inadequacy of price is not sufficient cause for setting aside a judicial sale, for it must generally appear that there were such irregularities or fraud as tended to prevent the property levied upon from being sold at a fairly adequate price, and, in the absence of an allegation of irregularities affecting substantial rights or of fraud, plaintiff is not entitled to have a sale vacated except upon a tender of the amount for which the sale was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 81, Judicial Sales, §§ 77, 78.]

7. JUDGMENT — ASSIGNMENT — RELEASE BY ASSIGNOR — EFFECT.

Where a judgment debtor has notice of an assignment of the judgment, a subsequent attempted release of the judgment by the assignor does not affect the assignee's right in any way, or vest in the judgment debtor any cause of action against the assignee. Hence, where the validity of an assignment of a judgment is not resisted by the judgment debtor in an action by the assignee to revive the judgment, a subsequent release by the original judgment holder cannot avail the judgment debtor.

Error to District Court, Larimer County; Christian A. Bennett, Judge.

Action by Marie La Fitte against George Salisbury and others to have a judgment of revival declared void, etc. Judgment for defendants, and plaintiff brings error. Affirmed.

Plaintiff in error filed a complaint in the court below, in which she designated the defendants in error as defendants. In her complaint she alleged, in substance, that in December, 1881, in the district court of Pueblo county, the defendant Rups obtained a judgment against her in the sum of \$2,076.30 and costs; that in 1894 the defendant George Salisbury commenced a proceeding in the district court of Pueblo county as the assignee of the Rups judgment, whereby it was revived in his name, in the sum of \$3,130, and costs amounting to \$65. She then alleges that Salisbury, contriving to cheat and defraud her, falsely represented to the court that he was the assignee of the judgment, when, in fact, it had never been assigned to him by Rups, and he was never authorized to revive it, but that Rups always owned the judgment; and alleges that the written assignment thereof upon which Salisbury predicated his rights as assignee was a forgery. Her complaint was filed November 25, 1904, and she avers that she did not learn of the revival of the judgment, and that no assignment of the original had, in fact, been made to Salisbury until October 9, 1903. She further avers that on August 13, 1903, Salisbury caused an execution to issue on the revived judgment, by virtue of which he caused a note belonging to her, of the value of \$1,070, to be sold to his wife, Susan, for the sum of \$570; but no credit was ever given upon the judgment on account of this sale. She further alleges that on August 13, 1903, Salisbury caused an execution to be issued and delivered to the sheriff of Larimer county, under and by virtue of which levy was made upon real estate belonging to her, which was thereafter sold under the execution to his wife for the sum of \$5,500, and that under the certificate of purchase thus made, and after the time for redemption from such sale had expired, a sheriff's deed was executed and delivered to Mrs. Salisbury. She alleges that the real estate so sold by the sheriff at the time of the levy thereon and sale thereof was worth the sum of \$20,000, and that the price at which it was sold was so grossly inadequate and insufficient, as compared with its real value, as to render the sale void. She also alleges that on the 5th day of January, 1904, Rups filed a satisfaction of the judgment in the office of the clerk of the district court of Pueblo county. She prayed judgment to the effect that the judgment of revival be adjudged void; that the court adjudge that no assignment of the original judgment was ever made by Rups to Salisbury; that the issuance of the executions and levies upon her property and sale thereof thereunder be declared void; that, in the event the judgment should be held valid,

she have judgment giving her credit for the sum of \$1,070, the value of the note sold; that the sale of the real estate be set aside because the price at which it was sold was so grossly inadequate, as compared with its value, as to amount to a fraud upon plaintiff's rights; and that she have judgment for the possession of the real estate, etc. To this complaint the defendants answered. When the case was called for trial, the defendant Salisbury was placed upon the stand as a witness by plaintiff, for cross-examination. Thereupon the defendants interposed an objection to the introduction of any testimony upon the ground that the complaint did not state a cause of action, which objection was sustained, and judgment rendered that the plaintiff recover nothing by her action, and that it be dismissed at her costs. She brings the case here for review on error.

Chas. M. Bice, for plaintiff in error. Geo. Salisbury, for defendants in error.

GABBERT, J. (after stating the facts as above). It will be noticed from the foregoing synopsis of the complaint that plaintiff does not allege that she was not duly notified of the proceedings instituted by Salisbury in the district court of Pueblo county, which finally culminated in a judgment reviving the Rups judgment in his name as the assignee of Rups. True, she avers that she did not learn of the revival of the judgment, and that no assignment of the original had been made to Salisbury until in October, 1903, but that is not equivalent to stating that no process was issued and served upon her in the proceeding instituted by Salisbury. She evades this fact, whatever it may be. Necessarily, she knows whether or not she was served with process in that proceeding. Consequently, the averments in her complaint on this subject must be positive and unequivocal, and not evasive. She seeks, however, to avoid the judgment upon the ground that in truth and in fact Salisbury was not such assignee at the time he instituted proceedings and obtained a revival of the judgment against her in his name. The complaint is insufficient to state a cause of action in so far as it attempts to attack the revival of the judgment upon this ground. One of the issues involved in the proceeding instituted by Salisbury was whether or not he was the assignee of the Rups judgment. *Hughes v. Brewer*, 7 Colo. 583, 4 Pac. 1115. That was determined by the court in his favor. The effect of a judgment reviving a judgment as an adjudication of all questions necessarily involved does not differ from that of other judgments. In such proceedings the judgment debtor must interpose such defenses as he may have, or they will be forever barred by the judgment of revival. *Freeman on Judgments*, § 448. There is no averment in the complaint from which it is made to appear that plaintiff was prevented from presenting to the district court of Pueblo coun-

ty the claim, which she now asserts, that Salisbury was not, in fact, the assignee of the Rups judgment. The frauds which will vitiate a judgment between the same parties rendered by a court of competent jurisdiction are those which are extrinsic or collateral to the matters tried. That is to say, the cases where relief from a judgment can be granted upon the ground of fraud are those where, by fraud or deception practiced by the prevailing party, the unsuccessful party has been prevented from fully exhibiting his case, without fault on his part. *Venner v. Denver Union Water Co. (Colo.)* 90 Pac. 623; *Boldenweck v. Bullis (Colo.)* 90 Pac. 634; *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93. Such is the law as long since firmly established, in order that repeated litigation between the same parties in regard to the same subject of controversy may be prevented.

The averment that no credit was given upon the judgment for the amount realized from the sale of the note levied upon does not state facts which entitle plaintiff to relief, although she prays that, in the event the judgment is held valid, she have a decree allowing her credit for the value of the note. She would only be entitled to credit for such net sum as was realized from the sale, and this would appear from the return of the sheriff. There is no statement to the effect that the sheriff's return does not exhibit the amount realized on this sale. In this connection we note that it does not appear from the averments of her complaint that the amounts realized from the two execution sales made at the instance of Salisbury were in excess of the judgment and costs. It is also proper to notice that she does not state in her complaint that Salisbury is making any claim against her on account of his judgment, which has been satisfied to the extent of the net sums realized on his execution sales of her property.

Ordinarily, inadequacy of price paid is not sufficient cause for setting aside a judicial sale. *Conway v. John*, 14 Colo. 30, 23 Pac. 170. Generally in addition, it must appear that there were such irregularities in connection with the sale, or such fraud practiced, as tended to prevent the property levied upon from being sold at a fairly adequate price. 17 Cyc. 1276. Nothing of this character appears in plaintiff's complaint. She relies entirely upon the alleged inadequacy of the price for which her real estate was sold, and in the absence of a charge of irregularities affecting her substantial rights, or of fraud, she is not entitled to have the sale vacated, except upon a tender of the amount for which the sale was made. 17 Cyc. 1283. "He who asks equity must do equity."

The attempted release of the judgment by Rups does not avail the plaintiff. It is true she alleges in her complaint that no assignment of the judgment was ever made by him to the defendant Salisbury, but the facts up-

on which she relies in support of this contention will not permit her to raise that question. The judgment of the district court when the original judgment was revived settled that issue as between the plaintiff and defendant Salisbury, in the absence of such averments of fraud as would permit her to now litigate it. She had notice of the assignment by Rups to Salisbury, and hence the attempt of Rups to release it in favor of the plaintiff does not affect Salisbury's rights in any way, or vest in her any cause of action against him. 23 Cyc. 1425.

Counsel for plaintiff has not called our attention to any propositions based upon the averments of the complaint which would entitle her to any relief whatever, and the judgment of the district court must therefore be affirmed, and it is so ordered.

Judgment affirmed.

STEELE, C. J., and CAMPBELL, J., concur.

PEOPLE ex rel. BRYANT v. YOUNGS et al. (Supreme Court of Colorado. May 4, 1908.)

1. ELECTIONS — ELECTION JUDGES—APPOINTMENT.

The charter of the city of Denver, § 174, provides that each member of the election commission shall have the right to appoint one of the three election judges in each precinct, provided that one of the said judges shall be of different political faith from either of the other two, and that the conduct of elections and all matters pertaining thereto in the city shall be exercised by the election commissioners. *Sess. Laws 1907, p. 374*, known as the "Booth Act," was expressly made applicable to municipal elections in the city of Denver. Relator, an election commissioner, not being in the city at the time of appointing judges, the other two members of the commission appointed a judge in each precinct for themselves, and appointed a third list of judges for relator, and certificates were issued to such three sets of appointees as the legal election officers, and defendant, thereafter returning, claimed that he had the exclusive right to appoint one judge for each precinct. *Held*, that respondents, having made appointments under the provisions of the city charter, could not insist that the right of relator to appoint judges be governed by the Booth act, since they themselves had acted under the former law, and cannot now be heard to say either individually or as a body that relator must act under another law.

2. SAME—POWER OF APPOINTMENT—APPOINTMENT BY ELECTION COMMISSIONERS.

Under the charter of the city of Denver, § 174, providing that each member of the election commission shall have the right to appoint one of the three election judges, and that one judge shall be of different political faith from either of the other two, and that the management of the registration, etc., and all matters pertaining to elections, shall be vested exclusively in the commission, the power of appointment does not reside in the commission as a body or any majority thereof, but each member has the absolute right to appoint one election judge, and though such appointment may not be final or conclusive upon the party organization of such member, it is not subject to review by either or both of the other members of the commission, whether acting individually or as a board.

3. SAME—REPRESENTATION OF POLITICAL PARTIES—APPOINTMENT OF MEMBERS OF OPPOSING PARTY—WHO MAY OBJECT.

The fact that a member of the election commission appointed as judges members belonging to the opposing party may not be objected to by the commissioners of opposing party, as the other members of the commission may not supervise or direct the appointment of any member.

4. SAME—DELAY IN MAKING APPOINTMENTS—EFFECT.

The charter of the city of Denver, § 174, provides that each member of the election commission shall appoint one of the three election judges in each precinct, and that one of the judges shall be of different political faith from the other two, and that the commission shall have entire control of elections. While relator, a commissioner, was away from the city, the other commissioners appointed judges for him as well as themselves, and on his return five days before the election relator appointed an election judge for each precinct as provided by the statutes, which appointments the board refused to confirm. *Held*, that relator's appointees should be confirmed, and the appointments made by the other two commissioners on his behalf in his absence annulled, as there was still sufficient time for a full registration of voters and relator's appointments were made in ample time, if certified when made, and the certification of the relator's appointees would not interfere with a fair and honest election, since relator represented the electors in appointing the judges, and did not act merely in an individual capacity, and his delay in appointing judges should not prejudice the interest of his constituents.

5. MANDAMUS—OFFICIAL ACTION—ELECTION JUDGES—CERTIFICATION OF APPOINTEES.

Under the charter of the city of Denver, § 174, providing that each member of the election commission shall appoint one of three election judges, and the commission shall have complete control of the election, and the action of the commission on all questions passed on by it shall be final, the making of the certificate by the president and secretary of the commission for election judges duly appointed is purely ministerial, they having no discretion, and, when a list of appointments of judges by any member of the commission is made and presented to them, neither they nor the majority of the board, acting as a body or individually, may refuse to certify the appointments, and they may be compelled by mandamus to certify any appointments duly made upon their refusal to do so.

Gabbert, J., dissenting.

En Banc. Error to District Court, City and County of Denver; George W. Allen, Judge.

Mandamus by the people of the state of Colorado, on the relation of William H. Bryant, an election commissioner, against Henry Youngs and others, to compel the certification of election judges appointed by relator. Judgment dismissing the action, and refusing the writ and relator brings error. Reversed, and the writ issued to compel respondents to perform the required acts.

T. J. O'Donnell, John A. Rush, Edwin Van Olse, and Wm. H. Bryant, for plaintiff in error. H. A. Lindsley and Thos. R. Woodrow, for defendants in error.

CAMPBELL, J. This writ of error is to a judgment of the district court dismissing an action in mandamus. Under the pleadings the issues are of law purely, and were so treated by the trial court and counsel for

both parties. The controversy arose out of these facts: The charter of the city of Denver created an election commission consisting of three members, to which are intrusted general control and supervision of municipal elections. In preparing for the approaching general city election, to be held May 19, 1908, Henry Youngs and George N. Ordway, two of the members, in the absence from the state of William H. Bryant, the third member of the commission, called a meeting of that body for March 18th, of which Bryant had notice, to arrange for the appointment of three judges and two registrars of election in each of the precincts of the city. Bryant at once notified them of his inability to be in Denver until March 27th. The meeting called for the 18th was then adjourned from time to time until the 21st of March, when Youngs and Ordway, each in his individual capacity as a member of the commission, appointed a separate list of judges and registrars for the various precincts, and because of Bryant's absence, and since the registration of electors must begin on April 4th, which, under the law as they conceived it to be, necessitated the immediate appointment of all judges and registrars, the two members present sitting as a commission thereupon proceeded to act and appointed, in behalf of Bryant, a third list of judges and registrars for every precinct in the city, and afterwards, in pursuance of the rules and regulations of the board, which required such certification to enable the appointees to act, caused its president and secretary to issue their certificates of appointment of the three lists so made as the legal election officers for the ensuing election. On March 27th Bryant returned to Denver, and on the following day, disclaiming the power of the commission as a body, and of his co-members, or either of them, individually, to appoint for him a list of judges and registrars, and repudiating their act in attempting to do so in his own behalf as a member of the commission, appointed a third list, and asked the president and secretary to certify the same. These officers refused to make the certificate, and the board as a board refused to rescind their action in appointing the list for Bryant, and declined to accept or recognize his list of appointments. Whereupon Bryant brought this action in mandamus to compel the president and secretary of the board to certify to the list of election officers appointed by him. The district court, being of opinion that under the provisions of the charter of the city of Denver the commission as a body, and not as individuals, possessed the power to appoint judges and registrars, and had full control over municipal elections, held that the foregoing action of the board was final and conclusive, and not subject to review by the courts, and accordingly dismissed the action.

The important ultimate question on this review is, did Bryant, under the foregoing

facts, at the time he acted, have the power to appoint judges and registrars of election? Or, stated in another form, did the other two members, as a majority of the board or individually, have the right and power to appoint a list in Bryant's behalf? The section of the charter of the city pertaining to the appointment of judges of election is section 174, and reads: "Each member of said commission shall have the right and power, and it shall be his duty, to appoint annually one of the three election judges in each precinct: Provided, however, that one of said judges shall be of different political faith from either of the other two; all of whom shall be qualified electors of the precinct. * * *

The conduct, management and control of the registration of voters, and of the holding of elections, canvassing the returns thereof and issuing certificates of election, and of all other matters pertaining to elections in the city and county, shall be vested exclusively in and exercised by the election commission, which shall perform all the duties, joint, several or otherwise of the city and county officers or employees required to be done by the Constitution or by general law in relation thereto, and the action of the commission on all questions passed upon by it shall be final." In 1907 the General Assembly of the state passed what is commonly called the "Booth Act" (Sess. Laws 1907, p. 374, c. 174) concerning elections, and it was expressly made applicable to municipal elections in the city of Denver. It is unnecessary to reproduce its provisions. Counsel for respondents say that it provides a method of selecting or designating the judges and registrars to be appointed by the election commission different from that of the charter, and is the paramount law, and must prevail over the latter. If that be true, it is entirely clear that respondents are not in a position to raise any such question in these proceedings, and we, therefore, decline to enter upon an inquiry or express an opinion as to whether the charter or the Booth act in case of conflict governs in municipal elections in Denver. That respondents cannot inject this question will readily appear upon a moment's reflection. In the absence of Bryant from the state, who was elected on the Municipal Ownership ticket, Youngs and Ordway, representatives and elected on the ticket of the Republican Party, and constituting the majority members of the commission, doubtless acting under legal advice, concluded that they must obey the charter and ignore the Booth law, and each for himself appointed a separate list of judges and registrars of election for every precinct of the city in accordance with the foregoing provision of the charter on that subject. Having done so, they cannot now, as a body or individually, be heard to say that Bryant, the third member, must follow the Booth law and not the charter under which they themselves acted. Respondents still claim as legal the lists

of judges and registrars which they appointed under the charter, while they insist that Bryant shall make his selection under the Booth act. They are estopped by their conduct to make such contention. Whether in case a member of the commission betrays his party, is faithless to his trust, derelict in duty, or refuses or neglects to act, his action may, at the instance of his party organization or its members, be reviewed and controlled by the court, or for his nonaction appropriate relief may be given, is not involved here, and we are not required to express our views upon it.

The solution of the controversy between these parties, therefore—and that is the only question with which we are now concerned—depends on the meaning of the foregoing section 174. That meaning is not difficult to discover. The language is unambiguous. It interprets itself. The trial court, construing the section as a whole, held that, while each member might nominate or suggest to the commission one of these judges, the power of appointment resides in the commission as a body, and that a majority of the board might reject the nominations of the minority and select other names in lieu thereof, and such action on their part is final and conclusive on the courts. Such construction is manifestly wrong. To justify it certain words in the statute of well-defined meaning must be stricken out and other words of different meaning inserted. Just what powers this section vests in the commission as a body we are not required to say; but it is entirely clear that in the appointment of election judges, so far as concerns the other members, each member has the absolute power and right to appoint one election judge in each precinct, and this power, when exercised, though it may not be final or conclusive upon the party organization of that member, or upon the general body of qualified electors, is not subject to review or correction in any particular by either or both of the other members of the commission, whether they act individually or as a board. The specific appointing power delegated to each member by the opening sentence of the section is in no wise affected or limited by the investiture in the commission of general management and control of the registration of voters and general conduct of elections contained in the concluding sentence. It is matter of common knowledge that this section was put in the charter for the purpose of securing an honest election, and, so far as possible, preventing frauds therein by having representatives of the different political organizations on the boards of election and registry. But this purpose might be entirely defeated if the decision of the trial court is right. The composition of the present board affords a good illustration of the practical workings which this decision would allow. Two of the members were elected by the Republican Party; one on the Municipal Ownership ticket. If

the list of judges appointed by the latter may for any reason be rejected by the majority and another list selected by them appointed, then the Republican Party, through its representatives on the board, could fill every registry and election board in every precinct with members of its own political faith.

It is only fair, however, to say that in the present case there was no such abuse of power. And this naturally leads to a consideration of another objection interposed by the Republican majority of the commission, which is that Bryant appointed some members of the Republican Party instead of taking all of his appointees from the list furnished by the Democratic organization, the leading opponent of the Republican Party. This objection of the majority that the minority selected for judges members of the majority party is not one on which respondents can be heard, though it exhibits a political altruism as rare as it is commendable. It is not the prerogative of the respondents, as the representatives of the Republican Party on this board, to correct or supervise the action of the minority member performed in obedience to the law. Moreover Bryant was not elected on the Democratic, but on the Municipal Ownership, ticket, and, if his party constituents are dissatisfied with his action in the selection of judges, it is for them not respondents, to present their grievance to the courts for redress. The meaning which we give this section accords with the plain intent of its framers, and, if followed, will tend to the suppression of frauds and the securing of a fair and honest election.

Bryant, therefore, having, as against these respondents, the absolute right and power to appoint one judge in each precinct, the question remains whether at the time he filed the list, so soon before April 4th, when, under the statute, the registration of electors is to begin, the court should virtually annul the appointments made by respondents by compelling the president and secretary of the board to certify his list. If Bryant was acting solely in an individual capacity, and not as the representative of qualified electors on whose ticket he was elected, or if an award of the relief asked would materially interfere with the registration or the conduct of the election, his absence at a time when his associates met and made their appointments might have some influence on our decision; but he is by the statute expressly recognized as a representative of others whose rights should be protected, if that can be done without prejudice to an orderly conduct of the election. His remissness, if any, not being prejudicial in the respect noted, should not operate to the injury of his constituents, or to defeat the chief object of the statute in distributing the power of appointment among the different members of the commission. Then, too, no particular time for the appointment of judges is fixed by

the charter, the direction being merely that it should be done annually. If, however, such time is in effect designated, to be determined by a computation from, or by analogy to, other kindred provisions of the law, it is not altogether clear that respondents brought themselves within the provisions which they now insist shall be enforced against relator. In a late decision by this court—*People ex rel. Johnson v. Earl*, 94 Pac. 294—it was held that similar provisions in an election law as to the time election officers shall perform their duty were directory, and a failure on their part strictly to observe such directions did not, in the circumstances of that case, which are in principle similar to the facts here, invalidate an election. While election officers should comply with directory provisions of the statute, and while this court is not disposed to overlook willful omissions or evasions of duty on their part, we think that under the facts here Bryant's appointments should have been certified by the president and secretary of the board, as they were made in ample time, had the proper certificate been issued, to enable his appointees to begin the work of registration at the time fixed by law. If that work is to be delayed for one or two days beyond the time fixed by statute, it is the result of the conduct of the respondents themselves in withholding the certificate, and the court will not now look with favor upon their objection that Bryant's dilatory action should divest him of an absolute right which the statute gives him. On the contrary, we do not think his delay has the effect claimed. There is still ample time for a full registration of voters, and an order now entered for the certification of Bryant's appointees will not in any way interfere with a fair and honest election.

We note, but shall not discuss, the point made by respondents touching the right of relator to this remedy. The existence of the right is too plain for argument. The making of the certificate by the president and secretary is purely ministerial, they having no discretion in the premises. When a list of appointments of judges by any one member of the commission is duly made and presented to these officers, as the rules require, neither they nor the majority of the board acting as a body or individually may refuse to certify the same, since in the exercise of this power each member of the commission is independent and not subject to control by the others.

The judgment is therefore reversed, and the president and secretary of the commission are instructed to certify, as the rules of the commission require, the list of judges made out by Bryant.

Reversed.

All the Judges concurring except MAXWELL J., who did not hear the arguments or participate, and GABBERT J., who dissents.

GABBERT J. (dissenting). I do not disagree with the construction given the charter provision under consideration, but in my opinion, in the circumstances of this case, that construction is not involved. Mr. Bryant had notice of the meeting at which the appointments were made, but did not attend. The appointees he now seeks to displace are of different political faith from the others appointed by Messrs. Ordway and Youngs. In this respect the charter provision has been complied with in letter and spirit. There is no suggestion of fraud or bad faith in making the appointments. They were made at the proper time. For these reasons Mr. Bryant should not be permitted to undo the work of his associates in any respect, and in my opinion the judgment of the district court should be affirmed.

STATE ex rel. DAVIS v. CUTLER et al.
(Supreme Court of Utah. May 28, 1908.)

1. COURTS — ESTABLISHMENT — STENOGRAPHERS—EMPLOYMENT.

Under Comp. Laws 1907, §§ 721, 722, authorizing the judges of the district court to contract with and employ competent persons as court stenographers at a rate not to exceed \$8 for each sitting of court, and that such stenographers shall be paid not to exceed 10 cents a mile for each mile actually traveled in the performance of their part of the contract, a district judge has power to contract to pay a stenographer for mileage at the rate of 10 cents a mile without reference to the amount actually paid for such travel.

2. SAME—STATUTES.

Laws 1907, p. 172, c. 123, making appropriations for payment of per diem mileage of court stenographers, and limiting reimbursement for mileage to the amount actually paid out, was not intended to apply to contracts for the payment of stenographers' mileage at the rate of 10 cents per mile executed by judges of the district court, as authorized by Comp. Laws 1907, §§ 721, 722.

3. STATUTES—AMENDMENT—TITLE.

Though a general appropriation bill is exempted from the general constitutional provision requiring all bills to contain but one subject, which must be clearly expressed in the title, a general law may not be amended, modified, or repealed by a general appropriation act containing a general title without complying with the constitutional provision providing that the section amended or modified be re-enacted in the form as modified or amended, and not by mere reference, etc.¹

4. COURTS — STENOGRAPHERS—COMPENSATION —STATUTES—IMPLIED REPEAL.

Laws 1907, p. 172, c. 123, making appropriations for general purposes, and limiting appropriations for the payment of mileage for court stenographers to the amount actually expended, did not modify or repeal by implication Comp. Laws 1907, §§ 721, 722, authorizing district judges to contract with stenographers for the payment of mileage at a rate of 10 cents a mile.

5. MANDAMUS — ACTS TO BE PERFORMED—JUDICIAL ACTS—STATE BOARD—CLAIMS—EXAMINATION—DISCRETION.

While the state board of examiners in the consideration of claims against the state acts in a quasi judicial capacity, and may exercise dis-

cretion in the discharge of its official duties, it may not arbitrarily refuse to allow a claim involving questions of law only, and, if it does so, the claimant may maintain mandamus to compel the allowance of the claim.²

6. SAME—SUPREME COURT—ORIGINAL JURISDICTION—MANDAMUS.

The power of the Supreme Court to issue mandamus is not limited to appellate proceedings, but extends to the enforcement of official action by the state board of examiners.³

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 132-135.]

Original application in the Supreme Court for mandamus by the state, on relation of Justin R. Davis, petitioner, against John C. Cutler and others, constituting the state board of examiners. Judgment for petitioner.

Thurman, Wedgwood & Irvine, for petitioner. M. A. Breeden, Atty. Gen., and A. R. Barnes, Asst. Atty. Gen., for respondents.

FRICK, J. This is an original proceeding commenced in this court by the relator as court stenographer for Hon. C. W. Morse, one of the judges of the district court of the Third judicial district of this state, against the respondents, constituting the state board of examiners of the state of Utah. The same matters involved in this proceeding were before this court in the case entitled *State v. Edwards*, 93 Pac. 720, where we held that, in view of certain constitutional provisions, the claim in question is one which ought to be presented for allowance to the state board of examiners. It now appears from the pleadings that the claim has been so presented to and has been disallowed by said board of examiners, and the relator has therefore instituted this proceeding to compel said board to audit and allow the claim in question.

The claim of the relator arises under a legislative act passed in 1899 (Laws 1899, p. 112, c. 72), which act has been carried into the compiled Laws of Utah of 1907, constituting sections 721 to 728x1, inclusive, of that compilation, and which compilation will hereafter be referred to instead of the original act. By sections 721 and 722 among other things it is in substance provided that the judges of the district courts of this state may contract with and employ competent persons as court stenographers to report the proceedings of such courts; that said contracts shall provide that such stenographers shall attend each sitting of the court and make full stenographic notes of the testimony and proceedings, which notes shall be filed with the clerk of the court; that such contracts shall provide the rate of compensation to be paid to the stenographers, which shall not exceed the sum of \$8 for "each sitting of the court"; that "such contract shall further provide that the said stenographer shall hold his employment at the pleasure of the judge of the court appointing him, or his successor, and may also provide

¹ *Mill v. Brown*, 31 Utah, 473, 88 Pac. 609; *Marionaux v. Cutler* (Utah) 91 Pac. 355.

² *Thoreson v. State Board of Examiners*, 19 Utah, 18, 57 Pac. 175.

³ *State v. Morse*, 31 Utah, 213, 87 Pac. 705.

that said stenographer shall be paid not to exceed 10 cents per mile for each mile actually traveled by him in the performance of his part of said contract, and the amount of such mileage shall be certified by the court to the State Auditor, who shall draw his warrant upon the State Treasurer for the amount so certified, and the same shall be paid out of the state treasury." Under the provisions aforesaid the relator instituted proceedings asking for a writ of mandate to compel the State Auditor to draw a warrant for the mileage certified to by the judge, as appears from the case of *State v. Edwards*, supra. The writ was denied in that case for the reasons there stated. Since that decision the relator has presented the claim for allowance to respondents, constituting the state board of examiners, and that board has rejected his claim upon the ground, as we understand it, that the judge did not certify that the amount of the claim for mileage, to wit, 10 cents per mile, was actually paid by the stenographer, and that the stenographer did not claim that the amount was actually paid by him in traveling from place to place while engaged in the performance of official duties under the contract.

It is admitted by respondents that the relator is a duly appointed court stenographer; that he entered into a contract with the district judge aforesaid as provided in the sections above referred to; that the number of miles as claimed by him were actually traveled in the discharge of official duties in pursuance of said contract; that the contract provides for mileage at the rate of 10 cents per mile; and that the certificate of the judge is regular upon its face. Indeed there is no dispute with regard to any matter of fact, but the board justify their action in disallowing the claim entirely upon questions of law, viz.: (1) That the judge did not have the authority to contract for mileage in excess of the amount actually paid, and in no event to exceed 10 cents per mile; and (2) that in the general appropriation bill of 1907 the Legislature limited the payment of mileage to be paid to court stenographers to the amount actually paid out by them. In view of this, it is asserted by respondents that, since it is not made to appear that the mileage claimed by the relator was actually paid by him, he therefore does not state sufficient facts to entitle him to the relief prayed for notwithstanding the admitted facts. Upon the oral argument the Deputy Attorney General did not seriously contend that the judge did not have the authority, under the provisions of the section above quoted, to contract for and allow mileage to the extent of 10 cents per mile. Indeed the language of the statute is so plain upon that point that it requires no construction. We, therefore, need not dwell upon the reasons why the Legislature permitted the judge and stenographer to agree upon the rate of mileage within the limits

fixed in the statute. It being admitted that the claim of the relator is for mileage actually traveled in pursuance of a contract duly entered into in January, 1905, and that the amount claimed is within the rate allowed by the law in pursuance of which the contract was entered into and under which it was in force at the time the mileage was earned, there seems no escape from the conclusion that the contention of the respondents that the facts stated upon this ground are insufficient should be overruled.

The respondents, however, contend that the relator cannot recover the amount claimed by him because the Legislature, in the general appropriation act of 1907 (*Laws 1907, p. 172, c. 123*), limited the mileage to be paid to the amount actually paid by the stenographer; that the relator does not allege that the amount claimed by him was actually paid for that purpose; and that therefore the allegations are insufficient to entitle him to recover. It is true that under the general title of "an act making appropriations for general purposes" the Legislature, in making the usual appropriation for the two following years for mileage and per diem for court stenographers, limited the payment for mileage to the amount actually paid. It seems clear to us, however, that it was not the intention of the Legislature to have this limitation apply to contracts in force under the section above referred to. It would be unreasonable to assume that the Legislature intended to amend or modify that section in the brief statement contained in the general appropriation act of 1907. But, if we assume that it was the intention to do this, did the Legislature have the power to amend, modify, or repeal a general law by merely inserting a conflicting clause or phrase into the general appropriation act? While under the Constitution general appropriation bills are exempted from the general constitutional provision which requires that all bills must contain but one subject, which must be clearly expressed in the title, it does not follow that general laws may be amended, modified, or repealed by a general appropriation act under such a general title. The Legislature had the undoubted right to amend, modify, or repeal the section in question in any respect and at any time. But in order to do this the Legislature would have to comply with the constitutional provision relative to the amendments or modifications of existing laws. If it was intended to directly modify or amend a particular chapter or section, the Constitution required that the chapter or section amended or modified be re-enacted in the form as modified or amended, and not by mere reference to the law intended to be modified or amended. It is true that we held in *Mill v. Brown*, 31 Utah, 473, 88 Pac. 609, and in *Marion-eaux v. Cutler*, 91 Pac. 355, in harmony with the great weight of authority, that this con-

stitutional provision does not apply to independent acts, and, further, when there is an irreconcilable conflict between a later and a prior law, that the later one repeals the former by implication. These rulings are, however, based upon the ground that the independent acts otherwise conform to the constitutional requirements with regard to both form and substance. We are not prepared to go to the extent of holding that a substantive law may be either amended or modified, nor may it be repealed by implication by a general appropriation act under a general title such as permitted in such acts. If this may be done, we know of no law fixing legislative salaries or official compensation of any kind that may not be amended or repealed by a general appropriation act. The committee having such a bill in charge might, in connection with each item of appropriation, add any provision which would amend or by implication repeal any existing law so that it would be almost impossible for any officer to know the state of the law with regard to the compensation of legislative offices. Moreover the members of the Legislature not of the particular committee might thus be entrapped into voting upon any number of subjects entirely foreign to mere appropriations of money without intending to do so. If it were the intention of the Legislature to amend the section in question, they were required to do this by a special amendatory act which conformed to the constitutional requirement, or by an independent act covering the subject-matter of stenographers' mileage. If the provisions of such an independent act were in irreconcilable conflict with the former law upon the subject, although the latter did not in terms repeal the former, it would still amount to a repeal of the former by unavoidable implication. But the general appropriation act of 1907 was not intended to be an independent act upon the subject of the appointment of court stenographers, nor upon the question of fixing or limiting their compensation. The Legislature had the undoubted right to limit in amount any general or special appropriation, or refuse to make any at all; but it could not reduce nor increase the compensation otherwise fixed by the law or by a contract authorized by law in a general appropriation act.

The respondents have cited several cases which are claimed to support their contention. The case of *Collins v. State*, 3 S. D. 18, 51 N. W. 776, is especially relied on. That case is, however, clearly distinguishable from the one at bar. In that case the officer whose salary was in question was holding under a territorial appointment and under a law which provided that the term of all officers appointed by the territorial Governor should terminate in 10 days after the term of the Governor making the appointment expired. When the territory of Dakota was divided

into two equal parts, the south half was created into the state of South Dakota. The officer in question held his office under an appointment calling for his duties to be performed within the entire territory, and when the territorial Governor ceased to hold office in South Dakota the officer in question still continued to discharge the duty of veterinary surgeon within the new state of South Dakota. The newly adopted Constitution of South Dakota contained a special provision as follows: "No warrant shall be drawn upon the State Treasurer except in pursuance of an appropriation for the specific purpose first made." The first Legislature of the new state of South Dakota made a specific appropriation for the salary and expense of this veterinary surgeon of about one-half of what he had received under the territorial appointment. He sued for the difference, and the court held that under the constitutional provision above quoted no warrant was authorized for an amount greater than the amount specially fixed by the Legislature for that purpose. It was further held that under the particular facts and circumstances of that case the officer had no cause of action against the state of South Dakota. The other cases cited are from the Supreme Court of the United States in which it is held that, where Congress fixed the amount to be paid for official compensation or salaries in an appropriation act, although the appropriation may be less than the amount fixed in another statute, if the appropriation specially states the amount appropriated to be in full for all compensation, the appropriation repeals by implication the former law with respect to the amount to be allowed and paid for the additional services. This rule is, however, not controlling in all cases, as is well illustrated in the case of *United States v. Langston*, 118 U. S. 389, 6 Sup. Ct. 1185, 30 L. Ed. 164, in which the cases cited by counsel for respondents are reviewed and distinguished. The case of *Strong v. United States* (D. C.) 34 Fed. 17, has no application here. In this connection, however, it must not be overlooked that there are no such constitutional restrictions upon Congress in passing, amending, and modifying existing laws as are imposed upon the Legislature of this state. The rulings of the federal courts upon these subjects, therefore, may or may not be authority upon any particular question. We are of the opinion, therefore, that neither the law as contained in section 722 aforesaid, nor the contract which was entered into in pursuance of the provisions of that section, were affected or modified by the general appropriation act of 1907.

It is further urged that a writ of mandate should not issue against respondents for the reason that in passing upon claims against the state they act in a quasi judicial capacity and must therefore be permitted to exercise the discretion usually exercised by such boards. That respondents do act in such a

capacity and that they may exercise discretionary powers in the discharge of their official duties in passing upon and in allowing or rejecting claims, does not admit of doubt. But this discretion is not one that may be arbitrarily exercised so as to prevent a claimant from seeking redress in the courts where purely questions of law are involved. In such cases even courts may be compelled to proceed to judgment, and, where the law directs what the judgment shall be in case all the facts are found or admitted, a superior court may direct an inferior one with respect to the particular judgment that shall be entered by it. The power to do this is not limited to appellate proceedings, as is illustrated in the case of *State v. Morse*, 31 Utah, 213, 87 Pac. 705. In this case the essential facts entitling the relator to have his claim audited and allowed are all admitted. The questions, therefore, are purely questions of law. If the claim, therefore, is one which is admitted to be just, and is authorized by law, and there is no dispute with regard to any fact involved, and the claim is presented to the board in due form as the law requires, we know of no law nor reason why respondents, although acting in a quasi judicial capacity, should not be required to audit and allow the claim. This is clearly the logic of the case of *Thoreson v. State Board of Examiners*, 19 Utah, 18, 57 Pac. 175. While in that case it is also held that ministerial officers may not question the validity of the law under which they are required to act (a question not involved in this case, and upon which we express no opinion), the decision in that case nevertheless also rests upon the doctrine above announced. The following authorities likewise sustain the foregoing views, namely: *Merrill on Mandamus*, § 126; *Mechem on Public Officers*, § 968; *High, Ex. Leg. Rem.* (3d Ed.) §§ 101-113; *Marionaux v. Cutler* (Utah) 91 Pac. 355.

In view of the conceded facts, there is nothing upon which the respondents can legally exercise any discretionary powers in this case, and therefore they should have audited and allowed the claim. No doubt they would have done so had they not entertained a view of the law different from the one we feel constrained to take. In such a case it is clear that the law in effect directs what the action of the board shall be, and, this being so, there is no reason why the board of examiners should not be required to comply with what it commands. There would be something lacking in our system of government or jurisprudence if under such circumstances a claimant could be defeated simply because the officer or board required to audit and allow his claim exercised some discretion in the matter. Where the duty to act is clear, and the law gives a right to obtain payment of a claim owing by the state, courts should not hesitate to enforce the right by mandamus. It follows, therefore, that the relator is entitled to have his claim

for mileage as set forth in his petition audited and allowed by the respondents as the state board of examiners.

It is therefore ordered that a writ of mandate issue in the usual form directing the respondents as the state board of examiners of the state of Utah to audit and allow relator's claim for mileage as prayed for in the petition in the manner provided by law. The relator to recover costs.

McCARTY, C. J., and STRAUP, J., concur.

(49 Wash. 477)

THEIS v. SPOKANE FALLS GASLIGHT CO. et al.

(Supreme Court of Washington. May 23, 1908.)

1. GAS — CORPORATIONS — FRANCHISES — CONSTRUCTION — CONSOLIDATION.

The franchise of an existing gas company, absolutely forbidding any combination with any other corporation, and prescribing forfeiture as a penalty, was impliedly repealed, in so far as such prohibition was concerned, by a franchise granted to a new company expressly authorizing such consolidation.

2. MUNICIPAL CORPORATIONS — FRANCHISES — FORFEITURE — ESTOPPEL.

A city was estopped to declare a forfeiture of the franchise granted by it to a gaslight company, on account of a consolidation of the company and another company subsequently organized, where the franchise granted to the later corporation expressly authorizes such consolidation.

3. GAS — CORPORATIONS — COMBINATIONS — FRANCHISES.

Where a city granted a franchise to a gas company authorizing it to combine with an existing gas company, the trustees, or a majority of the stockholders of the latter, had power, in the absence of fraud or unfairness, to exchange its franchise for that of the new corporation.

4. SAME — PURCHASE OF GAS — ULTRA VIRES ACTS.

Where two gas companies in a city were authorized to combine, the original company had implied power to purchase its gas from the other, instead of manufacturing it itself.

5. SAME — CORPORATE POWERS — COMBINATION — AGREEMENTS — EFFECT.

Where two gas companies were authorized to make an agreement by which the older company was to purchase gas from the new company, which it was able to do at a saving of over \$20,000 per year, and the new company did not sell gas to consumers, and was willing to supply the old company with all the gas necessary during the existence of the old company's franchise, such contract was not objectionable as operating to stunt the business and prospects of the old company, and build up that of the new company, to the detriment of the old.

6. CORPORATIONS — ENLARGEMENT OF BUSINESS — CREATION OF INDEBTEDNESS — RIGHTS OF MINORITY STOCKHOLDERS.

A stockholder, while entitled to have the business and property of the corporation managed according to law, and protected against illegal, wanton, or wasteful acts on the part of the majority, is not entitled to the incurring of corporate indebtedness to enlarge the plant, contrary to the discretion of the majority.

7. SAME — DOMINATION BY OTHER CORPORATION — RIGHTS OF MINORITY STOCKHOLDERS.

That one corporation is dominated by another, by the ownership of a majority of the

stock, is not ground for equitable relief to a minority stockholder, so long as such domination is not exercised unlawfully or illegally.

Rudkin and Dunbar, JJ., dissenting.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Charles Theis against the Spokane Falls Gaslight Company and others. From a decree for plaintiff, defendant Spokane Falls Gaslight Company and certain other defendants appeal. Reversed and remanded, with directions.

Gallagher & Thayer, W. J. Thayer, Franklin W. M. Cutcheon, and Augustine L. Humes, for appellants. Post, Avery & Higgins, for respondent.

ROOT, J. Plaintiff, as the owner of eight shares of the capital stock of the Spokane Falls Gaslight Company (hereinafter called the "Spokane Company"), brought this action, in behalf of himself and all others similarly situated and in behalf of the company, against the defendants, to nullify an arrangement made by some of defendants while acting as trustees, agents, and majority stockholders in this corporation and another, known as the Union Gas Company, whereby it was alleged by plaintiff the business and development of the Spokane Company were to be stunted, its franchise forfeited, and its business and property destroyed. From a judgment and decree in plaintiff's favor, several of the defendants appeal.

The trial court made findings of fact, which we will set forth in full:

"(1) That the defendant Spokane Falls Gaslight Company is, and has been for more than 15 years last past, a corporation organized under the laws of the state of Washington, for the sole object and purpose, as provided by its articles of incorporation, of manufacturing and selling illuminating and nonilluminating gas, and the residuary products arising therefrom, in the city of Spokane Falls (now Spokane), in Spokane county, state of Washington, with the usual powers as to purchasing, erecting, and operating gas works and houses, laying mains, etc., under contracts with the said city of Spokane, a municipal corporation, and with power to borrow money, issue bonds, and other evidences of indebtedness, secured by mortgage upon its entire property, or otherwise. That it has been engaged in such business in the city of Spokane during all of said time, and is now so engaged. That the plaintiff is, and has been for more than two years last past, the owner and holder of eight shares of the capital stock of said corporation. That the total issue of said capital stock is 1,500 shares of the par value of \$100 each.

"(2) That, according to the articles of incorporation, the board of trustees consists of five members, and at the time of the commencement of this action said board consisted of the defendants Anderson, Murphy, Twoby, Aldrich, and Nicholls, and during

the pendency of the said action Aldrich was succeeded by one Gimper. That defendant Murphy was and is president, and at the time of the commencement of the action the defendant Aldrich was secretary and treasurer, and he was thereafter succeeded in said office by said Gimper.

"(3) That the Spokane Falls Gaslight Company is the owner of several valuable pieces of real estate in the city of Spokane and a gas manufacturing plant, with many miles of mains, extensions, surface pipes, and appliances usual in the business of manufacturing and supplying gas. It is also the owner of a franchise from the city of Spokane, referred to in paragraph 3 of the complaint. That prior to the passage of such ordinance said corporation had been acting under another ordinance granted by the city of Spokane, which has expired, and the sole authority of the corporation for using the streets and alleys of said city for laying and maintaining of mains and pipes is the ordinance described in said paragraph 3 of the complaint. That said corporation was the only corporation engaged in said gas business in the city of Spokane until the formation of the defendant the Union Gas Company.

"(4) The defendant Spokane Falls Gaslight Company is a prosperous and solvent corporation having no bonded or other indebtedness, except a small sum in the form of bills payable. That its property and assets are worth in excess of the sum of \$500,000, and it is making annually a net income over and above all expenses of a sum in excess of \$30,000.

"(5) That there is an express prohibition in the ordinance referred to in paragraph 3 of the complaint against any union or combination of any kind or character between the Spokane Falls Gaslight Company and any other gas company doing business in the city of Spokane, which provision is section 7 of said ordinance, and is as follows, to wit: 'Sec. 7. If at any time after the acceptance of this franchise by the grantees herein, and before the expiration thereof, the person, association or company operating under this franchise or selling gas thereunder in said city, shall either directly or indirectly, unite or combine with a competing company, institution or person furnishing light in said city, whether such uniting or combining be through the sale of property or of stock or in any way, an absolute forfeiture of this franchise and all of its terms and provisions shall, at the option of said city, be declared, and a suit for such forfeiture may be brought in a court of proper jurisdiction, and such court may in such suit order and decree said franchise forfeited absolutely to said city. It is the expressed intention of this section to prevent the destruction or limiting of competition in the business of furnishing light to the said city or its inhabitants.'

"(6) That on May 12, 1904, there was passed by the city council of the city of Spokane an ordinance entitled 'An ordinance authorizing Roger H. Williams, his associates, heirs, successors and assigns, to maintain and operate a plant for the manufacture and sale and distribution of illuminating and fuel gas, and their by-products, and to use the streets and alleys of the city of Spokane therefor, and providing for the consideration to be paid for said privilege,' which ordinance went into effect in June, 1904, and was accepted by said Roger H. Williams. That by said ordinance said Williams and his assigns were authorized to erect and maintain and operate a complete plant for the manufacture, sale, and distribution of illuminating and fuel gas and their by-products, within the limits of the city of Spokane, and to lay pipes therefor throughout the streets and alleys of said city. That thereafter said Williams, or his associates, erected a plant sufficient for the manufacture of 2,000 cubic feet of gas for every 24 hours, and have laid several miles of mains thereunder in the streets of said city. That said Williams and his principals caused a corporation to be formed with power to manufacture and sell gas in the city of Spokane under the laws of the state of West Virginia, and the rights, privileges, and authorities granted by said ordinance were assigned to said corporation before the commencement of this action, and there was also transferred to said corporation the manufacturing plant, mains, and real estate described above in this paragraph.

"(7) That before the attempted transfer of stock hereinafter referred to to the defendant the Union Gas Company, at least 1,486 shares out of the total issue of 1,500 shares of the capital stock of the Spokane Falls Gaslight Company were owned by the defendants N. W. Halsey, Isaac W. Anderson, and associates of theirs, commonly known as the Halsey Syndicate, which syndicate was controlled by said Halsey and Anderson with plenary powers. A short time after the formation of the corporation, the Union Gas Company (which was formed by said Halsey Syndicate), and after that corporation had acquired the Williams franchise and the gas manufacturing plant referred to in the preceding paragraph, the owners of said stock assigned the same to said the Union Gas Company, and that corporation took physical possession thereof. That at such time the officers of the Union Gas Company were the agents or representatives of said syndicate, and the ownership of a majority of the stock of the Union Gas Company was vested in said syndicate, and the business manager thereof was the defendant Anderson, and said Roger H. Williams was at all times merely the agent of said syndicate.

"(8) That the trustees of the Spokane Falls Gaslight Company have no personal interest in said corporation. That they are not stock-

holders therein, except that each has one share of stock placed in his name on the books of said corporation, of which he is not actually the owner. That each and every member of said board of trustees, and each of the officers of said corporation, is dominated and controlled by the defendant the Union Gas Company, and each and all of them are now acting in the interest of that corporation and are managing the Spokane Falls Gaslight Company for the benefit and advantage and exclusively in the interest of the Union Gas Company, and such was the condition of affairs, at the time of the commencement of this action, that it was not incumbent upon the plaintiff to ask the board of trustees, or any of the officers of the Spokane Falls Gaslight Company, to bring this action or take any other steps for the protection of that corporation because so to do would be a vain and useless thing.

"(9) That a short time before the commencement of this action, the defendant the Union Gas Company executed an instrument in writing in the form of a mortgage running to the defendant United States Mortgage & Trust Company, a corporation organized under the laws of the state of New York, and to George M. Cumming, who is a nonresident of the state of Washington and a resident either of New York or some other state on the Atlantic Coast, under which instrument the Union Gas Company attempts to create a lien upon the entire property of that corporation, including the 1,486 shares of the capital stock of the Spokane Falls Gaslight Company. That said mortgage purports to secure bonds of the total issue of \$1,000,000, running for 30 years, bearing interest at 5 per cent, and it is provided therein that bonds to the amount of \$400,000 shall be issued at once to pay for the stock in the Spokane Falls Gaslight Company above mentioned. That before the commencement of this action bonds to the amount of \$400,000 were delivered to defendant Halsey, but none of the same had been sold or delivered to any third parties. That said mortgage, among other things, provides, and in said mortgage the Union Gas Company contracts and covenants, that said stock of the Spokane Gaslight Company, to wit, 1,486 shares, shall never be voted to authorize any mortgage or other lien upon the property of the Spokane Falls Gaslight Company, unless said mortgage shall be given to the Union Gas Company; and, further, that said stock shall never be voted to authorize any increase in the capital stock of the Spokane Falls Gaslight Company for any purpose whatsoever; and, further, that said stock shall never be voted to authorize the selling or leasing of the property of the Spokane Falls Gaslight Company to any person or corporation for any purpose or under any circumstances, unless such sale or lease shall be made to the Union Gas Company. That, before the commencement of this action, said Halsey was

offering said bonds for sale in open market. That, before the commencement of this action, the Union Gas Company had commenced to manufacture gas and had been manufacturing the same for a period of about two weeks.

"(10) That notwithstanding the city of Spokane has been growing with great rapidity, and the business of the Spokane Falls Gaslight Company increased to a considerable extent before the formation of the Union Gas Company, and although the older corporation had no bonded or other indebtedness and was a solvent and prosperous concern nothing was done by the officers of that corporation or permitted to be done by the Halsey Syndicate or the Union Gas Company towards increasing its manufacturing plant, all of which was without excuse; but a few days before the commencement of this action, a resolution was passed at a meeting of the so-called board of trustees of that corporation authorizing the secretary to enter into a contract with the Union Gas Company, whereby there would be a physical connection between the two plants, and whereby the older corporation would purchase gas manufactured in the plant of the Union Gas Company and distribute the same through its mains and sell the same to its customers, and, a few days before the commencement of this action, such physical connection was made, and at the time of the commencement of this action the Spokane Falls Gaslight Company was taking gas from the Union Gas Company and selling the same to its customers. That at that time it was contended by its officers that it was only purchasing from the Union Gas Company such surplus as it needed to supply its customers over and above the gas manufactured in its own plant, but during the pendency of this action for a time ceased, without any cause or excuse, to manufacture any gas in its own plant and has been selling to its customers all of the gas manufactured in the plant of the Union Gas Company and manufactured as little gas in its own plant as possible. That no formal contract was entered into, and no price was agreed upon. That in making this arrangement the Union Gas Company was represented by the defendant Anderson. That before such arrangement was entered into the plaintiff notified the officers of the Spokane Falls Gaslight Company that such an arrangement would be invalid, and that he would protest against the same, and was advised by them that they had no knowledge as to such arrangement being made or contemplated. That in the early part of 1903 said Halsey Syndicate, having purchased more than two-thirds of the stock of the Spokane Falls Gaslight Company, entered upon a scheme to put an end to the life of that corporation and cause its property to be sold to themselves, and in May, 1903, this plaintiff commenced an action to restrain the sale of the entire property of that corporation and

to prevent its destruction and annihilation, and after long litigation that action was decided in favor of the plaintiff by the Supreme Court of this state. That thereafter the said Halsey Syndicate caused said Roger H. Williams to apply for the franchise hereinafter referred to and entered upon the scheme outlined above, whereby there was issued to themselves bonds to the amount of \$400,000 and contracts were entered into and proceedings taken to stunt the older corporation, stop its growth, and prevent its enlargement, for the benefit of themselves and the other corporation the Union Gas Company.

"(11) That the franchises, rights, and privileges granted to the Spokane Falls Gaslight Company, under the ordinance referred to in paragraph 3 of the complaint, were of great value, and, without the privilege of maintaining pipes in the city of Spokane, the property of said corporation would be without any practical value whatsoever, and the attempted union or combination between these corporations, in violation of section 7 of said ordinance referred to above, jeopardizes the entire property and assets of the older corporation, and subjects said franchise to being forfeited at the instance of the city of Spokane.

"(12) That the United States Mortgage & Trust Company and George M. Cumming have no personal interest in said bonds, mortgage, or stock and no personal interest in the matter in controversy in this action, but are merely naked trustees under said mortgage or trust deed. That this action is brought on behalf of the defendant the Spokane Falls Gaslight Company and of all other stockholders similarly situated, as well as on behalf of the plaintiff.

"(13) That the attorneys of record herein were the attorneys employed by plaintiff to conduct this litigation. That no definite amount of compensation was agreed upon between the plaintiff and his attorneys, but said attorneys were to be paid a reasonable compensation, and such liability to said attorneys has been incurred by plaintiff. That such reasonable compensation for services in this action, up to the signing of the decree herein, is the sum of \$2,500."

The following findings were made at the request of defendants: "That the net earnings of Spokane Falls Gaslight Company have, ever since the year 1904, amounted to between \$30,000 and \$40,000 per year, and ever since said time all of said net earnings have been expended by the Spokane Falls Gaslight Company in betterments and improvements of its property in the city of Spokane, principally in mains and meters. That said last-named company now has about 50 miles of main in the city of Spokane, and during the year 1906 it built between 15 and 20 miles of main and paid for same out of its net earnings. Said Spokane Falls Gaslight Company does not pay any of its officers any salary except the salary

paid to the secretary, who has active charge of the business of the company. That under the arrangement between the Spokane Falls Gaslight Company and the Union Gas Company which existed at the time of the commencement of this action, and under which the former purchased gas from the latter, the former company obtained its gas for over \$20,000 less expense per year than it could manufacture same in its own plant, and said two companies have at all times been willing to enter into a permanent contract by which the Spokane Falls Gaslight Company would have the use of all of the Union Gas Company's mains, and all the gas manufactured by it, during the existence of the franchise of the Spokane Falls Gaslight Company, which has still 38 years to run. And said two companies would have made a permanent contract giving the Spokane Falls Gaslight Company the use of said mains and gas for said length of time had it not been for the opposition of plaintiff and the injunction of this court forbidding the making of a permanent contract between the two companies. That the mortgage referred to in plaintiff's complaint herein provides that the Union Gas Company may vote all of the shares of stock in the Spokane Falls Gaslight Company which purport to be covered by said mortgage or pledge therein, except that the voting power upon said pledged stock or any of it shall not, in any case or at any time, be used or exercised for the purpose of authorizing the creation of any lien or charge upon the properties or franchises of the Spokane Falls Gaslight Company, except to secure the unpaid purchase money of additional property which may be acquired by said last-mentioned company, nor for the purpose of authorizing the sale or lease of the property of the Spokane Falls Gaslight Company, except to the Union Gas Company, nor to increase the capital stock of the Spokane Falls Gaslight Company, nor to authorize the creation of any indebtedness, except current operating accounts, nor the issue or guaranty of any other obligations or of any bonds by said last-mentioned company, nor the creation of any mortgage or other lien upon the property of said Spokane Falls Gaslight Company, except to the Union Gas Company."

Defendants excepted to many of the findings made by the court upon its own motion or upon the request of plaintiff, and plaintiff excepted to some of those made at the request of defendants. We think, however, that the material findings, except such as are virtually conclusions of law or inferences drawn from other facts found, and excepting those ascribing improper motives or purposes to defendants in the matters mentioned, are fairly supported by the evidence.

In addition to those set forth in the findings, we may mention the following perti-

nent facts established by the evidence: The franchise of the Union Company had a restriction similar to that of section 7 of the Spokane Company's franchise. This restriction, however, had a proviso in these words: "Provided, nevertheless, that no merger, consolidation, combination, or union of interests, whether entire or partial between the grantees under this ordinance and the Spokane Falls Gaslight Company, its successors or assigns, shall be prohibited by this ordinance, or be a ground for the forfeiture of any of the rights or privileges hereby granted, but in case of such merger then the franchise granted to the Spokane Falls Gaslight Company, by ordinance A-1162 passed May 6, 1902, shall cease and determine; said ordinance No. A-1162 shall be repealed, and said Spokane Falls Gaslight Company and the grantees under this ordinance, shall thereafter operate under the provisions of this ordinance." When the ordinance granting this franchise was first passed by the city council, it was vetoed by the mayor; one of the grounds for his disapproval being that the recipient or user of the franchise was not to be a competitor of the Spokane Company. The city council then passed the ordinance over the mayor's veto. It was shown that the rapid growth of the city of Spokane had occasioned a demand for gas in excess of the amount which the Spokane Company was capable of producing without expensive repaving and costly enlargement of its plant; that the making of these betterments would have necessitated the incurring of a heavy indebtedness by the company; that the manufacturing plant was near the center of the city, where the land necessary to be purchased for an increase in the size of the plant was very expensive; and that the Union Company never sold or supplied any gas to any one except the Spokane Company. Upon the findings the trial court made conclusions of law, and, in accordance therewith, entered a decree, in substance, that the Spokane Company and the Union Gas company, their officers, agents, and servants, be perpetually enjoined from making and continuing the physical connection between the two plants; that the existing physical connection be severed; that the Spokane Company, its officers, agents, and servants, be perpetually enjoined from purchasing, taking, using, or selling any gas manufactured in the plant of the Union Gas Company and from making or permitting any combination, union, or consolidation with the Union Gas Company, or with its plant or properties; that the Spokane Company, its officers, agents, and servants, be perpetually restrained from recognizing the transfer of stock to the Union Gas Company, from permitting it or any agent, servant, assignee, "or trustee thereof from voting any such stock," "from permitting any pledgee or assignee of a pledgee under any mortgage

or contract executed by the Union Gas Company" to vote any such stock, and from paying dividends thereon to any such person; and, further, that the Union Gas Company and the United States Mortgage & Trust Company, their officers, agents, servants, and trustees, and all claiming under them, be enjoined from so voting or attempting to collect any dividends, provided that the Union Gas Company or its pledgee might sell the stock if sold to a person in no manner representing the Union Gas Company; that the Spokane Company should only recognize the holders of stock not falling within the previously stated prohibitions, and a decision of the majority of the voting stock permitted to vote should control on all questions; that the plaintiff recover from the defendant, the Spokane Company, in addition to its costs and disbursements, an attorney's fee of \$2,500; that the defendants should not be required to sever the physical connection existing between the plants of the two companies, nor the Spokane Company to cease using and selling gas manufactured in the plant of the Union Gas Company for the period of nine months from the date of the decree; and that if the defendants should within ten days take an appeal to this court, then the defendants should not be required to discontinue the physical connection nor cease using and selling gas manufactured in the plant of the Union Gas Company until the expiration of nine months after the decision of this court and the filing of the remittitur from this court with the clerk of the court below.

In the able and elaborate briefs of counsel for the respective parties, many questions are discussed that will not require discussion by us. They are all involved in, or subordinate to, what we conceive to be the paramount question of the case, to wit: Does the arrangement entered into by the officers of these two corporations constitute an illegal combination, or amount to a fraud upon respondent as a minority stockholder in the Spokane Company, or infringe his rights, or unlawfully destroy or lessen the value of his property as such stockholder? Respondent urges that section 7 of the franchise of the Spokane Company forbids any arrangement such as was made by these two companies, and provides a forfeiture of the franchise therefor, at the option of the city, that the franchise is very valuable, and that its liability to forfeiture can be obviated only by a disavowal on the part of the stockholders of the company. Appellants urge that section 7 does not forbid such an arrangement, that it forbids any combination with a "competing company, institution, or person furnishing light in said city," but that the Union Company is not a "competing" company, never was, and did not intend to be when it secured its franchise, and has never furnished light to any one except the Spo-

kane Company. They maintain that a "competing" company is one that competes; that was intended to compete. Besides the dictionary definition of the term, they cite: *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598; *Eddy on Combinations*, § 190; *F. H. Brewing Co. v. Belinder*, 97 Mo. App. 64, 71 S. W. 691; *Moores & Co. v. Bricklayers Union*, 23 Weekly Law B. 48; *Kimball v. Atchison, T. & S. F. R. R. (C. C.)* 46 Fed. 888. Respondent argues that the expression "competing company," as found in the ordinance, means any company having the power to compete, and cites in support thereof: *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849.

Assuming, without deciding, that these are competing companies, we will pass to the question of whether the franchises of the two companies, construed together, or that of the old interpreted in the light of the new, forbids such a combination or arrangement as was here made. Section 8½ of the ordinance granting the franchise to the Union Company expressly authorizes this company to merge, consolidate, or combine, wholly or partially, with the Spokane Company. Appellants maintain that, if the Union Company is so authorized to do, it necessarily follows that the Spokane Company is likewise authorized. Respondent disputes this. He refers to the wording of section 8½, where it says no combination, etc., "shall be prohibited by this ordinance, or be a ground for a forfeiture of any of the rights or privileges hereby granted," and calls special attention to the words above italicized, insisting that said words indicate a limitation and exclude the idea that there was any intention to waive or modify the restrictions in section 7 of the Spokane Company's franchise. We are constrained to differ with respondent as to the construction to be placed upon the language of the two sections under consideration. The Union Company's franchise was passed long after that of the Spokane Company. Hence, if there be such a conflict or inconsistency in the provisions of the two as calls for the yielding of those in one or the other, those of the older ordinance must give way. Section 7 in the franchise of the old company absolutely forbids any combination with any competitor and prescribes forfeiture as a penalty. Section 8½ of the new company's franchise has the same restriction, followed, however, by a proviso expressly authorizing such combination with the old company. It is conceded that the new company was given the power by its franchise to make a combination with the old company. This being conceded, how can it be said that the old company was not thereby permitted to enter such a combination with the new company? Suppose the Legislature should by statute provide that no white man should marry an Indian woman, and suppose the next session of the Legislature should enact that every Indian woman was authorized

to marry a white man. Would not the latter statute repeal the former? Or suppose the Legislature should forbid merchants from selling firearms to minors, and at a subsequent session should enact a law saying that boys over 18 were authorized to purchase firearms of any merchant. Would there be any doubt that the former statute was modified in so far as it applied to boys over 18? So, in this case, when the city council by ordinance gave the new company permission to make a combination with the old company, it impliedly authorized the latter to participate in that combination. The very fact of combination necessarily involves co-operation. It would seem to involve an absurdity to say to the new company: "You may combine with the old company, but it cannot combine with you." A corporation cannot combine with itself, nor can it combine with another without co-operation on the part of that other. By the enactment of the ordinance giving the Union Company authority to combine with the Spokane Company, the city authorized the latter to enter and be a party to such combination, or at least estopped itself from asserting a forfeiture on account thereof. *Spokane Street Ry. Co. v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072; *Commercial E. L. & P. Co. v. Tacoma*, 17 Wash. 661, 50 Pac. 592; *Fox v. Harding*, 61 Mass. 516; *Farlow v. Ellis*, 81 Mass. 229; 29 Am. & Eng. Enc. Law, 1095, 1103; 16 Cyc. 749, 781-2; 8 Current Law, 1075. It is not contended, as we understand, that a merger has occurred. In case of merger, it is provided that both companies may act under the terms of the franchise granted the Union Company. If the trustees and majority of the stockholders deemed it best for the company to exchange its franchise for that of the new company, we know of no reason why they would not have power to so do, in the absence of fraud or unfairness. *Symmes v. Union Trust Company (C. C.)* 60 Fed. 830.

The two companies having the right to combine, did the arrangement made infringe the legal rights of respondent? It is urged that the Spokane Company had no power to purchase gas; that in doing so it was acting *ultra vires*. A corporation, being an intangible creature, must act through agencies. This company could hire a man or men by the day, week or month to manufacture the gas which it was to distribute and sell. If it could pay by the day or week or month for having its gas made, we see no reason why it could not pay by the cubic foot. If it could furnish the material and plant and pay its workmen so much per cubic foot for the gas manufactured, we do not see why it might not with propriety hire men or another company to supply the material and plant, or some portion thereof, and pay by the cubic foot for the gas made and delivered to it. It is urged that this is a public service corporation, and that the public has an interest in having the company exercise its functions,

one of which is to manufacture the gas which it sells. The public is not a party to this suit; but, if it were, it would doubtless be a sufficient answer to say that the public is principally interested in the results, rather than the methods of the furnishing to it of gas. If the right quality of gas is supplied to the people at a reasonable price when and where it should be, the public is not ordinarily concerned as to where the supplying company obtains the gas. Matters of price, quality, and quantity concern consumers much more than source of supply. We think the old company had authority to purchase from the new any gas it deemed necessary or advisable, so long as it did not pay too much therefor, and there is no question of that kind here.

Appellants contend that the general powers to "purchase * * * real and personal property," conferred by section 4253, *Ballinger's Ann. Codes & St. (Pierce's Code, § 7058)*, authorize the purchase of gas by this company. Appellants in their brief claim to have offered to file a supplemental answer setting forth that the articles of incorporation of the Spokane Company had been amended so as to expressly authorize it to purchase gas. We find such a supplemental answer in the record and also objections by respondent to its being filed. The record does not seem to show any ruling of the court, but appellants' reply brief says that the court did not permit it to be filed, for the reason that the old company had ceased to purchase gas during the litigation. Respondent seems not to have pleaded—at least, not otherwise than inferentially—that the purchasing of gas was *ultra vires*.

Respondent contends that the entire purpose of the arrangement complained of by him was to stunt the business and prospects of the Spokane Company and build up the Union Company. The Spokane Company's capital stock consists of 1,500 shares. Respondent owns only 8 of these. Practically all of the other stock belongs to these defendants. Under the arrangement made, it would seem that about the only revenue the new company would receive would be from dividends on the stock of the old company. In all dividends declared by the latter company, respondent would share proportionately with other stockholders. The court found that, under the arrangement made, the old company was obtaining its gas "for over \$20,000 less expense per year than it could manufacture same in its own plant," and that the two companies had at all times been willing to enter into a permanent contract to continue this arrangement, and would have done so had they not been enjoined in this action from so doing. As the franchise had 38 years yet to run, this would amount to a saving of over \$760,000 to the company during that period. The court also made a finding that the company paid no salary to its officers except the secretary, and there is no claim of any extravagance in the mat-

ter of management. In the face of an economical administration of its affairs and of a saving as above mentioned, it would seem to require some clear showing of unfairness, discrimination, or disregard of legal or equitable rights before such control in the hands of the owners of 1,486 shares of the capital stock should be overturned by a court at the request of a holder of only eight shares. Respondent's argument that this arrangement permits the Spokane Company to become stunted seems to imply that the company should repair and enlarge its plant so as to meet the growing needs of the public for gas; that the officers of the company, instead of making this arrangement with the new company, should have repaired and increased the capacity of the old company's plant. To have done this would have required a large sum of money. The company did not have that money. It is said that it could readily have borrowed the necessary funds. Can a minority stockholder insist upon the trustees creating an indebtedness to enlarge the business of the corporation as against the wishes of the majority, unless it be possibly in a rare case of extreme emergency, where such enlargement is necessary to save its corporate life, or preserve its property from threatened and imminent destruction? The business policy of a corporation must be determined by the majority of the shareholders. Corporations could not do business on any other basis. Respondent knew that there were 1,500 shares of capital stock. It may be presumed that both respondent and appellants paid for every share of stock so held respectively. Respondent had the right to have the business and property of the corporation managed as by law required, and to have the same protected against illegal, wanton, or wasteful acts on the part of the majority; but, as a minority stockholder, there came no privilege to him to demand that the capital stock should be increased, or that the property of the corporation should be mortgaged or otherwise incumbered in order that the company might do more business and perhaps earn more dividends upon its stock. There might have been, and probably was, a difference of opinion as to the advisability of incurring the indebtedness necessary to enlarge the plant. The officers of the company, acting pursuant to the wishes of the majority of the stockholders, deemed it advisable to purchase its gas from the new company, instead of enlarging the old company's plant. We are unable to see why this was not a discretionary matter with them. As to whether or not an increase in the capacity of the plant was an improvement, justifying an outlay of money and the creating of a large indebtedness, was a business proposition for the determination of the board or the majority of the stockholders. That their opinion and action in relation thereto was not in accord with respondent's

views as to what was expedient or for the best interest of the company is not sufficient justification for a court of equity to stay their hand.

In discussing the proposition that a minority of stockholders cannot question an act *intra vires* of the majority, Cook on Corporations (5th Ed.) § 684, says: "The discretion of the directors or a majority of the stockholders as to acts *intra vires* cannot be questioned by single stockholders unless fraud is involved. This proposition of law is clearly, firmly, and very properly established beyond any question. Were the rule otherwise, there would be no safety or possibility of carrying on business through corporations. There would be suits instituted by dissatisfied stockholders on slight provocation, and sometimes for the very purpose of embarrassing the transaction of business. A partner in a copartnership may prevent action which he disapproves, but corporations are formed very largely to avoid that very danger and disadvantage. The corporate directors, so long as they act within their powers, may use their own discretion as to what ought to be done. * * *

A court of equity cannot, however, restrain the corporation from proceeding with business and using its funds for that purpose, even though a minority of the stockholders show that sound business discretion and judgment would dictate a different policy." In case of *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, the court said: "Lastly, it is urged that the manner in which the conversion plan is to be carried through and consummated is illegal, and furnishes sufficient ground for retaining the injunction. 'Individual stockholders cannot question, in judicial proceedings, corporate acts of directors, if the same are within the powers of the corporation and in furtherance of its purposes, are not unlawful or against good morals, and are done in good faith and in the exercise of an honest judgment.' *Ellerman v. Stock Yards Co.*, 49 N. J. Eq. 217, 23 Atl. 287. To the same effect are the cases of *Benedict v. Construction Co.*, 49 N. J. Eq. 23, 23 Atl. 485, and *Edison v. Phonograph Co.*, 52 N. J. Eq. 620, 29 Atl. 195. The action challenged in the case sub judice is that of the directors, fortified and upheld by the approving vote of more than two-thirds of the shareholders. The plan was adopted by the requisite vote with full knowledge of its purport, communicated in the circular letter accompanying the call of the stockholders' meeting, and therefore, in the absence of fraud, it is not the province of this court to substitute its judgment for that of the directors and shareholders, and declare that a less expensive or more beneficial plan could have been resorted to successfully." In *McMulle v. Ritchie* (C. C.) 64 Fed. 253, a case where a minority stockholder alleged fraud and conspiracy, the court, in speaking of the acts

complained of, said: "They all concern the management or policy of the company's assets. They do not involve acts *ultra vires* done or threatened, or acts of gross negligence in protection of corporate property, or acts involving a misappropriation of corporate assets. Mr. Ritchie's judgment was in conflict with the judgment of the board as to what was best to be done. They were questions of expediency as to measures of corporate interest. They present a case where it is sought to have the business judgment of the directory overruled, and the judgment of Mr. Ritchie enforced, through an appeal to the courts. I know of no rule of law which will justify an interference in regard to such matters by a court of justice. See, also, *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662; *Ellerman v. Chicago J. Rys. Co.*, 49 N. J. Eq. 217, 23 Atl. 287; *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456; *N. A. Land Co. v. Watkins*, 109 Fed. 101, 48 C. C. A. 254.

It is urged that the old company is "bound hand and foot" and absolutely dominated by the new company. Every corporation is bound to and dominated by the will of the majority stockholders; but, so long as this domination is not exercised unlawfully or inequitably, courts are powerless to interfere. To maintain an action like this for injunctive relief, it must ordinarily appear that the complaining minority stockholder is suffering some pecuniary or other substantial injury as a result of the illegal, reckless, or discriminatory conduct of the majority. As a rule, the bare possibility of damage or wrong is not sufficient. There must usually be a present or threatened and probable danger. The statutes of our state permit one corporation to own shares of the capital stock of any other corporation, and to exercise the same powers over such shares as any other owner might. *Laws 1905, p. 51, c. 27*. Hence the Union Company could legally own and control the majority of the shares of stock of the Spokane Company and shape its policy, so long as such ownership and control was not exercised in a manner that would be unlawful or unjustifiable if by a natural person or persons. It is not meant by this that a corporation controlling the majority of the stock of another corporation can so manipulate it as to work a fraud upon or discriminate against the minority shareholders thereof, either directly or indirectly, or by any kind of subterfuge. There are certain implied obligations due to and from every shareholder. The majority holders cannot avoid those resting upon them, nor ignore those due the minority, whether such majority be natural persons or a corporation. In this case we do not find respondent's rights to have been ignored or unlawfully circumscribed. We find no illegal or other action on the part of

appellants justifying the intervention of a court in respondent's behalf. Bearing upon these questions we may cite: *Gray v. Manhattan El. Ry. Co.*, 128 N. Y. 499, 28 N. E. 498; *Barr v. Pittsburgh, etc., Co.*, 57 Fed. 86, 6 C. C. A. 260; *Pender v. Lushington*, L. R. 6 Ch. D. 70; *Rothchild v. Memphis, etc., R. R. Co.*, 113 Fed. 476, 51 C. C. A. 310; *Wheeler v. Pullman I. & S. Co.*, 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; *Shaw v. Davis*, 78 Md. 308, 28 Atl. 619, 23 L. R. A. 294; *Price v. Holcomb*, 89 Iowa, 123, 56 N. W. 407; *Rand, McNally Co. v. Hartranft*, 29 Wash. 591, 70 Pac. 77; *City of Tacoma v. Bridges*, 25 Wash. 221, 65 Pac. 186.

The judgment and decree of the honorable superior court is reversed, and the case remanded, with directions to dismiss the action.

HADLEY, C. J., and FULLERTON, MOUNT, and CROW, JJ., concur.

RUDKIN and DUNBAR, JJ. (dissenting). The attempt on the part of the appellants to circumvent the judgment of this court in *Thels v. Spokane Gaslight Co.*, 34 Wash. 23, 74 Pac. 1004, is so apparent that we feel constrained to dissent.

FISK v. TACOMA SMELTING CO.

(Supreme Court of Washington. June 1, 1908.)

TRIAL—TAKING CASE FROM JURY—VOLUNTARY NONSUIT.

Under *Pierce's Code*, c. 23, § 727, par. 1 (*Ballinger's Ann. Codes & St.* § 5085), providing that a judgment of nonsuit may be entered by plaintiff himself at any time before the jury retires to consider their verdict, unless a set-off be interposed, the court had authority to grant a voluntary nonsuit asked for on the denial of a request to continue the case to enable plaintiff to procure a witness.

Appeal from Superior Court, Pierce County; Geo. T. Reid, Judge.

Action by Curtis Fisk against the Tacoma Smelting Company. From a judgment granting a voluntary nonsuit, defendant appeals. Affirmed.

Hudson & Holt, for appellant. Frank S. Carroll, for respondent.

PER CURIAM. This is an action for damages for alleged personal injuries. At the conclusion of respondent's testimony appellant challenged the sufficiency of the evidence, and moved the court for a judgment. The motion was denied. The respondent asked the court to continue the case so that he might be enabled to procure a witness whose testimony he regarded as essential. The court refused to continue the case. Whereupon the respondent asked the court for a voluntary nonsuit, which the court granted. From the ruling of the court in granting the nonsuit, this appeal is taken.

Paragraph 1, § 727, c. 23, *Pierce's Code*

(Ballinger's Ann. Codes & St. § 5085), the chapter in relation to judgment of nonsuit, is as follows: "An action may be dismissed, or a judgment of nonsuit entered in the following cases: (1) By the plaintiff himself, at any time, either in term time or in vacation, before the jury retire to consider their verdict, unless set-off be interposed as a defense, or unless the defendant sets up a counterclaim to the specific property or thing which is the subject-matter of the action." It will be seen at a glance that the terms of the statute are so certain and definite as to preclude construction. The motion in this case was made before the jury retired, and there was no set-off interposed or counterclaim set up.

The court acted by express authority of the statute, and the judgment is therefore affirmed.

(49 Wash. 518)

SOULE v. TOWN OF OCOSTA.

(Supreme Court of Washington. June 1, 1908.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—LIABILITY.

A town issuing to a contractor warrants drawn on a special fund for an improvement which was not of special benefit to the abutting property was not liable out of its general fund under a complaint in an action by the assignee of the warrants alleging that defendant had done nothing towards collection, and that the improvement was of no benefit to the abutting property; plaintiff having a remedy to compel the town officers to act, and being in no better position than the contractor, who, in taking the contract, was charged with notice that the improvement was not of special benefit to the abutting property.

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by M. C. Soule against the town of Ocosta. Judgment for defendant, and plaintiff appeals. Affirmed.

John C. Stallcup, for appellant. J. B. Bridges, for respondent.

MOUNT, J. This action was brought to recover upon 18 warrants, drawn upon a special fund for street improvements. The defendant demurred to the complaint. The demurrer was sustained, the plaintiff refused to plead further, and the action was dismissed. Plaintiff appeals.

The complaint alleged in substance that the defendant is a municipal corporation, duly organized and existing under the laws of the state of Washington; that in 1891 and 1892 said corporation graded, planked, and sidewalked Ocean avenue; that the work was performed and concluded in the year 1892; that the said improvement was not of special benefit to the abutting property, but was of general public benefit to the municipal corporation and its people; that warrants issued against the special fund were paid to the contractor, G. L. Lake, for the cost and price of said improvement; that the plaintiff in good faith and for value purchased 18 of the said

warrants; that the face value of these warrants was \$1,485.63. Paragraph 26 of the complaint alleges as follows: "That by reason of the fact that said improvement was of no special benefit to the property abutting on said Ocean avenue nothing was ever paid into the fund, nor anything paid by the abutting property owners, nor was anything ever done by the said defendant corporation towards collecting the cost of said improvement by means of proceedings against the property owners abutting on said Ocean avenue nor otherwise, so that no money was ever obtained in that way for the payment of the cost of said improvements; that the plaintiff purchased said warrants in good faith for value, without knowledge of said facts, and never discovered or had knowledge of said facts until within the last three years." The complaint then sets out the amount of damages claimed and a copy of each of the warrants. These warrants, with the exception of the amounts and the dates, read as follows:

"Ocota, Wash., Dec. 10, 1891.

"To the Treasurer of the Town of Ocota: Pay to George L. Lake or order two hundred and fifty dollars out of Ocean avenue east end fund for street improvements.

"\$250.00.

F. G. Deckebach, Mayor.

"Attest: A. M. Mitchell, City Clerk."

It is argued by the appellant that, because the improvement was of benefit to the town, and of no special benefit to the abutting property, there was no basis for a special fund, and none was ever provided, and the town never asserted any claim against the abutting property, and therefore the town is liable out of its general fund. In *German-American Savings Bank v. Spokane*, 17 Wash. 315, 47 Pac. 1103, 49 Pac. 542, 38 L. R. A. 259, this court held that, where the cost of a street improvement is to be paid out of a special fund raised by the city from assessments upon the property benefited, there can be no recovery against the city for failure to cause such fund to be raised as long as the assessment can be enforced in any way. In *Wilson v. Aberdeen*, 19 Wash. 89, 52 Pac. 524, it was held that a city cannot be rendered liable generally upon warrants drawn against a special fund for the payment of street improvements, even if the remedy of a street assessment proceeding is no longer available. This last-named case was subsequently followed in *Rhode Island Mtg. & Tr. Co. v. Spokane*, 19 Wash. 616, 53 Pac. 1104. To the same effect is *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197. In *State ex rel. Security Savings Society v. Moss*, 44 Wash. 91, 86 Pac. 1129, where general fund warrants were issued to take up street improvement warrants after the special fund had become exhausted, it was held that such general fund warrants were without consideration and void because the special assessment was not an obligation against the city. To the same effect see *State ex rel. American, etc., Mtg. Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321,

and State ex rel. Barnes v. Blaine, 44 Wash. 218, 87 Pac. 124.

It is not alleged that the town of Ocosta has collected or diverted the money. The allegation is that the town has done nothing toward collection, and that the improvement was of no special benefit to the abutting property. The appellant had a remedy to compel the town officers to act, and, if the improvement was of no special benefit to abutting property, the contractor is charged with notice of that fact at the time he took his contract and did the work. The appellant stands in no better position. It is clear under the authorities above cited that there is no general liability against the town. The trial court, therefore, properly sustained the demurrer. The judgment must be affirmed.

HADLEY, C. J., and CROW, DUNBAR, FULLERTON, RUDKIN, and ROOT, JJ., concur.

GOODRICH v. KIMBLE et al.

(Supreme Court of Washington. June 1, 1908.)

1. NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE TO PROCURE.

A motion for new trial because of newly discovered evidence is properly denied where there is no showing of diligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 210.]

2. APPEAL AND ERROR—REVIEW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The action of the trial court on motion for new trial because of newly discovered evidence rests largely within its discretion, and is reviewed only for abuse thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3876.]

Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by James W. Goodrich against Rebecca Kimble and others. Judgment for plaintiff, and, a motion for new trial because of newly discovered evidence having been denied, defendants appeal. Affirmed.

E. W. Howell, for appellants. Million, Houser & Shrauger, for respondent.

MOUNT, J. The respondent brought this action to enjoin the appellants from trespassing and committing waste upon certain real estate. The answer of the appellants consisted of certain admissions and denials, and also of a cross-complaint, by which it was alleged that appellant Rebecca Kimble deeded the land in question to respondent in the year 1898; that at the time of making the deed she was by reason of old age incompetent to make the deed; that the consideration therefor was inadequate; that the title to the land was obtained from her by the respondent through fraud, undue influence, and deceit, and prayed for a cancellation of the deed. These allegations were denied by the reply. The cause was

tried to the court without a jury, and, at the conclusion of the trial, the court found in favor of the plaintiff and against the defendants, and entered a judgment accordingly. Thereafter the defendants moved for a new trial upon the ground of newly discovered evidence, which motion was denied.

The first error assigned is that the court erred in denying this motion. There is no showing of diligence by the appellants. The action of the trial court in matters of this kind rests largely within the discretion of the court, and is reviewed only for abuse thereof. Since no abuse of discretion appears, there is no merit in the assignment.

It is next argued that the trial court should have set aside the contract between the respondent and Rebecca Kimble because of the incapacity of the latter, and also because the respondent permitted the land to become incumbered with tax liens. It appears that Rebecca Kimble obtained title to the land in question, amounting to 25 acres, in the year 1897. It was then worth about \$600. She was then about 73 years of age. She agreed to, and did on January 13, 1898, deed the land to the respondent for a consideration of \$50 per year, to be paid her on the 1st day of January of each year as long as she should live. After the deed was made, and after the first payment, she selected the acre of ground, and respondent erected at his own expense a small dwelling thereon satisfactory to her. She occupied the house for two or three years, and then went to the state of Ohio, where some of her children were living. She remained there until 1907, when she returned to this state, and immediately sought to rescind the contract for the reason that \$50 per year was not sufficient to support her. At the time she entered into the contract with respondent he was married to her granddaughter. The respondent has regularly, since the year 1898, paid the \$50 per year, and has improved the property. There is some evidence to the effect that Mrs. Kimble had odd notions, and was not competent to transact business; but the great weight of the evidence convinces us that she was competent to enter into the contract at the time it was made, and that no advantage was taken of her. She had several grown children who helped to support her both here and in Ohio. They knew of the contract after it was made. She enjoyed the benefits of the contract for nine years, and no complaint was made by her or any of the children that the contract was inequitable. They evidently supposed the contract was a fair one until recently, when the land became more valuable. It is true there were delinquent taxes against the land at the time the action was begun, but these were paid off by the respondent before the time of the trial. An examination of the

whole record convinces us that the judgment of the trial court was right.

It is therefore affirmed.

HADLEY, C. J., and DUNBAR, ROOT, FULLERTON, RUDKIN, and CROW, JJ., concur.

Ex parte DONNELLAN.

(Supreme Court of Washington. May 28, 1908.)

1. SUNDAY—STATUTORY PROVISIONS.

The state has the right to pass statutes prohibiting any sort of public exhibition or amusement on Sunday, in order to preserve peace and order, and 2 Ballinger's Ann. Codes & St. § 7250 (Pierce's Code, § 1886), providing that any person who shall keep open any playhouse or theater, * * * or engage in any noisy amusements on Sunday, shall, upon conviction thereof, be punished by a specified fine, is not unconstitutional, on the ground that it is unreasonable, arbitrary, unjust, and unnecessary for the protection of the public health, safety, or morals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Sunday, § 2.]

2. CONSTITUTIONAL LAW—CLASS LEGISLATION—SUNDAY AMUSEMENTS—PROHIBITION.

The statute is not objectionable as class legislation because, the state having the right to prohibit amusements, it must necessarily follow that any particular kind of amusements may be singled out and prohibited by law, and special penalties attached for a violation thereof, and all persons engaged in such amusements must comply with the law.

3. SAME — PERSONAL RIGHTS — RIGHT TO CHOOSE OCCUPATION.

The right to labor in a certain way, or to pursue a certain calling or profession, depends on the power of the state to prohibit or regulate such occupation, calling, or profession.

4. STATUTES—REPEAL—IMPLIED REPEAL BY ACT RELATING TO SAME SUBJECT.

A subsequent act, covering the same subject as a prior act, impliedly repeals such prior act, even though it does not expressly do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 230.]

5. SAME—SUBJECTS AND TITLES OF ACTS—EXPRESSION IN TITLE OF SUBJECT OF ACT IN GENERAL.

General titles, expressive of the subject of the act, include all special matters relating thereto, without specifically naming them; and hence the title of an act need not be a complete index thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 186.]

6. SAME — TITLES AND PROVISIONS OF ACTS RELATING TO PARTICULAR SUBJECTS—CRIMES AND CRIMINAL PROSECUTIONS AND PUNISHMENTS.

The Legislature of 1881 passed an act entitled: "The Penal Code. An act relative to crimes and punishment and proceeding in criminal cases." Code 1881, §§ 764-1206. All the usual and ordinary crimes were therein defined, and punishment provided therefor, and the criminal procedure was also prescribed. *Held*, that the title of the act was not in violation of Rev. St. U. S. § 1924, or of the state Constitution, providing that every law shall embrace but one subject, which shall be expressed in the title, and that under such title the Legislature had authority to enact 2 Ballinger's Ann. Codes & St. § 7250 (Pierce's Code, § 1886), making it a

misdeemeanor to open a theater for amusement on Sunday.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 158.]

7. SAME—ENACTMENTS, REQUISITES AND VALIDITY IN GENERAL — INTRODUCTION OF BILLS.

The Penal Code of 1881 was introduced as an original bill, and was passed as such by the Legislature, and was approved by the Governor. *Held*, that it was therefore a valid law, even though the person who prepared it was not authorized so to do, and therefore there is nothing in the contention that it was but a compilation of existing laws, and not the creation of new offenses, because the act was initiated by a commissioner, authorized to "reduce and bring into a written, intelligible, and systematic form statutory laws of the territory."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 214.]

8. SAME—SUBJECTS AND TITLES OF ACTS—EXPRESSION IN TITLE OF SUBJECT OF ACT.

Under the title "An act defining certain crimes and declaring their punishment and amending the Code of 1881 and certain other statutes in relation to the same subject," it was enacted, by Laws 1891, p. 127, c. 69, § 25, that "any person who shall keep open on Sunday any playhouse or theater, etc., shall be punished by a specified fine." *Held*, that the title is sufficient to include the subject of the section, under the rule that no elaborate statement of the subject of the act is necessary to meet the spirit of the Constitution, but that a few well-chosen words, suggestive of the general subject treated, is all that is required.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 158.]

9. SAME—REPEAL—INVALIDITY OF REPEALING ACT.

Even though Laws 1891, p. 127, c. 69, § 25, were void because the title of the act was not sufficiently broad to include the subject of the section, it could not avail one convicted thereunder, because the section, which was merely amendatory, did not change the substance of the law upon the subject of Sunday observance, but simply put into one section what before was contained in three separate sections (Code Wash. 1881, §§ 1266, 1268, 1270), and so the validity or invalidity of the amendment is entirely immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 211.]

Application by Frank H. Donnellan for a writ of habeas corpus against the sheriff of King county. Application denied.

F. C. Robertson, M. J. Gordon, and Fred H. Lysons, for petitioner. Kenneth Mackintosh and John H. Perry, for respondent.

MOUNT, J. This is an application for discharge on writ of habeas corpus. The petitioner alleges that he is restrained of his liberty, by the sheriff of King county, under a complaint in justice court, charging the petitioner with having kept open a theater and place of amusement on Sunday, and therein performed as an actor, in violation of section 7250, Ballinger's Ann. Codes & St. (Pierce's Code, § 1886), and that petitioner is unlawfully restrained of his liberty by reason of the unconstitutionality of the statute named. It is claimed that the section in question is unconstitutional upon the following grounds: (1) Because it is unreasonable,

arbitrary, unjust, and unnecessary for the protection of the public health, safety, or morals; (2) because the original act of 1866 (Laws 1865-66, p. 87, § 6) provided expressly that it should not apply to Snohomish county; (3) because the act of 1881 (Code 1881, §§ 764-1296) embraces more than one subject not expressed in the title; and (4) because the title of the act of 1891 (Laws 1891, p. 119, c. 69) is not sufficient to include the subject of this section. We shall consider these grounds in the order stated.

The section in question is as follows: "Any person who shall keep open any playhouse or theater, race ground, cock pit, or play at any game of chance for gain, or engage in any noisy amusements, or keep open any drinking or billiard saloon, or sell or dispose of any intoxicating liquors as a beverage, on the first day of the week, commonly called Sunday, shall, upon conviction thereof, be punished by a fine of not less than \$30 nor more than \$250. All fines collected for the violation of this section shall be paid into the common school fund." Section 7250, 2 Ballinger's Ann. Codes & St. It will be readily seen that this section prohibits any person from keeping open on Sunday the places stated. In the case of *State v. Herald*, 92 Pac. 376, we held that this section was intended to prevent the opening of theaters and playhouses for theatrical or dramatic performances, and that, as so construed, it does not abridge the privileges of citizens as guaranteed by the fourteenth amendment of the Constitution of the United States, or section 12, art 1. of the state Constitution. In the case of *State v. Nichols*, 28 Wash. 628, 69 Pac. 372, we had under consideration the validity of section 7251, Ballinger's Ann. Codes & St. (Pierce's Code, § 1887), being the section following the one now under consideration. That section provides that it shall be unlawful for any person to open on Sunday, for the purpose of trade or sale of goods, wares, or merchandise, any shop, store, or building, or place of business whatever; and the same objections were made to that section as are now urged against section 7250. After considering and citing many authorities, to the point that Sunday laws are within the general police powers of the state, we said: "It may well be concluded that the power of the Legislature to enact these laws, as an appropriate exercise of the police power, is set at rest by judicial authority." Further on, in considering the same case, we said: "There have been different views in the minds of legislators as to what particular acts were works of necessity or charity. They have been uniform in regarding all noisy occupations and amusements and trades as within the substance of the law. The statute (section 7251, supra) forbids the opening on Sunday, for the purpose of trade or sale, of all goods, wares, and merchandise at any place of business whatever. Here is the plain legislative expression that the sanitary, mor-

al, and physical good of the community requires the cessation of these labors on Sunday." This language may be as appropriately used with reference to section 7250, which imposes a penalty upon any person who shall keep open a playhouse or theater on Sunday, as it was to the section then under consideration. In 27 Am. & Eng. Enc. Law (2d Ed.) p. 390, it is stated: "Sunday laws are generally sustained as constitutional, on the ground that, since Sunday is a civil and political institution, established for the purpose of promoting the moral and physical well-being of society, they are within the domain of the police powers of the states. In asserting their unconstitutionality it has been claimed that they were in violation of the provisions safeguarding equal rights, personal or religious liberty, or that they took away liberty and property without due process of law, but, where not so drawn as to be objectionable as class legislation, they have been sustained almost without exception." Numerous cases are there cited in support of the text, including, *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1143, and *Petit v. Minnesota*, 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716. In 28 Am. & Eng. Enc. Law (2d Ed.) p. 118, the rule is stated as follows: "The state has the right to pass statutes prohibiting any sort of public exhibition or amusement on Sunday, in order to preserve peace and order." See, also, *Brackett's Theatrical Law*, p. 471; *State v. Bergfeldt*, 41 Wash. 234, 83 Pac. 177.

We are satisfied that this is the general rule, and that the section in question is not subject to the objections made upon the ground first stated. We are also satisfied that it is not objectionable as class legislation because, where the state has a right to prohibit amusements, it must necessarily follow that any particular kind of amusement may be singled out and prohibited by law, and special penalties attached for a violation thereof, and all persons engaged in such amusements must comply with the law. The right to labor in a certain way, or to pursue a certain calling or profession, depends upon the power of the state to prohibit or regulate such occupation, calling, or profession. It will not be necessary to consider the act of 1866 independently, because that act, if unconstitutional upon the ground urged, is no longer in force. If it was not expressly repealed by the act of 1881, it was impliedly repealed by that act, because that act covered the same subject as the act of 1866. We shall, therefore, pass to a consideration of the act of 1881.

It is argued that the act of 1881 is in violation of the provision of the organic act (section 1924, Rev. St. U. S.), and of the state Constitution, which provides that every law shall embrace but one subject, and that shall be expressed in the title, because the act of 1881 embraces more than one subject, not expressed in the title. The proceedings of the

legislative session of 1881 show that the law, as it appears in the "Code of Washington, 1881," from section 764 to section 1296, inclusive, was passed as one bill. The section upon which this prosecution is based appears in the act of 1881 as sections 1266, 1268, 1270. The title of the act of 1881 is as follows: "The Penal Code. An act relative to crimes and punishment and proceeding in criminal cases." This act was passed as a complete Penal Code. All the usual ordinary crimes were therein defined, and punishments provided therefor, and the criminal procedure was also prescribed. After that act became a law, it was continuously followed in the territory, and has been followed since statehood, except where amended. In *State v. Tieman*, 32 Wash. 294, 73 Pac. 375, 98 Am. St. Rep. 854, where the same question now presented was raised in reference to sections 1214-1221 of this act, we said, quoting from *Marston v. Humes*, 3 Wash. St. 267, 28 Pac. 520: "The Legislature may adopt just as comprehensive a title as it sees fit, and if such title, when taken by itself, relates to a unified subject or object, it is good, however much such unified subject is capable of division." We then concluded the discussion of the question by saying: "Tested by this rule, it is clear that it was competent for the Legislature, under the title which it adopted for the act in question, to include in the body of the act anything which related to crimes and their punishment and proceeding of a criminal nature." In addition to what was there said we may now state that this court has often held that general titles, expressive of the subject of the act, include all special matters relating thereto, without specifically naming them. *Percival v. Cowychee*, etc., *Irrigation District*, 15 Wash. 480, 46 Pac. 1035; *Johnston v. Wood*, 19 Wash. 441, 53 Pac. 707; *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91; *State ex rel. Smith v. Dental Examiners*, 31 Wash. 492, 72 Pac. 110. Hence the title of an act need not be a complete index thereof. *McKnight v. McDonald*, 34 Wash. 98, 74 Pac. 1060. We have no doubt that the title of the act of 1881 answered every requirement of the federal statute, and is not opposed to our Constitution, and that under such title the Legislature had authority to enact the statute in question, making it a misdemeanor to open a theater for amusement on Sunday.

It is also claimed that the act of 1881 was but a compilation of existing laws, and not the creation of new offenses, because the act was initiated by a commissioner, authorized to "reduce and bring into a written, intelligible, and systematic form statute laws of the territory." But what may have been the power of such commissioner or the one appointed under the provisions of section 3322, Code 1881, is unimportant, in view of the fact that the "Penal Code," being the act of 1881, was introduced as an original bill, and was passed as such by the Legislature it-

self, and was approved by the Governor. It was therefore a valid law, even if the person who prepared the bill was not authorized to prepare it. Neither was the act of 1881 merely a continuation of the act of 1866. It was an entirely new act. The mere fact that it embraced a portion of the act of 1866 upon the same subject need not be considered now, for the new act took the place of the old, and, unless it is subject to the objections of the old, those objections cannot now be made. That the act of 1881 under consideration is a new and independent act, complete within itself, is evidenced by the section next to the last, as follows: "Sec. 1295. No statute, law or rule is continued in force because it is consistent with the provisions of this Code on the same subject; but in all cases provided for by this Code all statutes, laws, and rules heretofore in force in this territory, whether consistent or not, with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated."

It is also urged that section 25, c. 69, p. 127, Laws 1891, is invalid, because the title of the act is not sufficiently broad to include the subject of this section. This section 25 of the act of 1891 is the same as section 7250, *Ballinger's Ann. Codes & St. (Pierce's Code, § 1886)*. It was enacted in that form as an amendment to section 1266 of the Code of Washington of 1881, under a title as follows: "An act defining certain crimes and declaring their punishment and amending the Code of 1881 and certain other statutes in relation to the same subject." Laws 1891, p. 119. We think this title is sufficient, under the rule announced in *State ex rel. v. Superior Court*, 28 Wash. 317, 68 Pac. 957, 92 Am. St. Rep. 831, as follows: "No elaborate statement of the subject of the act is necessary to meet the spirit of the Constitution. A few well-chosen words, suggestive of the general subject treated, is all that is required." See, also, *Marston v. Humes*, supra; *City of Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *State v. Scott*, 32 Wash. 279, 73 Pac. 365. If we were to hold, however, that this amendment was void because in violation of the Constitution in the respect claimed, such holding would not avail the petitioner in this case, because the amendatory act of 1891 did not change the substance of the law upon the subject of Sunday observance. It simply put into one section what before was contained in three separate sections, viz., Code 1881, §§ 1266, 1268, 1270. See *State v. Binnard*, 21 Wash. 349, 58 Pac. 210. This act of 1891 does not repeal any prior law, but expressly provides in the last section: "All acts and parts of acts in force at the time of the passage of this act relating to the same subject are continued in force so far as not repugnant to the provisions of this act, and the provisions of this act, so far as they are the same as those of acts and parts of acts upon the same subject

in force at the time of the passage hereof, shall be construed as continuations of such provisions." Since the amendment of 1891 did not change in any respect the law under consideration, the validity or invalidity of the amendment is entirely immaterial.

We find no substantial basis for the contention that the statute under consideration is invalid. The application must therefore be denied.

HADLEY, C. J., and FULLERTON, DUNBAR, CROW, and ROOT, JJ., concur. RUDKIN, J., took no part.

COLLINS et al. v. SEYFANG et al.

(Supreme Court of Washington. June 4, 1908.)

1. CANCELLATION OF INSTRUMENTS — COMPLAINT—SUFFICIENCY—INCAPACITY, FRAUD, AND UNCONSCIONABLENESS.

A complaint by a mother and son to set aside certain leases alleged that the mother was 78 years old, and that both she and her son were feeble in body and mind; that by reason thereof, and of their fear that the son might be placed in a hospital for the insane, they were easily imposed on and influenced; that, subject to the mother's life estate, the son owned an 18-acre tract, highly improved with buildings and under a high state of cultivation, having an annual rental value of \$250; that plaintiffs were prevailed upon to lease the property, together with household kitchen furniture and other personal property, tools, etc., of the value of \$500, to defendant for 25 years at the annual rental of \$15 per annum and repairs, on representation that defendant would thereby be able to prevent the son from being again placed in the insane hospital, and that he would care for the mother during her life; that such representations were false, and were known by defendant to be false, and that he has refused to care for the mother, and compelled her to leave the property. As a second cause of action, it stated that defendant in the same manner obtained possession of another tract of 100 acres for a term of 11 years, at a rental of \$50 per year for three years, and \$150 per year after that. A third cause of action asked an accounting for 15 head of stock which defendant obtained possession of without consideration. *Held*, that the complaint stated a cause of action for the cancellation of the leases, return of the personal property, etc.

2. SAME—ADDITIONAL RELIEF—ACCUMULATED RENT.

Where it appeared that defendant had sublet the premises at an increased rental, the subtenant was properly required to pay the accumulated rent into the registry of the court, under a bond to protect defendant pending the adjudication as to the leases involved, and, upon judgment of cancellation, the court properly ordered its payment to plaintiffs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, §§ 114-118.]

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by Anna M. Collins and another against T. F. Seyfang and others to cancel certain leases, and for other relief. From a judgment for plaintiffs, defendants appeal. Affirmed.

Vance & Mitchell, for appellants. Troy & Falknor, for respondents.

PER CURIAM. The plaintiffs in this action are mother and son, respectively. The mother is 78 years of age, and the complaint alleges that both she and her son are feeble in body and mind; that by reason thereof, and also by reason of the fear of both that the son may be incarcerated in a hospital for the insane, others may easily impose upon and influence them. Prior to June 1, 1904, the mother owned a life estate in a certain tract of land containing about 18 acres, and the son owned the land subject to the life estate. It is alleged that the land is highly improved with buildings of the value of \$4,000, and that it is in a high state of cultivation, having an annual rental value of \$250; that on said date the defendant Seyfang took advantage of the feeble condition in body and mind of the plaintiffs, and persuaded them to sign a written instrument purporting to be a lease for said premises to the said defendant for a period of 25 years on payment of an annual rental of \$15, lessors to pay the taxes upon the land and the lessee to keep the premises in repair. The instrument also purported to lease the household and kitchen furniture and every article of personal property situated in the dwelling house on said land, except the wearing apparel of the lessors; also the tools for garden, farm, or shop of every character, including platform scales, wagons, carriages, harness, and farm implements, the personalty being of the value of \$500, the lease thereof being for 25 years, and the \$15 per annum and repairs aforesaid being the only compensation provided for the use of both the land and personal property. It is alleged that the defendant Seyfang persuaded the plaintiffs that, if they would sign the instrument, he would be able to prevent the son from ever again being incarcerated in the hospital for the insane, and that he would also care for the mother during her remaining years; that they, being feeble in body and mind, believed his statements, but that the same were false, and were known to the said defendant to be false, at the time they were made; that he has refused to care for the mother, and has compelled her to leave the property. The above stated facts relate to the first cause of action. The second cause of action states that in a similar manner Seyfang obtained from plaintiffs possession of another tract of 100 acres of land for a term of 11 years for a rental of \$50 per year for the first three years, and \$150 per year after that, the lessors to pay the taxes. A third cause of action asked an accounting for 15 head of stock which Seyfang obtained without consideration. The complaint asks for the return of the personal property, and that the purported leases shall be set aside as null and void. After a trial by the court without a jury, judgment was rendered canceling both purported leases, and awarding the plaintiffs judgment for \$275 as the value of the stock taken and disposed of by Seyfang. Possession of the other personal property and

also of the real estate was restored. Seyfang sublet the leased premises to the defendant Price, along with other land, for the full sum of \$600 per year. It was found that about two-thirds of the \$600 was for the use of plaintiffs' lands, and, upon such a showing, Price was required to pay that portion of the accumulated rent into the registry of the court under a bond given to protect Seyfang pending the adjudication as to the leases here involved. It was provided in the final judgment of the court that the money so paid into the registry shall be paid to the plaintiffs. The defendant Seyfang has appealed.

The motions to dismiss the appeal and to strike the statement of facts and appellants' brief present some questions that may be serious as to the right to be heard on this appeal, but, in view of the fact that we think the case should be affirmed on the merits, we will pass the motions without discussion. Appellant contends that the complaint does not state a cause of action, but we think it clearly does so. The statement of facts is voluminous, and we do not believe a discussion of the evidence is necessary here. The evidence shows facts substantially as alleged in the complaint and as above stated. No findings of facts were entered by the trial court, but we think the judgment is in all respects fully justified by the evidence. The disposition that was made of the money in the registry of the court was in its final effect an equitable application by a court of equity of funds in its possession, which application was fully justifiable under the facts of the case.

We do not think the court erred; and the judgment is affirmed.

LUEDERS v. TOWN OF TENINO.

(Supreme Court of Washington. June 1, 1908.)

1. TRIAL—RECEPTION OF EVIDENCE—REOPENING CASE.

It is not an abuse of discretion to reopen the case after submission to allow introduction of evidence unknown till after the trial; the other party being allowed opportunity to rebut it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 166.]

2. DEDICATION—ACTS CONSTITUTING.

Where the owners of land plat part of it into lots, blocks, and streets, and make and distribute blueprints thereof, showing the adjoining land as a park, and sell part of the lots on the representation that the park is a public park, and with their acquiescence citizens use it, and it is recognized generally as a public park for many years, there is an irrevocable dedication of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Dedication, §§ 38-41.

For other definitions, see Words and Phrases, vol. 2, pp. 1908-1918; vol. 8, pp. 7629, 7630.]

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by A. W. Lueders against the town of Tenino. Judgment for defendant. Plaintiff appeals. Affirmed.

Frank C. Clevings, for appellant. Troy & Sturdevant, for respondent.

MOUNT, J. The plaintiff brought this action to quiet his alleged title to certain lands in the town of Tenino. The town claims title by reason of a dedication to the public for park purposes, and by adverse possession. At the trial a decree was entered in favor of the town. The plaintiff appeals.

Two errors are assigned: (1) That the court erred in reopening the case for further evidence upon motion of the defendant after the case was submitted; (2) that the evidence is not sufficient to show a dedication of the property to the public for park purposes by the grantors of the appellant. On the first question it appears that after the cause was submitted to the trial court for decision, before a decision had been made, the respondent applied to the court upon notice to the appellant to reopen the case for further evidence. Affidavits were filed. Upon a hearing the court granted the application, and received further evidence. It is conceded by the appellant that the reopening of the case rests in the discretion of the trial court, but it is argued that the court abused its discretion because the evidence which was subsequently introduced might have been obtained before the submission of the case. The showing upon the motion to reopen the case was that this evidence was unknown to the counsel at the time of the trial, and was subsequently discovered. This was sufficient to justify the order of the court, especially where no unfair advantage was taken of the appellant and where he was given an opportunity to rebut this evidence, as is the fact here. There appears to have been no abuse of discretion in this case.

Upon the second question there appears to be abundant evidence to show an oral dedication of the property in dispute to the town as a public park. The evidence clearly shows that along about the years 1890-91-92 the land in question was owned by William Raglass and wife. They platted certain adjoining lands into lots, blocks, and streets. They had certain blueprints made of this land, and upon these blueprints showed the land in question as a park. They gave out these blueprints, and sold many lots upon the representation that this park was a public park, and many persons purchased lots and blocks adjoining the park, relying upon such representation. The citizens of the town, with the acquiescence of Raglass and wife, used the premises, which were recognized generally as a public park for many years. The appellant a few months prior to the time of bringing this action purchased the property with notice and knowledge of these facts. There is some question whether there was a dedication of this land by deed; but, assuming that the dedication by deed refers to another piece of ground, the facts shown prove a clear intention to dedicate this particular tract, and

that Raglass and wife and the appellant are now estopped to say the land is not a public park. 13 Cyc. 454 et seq.

The judgment is therefore affirmed.

HADLEY, C. J., and CROW, DUNBAR, FULLERTON, and RUDKIN, JJ., concur.

CITY OF OLYMPIA v. KNOX.

(Supreme Court of Washington. June 2, 1908.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—REASSESSMENT—REASONABLE TIME.

Certain grading was done in the city of Olympia in 1891, and a special assessment to pay therefor was confirmed in January, 1892, but in January, 1893, a certain assessment was held invalid, and later, in 1893, a statute was enacted authorizing a reassessment of property for special benefits where it should be found that a former assessment was invalid, but this statute contained no limitation as to the time within which a reassessment should be made. No reassessment was made in the case in question until 1904. *Held*, that the delay was unreasonable, and that the reassessment was invalid, and could not be enforced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1213.]

2. JUDGMENT—RES JUDICATA—PRIOR ASSERTION OF INVALIDITY OF ASSESSMENT.

In an action by a city to enforce a certain grading assessment the assessment was held invalid, and in a subsequent action to compel the enforcement of the assessment generally, the city defended on the ground that it was invalid and prevailed. *Held*, that the city was estopped to claim the validity of the assessment in a subsequent action by it, even though the assessment in question differed from that which was first determined to be invalid.

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

An action by the city of Olympia against Mrs. J. D. Knox from a judgment and decree by plaintiff. Defendant appeals. Reversed and remanded, with instructions.

Troy & Falknor, Vance & Mitchell, and G. C. Israel, for appellant. George R. Bigelow and William W. Manier, for respondent.

ROOT, J. This action was brought to foreclose a lien on certain lots of appellant in the city of Olympia for a special assessment levied on account of the grading of Third street. From a judgment and decree in favor of the city, this appeal is prosecuted.

The grading was done in 1891, and a special assessment to pay therefor was confirmed by the city council January 26, 1892. In 1904 a reassessment was made upon these lots, and, to enforce such reassessment, the present action was instituted on the 19th of June, 1907. Appellant pleads the statute of limitations, and urges that the reassessment was not made in due time. Respondent contends that there is no statute or other law limiting the time within which a reassessment may be made, and that, in view of the circumstances surrounding this case, the reassessment herein was levied within due time, and is enforceable.

We will notice certain proceedings which were thought to have a bearing upon the questions before us. The grading was done and the original assessment made under Ordinance No. 493. Shortly thereafter certain proceedings were instituted in the superior court to foreclose special street assessments believed to be identical or similar to that made upon these lots. One of these suits was that of the City of Olympia v. Owings, which resulted in favor of the defendant by a judgment entered January 27, 1893. In 1895 Thomas & Co., a corporation, brought an action against the city to compel it to collect the amount of the original assessment. In this action the city defended upon the ground that the original assessment was invalid, and prevailed. In 1897 Phillips, as receiver of the First National Bank, instituted an action to compel the city to proceed to reassess. In this case the city sought to assert the validity of the original assessment, but this court held that it was estopped from asserting the validity of such assessment by reason of having in the Owings Case and on other occasions urged that said assessment was invalid. Phillips v. Olympia, 21 Wash. 153, 57 Pac. 347. This decision was rendered in 1899. In March, 1893, the Legislature enacted a statute authorizing a reassessment of property for special benefits where it should be found that a former assessment was invalid. The reassessment statute contains no limitation as to the time within which a reassessment is to be made, and the respondent urges that no limitation as to time is in any manner placed upon the city in making such reassessment, and relies particularly upon the cases of City of Port Townsend v. Eisenbeis, 53 Wash. 533, 68 Pac. 1045, and Port Townsend v. Trumbull, 40 Wash. 386, 82 Pac. 715. Notwithstanding the excellent brief and able argument of the attorneys for respondent, we are unable to agree with the conclusion reached by the honorable superior court. The statute of 1893 permitted a reassessment to pay for this grading which had been done about two years prior to that time.

It is suggested by respondent that the city authorities were in error in supposing the original assessment to have been void, and that the decision of the courts upon which the city authorities apparently relied were upon assessments essentially different from the original assessment herein, and did not constitute authority for holding that this original assessment was invalid. As an original proposition there would perhaps be some force in this contention; but the city in defending one or more actions brought against it in the courts solemnly asserted the invalidity of such original assessment and prevailed upon such contention, and this court in the Phillips Case, held the city estopped to turn about and assert the validity of that assessment. If the city was at that time estopped to make such contention, it would seem to be clearly so estopped now. Having prevailed in the Owings

Case upon that defense, the judgment in which case was entered January 27, 1893, it would seem that there was no reason why the city should not have been at liberty to proceed with the reassessment immediately upon the passage of the reassessment law in March, 1893. However, it did not make any reassessment until 1904, 11 years after it was authorized to reassess and 13 years after the work had been done. To fix a definite time within which a reassessment should be levied in order to be deemed to have been made within a reasonable time is not without difficulty. Various facts and conditions, must be taken into consideration, and it is well-nigh impossible to lay down any definite rule; and we think that the courts should hesitate to question the action of the city council in determining how soon they should make a reassessment; but this cannot be carried to the extent of ignoring the rights of others. In this case taking into consideration all the conditions and circumstances shown by this record, we do not find justification for the long delay indulged in by the city before making this reassessment. We do not think, under the circumstances here shown, that this reassessment was made within a reasonable time. We think, on the other hand, that it was unreasonable to defer the same for 11 years. This being true, the reassessment was invalid, and cannot be enforced.

The judgment of the honorable superior court is reversed, and the cause remanded, with instructions to dismiss the action.

HADLEY, C. J., and DUNBAR, FULLERTON, RUDKIN, CROW, and MOUNT, JJ., concur.

HOLCOMB v. HOLCOMB.

(Supreme Court of Washington. May 29, 1908.)

1. DIVORCE—ALIMONY—ALLOWANCE AND DISPOSITION OF PROPERTY—APPELLATE JURISDICTION.

Ballinger's Ann. Codes & St. § 5722 (Pierce's Code, § 4636), provides that, pending an action for divorce, the court may make such orders for the disposition of the persons, property, and children of the parties as may be deemed right and proper, and such orders, relative to the expenses of such action, as will insure to the wife an efficient preparation of her case. Section 5723 provides that in granting a divorce the court shall also make such disposition of the property of the parties as shall appear just and equitable. Section 5730 provides that "when either party shall signify a desire to appeal from any of the orders of the court in the disposition of the property or of the children the court shall certify the evidence adduced on the trial and the Supreme Court shall be possessed of the whole case as fully as the superior court was, and may reverse, modify or affirm said judgment according to the real merits of the case." Const. art. 4, § 4, provides that "the Supreme Court shall also have power to issue * * * all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction." *Held*, that on an appeal from a decree of divorce in favor of a wife, where a considerable amount of community property, which by the decree was divided between the parties, was tied

up by a stay bond, the Supreme Court had power, as incident to its appellate jurisdiction, to grant alimony, attorney fees, and suit money pending the appeal, to enable the wife to appear and be heard concerning the rights of herself and minor children, and, also, because she was a joint owner in the property.

2. SAME.

While the Supreme Court has power to award suit money, attorney fees, and alimony pendente lite in such court, its jurisdiction over such matters should be exercised with much care and discretion, and an award made only where the demands of justice make it clearly essential.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 605-612, 625.]

3. SAME.

Respondent obtained a decree of divorce from appellant, and the property, mostly or all having been community in character, was by the decree divided between them. The decree also awarded respondent \$50 per month alimony. The property allowed respondent was not income producing. The appeal was from that portion of the decree disposing of the property and awarding the alimony. Respondent was and for many years had been a cripple. A young child of the parties was awarded to her care. *Held*, that she should be allowed suit money, attorney fees, and alimony pending the appeal, the property allowance and the award of alimony not being available by reason of the supersedeas bond, and it being made to appear that respondent had no property of her own, and no means of adequate support for herself and child, except from friends.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 605-612, 625.]

4. SAME.

In fixing the amount of suit money which the Supreme Court should allow a wife pending an appeal by her husband from a decree of divorce in her favor, the court will be guided by what it conceives to be a fair amount for printing the briefs, meeting docket fees, and other expenses incidental to the presentation of the wife's case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 653, 654.]

5. SAME.

In fixing the amount of attorney fees which the Supreme Court should allow a wife pending an appeal by her husband from a decree of divorce in her favor, the court will not be guided by what it deems to be adequate compensation for the services of an attorney in preparing her case and appearing in court, such matters, together with the final determination of the question of alimony or other allowance and disposition of property, being for consideration at the final adjudication of the case, but will only allow such an amount as will enable her to secure the legal services necessary to properly represent her interests upon the appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 653, 654.]

6. NE EXEAT—GROUNDS—ACTION FOR DIVORCE—ALIMONY PENDING APPEAL.

Pending an appeal by a husband from a decree of divorce in favor of his wife, a writ of ne exeat, restraining appellant from leaving the state without an order of the Supreme Court, will not be granted, in the absence of a sufficient showing that appellant is about or threatening to leave the jurisdiction, and where there is a stay bond, and a considerable portion of the property is real estate, title to which it would be difficult for him to pass without respondent's consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Ne Exeat, § 3.]

Mount, Rudkin, and Fullerton, JJ., dissenting.

Appeal from Superior Court, King County; John B. Yakey, Judge.

Action for divorce by Eva Holcomb against Augustus H. Holcomb. Judgment for plaintiff, and defendant appeals. Application by respondent for the allowance of suit money, attorney's fees, and alimony pendente lite, and for a writ of ne exeat to restrain appellant from leaving the state and an order making the alimony a first lien on appellant's property. Suit money, attorney's fees, and alimony allowed. Writ of ne exeat and order making the alimony a first lien on appellant's property denied.

Herbert E. Snook, for appellant. Bo Sweeney, for respondent.

ROOT, J. This is an application by respondent, to this court in a divorce proceeding, (1) for an allowance of alimony pendente lite, for the support of the respondent and her minor child; (2) for an allowance of attorney's fees and expense money, to enable her to properly present her case in this court upon the appeal taken herein; (3) for a writ ne exeat, restraining and prohibiting the defendant from leaving the state of Washington without the order of this court, and that he be required to give bonds to insure his obedience to the orders of the court; (4) for an order or decree making the alimony a first lien on any and all property of appellant.

The application presents the question of the power of this court to grant alimony, attorney's fees, and suit money pending an appeal of a divorce proceeding in this court. Sections 5722 and 5723, Ballinger's Ann. Codes & St. (Pierce's Code, §§ 4636, 4637), read as follows:

"Sec. 5722. Pending the action for divorce the court, or judge thereof, may make, and by attachment enforce, such orders for the disposition of the persons, property and children of the parties as may be deemed right and proper, and such orders relative to the expenses of such action as will insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof; and on decreeing or refusing to decree a divorce, the court may, in its discretion, require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the action, when such divorce has been granted or refused, and give judgment therefor.

"Sec. 5723. In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody and support and education of the minor children of such marriage."

A portion of section 5730, Ballinger's Ann. Codes & St. (Pierce's Code, § 4641), reads as

follows: " * * * When either party shall signify a desire to appeal from any of the orders of the court, in the disposition of the property or of the children, the court shall certify the evidence adduced on the trial, and the Supreme Court shall be possessed of the whole case as fully as the superior court was, and may reverse, modify or affirm said judgment, according to the real merits of the case."

Under section 5723 it is conceded that the trial court has power in all proper cases to allow alimony, suit money, and attorney's fees pending the litigation in that court. That portion of section 5730, which says, "and the Supreme Court shall be possessed of the whole case as fully as the superior court was," would seem to imply that the appellate court should, upon the appeal, be vested with every power concerning the parties and the property which was possessed by the trial court during the pendency of the case in that court. But it is suggested that, under the state Constitution, such power is not vested in this court. Where the parties by their pleadings bring before the trial court their property, that court is by section 5722 given express authority to dispose of it, during the pendency of the action, "as may be deemed right and proper." Hence, during that time, the property is practically in custodia legis. Section 5723 requires the court, upon granting a divorce, to dispose of the property "as shall appear just and equitable." If an appeal is taken, and the decree superseded, where is the control of the property then vested? It could not go absolutely to the appellant, but would be there subject to just such limitations as existed immediately before the decree was entered. That would be the natural effect of the stay bond. It would seem that the power over the property, given by section 5722, would then pass to the appellate court, and should be exercised by that court as an incident to its appellate jurisdiction, essential to the administration of justice in such cases, although, possibly, it might also be exercised by the trial court in providing for the maintenance of the wife, and for the preparation and presentation of her case on appeal, a question, however, that we do not now decide. We think it may be deemed such an incident to the exercise of the appellate and revisory jurisdiction of this court, in a case like this at bar, for two reasons: (1) Because the state is an interested party in every divorce case, and public policy forbids that the issues in such a case should be adjudicated when the wife, by reason of the withholding of her property by the husband, is unable to appear or be heard concerning the rights of herself and minor children; (2) because she, being a joint owner in the property, which by sections 5722 and 5723 is made subject to the control pendente lite, and to the disposition finally of the court, is entitled, both as a matter of right and public policy, to such an allow-

ance from the property as will sustain her during the litigation, and enable her to be heard, before both the trial and appellate courts, as to her claims and rights involved in the litigation.

A divorce case is tried in this court de novo upon the record and evidence brought from the trial court. In the consideration and determination of the case, we must consider, not only the interests of the husband and wife, but also the interests of the state and society generally and of the minor children of the parties. The peculiar character of a divorce proceeding is such that both justice and public policy demand an opportunity for the wife to be present, or heard, before her property and other rights are passed upon by the appellate court. The law cannot consistently say to her: "You must support yourself during this litigation and defend the interest of yourself, children, and the state, appear on this appeal, and pay all expenses for preparing and presenting your case"; and then add, "but you will not be allowed any of your money or other property tied up herein with which to meet such demands, even though your inability to appear results disastrously to the interests of yourself, your infant child, and the state." We do not think our Constitution and statutes demand a construction producing such an incongruity. To say that the law requires the wife to do something which the law makes it impossible for her to do is to assert a proposition to which we cannot accord legal sanction. We think this court has the power to exercise its jurisdiction so as not to give recognition to such a doctrine. Where, as in this case, there is a considerable amount of community property involved, all of which is tied up by a stay bond on appeal, we think this court has the power, incidental to its appellate jurisdiction, to award from such property a sufficient amount to support the wife and minor child, and to properly present her case herein. We think such power is contemplated in section 4, art. 4, of the state Constitution, where it says: "The Supreme Court shall also have power to issue * * * all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction." While upon the general proposition as to an appellate court having this power there is some conflict in the authorities, we believe the weight of authority sustains the affirmative of the proposition. *Bachelor v. Bachelor*, 30 Wash. 203, 70 Pac. 491; *Kimble v. Kimble*, 17 Wash. 75, 49 Pac. 216; *Willey v. Willey*, 22 Wash. 115, 60 Pac. 145, 70 Am. St. Rep. 923; *Chaffee v. Chaffee*, 14 Mich. 462; *Goldsmith v. Goldsmith*, 6 Mich. 284; *Hall v. Hall*, 77 Miss. 741, 27 South. 636; *Prine v. Prine*, 36 Fla. 676, 18 South. 781, 34 L. R. A. 87; *Lake v. Lake*, 17 Nev. 230, 30 Pac. 878; *Van Voorhis v. Van Voorhis*, 90 Mich. 276, 51 N. W. 281; *Zeigenfuss v. Zeigenfuss*, 21 Mich. 414; *Disborough v. Disborough*, 51 N. J. Eq.

306, 28 Atl. 3; *Callahan v. Callahan*, 7 Neb. 38; *Wagner v. Wagner*, 36 Minn. 239, 30 N. W. 766; *Pollock v. Pollock*, 7 S. D. 331, 64 N. W. 165; *Pleyte v. Pleyte*, 15 Colo. 125, 25 Pac. 25; *Day v. Day*, 84 Iowa, 221, 50 N. W. 979; *Weishaupt v. Weishaupt*, 27 Wis. 621; *Krause v. Krause*, 23 Wis. 354; 2 *Bishop, Marriage & Divorce*, § 393; 14 *Cyc.* 745, 750, 766; 1 *Ency. Pl. & Pr.* 448, 449; 2 *Am. & Eng. Enc. Law*, 110; *Clarkson v. Clarkson*, 20 Mo. App. 94. As to the power of the trial court to make this allowance after appeal has been taken, see *McBride v. McBride*, 119 N. Y. 519, 23 N. E. 1065; *Miller v. Miller*, 43 Iowa, 325; *Rohrback v. Rohrback*, 75 Md. 317, 23 Atl. 610; *State v. St. Louis Ct.*, 99 Mo. 216, 12 S. W. 661; *Storke v. Storke*, 99 Cal. 621, 34 Pac. 339; *Reilly v. Reilly*, 60 Cal. 624; *Peavey v. Peavey*, 76 Iowa, 443, 41 N. W. 67; *Jenkins v. Jenkins*, 91 Ill. 167; *Ex parte King*, 27 Ala. 387; *Ross v. Griffin*, 53 Mich. 5, 18 N. W. 534.

While we are of the opinion that this court has the power to award suit money, attorney's fees, and alimony pendente lite in this court, we believe its jurisdiction over these matters should be exercised with much care and discretion, and an award made only where the demands of justice make it clearly essential. In the case at bar the respondent obtained a decree of divorce in the trial court from appellant, and the property, mostly or all having been community in character, was by the decree divided between the parties. An allowance of \$50 per month alimony was awarded to respondent by the final decree. The property allowed to respondent was not income-producing property. The defendant appealed from that portion of the decree disposing of the property and awarding the alimony. The respondent is and for many years has been a cripple. A young child of the parties was awarded to the care and custody of the mother. The allowance and award not being available by reason of the supersedeas bond, and it being made to appear that respondent has no property of her own, and no means of adequate support for herself and child, except from friends, we think this is a proper case for the allowance of suit money, attorney's fees, and alimony pendente lite. In fixing the amount of suit money the court will be guided by what it conceives to be a fair amount for printing the briefs, meeting docket fee, and other expenses incidental to the presentation of respondent's case in this court. In fixing the amount of the attorney's fees the court will not be guided by what it deems to be adequate compensation for the services of an attorney for respondent in preparing respondent's case and appearing in this court. Those matters, together with the final determination of the question of alimony or other allowance and disposition of property, will be taken into consideration at the final adjudication of the case. At present this court will only allow such an amount as we

think will enable respondent to secure the legal services necessary to properly represent her interests upon the appeal.

It is the order of the court that appellant be and he is hereby directed to pay to the respondent, for the support of herself and minor child, the sum of \$50 per month from the date of the supersedeas bond until the filing of the opinion and decision of this court upon the merits of the case, said allowance to be paid on the first business day of each and every month. It is also ordered that appellant be and he is hereby ordered and directed to pay to respondent, or to her attorney of record, the sum of \$50 as suit money, and the further sum of \$100 as attorney's fees. That part of the application asking for a writ of ne exeat will be denied. We do not think there is any sufficient showing that the appellant is about or threatening to leave the jurisdiction of the court; and in view of the fact that a considerable portion of the property is real estate, which it would be difficult for him to pass title to without the consent of respondent, and having in mind also the stay bond, we do not think that an order or writ of this kind is justified. As to an order making the award of alimony a first lien upon appellant's property, there is some question as to whether this court has power so to do other than as its order allowing the alimony may thus impress the property, a question, however, that we are not called upon to decide at this time. We will decline to make any order concerning this branch of the application.

The order made herein will be in effect from the time of the filing of this opinion.

HADLEY, C. J., and DUNBAR and CROW, JJ., concur.

MOUNT, J. I dissent. The Constitution of this state invests the superior courts with "original jurisdiction in all cases * * * of divorce and for annulment of marriage" (section 6, art. 4, Const.), and the section of the statute quoted in the majority opinion (section 5722, Ballinger's Ann. Codes & St. [Pierce's Code, § 4636]) authorizes the judges of such courts to make such orders, for the expenses of such actions, as will insure to the wife an efficient preparation of her case, etc. The Constitution gives this court appellate jurisdiction in this class of cases. Its original jurisdiction is limited to certain named writs and "to all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction." Article 4, § 4, Const. This is an original application to this court, for an order for attorney's fees, suit money, and alimony in a case pending here upon appeal. Affidavits are filed here in support of the application. In order to allow applications of this character, we must determine facts, which in most cases will be disputed by original evidence. In other words this court must ex-

ercise original jurisdiction. *Relly v. Relly*, 60 Cal. 624; *Hunter v. Hunter*, 100 Ill. 477; *Kesler v. Kesler*, 39 Ind. 153; *State v. St. Louis Court of Appeals*, 88 Mo. 135. No such jurisdiction is conferred by the Constitution, and even if the Legislature has authority to confer it upon this court, which is subject to much doubt, it has not done so, nor attempted to do so. It is true while the case is pending here on appeal this court is "possessed of the whole case as fully as the superior court was, and may reverse, modify, or affirm the judgment." This, of course, refers only to the appellate capacity of the court. It is also true "that a divorce case is tried in this court de novo upon the record," as all equity cases, and cases tried by the court without a jury, are triable here; but it has not been supposed until now that this court may go outside of that record, receive new evidence, and find facts, possibly at variance with the record on appeal, and make or enforce orders which require the exercise of original jurisdiction in advance of the hearing of the case upon its merits.

In my opinion this court is assuming jurisdiction in this matter in violation of the Constitution, which confers only appellate or revisory powers upon it. If an order of the trial court, granting attorney's fees, suit money, and alimony may be superseded, and thereby the property of a party rendered unavailable, the hardship created thereby is the result of legislation, the remedy for which is in the Legislature. Many cases appealed here present hardships which we are powerless to avoid. The mere delay of an appeal frequently prevents a party from receiving money, to which he is immediately entitled, and which may be necessary for food for himself or family; but he must content himself with interest on his judgment pending the delay. These considerations are not sufficient to authorize this court to usurp legislative functions, or to change the plain mandate of the Constitution that the jurisdiction of this court is appellate only. The power of this court to issue all writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction does not, in my opinion, authorize the order made by the majority in this case. That provision applies to a case where some action is necessary to compel some officer to perform a legal duty, such as preserving the status of the property or of the parties, or of preserving or completing the record or some other such action, in order that this court may exercise its appellate jurisdiction. No such writ is sought here. It is not claimed that one is proper. I think the majority would probably deny such a motion in any other case than a divorce case; and yet the clause of the Constitution under discussion may be applied to any other case, upon the same reasoning invoked in this. Some of the cases cited by the majority sustain the conclusion reached in this cause, upon the ground that

divorce cases are a class requiring such action; but where the superior court or court of original jurisdiction is authorized to make provision for the wife, and where this court has no original jurisdiction in such cases, it seems to me such cases on appeal should be treated as other appealed cases. In the divorce case out of which this application arises the trial court entered a final judgment, and, among other things, awarded the plaintiff \$50 per month alimony. The trial court refused to fix the amount of a supersedeas bond on appeal, and this court, upon an application, issued a writ requiring the trial court to do so, and the judgment was superseded. *State ex rel. Holcomb v. Yakey* (Wash.) 93 Pac. 928. This court now makes an original order, requiring the payment of the same amount as alimony. This is a fair sample of results sure to follow, and real difficulties are in store if we assume original jurisdiction in this class of cases.

RUDKIN and FULLERTON, JJ., concur.

SULLIVAN v. SULLIVAN.

(Supreme Court of Washington. May 29, 1908.)

1. DIVORCE—ALIMONY—ALLOWANCE AND DISPOSITION OF PROPERTY — APPELLATE JURISDICTION.

On appeal by a husband from a decree of divorce in favor of his wife, the Supreme Court has power to grant her suit money, attorney's fees, and alimony pendente lite.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 625.]

2. SAME.

Where, in a divorce case, the wife prevails in the trial court, and there is a substantial amount of community property in the possession and under the control of the husband, and the disposition thereof made by the trial court is superseded by the husband's stay bond on appeal, and the wife has no means of support for herself and minor children, and for legal services and charges incidental to properly preparing and presenting her case upon appeal, allowances by the Supreme Court for suit money, attorney fees, and alimony pendente lite are warranted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 603-609, 625.]

3. SAME.

In fixing the amount of attorney fees which should be allowed a wife pending an appeal by her husband from a decree of divorce in her favor, the Supreme Court is not called upon to say what the value of the services of respondent's attorneys, in representing her interest in such court, might be, or to say what proportion, if any, of their fees should be paid by appellant from the community property, but is called upon merely to allow what it thinks necessary to enable her to secure suitable legal services for the preparation and presentation of her case, leaving the question as to the value of such services and the manner of their being paid in full to the final determination of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 653, 654.]

Mount, Rudkin, and Fullerton, JJ., dissenting.

Appeal from Superior Court, Skagit County; George A. Joiner, Judge.

Suit for divorce by Ella A. Sullivan against Daniel Sullivan. Judgment for plaintiff, and defendant appeals. Application by respondent for the allowance of suit money, attorney's fees, and alimony pendente lite. Allowance made.

Million, Houser & Shrauger, for appellant. Smith & Brawley, for respondent.

ROOT, J. This is an application by the respondent, in a divorce case on appeal to this court, for the allowance of suit money, attorney's fees, and alimony pendente lite in this court. The power of this court to make such allowances to the wife upon appeal in such proceedings has been passed upon in the case of *Holcomb v. Holcomb* (just decided) 95 Pac. 1091. From respondent's application it appears that appellant has, under his control, property of the value of at least \$224,000, much of it being or having been community property, and of which \$7,000 is in actual cash in the bank, subject to his check or order. It further appears that the respondent has the care and custody of their minor child, afflicted with tuberculosis of the lungs, by reason of which she is at present under the physician's care in the state of California, where it is necessary to have with her an older sister or this respondent, and for whose expenses it is necessary that a considerable amount of money shall be available regularly; that the respondent has no property in her possession or under her control, and no means of supporting herself or minor child; that the lower court awarded respondent a decree of divorce, and a substantial portion of the property, which said decree has, however, been superseded by a stay bond, interposed by appellant when this appeal was undertaken; that it is necessary for her to have money to meet the ordinary expenses incurred in preparing or having prepared her case for consideration in this court, and to hire the legal services necessary therefor. It states that it is necessary for her to be awarded for herself the sum of \$200, for her children the sum of \$150 per month, for suit money \$100, and as attorney's fees \$2,500.

Where the wife prevails in the trial court, and there is belonging to the parties a substantial amount of community property, which is in the possession and under the control of the husband, and the disposition thereof made by the trial court is superseded by the husband's stay bond on appeal, and the wife has no means of support for herself and minor children, and for legal services and charges incidental to properly preparing and presenting her case upon appeal, we think a sufficient showing is made for an allowance for these purposes by this court. As to the amount of attorney's fees to be allowed herein, we are not called upon at this time to say what the value of the services of respondent's attorneys, in representing her interests in this court, might be, or to say

what proportion, if any, of their fees should be paid by the appellant or from the community property. It is for us to allow at this time merely what we think is necessary to enable her to secure suitable legal services for the preparation and presentation of her case, leaving the question as to the value of such services and the manner of their being paid in full to the final determination of the case. It appears that certain allowances for alimony and suit money, amounting to \$500, were made in the trial court. It is the order of this court that the appellant be and he is hereby directed to pay to the respondent, for her use, the sum of \$100 per month, and for the care, use, and benefit of the minor child the sum of \$150 per month, all payable to respondent on the first business day of every month, said allowance computed from the date of the filing of the supersedeas bond until the filing of the opinion of this court upon the determination of the case upon the merits. It is further ordered that appellant, within 10 days from the filing of this opinion, pay to respondent or her attorneys the sum of \$75 as suit money, and the further sum of \$150 as attorney's fees. The orders herein made shall be in full force and effect from and after the filing of this opinion.

HADLEY, C. J., and DUNBAR and CROW, JJ., concur. MOUNT, RUDKIN, and FULLERTON, JJ., dissent.

VEYSEY et al. v. BERNARD.

(Supreme Court of Washington. June 5, 1908.)

1. APPEAL AND ERROR — HARMLESS ERROR — SUBSTITUTION OF PARTIES — PLEADING.

Defendant is not injured by allowing the substitution, as plaintiff, of one who has become owner, by assignment after action, of the claim sued on, without requiring him to plead over; he adopting the original complaint, with which defendant had already joined issue.

2. PLEADING — WRITTEN PLEADINGS — NECESSITY.

Where the cause was regularly assigned for trial prior to notice of filing a supplemental answer which set up a counterclaim and insufficient matters for the purpose of abating the suit, motion for leave to file which came on for hearing at the time of the trial, and, after the filing was allowed, the court, in response to inquiry by plaintiff's counsel, stated that a demurrer to the counterclaim would be sustained when filed, it was not error to require the trial to proceed without written pleadings to the supplemental answer.

3. ATTACHMENT — WRONGFUL ATTACHMENT — SET-OFF OF DAMAGES IN ATTACHMENT SUIT.

Damages from the wrongful issuance of attachment in the action cannot be pleaded by way of counterclaim therein, though the attachment has already been dissolved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 1339.]

4. ABATEMENT AND REVIVAL — GROUNDS FOR ABATEMENT.

It is not ground for abating an action on a claim that in the order dismissing, on their motion, bankruptcy proceedings of plaintiffs against defendant, was the provision "without right to said petitioners to further prosecute their re-

spective claims," and that there is pending in the federal courts defendant's appeal from the order of the bankruptcy court, striking out such provision as inadvertently entered; such matter being easily determinable against defendant without reference to the appeal; the bankruptcy court having on such a dismissal no power to prevent prosecution in the state courts by petitioners of their claim against the debtor.

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by Charles Veysey and another, partners as Veysey Bros., George L. Thompson, guardian of Mildred Veysey, a minor, being substituted as plaintiff, against Joseph Bernard. From an adverse judgment, defendant appeals. Affirmed.

J. C. Cross and A. Emerson Cross, for appellant. W. I. Agnew, for respondent.

HADLEY, C. J. This suit was brought in the superior court by Charles Veysey and Marion Veysey, copartners as Veysey Bros., to recover from the defendant a balance of \$848.10, alleged to be due upon account for goods sold and delivered. The defendants answered, admitting a balance of \$504.45, and offering to confess judgment for that amount. After issue was thus joined, the original plaintiffs in the action, together with other alleged creditors of the defendant, filed a petition in bankruptcy against the defendant in the District Court of the United States for the Western District of Washington. This defendant appeared in the bankruptcy proceedings and entered his plea to the petition. During the pendency of the bankruptcy proceedings, the petitioners moved the court for the dismissal of their petition, and an order was entered dismissing the same "without right to the said petitioners to further prosecute their respective claims." Afterwards the petitioners moved the court for a modification of the judgment of dismissal, so as to expressly show that the right of the petitioning creditors to sue upon their claims in the state courts is preserved, and that the denial of the right to further prosecute is limited merely to the bankruptcy proceedings. The court granted the motion, and, over the objection of this defendant, entered an order to that effect, reciting in the order that the original judgment of dismissal was inadvertently entered, and did not conform to the motion upon which it was based. Thereupon the said district court granted to this defendant, as the alleged bankrupt in the bankruptcy proceedings an appeal to the United States Circuit Court of Appeals, and afterwards this defendant filed in the last-named court his petition for the review of the order of modification aforesaid. The above facts were set up by way of supplemental answer in this case, and for the purpose of abating this suit pending the said review in the United States Circuit Court of Appeals. The supplemental answer also set up as an alleged counterclaim a claim for damages by reason of an attachment

which it is alleged was wrongfully sued out at the commencement of this action. Pending the suit the plaintiff Marion Veysey died, and Charles Veysey was appointed administrator of the partnership of Veysey Bros., and also of the estate of Marion Veysey. In the course of such administration an order of distribution was made, whereby the chose in action upon which this suit is founded was transferred to Mildred Veysey, a minor, who is the sole heir at law of said deceased. Thereupon George L. Thompson was duly appointed and qualified as the guardian of Mildred Veysey, and as such guardian was substituted as the party plaintiff in this cause. The cause came on for trial before the court without a jury, and resulted in a judgment in favor of the guardian aforesaid for the full amount demanded with interest. The defendant has appealed.

It is first urged that the court erred in allowing the substitution of respondent without requiring him to plead over; but it is not shown that appellant has suffered thereby. Respondent was merely substituted as the real party in interest, which was proper under our statute. The motion for substitution was in the nature of a supplemental pleading, alleging a transfer of interest, and it does not appear that appellant was prevented from controverting that fact if he desired to do so. Respondent adopted the pleading already in the record with which appellant had joined in issue, and no injury resulted to the latter.

It is complained that the court required that the trial should proceed over appellant's objection upon oral pleadings by way of demurrer to the counterclaim contained in the supplemental answer, and also by reply to the same answer. The record, however, shows that the case was regularly assigned for trial prior to the giving of notice of the filing of the supplemental answer, and that the motion for leave to file the supplemental answer came on for hearing at the time of the trial. After the filing was allowed, the court stated in response to an inquiry from respondent's counsel that a demurrer to the counterclaim would be sustained when filed. Under such circumstances there was no error. The convenience of the court required that the trial should then proceed. The original answer had been traversed by reply, and it is clear that both court and counsel understood that the supplemental answer would also be traversed. The issues as thus defined by the record and announced by the court were clearly understood.

It is next contended that it was error to sustain the demurrer to the counterclaim set up in the supplemental answer. The ruling of the trial court was authorized by the decision of this court in *Tacoma Mill Company v. Perry*, 32 Wash. 650, 73 Pac. 801, where it was held that a counterclaim for damages arising out of the wrongful issuance of an attachment cannot be pleaded in

answer to a complaint in the original action, although the attachment may have been dissolved prior to the filing of the counterclaim. The reasons therefor are fully discussed in the opinion cited, and need not be repeated here.

Appellant insists that the court erred in not giving effect to his plea in abatement. The recital in the first order of dismissal entered by the bankruptcy court was so manifestly an inadvertence that it would seem no modification was really necessary. It cannot be successfully maintained that on a mere motion by petitioners to dismiss bankruptcy proceedings, the bankruptcy court has the power to enter a judgment that will prevent the petitioners from prosecuting their valid claims against the debtor in the state courts. The plea in abatement, therefore, seems easily determinable without reference to the appeal which was taken from the order of modification. The court did not err in refusing to sustain the plea in abatement.

We think the judgment is fully sustained by the testimony; and it is affirmed.

FULLERTON, RUDKIN, ROOT, DUNBAR, MOUNT, and CROW, JJ., concur.

SAUERS et ux. v. SMITS.

(Supreme Court of Washington. June 4, 1908.)

1. PHYSICIANS AND SURGEONS—ACTION FOR MALPRACTICE—SUFFICIENCY OF EVIDENCE.

In a malpractice suit against a physician, evidence held sufficient to take the case to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Physicians and Surgeons, § 44.]

2. SAME—LIABILITY FOR MALPRACTICE.

The fact that a patient discontinued the treatment of a physician before she should have done so, and thereby augmented an injury caused by the negligence or incompetency of the physician, did not preclude her recovery for the injury caused by the physician.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Physicians and Surgeons, § 33.]

3. SAME.

The fact that a patient did not follow a physician's instructions for treatment, and thereby suffered an injury, would not preclude her recovery for the physician's negligent or incompetent treatment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Physicians and Surgeons, § 33.]

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by G. J. Sauers and wife against Paul Smits for malpractice. Judgment for defendant, and plaintiffs appeal. Reversed, and new trial ordered.

W. H. Abel, for appellants. J. B. Bridges, for respondent.

RUDKIN, J. This action was instituted to recover damages for malpractice. Without going into the details of the complaint, the substance of the plaintiffs' cause of action is that during the early part of the year 1904

the plaintiff Mrs. Sauers was suffering from an ailment of the foot, and applied to the defendant, who is a regularly licensed physician and surgeon, for treatment. The treatment prescribed and administered consisted in the daily exposure of the affected member or part to the light and rays of an X-ray machine for a period of about a month, each exposure lasting from 15 to 30 minutes. After this course of treatment had continued for some two weeks, the foot began to swell, itch, and burn. The treatment continued for about two weeks longer, at the expiration of which time the entire left side of the foot from the toe to the heel was severely burned, so that the skin came off and a large angry sore, involving the whole side of the foot, was formed; and, by reason of the treatment prescribed, the foot is permanently injured, the patient has been rendered a cripple for life, and the injury will probably necessitate the amputation of the foot. The negligence charged is that the defendant failed to shield or protect the foot from the X-rays, that he should have discontinued the X-ray treatment as soon as the burning and scalding of the foot made its appearance, and that the tube or bulb of the X-ray machine was placed too close to the foot. Issue was joined on the complaint, and, from a judgment and verdict in favor of the defendant, the plaintiffs have appealed.

Two questions have been presented for the consideration of this court: First, the sufficiency of the evidence to warrant the submission of the case to the jury; and, second, the accuracy of one of the instructions given by the court. The testimony on the part of the appellants tended to show that there were 17 daily exposures of the foot to the X-ray machine, except on one date toward the last when the patient was unable to attend the hospital; that no shield was used to protect the foot from the X-rays; that the tube or bulb of the X-ray machine was placed not to exceed two or three inches from the foot; that the exposures after the first lasted from 25 to 30 minutes; that at the expiration of about two weeks from the first exposure the foot became very red and itched and burned, and that this condition grew gradually worse from day to day until the patient was no longer able to go to the hospital; that thereafter the respondent attended the patient once at the home of her brother-in-law, where she was stopping, but did not call on the following day, and another physician was called in; and that after the fifth exposure to the X-rays a medicated paste was spread over the affected part, which was about the size of a nickel. There was further testimony tending to show that at the close of the respondent's treatment there was an X-ray burn of the fourth degree on the foot which is generally considered incurable. It is unnecessary to refer to the testimony bearing upon the condition of the patient after this time

as it would only go to the measure of damages, and that question is not before us. The testimony on the part of the respondent, on the other hand, tended to show that the number of exposures was about 10; that the tube or bulb was placed from 4 to 6 inches from the foot; that the exposures occurred only every other day, and lasted from 8 to 18 minutes; that the red or burnt appearance of the foot was caused by the paste, and not by the X-rays; that the patient had used her foot contrary to instructions, and by reason thereof the paste spread from the affected part to other parts of the foot; that there was no X-ray burn of any kind; that the treatment was proper; and that at the time of the trial the foot was entirely cured, and in a healthy condition. There was further testimony on the part of the respondent tending to show that the X-ray is comparatively a new discovery, and was not well understood by physicians and surgeons practicing in such communities as Aberdeen at the time this treatment was given. The appellants denied that the patient had disobeyed instructions, or that the paste had spread from the affected part to other portions of the foot, or that the condition of the foot was caused by the paste. It will thus be seen that there was a direct conflict in the testimony on many essential points. The jury would have been authorized in finding that the injured foot was severely burned by the X-rays, that the treatment was improper, and that the injury was caused by one or more of the acts of negligence charged in the complaint. If it should appear that physicians and surgeons in such communities as Aberdeen were as ignorant of the effect of X-ray exposures as some of the testimony tends to show, the jury might well conclude that the use of such a dangerous agency by one who had little or no knowledge as to the probable consequences was negligence per se. We are satisfied, therefore, that the motion for a nonsuit and the motion for a directed judgment were properly denied.

The instruction complained of by the appellants is as follows: "If you find from the evidence that the patient quit the treatment of the defendant before she should have done so, and before he was willing she should quit him, and that any evil results have come from that action on her part, then she would not be entitled to recover. If you believe that the defendant gave her directions as to how she should act, and as to how she should treat her foot, how she should use it and take care of it during the time she was treating it, and she did not follow those directions with reasonable care and diligence upon her part, and any injury has resulted on account of that negligence or want of attention or care upon her part, then she would not be entitled to recover." This instruction was erroneous. If we assume that the patient quit the treatment of the respondent before

she should have done so, and before he was willing that she should quit him, or that she neglected to follow instructions as to how she should use and care for the foot, and injury resulted by reason thereof, the fact remains that these acts of negligence on the part of the patient in no manner concurred with the act of the respondent in burning the foot, if he did so. It would be a harsh doctrine to say that a patient cannot recover for malpractice if any subsequent or independent act of negligence on her part increases or augments the injury caused by the negligence or incompetency of the attending physician; and such is not the law. As said by Agnew, C. J., in *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705; "The contributory negligence which prevents recovery for an injury is that which co-operates in causing the injury—some act or omission concurring with the act or omission of the other party to produce the injury (not the loss merely), and without which the injury would not have happened. A negligence which has no operation in causing the injury, but which merely adds to the damages resulting, is no bar to the action, though it will detract from the damages as a whole." In *Beadle v. Paine*, 46 Or. 424, 80 Pac. 906, the court said: "But it will not suffice to defeat the action that the injured party was subsequent negligent, and thereby conduced to the aggravation of the injury primarily sustained at the hands of the physician or surgeon, and such conduct on the part of the patient is pertinent to be shown in mitigation of damages only where enhanced thereby, but not to relieve against the primary liability." See, also, *Carpenter v. Blake*, 75 N. Y. 12; *Du Bois v. Decker*, 130 N. Y. 325, 29 N. E. 813, 14 L. R. A. 429, 27 Am. St. Rep. 529; *Wilmot v. Howard*, 39 Vt. 447, 94 Am. Dec. 338; *Thompson on Negligence*, § 201; 22 Am. & Eng. Ency. of Law, 407. The statement that any injury resulting from the negligent acts of the patient would bar a recovery was also too favorable to the respondent. We are therefore of opinion that there was sufficient evidence of negligence on the part of the respondent to go to the jury, and that the instruction complained of was erroneous.

For this error, the judgment is reversed and a new trial ordered.

HADLEY, C. J., and FULLERTON, ROOT, MOUNT, CROW, and DUNBAR, JJ., concur.

BLEITZ v. CARTON.

(Supreme Court of Washington. June 3, 1908.)

1. LIBEL AND SLANDER—ACTIONABLE WORDS—WORDS IMPUTING CRIME.

An alleged slander consisted in defendant's speaking of plaintiff as follows: "Bleitz is not a fit man to associate with decent people. He has another wife back East, and a wife and child here. He has been in jail two or three years back East. I have the documents to prove

all this." *Held*, that the words, "He has another wife back East, and a wife and child here" were actionable per se, as they, in substance, charged the crime of bigamy, but that the other words were not actionable per se.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 22, 32.]

2. SAME—PLEADING—VARIANCE.

The rule in the earlier cases, as to variance, in actions for libel and slander, that, if the allegations of the pleading and the proof do not strictly correspond, plaintiff cannot recover, has been somewhat relaxed, so that proof is now held to be sufficient if the charge is substantially sustained, although the proof made does not, in every minute particular, correspond with the words alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 246.]

3. SAME.

In an action for slander, plaintiff alleged that defendant spoke of him as follows: "He has another wife back East, and a wife and child here." Plaintiff's witness testified that defendant said of plaintiff: "He has a wife and child back East, and is living with another woman here." *Held*, that the variance was fatal, since the words alleged charged bigamy, and were actionable per se, and the words proven could, by no possible construction, be held to charge plaintiff with bigamy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 246.]

4. SAME.

One reason for requiring substantial proof of the words alleged, in an action for slander, is that defendant may, if he so desires, have an opportunity to plead and prove justification, by showing the truth of the words charged, but the absence of a plea of justification does not have the effect of decreasing the amount or accuracy of proof to be required of plaintiff in sustaining the allegations of his complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 246.]

5. SAME.

In an action for slander, plaintiff alleged that defendant spoke of him as follows: "Bleitz is a bigamist. I threw it in his teeth, and he did not deny it. He has two wives." Plaintiff's witness testified that defendant said that plaintiff had a wife and family in the East, and that he was living here with another woman, and that defendant did not call plaintiff "a bigamist in so many words; that is, he didn't call Mr. Bleitz a bigamist that I can recollect." *Held*, that the evidence was not only such a failure of proof as to constitute a variance, but that it, in effect, amounted to a positive denial of the allegations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 246.]

6. SAME—PLEADING—BILL OF PARTICULARS.

In an action for slander, where the proof failed to show the speaking of the slanderous words at the times, places, and to the persons alleged, plaintiff contended that the verdict and judgment for him should not be set aside, for the reason that proof was made of the speaking of the words, at other times and places, and to other persons. Such proof consisted in part of conversations other than those set out in the complaint, which occurred after the commencement of the action, and were offered for the sole purpose of showing malice. Plaintiff did not amend nor ask to amend his complaint so as to admit such proof. Prior to the trial defendant had demanded and plaintiff had furnished a bill of particulars, stating the names of all persons known to plaintiff who were present at the times of the speaking of the words alleged in the complaint. *Held*, that plaintiff's contention could not be sustained, for if such a method

of proving a cause of action could be permitted, a bill of particulars would be of no value to the party to whom it is furnished.

7. SAME—ADMISSIONS IN PLEADING.

Plaintiff, in an action for slander, alleged that defendant said of him: "He has another wife back East, and a wife and child here"—thereby charging plaintiff with the crime of bigamy. Defendant denied the allegation, and then in pleading the defense of privileged communication, alleged that plaintiff applied for admission to a secret fraternal order of which defendant was a member, and thereby submitted his reputation to investigation by the members of the order; that while such application was pending, and at a regular lodge meeting, defendant, without malice, and only to assist the order in an investigation of the character of applicants, spoke of plaintiff to a doctor, who was then a member of the order, the following words: "If what Mr. Davis has told me is true, Bleitz is not a fit man to belong to the order. He tells me he has a wife and children back in Wyanette, Illinois, and you know he has a wife and children here." Held, that the affirmative allegations of the answer were not inconsistent with its denials, and did not, as pleaded, amount to an admission of the speaking of the words alleged in the complaint.

8. SAME—VARIANCE.

Proof of slanderous words, spoken in a conditional or hypothetical statement, does not support an allegation of slanderous words pleaded as a positive or direct assertion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 246.]

9. SAME—TRIAL—DIRECTION OF VERDICT.

In an action for slander, plaintiff alleging that defendant spoke of him as follows: "He has another wife back East, and a wife and child here," the evidence showed that plaintiff formerly had a wife and three children in Illinois; that he sold his business there and left them, going to S. county, Kan., where he lived about a year; that he then went to P. county, Kan., and commenced an action for divorce, making service by publication; that he obtained a decree, his wife having failed to appear; that a warrant was issued for his arrest on a charge of perjury, based on certain allegations of his petition for divorce; that he was arrested and taken back to P. county; that he there met an attorney for his wife and children, who had a requisition for his return to Illinois, and that he settled with the attorney by giving a series of notes for the support of his family, and the criminal charge of perjury was then dismissed; that he paid one of the notes; that afterwards he was married to his present wife in Indiana; that, at the time of the speaking of the words alleged, plaintiff had made application for membership in a fraternal order of which defendant was a member; that the facts as to plaintiff's former wife and a newspaper account of his arrest had been communicated to defendant by one who had known plaintiff in Illinois; and that defendant made to another applicant for membership in the order the statement that, if what he had been told was true, plaintiff, having a wife and children back in Illinois and a wife and children here, was not a fit man to belong to the order. Held, that plaintiff was not entitled to recover damages, and that defendant's motion for a directed verdict should have been sustained.

Fullerton, Rudkin, and Dunbar, JJ., dissenting.

Appeal from Superior Court, King County; H. B. Rigg, Judge.

Action for slander by J. J. Bleitz against Matthew O. Carton. From a judgment for plaintiff, defendant appeals. Reversed and

remanded, with instructions to dismiss the action.

John F. Miller and James McNeny, for appellant. John E. Humphries and George B. Cole, for respondent.

CROW, J. Action by J. J. Bleitz against Matthew O. Carton, for slander. From a verdict and judgment in favor of the plaintiff, the defendant has appealed.

The appellant contends that the trial court erred in denying his motions for a nonsuit and a directed verdict. A demurrer having been sustained to the first cause of action, trial was had on the second and third causes only. In his second cause of action the respondent alleged that, on April 5, 1906, the appellant did speak of and concerning him to one Dr. Frank T. Maxson, the words: "Bleitz is not a fit man to associate with decent people. He has another wife back East, and a wife and child here. He has been in jail two or three years back East. I have the documents to prove all this"; and that appellant meant to thereby charge that the respondent had been guilty of the crime of bigamy. The trial judge correctly held that the alleged words: "He [Bleitz] has another wife back East, and a wife and child here," were actionable per se, as they, in substance, charged the crime of bigamy (25 Cyc. 264); but that the other words, alleged to have been orally uttered, were not actionable per se (25 Cyc. 265). Dr. Maxson was the only witness called to show the speaking of the words alleged in the second cause of action. His testimony was that the appellant said to him, of and concerning respondent: "He has a wife and child back East, and is living with another woman here." The appellant contends that this evidence shows a fatal variance between the words alleged to have been uttered and those proven; that the testimony of the witness Maxson did not establish, but disproved, the allegations of the complaint; that to charge that a man, who has a wife, is living with another woman is not equivalent to charging him with having another wife; that the effect of the words proven was to charge that the woman with whom respondent was living was not his wife; that although the words shown to have been spoken might, when accompanied by proper colloquium and proof of surrounding circumstances, tend to establish an accusation of adultery, they do not establish or tend to establish the crime of bigamy; and that the allegation of the complaint is an accusation of one act, while the proof made is an accusation of an entirely different act, as proof of adultery does not sustain a charge of bigamy. In actions for libel and slander the general rule as to variance is that, if the allegations of the pleading and the proof do not strictly correspond, the plaintiff cannot recover. This rule, which was rigidly enforced in the earlier cases, has been somewhat relaxed by later adjudications, so that proof is now held to be sufficient

If the charge of the complaint is substantially sustained, although the proof made does not, in every minute particular, correspond with the words alleged. 25 Cyc. 484. After a careful examination of numerous authorities we have been unable to find any cases in which the general rule has been so far relaxed as to hold that an allegation of the speaking of words, charging one crime or misdemeanor, is sustained by proof of the speaking of words charging or tending to charge a different crime or misdemeanor, or that such a failure to prove the words alleged would not constitute a fatal variance. Respondent alleged the speaking of words which, in substance and effect, charged the crime of bigamy; such words being actionable per se although orally spoken. The words proven can, by no possible construction, be held to have charged respondent with bigamy. The variance was therefore fatal.

One reason for requiring substantial proof of the words alleged is that the defendant may, if he so desires, have an opportunity to plead and prove justification by showing the truth of the words charged. Were it to be conceded that the appellant had actually said of and concerning the respondent in this action that he had a wife and child back East, and another wife and child here, thereby charging him with bigamy, it could not be seriously contended that he would establish the truth of such words, under a plea of justification, by showing that respondent, while having a wife back East, was living with another woman here. By the words alleged he would have charged bigamy, but such a showing as to the facts would not constitute a justification. The absence of any plea of justification in this action does not have the effect of decreasing the amount or accuracy of proof to be required of the respondent in sustaining the allegations of his complaint. In *Doherty v. Brown*, 10 Gray, 250, the Supreme Judicial Court of Massachusetts said: "The proof of making a charge of unchastity against the plaintiff does not sustain the allegation in the first count that the defendant charged the plaintiff with being a common prostitute. They are not the same charge. Supposing the words as set out to have been proved, it is plain that proof of the unchastity of the plaintiff would not be a justification of the charge made." In *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251, the court said; "We do not think an allegation of stealing whisky fines [by a justice of the peace] was met by proof of not paying over a fine for an assault. There may be no difference in the legal or moral quality of the acts, but there is a difference in their identity; and a plaintiff should be informed what charges in justification he is expected to meet." In *Perry v. Porter*, 124 Mass. 338, it was substantially held that, in an action for slander, an allegation that the defendant had accused the plaintiff of larceny was not sustained by proof of words accusing him of deception and

fraud. In *Kimball v. Page*, 96 Me. 487, 52 Atl. 1010, it was held that an allegation of the speaking of the words, "Mima stole the pin," was not sustained by proof of the speaking of the words, "Mima stole the buckle." *Jones v. Edwards*, 57 Miss. 28; *Crotty v. Morrissey*, 40 Ill. 477; *Smith v. Moore*, 74 Vt. 81, 52 Atl. 820.

In respondent's third cause of action it was alleged that, on April 9, 1906, the appellant did speak to one A. E. Croft, of and concerning him, the words: "Bleitz is a bigamist. I threw it in his teeth, and he did not deny it. He has two wives." The only witness called to prove the speaking of these words was A. E. Croft, who testified that: "He [Carton] said that he [Bleitz] had a wife and family in the East, and that he was living here with another woman. He didn't state, he didn't call him a bigamist in so many words; that is, he didn't call Mr. Bleitz a bigamist that I can recollect." This evidence was not only such a failure of proof as to constitute a variance, but it, in effect, amounted to a positive denial of the allegations of the third cause of action of the complaint.

The respondent contends that the verdict and judgment should be sustained, for the reason that proof was made of the speaking of the alleged words at other times, in other places, and to other persons than the times, places, and persons alleged, and that such proof was sufficient. He did not amend, nor did he ask to so amend, his complaint as to permit such proof. Prior to the trial the appellant demanded and respondent furnished a bill of particulars, stating the names of all persons known to the respondent, who were present at the times of the speaking of the words alleged in the complaint. Yet the respondent now contends that he is entitled to show a speaking of the alleged words at other times and places, and to other persons. If this method of proof of a cause of action, could be permitted, a bill of particulars would be of no value or advantage whatever to the party to whom it is furnished. The evidence, on which the respondent now attempts to thus predicate his right to recover, consisted in part of the testimony of certain witnesses, who narrated other conversations, which occurred after the commencement of this action, and was none of it introduced for the purpose of showing the speaking of the alleged words at the times and places, or to the persons pleaded in the complaint. It related to the other conversations, offered for the sole purpose of showing malice. The principal witness upon whose statements the respondent now relies was one Bennett Young, but his evidence constituted a variance, as he positively testified that the appellant, in referring to respondent, said: "He has a wife and family here who was not his wife."

The appellant, in pleading the defense of privileged communication, in substance alleged that, on April 5, 1906, the respondent applied for admission to a secret fraternal

order of which appellant was a member; that respondent thereby submitted his moral character, reputation, standing, past and present mode of life, to an investigation by the order and its members; that while his application for admission to the order was pending, and at a regular meeting of one of its lodges, the appellant did, on April 5, 1906, speak of and concerning the respondent, to Dr. Frank T. Maxson, who was then and there a member of the order, the following words: "If what Mr. Davis has told me is true, Bleitz is not a fit man to belong to the order. He tells me he [Bleitz] has a wife and children back in Wyanette, Illinois, and you know he has a wife and children here;" that such words were uttered by appellant without malice, in good faith, and with the sole object, intent, and purpose of assisting the members of the order in an investigation of the character of applicants, and that the speaking of the words was privileged by reason of the time, place, occasion, and circumstances under which they were uttered. Respondent now contends that this affirmative allegation of the answer amounts to an admission of the speaking of the words pleaded in the complaint, and that by reason of such admission it was not necessary for him to offer further proof. The allegation of the complaint set forth a positive charge of bigamy which appellant denied. Appellant then alleged that he did speak the words set forth in his answer, in the manner and under the circumstances there narrated. Respondent denied that appellant had made use of the qualifying words: "If what Mr. Davis has told me is true," and now insists that the affirmative allegation of appellant's answer, being inconsistent with his denials, is conclusive proof against him. The affirmative allegations of the answer were not inconsistent with its denials, nor do they, as pleaded, amount to an admission of the speaking of the words alleged in the complaint. The allegation of the complaint was that the appellant made of and concerning respondent a positive and direct statement that he had a wife and family back East, and that he had another wife here, thereby substantially charging him with the crime of bigamy. In pleading the defense of privileged communication, the appellant alleged that he said, conditionally, that if what Mr. Davis had told him was true, Bleitz was not a fit man to belong to the order, etc. Proof of slanderous words, spoken in a conditional or hypothetical statement, does not support an allegation of slanderous words pleaded as a positive or direct assertion. *Townshend on Slander and Libel* (4th Ed.) § 364; *Evarts v. Smith*, 19 Mich. 55; *Stees v. Kemble*, 27 Pa. 112; *Nailor v. Ponder*, 1 Marv. (Del.) 408, 41 Atl. 88.

The undisputed evidence discloses that respondent did formerly have a wife and three minor children in Illinois; that he sold his

business on April 4, 1902, and left them in that state on April 5, 1902, going to Sedgwick county, Kan., where he lived for about one year; that he then went to Pawnee county, Kan., where on May 12, 1903, he commenced an action for divorce, making service by publication; that he filed an amended petition on July 11, 1903, and on July 16, 1903, obtained a decree, his wife having failed to appear; that he returned to Sedgwick county; that a warrant was issued in Pawnee county for his arrest on a charge of perjury, based on certain allegations of his petition for divorce; that, as shown by certified copies of the proceedings, he was arrested and taken back to Pawnee county; that he there met an attorney who represented his wife and children, who claimed he had abandoned them in Illinois, and who had a requisition for his return to that state; that he made a settlement with the attorney, by giving a series of six notes of \$50 each for their support; that the criminal charge of perjury was then dismissed, he paying the costs; that he paid only one of the notes; that on September 10, 1903, he was married to his present wife in Jeffersonville, Ind.; that at the time of the speaking of the words alleged in the complaint he had made application for membership in a new lodge, which was being organized in a fraternal secret order of which appellant was already a member; that substantially the above facts as to his former wife and a newspaper account of his arrest had been communicated to appellant by one Davis, who had known respondent back East, and knew that he had a wife there, not the same person who is his wife here; that respondent has not contributed to the support of his former wife and his children in Illinois, except by the payment of one \$50 note; and that appellant made to Dr. Maxson, another applicant for membership in the order, the conditional statement which he pleaded in his answer. Under these facts the respondent was not entitled to recover damages, and the motion for a directed verdict should have been sustained.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

HADLEY, C. J., and MOUNT and ROOT, JJ., concur.

FULLERTON, J. (dissenting). Conceding that there was a variance between the allegations and proofs as to the exact language used by the appellant, yet both were equally actionable, and we see no reason why the complaint should not be deemed amended to conform to the proofs as in other cases. The court below concluded that no prejudice resulted from this variance, and no such claim is advanced here. But the appellant relies wholly upon a technical rule of procedure

and pleading which has long since been discarded in this jurisdiction.

We therefore dissent from the judgment, as the plea of justification was not sustained.

RUDKIN and DUNBAR, JJ., concur with FULLERTON, J.

TACOMA GAS & ELECTRIC LIGHT CO. v. PAULEY et al.

(Supreme Court of Washington. June 4, 1908.)

1. TAXATION — TAX DELINQUENCY CERTIFICATE—FORECLOSURE—PROCESS.

The fact that the published summons in an action to foreclose certificates of tax delinquency was not addressed to the owner of the property taxed as he appeared on the tax roll on the day the suit was begun, but described him as unknown, did not deprive the court of jurisdiction to render judgment; the proceeding being in rem, rather than in personam.

2. SAME — JURISDICTION—EVIDENCE—KNOWLEDGE OF OWNERSHIP.

Evidence held not to show that the county treasurer knew, or could have known from the tax record, who the owner of land was at the time he made out a certificate of delinquency stating therein that the owner was unknown, so as to deprive the court of jurisdiction in foreclosure proceedings thereon, where the certificate of delinquency was regular upon its face, and properly and seasonably filed, and the foreclosure proceedings thereunder and the sale were regular.

3. SAME—SETTING ASIDE SALE.

The fact that a county treasurer failed to answer a landowner's inquiry as to whether there were any delinquent taxes for former years on land was no justification for his belief that there were no such taxes, nor was it ground for setting aside proceedings foreclosing the certificate of delinquency covering the land and a sale.

4. SAME—EFFECT OF TAX DEED AS EVIDENCE.

Under the express provisions of Ballinger's Ann. Codes & St. § 1767, subd. 1 (Pierce's Code, § 8704), a tax deed executed by the county treasurer is prima facie evidence that the real estate conveyed was listed and assessed as required by law.

5. APPEAL AND ERROR—REVIEW — HARMLESS ERROR — FINDINGS AND CONCLUSIONS IN EQUITABLE ACTIONS.

Though findings of fact and conclusions of law are unnecessary in an equitable proceeding to avoid a tax sale and deed, the making of them is not prejudicial error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3; Appeal and Error, § 4238.]

Appeal from Superior Court, Pierce County; Arthur E. Griffin, Judge.

Action by the Tacoma Gas & Electric Light Company against Luther Harry Pauley and others to avoid a tax sale and deed. Judgment of dismissal, and plaintiff appeals. Affirmed.

T. L. Stiles, for appellant. I. B. Knickerbocker, for respondents.

ROOT, J. This is an action to avoid a tax sale and deed of certain lands in King county; the sale having been made at the general county sale of 1902. From a judgment dismissing plaintiff's action and con-

firmer defendants' title, this appeal is prosecuted.

The facts are substantially these: On the 17th day of May, 1881, the Northern Pacific Railroad Company contracted to sell the lands in question to one Charlie Tumas, an Indian, upon payments, the last of which was to be made in May, 1884. Tumas contracted to pay all taxes on the premises. A conveyance was made to Tumas October 1, 1884. December 28, 1887, Tumas and his wife conveyed to C. F. Seal. December 23, 1889, Seal conveyed to Horatio C. Clement. February 28, 1890, Horatio C. Clement and his wife conveyed to the Tacoma Light & Water Company. May 1, 1895, the Tacoma Light & Water Company conveyed to the plaintiff. The tract of land in controversy is described as "lot 8 and the E. ½ of the N. W. ¼ of the S. W. ¼ of section 17, township 21 N., range 5 E., excepting a tract of 5 acres, described as follows: Commencing at a point 1048 feet east of the northwest corner of the S. W. ¼ of said section 17; running thence south 20 rods; thence east 40 rods; thence north 20 rods; and thence west 40 rods, to the place of beginning." The plat drawn on a large scale, which is a part of paragraph 3 of the complaint, shows the situation of the land on Green river. For the year 1883 the entire tract, without the exception, was assessed to John Lagolt and Chas. Tumas as owners, and a tax of \$3.92 was levied thereon, which not being paid the property was sold to the county, by the sheriff, May 7, 1894. For 1884 the taxes seem to have been paid. For 1885 lot 8 was not assessed at all; but the other part of the tract (E. ½ of N. W. ¼ of S. W. ¼) was included in a description "W. ½ of S. W. ¼ of Sec. 17" etc., assessed to "Charles Tenas," as owner, and a tax of \$11.40 was levied upon the 80 acres described; or, proportionally, \$2.85 on the 20-acre tract owned by Tumas. This tax not being paid, the land was sold to the county by the sheriff on the 11th day of June, 1886. The taxes were paid for the years 1886-87-88. For 1889 the tax for the west 20 acres (E. ½ N. W. ¼ S. W. ¼) was paid, but that on lot 8 was not paid. C. F. Seal was then the owner of the original two tracts, less the five acres, shown upon the plat referred to, subject to whatever rights had been lost by the two sales above mentioned. As an assessment to Seal, this was the entry in the roll: "Pt. lot 8 (less 5 acres)," the section, township, and range following, and by that description it was sold to the county by the sheriff on the 9th day of August, 1890, for the tax of \$3.15. Subsequent to 1890 all taxes were seasonably paid. The revenue law of 1893 required the county treasurer to make up a register of unpaid taxes (section 80, c. 124, p. 358, Laws 1893), and provided that lands theretofore sold to counties for delinquent taxes should be deemed registered (section 85, p. 360). And so the treasurer

of King county registered each of the above mentioned sales, and named Charles Tumas and John Lagolt as owners in 1883, "Charles Tenas" as owner in 1885, and C. F. Seal as owner in 1889. The descriptions were the same as above given, excepting that in registering the sale of 1889 the treasurer added to the description, "Pt. lot 8 (less 5 acres)," the following: "Com. at a point 1048 feet E. of N. W. Cor. of N. W. $\frac{1}{4}$ of said Sec. 17; S. 20 rods, E. 40 rods, N. 20 rods, W. 40 rods to beg." Later the above "N. W." was changed to "S. W." by some treasurer. Next, pursuant to the statute of 1907 (sections 90, 94, pp. 174, 181), the treasurer issued two certificates of delinquency, Nos. 94,879 and 94,880, on the 31st of January, 1898. These certificates were not at hand, and resort for their contents was had to the treasurer's record of them, copies of which are contained in the statement of facts. The first certificate, No. 94,879, covered the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, less the northeast $2\frac{1}{2}$ acres, by a long and complicated description, and recited taxes, penalties, interest, costs, etc., for two years, 1883 and 1885. The second certificate, No. 94,880, covered lot 8, less 5 acres, but the excepted tract as described only included about 3 acres of the lot. There was a recital of taxes, penalties, interest, costs, etc., for two years, 1885 and 1889. Both certificates stated that the owner was "unknown," although at the time they were issued the original assessment rolls showed the names of the assessed owners, Tumas, Lagolt, "Tenas," and Seal. The register of unpaid taxes contained the same names of owners, and for two years at least—1896-97—the taxrolls of the county had contained the name of the Tacoma Light & Water Company as the owner of the property. In 1890 the lands were sold by the sheriff to the county for taxes delinquent for the year 1889, which taxes appear afterwards to have been paid upon part of the land. On May 14, 1894, the superior court of King county entered a judgment and order of sale, directing the county treasurer to sell said property for delinquent unpaid taxes, and a portion of said property was so sold to the county for the taxes of 1883 and 1885, and the remainder of said property was, under an order of said court, sold to the county for delinquent taxes of 1885 and 1889. All of these proceedings are matters of record in King county. Some time after the delivery of the certificates of delinquency, and prior to January 1, 1902, the county commenced an action to foreclose said certificates. Said action was a proceeding against all real property upon which there were unpaid taxes for the year 1895 and prior years, and is commonly known as the "King County Omnibus Tax Foreclosure Suit." The notice of summons was published in the Seattle Times, and covered many pages of that paper. All acreage property was described and arranged

numerically in said notice and summons according to range, township, and section. The tracts of land involved herein appeared in the proper place in said notice with the owner's name appearing as "unknown" in each instance. The usual proceedings were had, and a judgment and decree and order of sale duly signed and entered in the suit. Pursuant to said judgment, decree, and order of sale, the county treasurer sold the property herein involved to this respondent Luther Harry Pauley, and on December 9, 1902, the county treasurer, in pursuance of said sale, executed and delivered to Pauley a tax deed which was duly recorded. On or about June 15, 1905, the appellant tendered respondent Pauley \$117.08 for moneys paid by Pauley for taxes, penalties, interests, and costs upon said property, and requested respondent to execute to appellant a quitclaim deed of the land in controversy. Respondent declining to receive the money or execute the deed, this action was commenced in July, 1905.

Appellant's first contention is that, because the published summons was not addressed to any of the several owners of the property taxes as they appeared upon the tax rolls up to the day the foreclosure suit was commenced, it was void as to that property, and conferred no jurisdiction upon the court to render any judgment against it. We do not think this contention can be upheld. It has been repeatedly held by this court that proceedings to foreclose a tax certificate are in the nature of proceedings in rem, and that they run against the property itself rather than the owner. In the case of Shipley v. Gaffner, 93 Pac. 211, this court said: "The main question in the case is: May the county foreclose for delinquent taxes against property assessed to unknown owners, if the taxing officers knew, or could by reasonable diligence have ascertained, the names of the real owners? We have repeatedly held that these foreclosure proceedings are in rem, and not against the person of the owner; and that owners are bound to take notice of the property they own, and pay the taxes thereon, and defend against foreclosure for delinquent taxes, even though the property is assessed to unknown owners or to other persons." In the case of Allen v. Peterson, 38 Wash. 604, 80 Pac. 851, this language was used: "As we have repeatedly held, a tax foreclosure proceeding in this state is a proceeding against the property, and is in no sense an action against the person of the owner of such property. Its purpose is to charge such property with its just proportion of the public revenues; and the state's dominion over the land exists for that purpose, without regard to its ownership." And in the case of Spokane Falls & Northern R. R. Co. v. Abitz, 38 Wash. 12, 80 Pac. 194, the court spoke as follows: "Appellant contends that, under the provisions of this section, notice shall be given to the person or persons

appearing upon the treasurer's rolls as the owner or owners at the time the notice is given, and not when the certificate is issued. We have frequently held that a proceeding to assess and collect taxes upon real estate under this statute is a proceeding in rem." In *Washington Timber Company v. Smith*, 34 Wash. 638, 76 Pac. 271, the court said: "The difficulties attending the collection of public revenue are many at best, and the relation of the citizen to the subject is somewhat different from his relation to the ordinary contractual obligations. He must take notice that by law his property is assessed each year; that the tax is due and delinquent at a fixed time, is a lien upon his land and that, if not paid, the lien shall be enforced by foreclosure proceedings in the manner provided for by statute. The action is not in personam, but in rem." In *Williams v. Pittock*, 35 Wash. 274, 77 Pac. 386, this language is employed: "Tax proceedings under our statutes are purely in rem. The same is true of tax foreclosure proceedings. Our statutes permit property to be assessed to an unknown owner when the owner's name is unknown. It is also provided that the notice in the foreclosure proceedings shall contain the name of the owner, if known. The fair inference to be drawn from these statutes is that if property has been assessed to an unknown owner, and the certificate of delinquency has been so issued, the foreclosure may be had in form against an unknown owner. It would appear that the actual name of the real owner is made no more essential in the proceedings to foreclose than it is in the assessment. The whole procedure, including the assessment, foreclosure, and sale, is for the purpose of establishing and enforcing a lien for public revenue, which, under the policy of the state, is chargeable to the property only, and not personally to the owner. It is the land itself with which the state is concerned, and its dominion over the land for revenue purposes exists without regard as to who is the owner. All owners know that such is the fact, and that the power of taxation will be exercised each year. In the very nature of our revenue procedure, the statutory provisions with regard to owners must have been intended to be directory rather than mandatory—of the form, and not of the essence, of the proceedings."

Section 1767, Ballinger's Ann. Codes & St. (Pierce's Code, § 8704), reads as follows: "Deeds executed by the county treasurer, as aforesaid, shall be prima facie evidence in all controversies and suits in relation to the right of the purchaser, his heirs and assigns, to the real estate thereby conveyed of the following facts: First: That the real estate conveyed was subject to taxation at the time the same was assessed, and had been listed and assessed in the time and manner required by law. Second: That the taxes or assessments were not paid at any time before the issuance of deed. Third: That the real estate

conveyed had not been redeemed from the sale at the date of the deed. Fourth: That the real estate was sold for taxes, assessments, penalties and costs, as stated in the deed. Fifth: That the grantee in the deed was the purchaser, or assignee of the purchaser. Sixth: That the sale was conducted in the manner required by law. And any judgment for the deed to real estate sold for delinquent taxes rendered after the passage of this act, except as otherwise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered, and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or assessments have been paid, or the real estate was not liable to the tax or assessment." We think, where the certificate of delinquency is regular upon its face and properly and seasonably filed and the foreclosure proceedings thereunder and the sale following are all regular, that there is not an absence of jurisdiction because the county treasurer in making up the certificate of delinquency stated therein that the owner was unknown where the facts are as shown in this case. It appears that this property had changed hands several times, and that there were some notations made upon the tax rolls with lead pencil, which the appellant claims were sufficient to indicate to the county treasurer who the owner was. We do not think the showing made here is sufficient to justify the conclusion that the county treasurer knew, or could have known, from the tax records, who the owner was at the time he made out the certificate of delinquency. There is no showing of fraud on the part of that official and nothing to show this respondent responsible for any errors which the county treasurer or other county authorities may have made, if any were made, in any of the transactions having to do with the preparation of the certificates of delinquency or their foreclosure. There probably are cases where the owner of property sold under a certificate describing the owner as unknown might be heard to question the foreclosure proceeding; but we do not think the facts in this case justify this appellant in setting aside such foreclosure and sale. An abstract of title or an examination of the published summons would have revealed these unpaid taxes, which had for so many years been delinquent. An officer of the appellant testified that he wrote to the county treasurer asking if there were any delinquent taxes for former years, but received no answer to his inquiries, and it is urged that this silence justified the appellant in believing that there were no such taxes. We are unable to agree with this conclusion.

Had the treasurer answered the inquiries, and stated that there were no delinquent taxes, and such information had been found to be erroneous, a different question might be presented. But we cannot overturn a tax proceeding upon the showing here made in this particular.

It is urged that the description in one of the assessment rolls was insufficient. This is insufficient, in the light of section 1707, Ballinger's Ann. Codes & St., to justify a reversal of the judgment. It is urged that the trial court had no authority to make findings of fact and conclusions of law; this being an equitable proceeding. In such an action findings and conclusions are unnecessary, but the fact that they are made we do not think constitutes an error prejudicial to appellant. Appellant urges that the lower court erred in confirming the title of respondents in and to the real estate involved. If the conclusion of the trial court was correct in finding that appellant's cause of action could not be sustained, and that the foreclosure proceedings and sale were regular, we do not think appellant is injured by the portion of the decree complained of.

Finding no error in the record, the judgment of the superior court is affirmed.

HADLEY, C. J., and FULLERTON, DUNBAR, MOUNT, and CROW, JJ., concur.

STRANDELL v. MORAN et al.

(Supreme Court of Washington. June 2, 1908.)

1. MECHANICS' LIENS—PROCEEDINGS—NOTICE OF CLAIM—STATEMENT AS TO AMOUNT DUE—OVERSTATEMENT—EFFECT.

The fact that notice to the owner of materials furnished in the construction of a building, etc., stated that a larger amount was due to the person giving notice than was in fact due, does not prevent a recovery of the amount actually due, if the mistake was made in good faith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 168, 253, 270.]

2. SAME—SIGNING OF NOTICE—SUFFICIENCY—STATUTE.

The statute provides that notice given by a materialman, etc., of money due from a contractor for making repairs for a city, etc., shall be given to the board with whom the bond is filed, and shall be signed by the person making the claim or giving the notice. Plaintiff was doing business under the name of "A. S., Agent," and, preliminary to suing on the contractor's bond, gave notice to the city council of her claim, the notice being signed by Andrew S. without the word "Agent." Held, that the defect in the signature, not having misled the bondsmen or the city to their injury, was a sufficient compliance with the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 260.]

3. TRIAL—QUESTION FOR JURY—ON CONFLICTING EVIDENCE.

Where the evidence was conflicting as to whether a contract between contractors and the city was assigned by the contractors to another without the surety's knowledge so as to

release the latter, the question of such assignment was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 332-343.]

4. APPEAL AND ERROR—REVIEW—FINDINGS OF FACT—WEIGHT AND CREDIBILITY OF EVIDENCE.

The Supreme Court has no authority to weigh the evidence on appeal; and whether testimony was true or false is for the jury and the trial court to determine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

Appeal from Superior Court, Whatcom County; Jeremiah Neterer, Judge.

Action by Freda Strandell, doing business as A. Strandell, agent, against Thomas Moran and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Fairchild & Bruce, for appellants. Bugge & Swartz, for respondent.

FULLERTON, J. In December, 1903, the appellant Moran entered into a contract with the city of Whatcom (now Bellingham), by the terms of which he agreed for a stated consideration to grade and otherwise improve Maple street, in that city, according to certain specifications attached to the contract. At the time of entering into the contract, Moran gave a bond on which his co-appellants were sureties in the sum of \$6,500, running to the state of Washington, conditioned that he would pay for all material that it should be necessary to use in the successful performance of the work. While Moran was performing the contract, the respondent sold and delivered to him to be used therein 120,768 feet of lumber at the agreed price of \$8.50 per 1,000 feet board measure. Of this quantity Moran used on the work some 90,916 feet; the remainder, or some part of it at least, being rejected by the city engineer as unsuitable for the purposes for which it was intended. Moran did not pay for the lumber purchased, and the respondent within 20 days after the completion of the contract gave the city the following notice: "Bellingham, Wash., Sept. 23, 04. To the Honorable Mayor & Members of the City Council of the City of Bellingham, Wash.—Gentlemen: Please take notice that the undersigned, Andrew Strandell, who furnished material for and upon the contract between the city of Whatcom, Washington and Thomas Moran for the grading, sidewalk and improving of Maple St., between High Street and Newell Street, has a claim for the sum of \$1026.52 against the Bond taken from Thomas Moran wherein he is the principal and Miller G. Scouten & Otto Matthes are sureties. Andrew Strandell, by D. T. Winne, Her Attorney." The city officers notwithstanding this notice paid the balance due on account of the contract over to Moran, leaving the claim unsatisfied. The present action is an action upon the bond to recover the contract price of the lumber furnished the contractor for use in improv-

ing the street. The trial court limited the amount of the recovery to the lumber actually used in the construction work, and the jury returned a verdict for the amount so used at the contract price, with interest. Judgment was afterwards entered upon the verdict, and this appeal is taken therefrom.

The first assignment of error goes to the sufficiency of the notice above quoted. The notice is thought to be fatal to the respondent's right of recovery, first, because it claims as due a much larger sum than was actually due the respondent; and, second, that it was not signed by the respondent. As to the first objection, it is not necessarily fatal to the respondent's right of recovery that the notice stated a larger sum to be due than was afterwards actually recovered. With regard to statutory liens, courts have often held them invalid where an exaggerated statement of the amount due was made in the notice, or where the amount claimed was unduly enlarged by the intermixture of lienable and nonlienable items, but even in these cases there must have been a willful misstatement of the amount due, or an exaggeration so gross as to imply willful misstatement, before that result would follow. Mistakes made in good faith, although increasing the claim beyond the amount justly due, are not fatal to a maintenance of the claim for the amount actually due. *Powell v. Nolan*, 27 Wash. 318, 338, 67 Pac. 712, 68 Pac. 389; *Robinson v. Brooks*, 31 Wash. 60, 71 Pac. 721. The same rule should apply to notices under the statute in consideration here. If the notice is made in good faith, under the honest belief that the amount demanded is justly due, the claimant should not be denied the right to recover for the amount actually due merely because his notice does overstate his just claim. Actual fraud or acts from which fraud is necessarily implied should be shown before that result should be held to follow. The trial court, therefore, did not err in refusing to rule as a matter of law that the mere fact that the amount due was overstated in the notice filed with the city council barred the right to recover the amount justly due.

The statute provides that the notice required to be given the board with whom the bond is filed "shall be signed by the person or corporation making the claim or giving the notice"; and it is urged in support of the second branch of the objection that the notice at bar is neither signed by the present claimant nor by any one on her behalf, but is signed by a stranger to the record. The respondent was doing business through an agent under the name of "A. Strandell, Agent"; Andrew Strandell being the full name of the person who so acted. The notice was signed, it will be observed, by Andrew Strandell without the addition of the word "Agent," and this omission is thought to render the notice void, since, as it is claimed, such a signing is neither a

signing by the real nor the trade name of the claimant. But the primary purpose of the statute is notice. It is intended to inform the city and the bondsmen of the contractor who, if any, of the laborers, mechanics, and materialmen have not been paid, and any form of notice does this, and does not mislead either the city or the bondsmen to their injury, is sufficient to comply with the statute. In the case before us there is no pretense that either the city or the bondsmen were misled, or that it was want of such notice that prevented the retention of the amount of this claim from the balance due the contractor paid him or on his orders after the notice was received. The record does show that the city officers were misled by a transaction of some kind had between the contractor and a third party, but it was not one for which the respondent was responsible.

It is next contended that the contract between Moran and the city was assigned by Moran to one Clark without the knowledge or consent of the sureties, and that such assignment relieved the sureties from their obligation. But whether this result would follow were the fact established we do not need to determine. The question whether it was so assigned was a disputed question at the trial on which contradictory evidence was introduced. The question, therefore, was one for the jury. It was, moreover, submitted to them by the court and determined in favor of the respondent. This concludes the question in this court.

The last contention is that the respondent was tendered payment in full by Moran and the city council of all that was justly due her long prior to the commencement of this action, and that this tender was refused. These facts, it is claimed, exonerated the sureties. But here, also, the facts were in dispute. Whether or not there was such a tender was a disputed question which the court submitted to the jury who determined it contrary to the contention of the appellants. True, the appellants say there was no substantial testimony contradicting their contention, but we find against it the positive testimony of the respondent's agent. Whether his testimony was true or false was for the jury and trial judge to determine. This court has no authority to weigh the evidence.

The judgment is affirmed.

HADLEY, C. J., and RUDKIN, ROOT, CROW, MOUNT, and DUNBAR, JJ., concur.

GRIFFIN v. CITY OF TACOMA et al.
(Supreme Court of Washington. June 1, 1908.)

1. WATERS AND WATER COURSES — PUBLIC SUPPLY—ACQUISITION BY MUNICIPALITY—PURCHASE OF WATER SYSTEM—SUFFICIENCY OF ORDINANCE.

Where the electors of a city authorized by their vote the purchase of all sources of water

supply either owned or operated by a private water company in connection with its water system, the property authorized to be purchased included certain springs which the company had provided for its system, but had not actually drawn water from; and it was not necessary that the springs be specifically mentioned in the ordinance submitting the question of purchase to the voters.

2. SAME.

Pierce's Code, § 3784 (Ballinger's Ann. Codes & St. § 835), provides that, when a plan for furnishing water to a city shall afterwards be deemed insufficient, the city council may determine the fact by resolution, and may thereupon by ordinance submit to the electors any new plan or extension. A city purchased the different sources of water supply owned by a private company, one of which was not being used as a part of its water system. *Held*, that the city, in afterwards connecting that source with the city mains, did not change the plan of the system, and no vote was required to authorize the connection.

3. MUNICIPAL CORPORATIONS—FISCAL MANAGEMENT—DIVERTING FUNDS FROM GENERAL TO SPECIAL FUNDS—"DIVERTED."

Revised Charter and Ordinances of Tacoma, § 96, pp. 79, 80, provides that moneys collected by taxation for special funds provided by law shall remain therein, and that all funds raised by a vote of the people or by special taxation for a special purpose shall be used for that purpose and none other, and that no fund shall be "diverted" from the purpose for which it was originally assessed or collected or voted by the people, without submission of the question to a vote of the people, etc. *Held*, that the word "diverted" contemplates the permanently turning of a fund from its purpose, the equivalent of appropriation for some other use, and not the temporary transfer of the general fund to another fund with an assured income under the control of the city when necessary to expedite the city's business.

4. SAME.

While city authorities may transfer from its general fund moneys as temporary loans to other funds, they should exercise common business sense in making the transfer, and not transfer them to special funds that have not an assured and certain source of income, the collection of which is under the control of the city itself, so as to imperil the general fund.

5. SAME — INDEBTEDNESS — CONSTITUTIONAL INHIBITION—PLEDGING WATER RECEIPTS AS SPECIAL FUND.

The mere pledge of water receipts as a special fund by a city does not create a debt within the constitutional inhibition against municipal indebtedness.

6. SAME—NECESSITY FOR VOTE OF PEOPLE.

A vote of the people is unnecessary to authorize the pledging of city water receipts to a special fund for the purpose of furthering a general plan of utilizing water sources acquired in pursuance of a vote once taken.

7. SAME—CONSTRUCTION OF STATUTE.

Pierce's Code, § 3644, subd. "b" (Ballinger's Ann. Codes & St. § 1077), relating to the construction and maintenance of waterworks systems by municipalities, and providing that a special fund may be created for the purpose of defraying the cost and expense of construction, and that bonds or warrants may be issued, prescribes the procedure necessary when actual indebtedness is created against the city, and does not apply where water receipts alone are pledged in such a manner as to create no indebtedness.

8. SAME — WATERWORKS — EXPENSE OF IMPROVEMENTS—POWER OF CITY.

In the absence of express legislation the details as to the expenditure of a part of the moneys received from the operation of a city

water plant, for the purpose of increasing the utility of the system, may be regulated by the city authorities.

9. SAME—CONTRACT—EFFECT OF FAILURE OF OFFICER TO COUNTERSIGN.

A city charter provision that contracts entered into by the city shall be countersigned by the comptroller is merely directory, and, where the law does not clearly make the countersigning necessary, the failure of the comptroller to perform that purely ministerial duty does not affect the validity of a contract authoritatively executed in behalf of the city by the commissioner of public works.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 676.]

Rudkin and Fullerton, JJ., dissenting in part.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by F. L. Griffin against the city of Tacoma and another to enjoin the construction of a pipe line. Judgment of dismissal, and plaintiff appeals. Affirmed.

Leo & Cass, for appellant. C. M. Riddell, J. W. Quilek, C. E. Dunkleberger, F. R. Baker, Frank Latcham, and T. L. Stiles, for respondent city of Tacoma. Titlow & Huffer, for respondent Savage.

HADLEY, C. J. This action was brought by the plaintiff, as a resident citizen and taxpayer of the city of Tacoma, to enjoin that city and its codefendant Savage from proceeding with the construction of a main pipe line and other adjuncts to connect certain springs, known as "Maplewood Springs," with the water system of Tacoma as now operated. In the month of March, 1908, the city council of Tacoma duly passed an ordinance numbered 3264, authorizing such construction, and provided that the commissioner of public works in calling for bids should state that the contractor for any part of the work should agree to accept payment in cash by warrants drawn upon and payable out of the Maplewood extension fund, as created and established by ordinance. The same ordinance also created such special fund by setting aside from the gross revenues all proceeds derived from the waterworks system now belonging to, or which may hereafter belong to, the city at least 50 per cent. thereof, exclusive of revenue for water used by the city for municipal purposes, and provided that all moneys so set aside and placed in such special fund shall be applied solely to payment for the aforesaid construction and to other expenses necessarily incidental to such construction. On the same day the city also passed Ordinance No. 3265, by the terms of which there is transferred from the general fund of the city to the said special fund the sum of \$100,000. The transfer was made in the nature of a temporary loan from the general fund to the special fund, to be returned to the general fund under the provisions of Ordinance 8264, and also of Ordinance 8201. The latter ordinance expressly provides that, when any money is

by ordinance transferred from one fund of the city to another, the sum so transferred shall be by the proper officers transferred back to the original fund whenever there is a sufficient amount in the fund to which the transfer was made to return the amount so transferred. The commissioner of public works advertised for bids, and the city let two contracts to the defendant Savage, under the terms of the ordinance as aforesaid. One contract was for the building of the main pipe line between Maplewood Springs and the city of Tacoma, in length from $8\frac{1}{2}$ to 9 miles, for the price of \$119,387, and the other was for the construction of a force main in the city for such extension, for the price of \$48,643. The contractor entered upon the prosecution of the work, and thereupon this suit was brought to enjoin its further continuance, as well as all further proceedings to accomplish the construction under said ordinances and contracts. The cause was tried by the court, and resulted in a judgment denying any injunctive relief and dismissing the action. The plaintiff has appealed.

Appellant's first contention is that the Maplewood Springs extension is an addition to the present water system of the city, and that Ordinance 3264 does not provide for submitting to the electors of the city for their ratification or rejection the question of making said addition. It must be determined whether the extension is in fact an addition to the present water system which calls for ratification by the electors. Under the terms of Ordinance No. 790, the electors of the city did hold an election in 1893 to determine, among other things, whether the city should purchase of the Tacoma Light & Water Company its waterworks and all sources of water supply then owned or operated by said company as part of its water system. The vote was in favor of such purchase, and the same was effected; the regularity of the proceedings being upheld by this court in *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077. The company then owned the Maplewood Springs in connection with its water system, and they belonged to and were a part of the various sources of water supply which the company had provided for its system, although it had not previously actually drawn water from these particular springs. They were held as a reserve source of supply for future use. The springs were transferred by the company to the city as a part of its water system, and the city has ever since been the owner. Through the proceedings here attacked by appellant the city is now seeking to utilize this source of supply which it acquired and has for years owned and held as part of its source of supply to its water system. Appellant makes the point that, inasmuch as the Maplewood Springs were not specifically mentioned in Ordinance 790, the electors therefore did not authorize their purchase by the vote of

1893. We think it was not material that they should have been specially mentioned. The electors by their vote authorized the purchase of all sources of water supply either owned or operated by the company in connection with its water system. This covered the springs in question, and, when the city acquired them, they became a part of its authorized water system which it may now utilize. We do not think there has been any change of plan as contemplated by the statute of 1895. Section 3784, Pierce's Code (Ballinger's Ann. Codes & St. § 835). This statute has been called to our attention in a brief filed by the new city attorney of Tacoma, who assumed his official duties after this cause was submitted here. The attitude of the present city administration toward this controversy seems to differ from that of the administration which was in charge when the cause was first submitted here. The city cannot now, however, be heard to repudiate its former position if that position is sustainable in law, but we receive the suggestions of the present city attorney as presenting points which should be considered in the determination of the controversy. We believe that the above statute cited by him is inapplicable here, for the reason that this case does not present one of a change of plan, but the city is simply adhering to its original plan of utilizing the different sources of water supply which it purchased from the Tacoma Light & Water Company by authority of a vote of the people then taken, and no vote is now required to authorize the details of furthering that plan.

The appellant's next contention is that the transfer of money from one fund of the city to another as provided by Ordinance 3265 is prohibited by the city charter. The charter provision referred to is section 96, pp. 79, 80, Revised Charter and Ordinances of the City of Tacoma, and is as follows: "Immediately after the annual tax levy the city treasurer shall open and keep separate and distinct accounts with each special fund made necessary by law, and whenever any taxes shall be collected and paid into the treasury he shall credit each fund with its proportionate amount of such tax, and the same shall remain so credited and shall be paid out only in payments of orders drawn against said fund. All funds raised by a vote of the people or by special taxation, or in any other manner for a special purpose, shall be used for that purpose, and none other. No fund shall be diverted from the purpose for which it was originally assessed or collected or voted by the people without the proposition therefor is submitted to a vote of the people and authorized by at least a majority vote at either a special or general election. The treasurer shall keep such accounts and make such other reports and perform such other duties incident to his office as may be prescribed by ordinance." It

will be seen that the charter provision first deals with the subject of special funds provided by law, and requires that moneys which have been collected by taxation for such special funds shall remain therein. It is not provided that moneys which have been collected for the general fund for general municipal purposes may never in the interest of expediting the city's business be temporarily transferred to a special fund; but it is provided that no fund shall ever be diverted from the purpose for which it was originally collected. The word "diverted" is used in the sense of turning permanently from its purpose, the equivalent of appropriation for some other use. A temporary transfer from the general fund to another fund with an assured income is not an appropriation or diversion. With its outstanding credit against the other fund, the assets of the general fund remain the same, and its power to accomplish general municipal purposes has not been decreased. The city controls both funds, and it is under the legal obligation to see that the general fund is seasonably reimbursed from the source of supply to the special one. Of course, the city authorities must exercise common business sense in making such transfer. As a personal loan of magnitude is not ordinarily made to an individual who is insolvent, so a city should not transfer its general fund moneys as temporary loans to other funds that have not assured and certain sources of income, the collection of which is under the control of the city itself. The evidence shows the special fund in this case to be such. The income from the water system is about \$20,000 a month, and the amount is increasing. The city collects and disposes of this money, and has provided for placing one-half of the water income in the special fund. The city owns the water system, with a large amount of money invested therein. The people are dependent upon the city for their water supply which they must have for the conveniences and necessities of life. The city fixes the water rates, and enforces collection with practically the same regularity and universality that it levies and collects general taxes. The source of supply to the special fund is therefore to all intents and purposes as constant and certain as that of the general fund. The purpose of the transfer made by the city is doubtless to provide immediate funds for carrying on the construction, so that there may be no delay while awaiting the incoming of water taxes. The transfer under such circumstances does not imperil the general fund, and, if the city in the accomplishment of the purpose to supply sufficient water to its people finds that such transfer will accelerate such needed result, there is nothing in the charter provision that prevents it.

It is next suggested that the proposed pledging of the water receipts and the transfer from the general to the special fund will

oblige the city for new indebtedness which it cannot incur by reason of the constitutional limitation upon that subject. This court has already held that the mere pledge of the water receipts as a special fund does not create a debt against the municipality within the meaning of the constitutional inhibition. *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888; *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365; *Dean v. City of Walla Walla* (Wash.) 92 Pac. 895. We have also seen from what has already been said that the transfer from the one fund to the other creates no indebtedness against the city. It is a mere temporary loan to a fund, with an assured income, whose sources of supply are entirely under the control of the city. The city's general funds are not thereby in fact reduced, inasmuch as the credit of the general fund for the temporary transfer is the equivalent of cash as a working asset, and no new debt of the city arises.

It is suggested in the brief of the present city attorney that the pledging of the water receipts should be authorized by a vote of the people. No statute is pointed out which so expressly provides; and, inasmuch as their pledging does not create a municipal indebtedness, it would seem that such vote is unnecessary where the funds are being used to further a general plan of utilizing water sources which have been acquired in pursuance of a vote once taken. The brief of the present city attorney also suggests that ordinance 3264 fails to provide for certain details required by the statute of 1901, as found in subdivision "b," § 3644, *Pierce's Code* (Ballinger's Ann. Codes & St. § 1077). From an examination of the entire section, we think it appears that the details enumerated in subdivisions "a" and "b" relate to procedure when actual indebtedness is created against the city. The two subdivisions are immediately preceded by the following language: "When the system or plan has been adopted and the creation of an indebtedness by the issuance of bonds or warrants assented to as aforesaid, the said corporation shall be authorized and empowered to construct and acquire the improvements or lands contemplated, and to create an indebtedness and to issue bonds or warrants therefor, or for the condemnation thereof, as hereinafter provided, to wit." Subdivision "a" relates to details for the issuance of bonds evidencing a general indebtedness, and subdivision "b" authorizes the city authorities at their option to create a special fund from the water receipts, which fund appears to be intended as in the nature of additional security for the general indebtedness. That subdivision "b" deals with a method of securing general indebtedness we think appears, not only from the general context of the whole section, but also from the specific provision in subdivision "b" that "the city or town authorities may from time to time, by ordinance, transfer to any such spe-

cial fund any other available funds of said city." There can be no other "available funds" that can be so transferred, where the special fund is composed entirely of water receipts, which alone are pledged and in such a manner as to create no indebtedness against the city. That ordinance does not therefore deal with the conditions contemplated by the statute cited, but it is confined to the subject of increasing the utility of the water system by the mere expenditure of a part of the moneys received from the operation of the water plant itself. In the absence of express legislation upon the subject, the method of such expenditure in its details may be regulated by the city authorities.

We think the suggestion by appellant that the contract is void because not countersigned by the city comptroller is without merit. It is true there is a city charter provision to the effect that contracts entered into by the city shall be countersigned by the comptroller; but the provision is directory merely, and the failure to so countersign does not render the contract void. Unless the law clearly makes the countersigning necessary to the validity of the contract, the duty to countersign is merely ministerial, and the failure of a ministerial officer to discharge that duty does not affect the validity of the contract. The contract was authoritatively executed in behalf of the city by the commissioner of public works, and the comptroller's duty in the premises was clerical, without discretion on his part, and he could doubtless have been compelled to perform it. *State ex rel. Benz v. District Court*, 32 Minn. 181, 19 N. W. 732; *Goodyear Rubber Co. v. City of Eureka*, 135 Cal. 613, 67 Pac. 1043.

We find no substantial ground for reversing the judgment of the lower court, and it is therefore affirmed.

MOUNT, CROW, DUNBAR, and ROOT, JJ., concur.

RUDKIN, J. I concur in the majority opinion, except in so far as it upholds the right of the city to transfer or loan money from the general fund to the special water fund. I am also inclined to agree with the majority that the charter provision applies only to a permanent diversion of funds. But it does not follow from this that the city has power to shift its funds or loan its credit in the manner proposed. On the contrary, its powers are limited and defined by the law of its creation, and, when its authority is challenged, it must be able to point to the source of its power. The burden does not rest on the challenging party to point out the restraint or prohibition. If the city may transfer or loan \$100,000, it may transfer or loan the full amount necessary to construct a water or light plant, and, when its credit is thus loaned, its liabilities are increased to the extent of the loan. The adequacy or inadequacy of any security it may have or hold

is entirely beside the question. The security may be good in this case, but it may be bad in the next, and the existence of the power cannot depend on the wisdom or folly that may accompany its exercise. I therefore dissent.

FULLERTON, J. I dissent for the reason stated by RUDKIN, J.

RUMBLE et al. v. CUMMINGS.

(Supreme Court of Oregon. June 9, 1908.)

1. APPEAL AND ERROR — PRESENTATION OF QUESTIONS—PLEADING—REPLY.

Where a reply was not challenged in any manner in the trial court, any defect therein is waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 1244.]

2. PRINCIPAL AND AGENT—PROOF OF AGENCY —MATTERS TO BE SHOWN.

Where a party relies upon a contract, made with a person claiming to be an agent of another party, he must prove, where the agency is disputed, that the person claimed to be an agent was expressly empowered by the person for whom he acted to make the agreement for him, and that the terms of the contract made were within the scope of the authority conferred, or that the principal knowingly permitted the agent to assume that he had power to make such contracts, or held the agent out to the public as possessing such power, or that the principal, with full knowledge of the agent's arrogation of power in making the contract, ratified the agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 36, 391.]

3. SAME — AUTHORITY OF AGENT—EVIDENCE OF.

A person, employed by a lumber forwarding company as overseer or field overseer, whose duty was to protect the interests of the company, to protect their timber from being destroyed, to see that the company's men were paid, and that there would be no labor liens on the property, had no authority, as agent of the forwarding company, to enter into a contract for the construction of a dam, with a party furnishing the forwarding company with timber under contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 255.]

4. SAME — RATIFICATION OF UNAUTHORIZED CONTRACT—EVIDENCE—SUFFICIENCY.

Where an agent had no authority to enter into an agreement for the erection of a dam, a declaration by the principal that he did not intend to put any more money into the dam was not sufficient to show a ratification of the agreement of the agent, where the principal asserted that he was furnishing goods and loaning money, to the person with whom the agent contracted, to conduct his business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 636-643, 661.]

5. SAME — DETERMINATION OF AGENT'S AUTHORITY—QUESTION FOR COURT.

The determination of whether or not an agent is duly authorized to manage some affair for his principal is a matter devolving upon the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 724, 726.]

6. EVIDENCE—OPINIONS—AGENCY.

In an action against a principal for breach of a contract made by an alleged agent, in

which plaintiff failed to prove the agent's power to make the contract, by showing either express authority, holding out to the public, or ratification by acceptance of benefits, testimony by plaintiff, relating to the agent's authority to make the contract, *held* properly excluded; the question whether the agent was duly authorized being for the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2175.]

7. APPEAL AND ERROR—OBJECTIONS FOR REVIEW—EXAMINATION OF WITNESSES.

Where an objection, in the trial court, to allowing a witness to refresh his memory by looking at a book containing a statement of certain dealings, was made on the sole ground that the record of the transaction afforded the best evidence, the action of the trial court overruling the objection would not be reviewed on appeal, on the ground that error was committed in permitting the witness to refresh his memory without first establishing the preliminary facts essential.

8. SAME — RECORD — ESSENTIALS OF—SUPERFLUITY.

Where a bill of exceptions is unreasonably voluminous by reason of the incorporation therein of immaterial testimony, the Supreme Court, in reviewing an exception to a ruling, will not search the entire transcript to determine whether or not error was committed in the ruling, but will presume that the trial court's ruling was correct.

Appeal from Circuit Court, Union County; T. H. Crawford, Judge.

Action by E. W. Rumble and another, partners doing business as the Elgin Forwarding Company, against F. M. Cummings. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is an action by E. W. Rumble and F. D. McCully, partners doing business as the Elgin Forwarding Company, against F. M. Cummings, to recover \$998.77, the value of certain goods, wares, and merchandise, alleged to have been sold and delivered to the defendant at his request, and for money advanced to him. The answer denies the material allegations of the complaint, and as counterclaims sets up five separate defenses, in substance as follows: (1) That about June 20, 1906, the parties made an agreement, whereby the plaintiffs stipulated to purchase for the defendant a sawmill, and to put it in suitable condition for operation, and also to furnish him with such goods, and to advance to him such sums of money as might be necessary to enable him to pay the laborers whom he might employ in manufacturing lumber and in making railroad ties from certain timber, for which he was to receive \$8 per 1,000 feet for the lumber, and 20 cents apiece for all the ties that might be accepted by an agent of a railway company; that the agreed value of such material, when delivered, was to be credited on account of the money and goods so advanced and furnished; that pursuant to the agreement the plaintiffs purchased the mill for the defendant, and he moved it to and set it up on certain land, thereby incurring an expense of \$1,670.64, but on October 3, 1906, they unlawfully took possession of the mill, and refused to furnish him with

any more goods, or to advance any more money, whereby the agreement was rescinded, to his damage, in the sum of money last mentioned; (2) that if they had permitted him to manufacture the lumber and to make the ties, he would have made a net profit of \$7,000, of which sum he was deprived by their conduct; (3) that, relying upon the validity of the agreement, the defendant made 2,204 ties of the reasonable value of \$440.80, the possession of which the plaintiffs took, thereby waiving the inspection mentioned; (4) that he received from them goods of the value of \$347.16, and no more, which are the commodities mentioned in the complaint, and which goods were returned to the plaintiffs, who agreed to give the defendant credit therefor on the settlement of their accounts, and that by reason of such stipulation, they ought not to be permitted to recover in this action; (5) that at their request he also made for them 3,020 other ties, of the value of \$483.20, no part of which sum has been paid. The reply denies the material allegations of new matter in the answer, and also avers facts applicable to the several causes of defense, upon which issues the cause was tried; and, judgment having been rendered against the defendant, he appeals.

J. W. Knowles, for appellant. F. S. Ivanhoe, for respondents.

MOORE, J. (after stating the facts as above). It is contended by defendant's counsel that, as the averments of new matter in the answer are not controverted by the reply, an error was committed in rendering judgment for the plaintiffs. The reply denies the "material" allegations of the answer, except such facts stated therein as are admitted by the plaintiffs' pleadings. The adequacy of the reply was not challenged in any manner at the trial, and, such being the case, any defect in that pleading was thereby waived. *Ready v. Schmith* (decided May 26, 1906) 95 Pac. 817.

It is insisted that an error was committed in striking out, over objection and exception, that part of the defendant's testimony which tended to show that one Leander Martin was plaintiffs' agent. To render the action of the court in this particular comprehensive it will be necessary to call attention to some of the salient features of the case, as they were developed at the trial. A contract, made by the parties, June 11, 1906, was received in evidence, a copy of which has been sent up, showing that the defendant stipulated to convert all the available timber on certain lands in Union county into railroad ties, which he was to deliver to the plaintiffs at such places as they might designate, in quantities as desired, but not less than 12,000 a month. The ties were to be of uniform length and of four classes, differing in width and thickness, all of which were to be subject to inspection by an agent,

of the Oregon Railway & Navigation Company, whose decision was final. The ties which did not correspond with the specifications were to be considered as "culls," and, without receiving any consideration therefor, the defendant was to leave them on the premises as the property of the plaintiffs, who were to pay him for all ties accepted, prices varying from 13 to 20 cents. The defendant, referring to this contract, testified that, about four days after it was signed, it was abandoned by him and the plaintiffs' agent, Martin, with whom he made another agreement, the terms of which are stated in the first separate defense; that pursuant thereto, Martin purchased for the witness a sawmill, and stipulated to furnish whatever goods and money were necessary to enable him to manufacture the lumber and ties, and instructed him how to draw orders with which to pay the laborers whom he might employ, which vouchers Martin was to indorse, whereupon the plaintiffs were to pay the sums of money stated therein; that the witness, to secure the purchase price of the mill, executed to the plaintiffs a mortgage; that, Martin having selected on the banks of a stream the site for the mill, the witness built thereat a dam, a part of which was carried out by a freshet; that the plaintiff Rumble, referring to the loss thus sustained, said to the witness: "I have come to the conclusion that the dam is an expensive luxury, and we don't propose to put any more money into the dam"; that a voucher, drawn according to the prescribed form, but not indorsed by Martin, who was absent at the time, was not immediately paid by the plaintiffs; and that the mill was never operated after it was moved. The contract, executed June 11, 1906, contains no provision for the manufacturing of lumber, but stipulates, however, that the ties, which constituted the subject-matter of the agreement, should be "smoothly hewn or sawed on two sides to parallel faces," from which language it may reasonably be inferred that the defendant then contemplated using a sawmill, as a means of complying with the terms of the contract. Martin, as plaintiffs' witness, alluding to his employment by them, testified as follows: "My business, generally speaking, was to protect the interests of the Elgin Forwarding Company, to protect their timber from being destroyed, to see that the men got their pay, so that there would be no labor liens on the property, and, in general, overseer or field overseer."

It is argued that the testimony thus stated shows that Martin was authorized to enter into a contract with the defendant, and, having done so, the agreement was ratified by the plaintiffs, and hence an error was committed as alleged. When a third party relies upon a contract which he effected with a person who claims to be an agent, he must, when the agency is disputed, prove either,

first, that the individual, who thus undertook to transact with him some business for another, was expressly empowered by the latter to make agreements for him, and that the terms of the contract, which are sought to be established, are within the scope of the authority conferred; or, second, that the principal knowingly permitted the agent to assume that he had liberty to make agreements, or that he held the agent out to the public, in other instances, as possessing requisite power to embrace the execution of the contract involved, in making which the third party had reason to believe and did believe that the agent had the necessary authority; or, third, that the principal, with full knowledge of the agent's arrogation of power in making a contract on his behalf, accepted the fruits thereof, or with like knowledge, otherwise ratified the unauthorized agreement. *Hahn v. Guardian Assurance Co.*, 23 Or. 576, 32 Pac. 683, 37 Am. St. Rep. 709; *Jameson v. Coldwell*, 25 Or. 199, 35 Pac. 245; *Connell v. McLoughlin*, 28 Or. 230, 42 Pac. 218. Rumble's declaration to the effect that the plaintiffs did not intend to put any more money in the dam is not, in our opinion, sufficient to evidence a ratification of Martin's alleged agreement, for such assertion is compatible with the plaintiffs' theory of the case, as outlined in the reply, and manifested by evidence, introduced by them, that they were furnishing goods and loaning money to the defendant, who was conducting business for himself, and that, when a part of the dam went out, thus proving its inefficiency, the creditor, whose money was being used to further the defendant's enterprise, had the undoubted right to declare that no more of the plaintiffs' means should be loaned for the purpose for which a part thereof had been employed. The defendant did not establish the alleged agency by either of the modes indicated; and as the question as to whether or not an agent is duly authorized to manage some affair for his principal is a matter devolving upon the court (*Glenn v. Savage*, 14 Or. 567, 13 Pac. 442), no error was committed in striking out that part of the defendant's testimony relating to Martin's authority to abrogate the original contract of the parties, or to substitute a new agreement in lieu thereof.

Rumble, having identified a book of the firm, containing a statement of the defendant's dealings with the plaintiffs, was asked: "You may refresh your memory, and say how much of this account you have sued on, how much it aggregates exactly." An objection was interposed to the question, on the ground that the record of the transaction afforded the best evidence upon the subject, but the objection was overruled, and an exception allowed, whereupon the witness replied: "Nine hundred, ninety-eight dollars and seventy-seven cents." It is argued that an error was committed in permitting the

witness to refresh his memory, without having first established the preliminary facts prescribed by the statute for the government of such cases. If the legal principle now invoked had been insisted upon at the trial, it would have necessitated the production of testimony to the effect that the book referred to was written by the witness, or under his direction, at a time when the incidents thus narrated occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. B. & C. Comp. § 848. It will be observed that the objection now urged is not the same question that was presented to the trial court; and hence the consideration of the matter by that court will not be reviewed, since a different theory is adopted on appeal from that pursued at the trial. Rumble, having testified in his own behalf in the manner last above indicated, was asked by the defendant's counsel: "Now, there is some of the goods that Mr. Cummings turned back to you, that you are suing for?" An objection to this question, on the ground that it was not cross-examination, having been sustained, an exception was allowed; and it is claimed that an error was thus committed. There has been sent up to this court what purports to be a bill of exceptions, attached to which is a transcript of all the testimony given at the trial, consisting of 100 type-written pages, which we have carefully examined in reviewing the question of Martin's agency.

An exception is an objection taken at the trial to a decision upon a question of law. B. & C. Comp. § 169. No particular form of exception is required, but the objection must be stated with so much of the evidence or other matter as is necessary to explain it, and no more. *Ib.* § 171. In preparing a bill of exceptions counsel for the appellant must be allowed considerable discretion in determining the quantum of evidence necessary to explain the exceptions reserved; if objections are interposed to the bill as formulated, such changes may be made therein by the judge who tried the cause as he considers requisite. When a motion for a judgment of nonsuit has been granted or denied, or when a request to instruct the jury in a particular manner has been given or rejected, a review of such action usually demands a re-examination of all the testimony given or offered at the trial, and generally necessitates the incorporation in the bill of exceptions of the entire evidence tendered or received, so that the appellate court may have the same means of determining the questions involved that the trial court possessed. In all other cases of appeal, except in the instances suggested, it is not to be supposed that the entire testimony is necessary to explain the exceptions reserved by the appellant. If the question of the need of incorporating in the bill of exceptions the entire tes-

timony is debatable, so that disinterested persons who are learned in the law might reach different conclusions upon the subject, no objection to the magnitude of the bill ought seriously to be considered. When, however, no controversy could arise in respect to the matter, and all unblased lawyers must say that a bill of exceptions is unreasonably voluminous, by reason of the incorporation therein of immaterial testimony, the Supreme Court ought not to be required to search the entire transcript to determine whether or not an error had been committed as alleged. *Eaton v. O. R. & N. Co.*, 22 Or. 497, 30 Pac. 311; *Hedin v. City, etc., Ry. Co.*, 26 Or. 155, 37 Pac. 540. We must therefore presume that the question propounded to Rumble did not, as the trial court decided, come within the designation of cross-examination.

Other objections to the admission or rejection of testimony are included in the principle last announced, and for the reason there assigned the exceptions will not be considered, because the bill does not comply with the statutory requirement in the respect mentioned.

The court, having struck out that part of the defendant's testimony relating to Martin's agency, instructed the jury to the effect that they should not consider any evidence as to the expenses incurred by the defendant in taking down, moving, or rebuilding the sawmill, or in erecting the dam; and it is urged that an error was thus committed. The right to recover these outlays is based on the agreement to purchase the mill, which contract the defendant asserts he effected with Martin, but as the authority of the latter to act for the plaintiffs was not established, as hereinbefore determined, no error was committed in this respect.

Notwithstanding the condition of the bill of exceptions, the entire testimony has been examined to determine Martin's agency, because of the instruction relating thereto, but the practice in this particular cannot be commended, and ought not to be observed in the future.

It follows, from these considerations, that the judgment should be affirmed; and it is so ordered.

FREDENTHAL v. BROWN & McCABE.

(Supreme Court of Oregon. June 9, 1908.)

1. EVIDENCE—DECLARATIONS BY EMPLOYÉ—SCOPE OF EMPLOYMENT.

The acts of an employé within the scope of his employment are the acts of the employer, and the statement of the employé characterizing such acts and constituting a part of them are competent evidence against the employer; but statements of a past transaction made by the employé, and not a part of an act done by him, are not within the scope of the employment, and cannot be admitted in evidence to affect the employer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 308, 352, 365, 887-892.]

2. SAME.

The statement of an employé operating a winch and derrick used in loading a ship with lumber, made after he had come into the hold of the ship, immediately after an accident, to a co-employé therein, and in response to questions, that he could not help the accident, that he could not hold the load, and that the machinery was out of order, were not a part of his acts in operating the winch, but only his account of the accident, and were incompetent against the employer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 365.]

3. SAME—RES GESTÆ.

Under B. & C. Comp. § 698, providing that a declaration forming a part of a transaction is evidence as part of the transaction, the declarations of an employé employed to operate a winch and derrick in loading a ship with lumber, made after he came into the hold of the ship, after an accident resulting in injury to a co-employé therein, are not a part of the res gestæ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 365.]

4. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—BURDEN OF PROOF.

Proof that an employé storing lumber in the hold of a ship was injured by boards slipping from a load, while the same was carried into the ship by means of a derrick operated by a steam winch, is not prima facie proof of negligence of the employer, but the employé has the burden of showing negligence by affirmative evidence thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 881, 895, 898.]

5. APPEAL AND ERROR—HARMLESS ERROR—ERRONEOUS GRANTING OF NONSUIT.

Where the court in a personal injury action erroneously denied a motion for a nonsuit at the close of plaintiff's case, the action of the court in granting a nonsuit at the close of all the evidence was not prejudicial to plaintiff, though the better practice would have been to strike out evidence erroneously admitted in support of plaintiff's case, and then direct a verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4210.]

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Action by C. W. Fredenthal against Brown & McCabe. From a judgment granting a nonsuit, plaintiff appeals. Affirmed.

The defendants, as stevedores, were engaged in loading a ship, the *Eva*, with lumber at the Inman-Poulsen Dock on the Willamette river, at Portland, Or.; the lumber being placed in a sling on the dock, lifted, carried over the vessel, and lowered through the hatchway into the hold by means of a derrick, operated by a steam winch situated on the deck of the ship and belonging to it. The plaintiff and two other men were in the hold of the ship, storing the lumber away as it was delivered there. The lumber was of uneven lengths, and carried in the sling at a slant, so that one end of the load reached the floor first. When the end of the load was within two or three feet of the floor, it was stopped, and plaintiff and his fellow workmen would take hold of it and bear it into the hold, and, upon a signal, the engineer would lower it

to the floor. On the occasion of the injury, as the plaintiff and his fellows took hold of the end of the load to bear it into the hold of the ship, the load dropped several inches, thus loosening the sling, or otherwise causing the short boards to slip to the floor, striking the plaintiff's foot, which resulted in the injury complained of. The negligence of defendant relied upon by plaintiff is that the steam winch was defective and out of repair, by reason of which it would not hold the load or steady it into the hold of the ship, and was thus the occasion of the accident that caused the injury. Chas. S. Smith was the engineer who operated the steam winch and derrick, and at the trial the plaintiff asked witness Olsen as to a conversation had with Smith immediately after the accident, when he came into the hold of the ship, to which objection was made and overruled, and the witness answered: "I asked the engineer what the matter was, and he said it wasn't his fault; that the donkey was leaking steam; he could not handle it; he was unable to handle it—to bring it out; that it was leaking steam. * * * He said the packing of the donkey was out of fix; he could not do any better than he did; it was out of whack in some way, and he could not handle it." Witness Mahoney also testified, over objection, to the same conversation: "Yes, sir; as Fredenthal was hurt, the engineer was down there in 20 or 25 seconds later. He said it was pretty bad; don't blame him. 'Don't blame me,' he says. Q. State what the conversation was. A. He says: 'It looks pretty bad. Don't blame me. I could not help it. I could not hold it—I could not hold the load.' Q. Did he offer any explanation as to why he could not hold the load? A. No; I do not recollect now. He did not say anything regarding the engine being out of order. He says, 'Don't blame me. I could not hold it,' he says." At the close of plaintiff's case defendant moved for a judgment of nonsuit, on the ground "that no evidence had been introduced here to show any negligence on the part of the defendant," and on other grounds. This motion was at first overruled, but at the close of the trial defendant renewed the motion in this language: "At this time we desire to renew our motion for judgment of nonsuit on the same ground as heretofore argued on the motion for nonsuit when plaintiff finished introducing his testimony in chief." This motion was allowed for the reason that the testimony as to the statements made by Smith, the engineer, was incompetent, as such statements could not bind the principal, and without proof of them there was no negligence shown; and plaintiff appeals.

Claude Strahan, for appellant. W. D. Fenton and R. A. Leiter, for respondent.

EAKIN, J. (after stating the facts as above). The plaintiff's case rests principal-

ly upon whether the statements made by Smith, the engineer, to witnesses Olsen and Mahoney, soon after the accident, in relation to the cause thereof, was competent evidence against the principal as admissions by an agent. It was not shown by the evidence that Smith was the agent of the defendant for any purpose except to operate the winch and derrick. His acts within that employment are the acts of the principal, and what he said about those acts while performing them is a part of the transaction; and, where the acts are competent evidence against the principal, such statements are also admissible as characterizing the acts and constituting a part of them; but statements of a past transaction made by an agent, and not part of the act itself or characterizing it, are not within the scope of the agency, and cannot be admitted in evidence to affect the principal. *First Nat. Bank v. Linn Co. Bank*, 30 Or. 296, 47 Pac. 614; *Wicktorwitz v. Farmers' Ins. Co.*, 31 Or. 569, 51 Pac. 75; *Luman v. Golden A. C. M. Co.*, 140 Cal. 700, 74 Pac. 307; *Redmon v. Metropolitan St. Ry. Co.*, 185 Mo. 1, 84 S. W. 26, 105 Am. St. Rep. 558. In *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 172, 30 L. Ed. 299, Mr. Justice Harlan, in considering the admissibility of declarations of an agent as against the principal, says: "There can be no dispute as to the general rules governing the admissibility of the declarations of an agent to affect the principal. * * * 'The admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending, "et dum fervet opus." It is because it is a verbal act and part of the *res gestæ*, that it is admissible at all, and therefore it is not necessary to call the agent to prove it; but, wherever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it.' * * * But an act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period." The statements of Smith sought to be proved here were no part of his acts in operating the winch, but only his account or opinion of it given afterward in response to an inquiry, and were incompetent to affect the defendants.

It is also urged by plaintiff that the statements of Smith referred to were admissible as a part of the *res gestæ* of the accident because made soon thereafter. Some of the courts have permitted a wide range in the admission of statements made after the principal act as part of the *res gestæ*, as being largely in the discretion of the trial court, on the theory that because of its proximity in time to the main act or transaction there is a strong probability that the declarations are true. In *Vicksburg & M. R. Co. v. O'Brien*,

supra, Mr. Justice Harlan, for the majority of the court, as to such statements being *res gestæ*, says: "The cases have gone far enough in the admission of subsequent declarations of agents as evidence against their principals"—while Mr. Justice Field, dissenting, says: "The modern doctrine has relaxed the ancient rule that declarations, to be admissible as part of the *res gestæ*, must be strictly contemporaneous with the main transaction." However, it seems unnecessary to look beyond the decisions of our own court for the solution of this question. B. & C. Comp. § 698, provides that, "Where also the declaration, act, or omission forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence as part of the transaction"; thus defining *res gestæ*. In *Sullivan v. O. R. & N. Co.*, 12 Or. 392, 398, 7 Pac. 508, 512, 53 Am. Rep. 364, in discussing this question, Mr. Justice Thayer says: "The Massachusetts cases, with the exception of the one referred to, have generally held to a reasonable and consistent rule upon that branch of evidence. They have repudiated the notion that the admission of such declarations is left to the discretion of the presiding judge, and admit them only when they are calculated to explain the character and quality of the act, and are so connected with it as to derive credit from the act itself, and to constitute one transaction. This appears to me to be as liberal a rule as any court can, consistently with the rules of evidence, sanction, and I think it very doubtful whether our courts, under certain provisions of our statute, would have any right to permit the introduction of declarations of parties as evidence, except under the condition of circumstances above referred to." He here quotes sections 672 and 676 of Deady's Code, being sections 694, 698, B. & C. Comp., and says: "These provisions of the statute are declaratory of the law upon the subject, and are binding upon the court. They limit the right of a party in the introduction of that character of testimony to those cases where the declaration forms part of the transaction which is in dispute, and provide that it is evidence as part of it. * * * It occurs to me that courts at nisi prius would have but little difficulty in determining when the statements of a party in such cases were admissible as a part of the *res gestæ*, or were incompetent upon the grounds that they were only hearsay, if they would consider whether the transaction to which they related was continuing when they were made, or terminated at the time, and make that the test of the matter; and I believe that much of the embarrassment they labor under in applying the rule in such cases has arisen in consequence of an attempt that has frequently been made to stretch the *res gestæ* doctrine to an unnatural extent in order to suit some supposed meritorious case, and which has led to the great diversity of decisions and confusion of the law upon that

subject." This decision has been cited by this court with approval on this question in *Thomas v. Herrail & Zimmerman*, 18 Or. 546, 23 Pac. 497, and *Johnston v. O. S. L. Ry. Co.*, 23 Or. 94, 31 Pac. 283. An article upon the question of *res gestæ* in 24 Cent. Law J. p. 463, quotes at length from the case of *Sullivan v. O. R. & N. Co.*, supra, and from *Waldele v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274, 47 Am. Rep. 41, and, referring to the *Sullivan* Case, says: "The test here suggested for the application of the doctrine of *res gestæ* seems to be a very good and correct one, and which, I think, should command the considerate attention of every one having occasion to apply the doctrine. If followed, it would result in certainty and uniformity where there is now uncertainty and confusion." In concluding his article the author says: "I confidently believe that the proper application of the rule or doctrine of *res gestæ*, and some pertinent reasons for such application, will be found in the two cases [*Sullivan v. O. R. & N. Co.* and *Waldele v. N. Y. C. & H. R. R. Co.*, supra] above copiously quoted from, and that very much aid will be received in the application of the doctrine in following their reasonings and suggestions." The case of *L. & N. R. Co. v. Pearson*, 97 Ala. 211, 12 South. 176, lays down practically the same rule as in the case of *Sullivan v. O. R. & N. Co.*, supra, and states in conclusion: "The real inquiry is: Did the main act *proprio vigore* further assert itself and demonstrate its character or intent by impelling the contemporaneous or subsequent declaration or act, offered in evidence, and without which the main act is left incomplete and only partially proven, or did the declaration or circumstance offered as *res gestæ* originate from some cause extraneous to the main act? If traceable solely to the main act, as the producing cause, and the declaration or circumstance as illustrative of the main act, it is *res gestæ*; otherwise it is mere hearsay or irrelevant and inadmissible as *res gestæ*." *Waldele v. N. Y. C. & H. R. R. Co.*, supra, contains a review of some of the cases on this subject, and says: "The question is: Did the proposed declaration accompany the act, or was it so connected therewith as to constitute a part of it? If so, it is part of the *res gestæ*, and competent; otherwise, not." *Redmon v. Metropolitan St. Ry. Co.*, 185 Mo. 1, 84 S. W. 26, 105 Am. St. Rep. 538, is to the same effect.

The statements of Smith were made to the witnesses Olsen and Mahoney after he had left the engine and gone to the hold of the ship and was asked what was the matter. From his answers and statements it is evident that he feared he would be blamed for the accident, and sought to excuse himself. It was neither a spontaneous expression impelled by the act while operating the winch and characterizing it, nor was it such an expression of what took place in the hold of the ship as demonstrating its character; but it was a subsequent narrative or opinion made

in response to an inquiry. Therefore the evidence of statements made by Smith, the engineer, was neither admissible as declarations of an agent to affect the principal nor were they *res gestæ*; and, even if the evidence was sufficient to be submitted to the jury as to whether the dropping or jerking of the load in the manner complained of was occasioned by defective machinery—which we do not concede—still there was no evidence tending to show that the loads had so dropped or jerked prior to the morning of the accident. Defendant himself says he did not know of it prior to the dropping of the load by which he was injured; and there is nothing in the evidence indicating that knowledge thereof was communicated to the defendants, or that the conditions were such that the defendants must be charged with notice of it. *Kincaid v. O. S. L. Ry. Co.*, 22 Or. 35, 29 N. E. 3; *Madden v. Occidental, etc., S. S. Co.*, 86 Cal. 445, 25 Pac. 5. The burden was upon plaintiff to show the negligence relied upon. This is not a case where proof of the accident *prima facie* shows negligence. There must be some affirmative proof of it. *Woods, Mast. & Ser.* § 382. The plaintiff suggests, also, that, as the motion for the nonsuit was at first overruled, the court erred in sustaining it at the close of all the testimony, relying upon the case of *Ferrera v. Parke & Lacey*, 19 Or. 143, 23 Pac. 888. That case, however, is not in point, for the reason that there the motion was not made until the evidence was all in and the ruling was based upon the result of all the evidence of both plaintiff and defendant, and this court held that the plaintiff had made a *prima facie* case, and, that being true, it became a question for the jury as to whether the defense was sufficient to overcome it; but in the case before us the trial court changed its ruling upon the admissibility of part of plaintiff's evidence, namely, the statements of Smith, the engineer, in effect striking them out, and in sustaining the motion, held that upon plaintiff's evidence alone plaintiff had not made a *prima facie* case. Probably the better practice is to strike out the evidence erroneously admitted, and then direct a verdict; but the result of the nonsuit was more favorable to the plaintiff than a directed verdict would have been. *Carroll v. G. R. E. Co. (Or.)* 90 Pac. 903.

We find no errors in the ruling of the court below; and the judgment is affirmed.

SWANSTON et al. v. CLARK. (Sac. 1,505.)
(Supreme Court of California. March 28, 1908.
On Rehearing, April 27, 1908.)

1. APPEAL AND ERROR—DISCRETION OF TRIAL COURT — ALLOWANCE OF AMENDMENTS TO PLEADINGS—REVIEW.

The propriety of allowing amendments to pleadings is for the trial court, and its rulings will not be disturbed, except for an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3825-3833.]

2. SAME — REVIEW—HARMLESS ERROR—RULINGS ON DEMURRER.

Where plaintiff amends his complaint, rulings as to its sufficiency before amendment become immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4104.]

3. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE.

A complaint in a suit to enforce specific performance of a contract, which alleges the execution of the contract as set out, consisting of a lease and an option to the lessee to purchase during the term at a fixed price, and which avers that the lessee elected to purchase, that the contract was fair and reasonable, that the price agreed on was in fair proportion to the value of the property, and prays for the reformation of the contract relating to the rights of the parties in the event the lessee does not purchase under the option, shows a contract sufficiently certain on its face to support a suit for performance, especially after the contract has been reformed as prayed for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 61-85, 357-360.]

4. SAME.

Where, in a suit to enforce specific performance of a contract, consisting of a lease for a specified term, and of an option to the lessee to purchase during the term at a fixed price, the complaint alleges the making of valuable improvements by the lessee on the faith of the option to purchase, an answer attempting to allege a rescission by the lessor of the contract, prior to the election by the lessee to purchase, which does not offer to repay the lessee the moneys expended by him in improvements on the land, but only to repay the moneys "paid" the lessor by the lessee, and "to restore everything received" by the lessor under the agreement, is insufficient on demurrer.

5. CONTRACTS—RESCISSION—GROUNDS.

A party to a contract cannot rescind at his pleasure, but only for some one or more of the causes enumerated in Civ. Code, § 1689, authorizing a party to rescind a contract for enumerated grounds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1152-1180.]

6. CANCELLATION OF INSTRUMENTS—PLEADING—ALLEGATIONS—CROSS-COMPLAINT.

The rule that one, seeking to rescind a contract, or to enforce a rescission, which he claims he has effected in the manner provided by Civ. Code, § 1691, prescribing how a rescission may be effected, must allege facts showing that he had good right to rescind, and for what cause a rescission had taken place, or that a rescission had been made by consent, controls, where a rescission is averred as a defense; and a defense, not averring any facts as regard to defendant's right to rescind, and not showing a rescission by consent, is insufficient.

7. VENDOR AND PURCHASER — CONTRACTS — PERFORMANCE.

Where a contract bound a lessor to convey the premises to the lessee, on exercise of his option to purchase at a fixed price, free from all liens and incumbrances, "except such as may be created by" the lease, a conveyance in fee to the lessee, on his electing to purchase, effected a merger of the two estates, and the lease was not an incumbrance.

8. APPEAL AND ERROR—ORDERS—REVIEW.

An order denying a motion to amend a judgment awarding specific performance of a contract is an order made after a final judgment, and is not reviewable on appeal from the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3522.]

9. SAME—HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE—IMMATERIAL ISSUES.

Where there was no ground for rescinding a contract, erroneous rulings, on the admission of evidence relating to service of notice of rescission, were immaterial.

10. SPECIFIC PERFORMANCE—DEFENSES.

The attempt of a party to a contract to rescind the contract without having any grounds therefor did not affect the right of the adverse party to specifically enforce the contract.

11. LANDLORD AND TENANT—LESSEE'S OPTION TO PURCHASE—EXERCISE—TIME.

A lessee was in possession of the premises under a lease expiring January 1, 1903. A new lease, for a term of five years, from October 1, 1902, which gave the lessee the option to purchase the premises at a fixed price at any time during the term, was executed. No cause for a rescission of the contract, contained in the new lease, existed. The new lease provided that the lessee should have immediate possession, and could make any use of the land he saw fit, while the prior lease prohibited any waste or alterations without the consent of the lessor. *Held*, that the lessee had the right, under the new lease, to exercise his option to purchase at any time during the term thereof, and the question whether he was in possession of the premises under the new lease immediately on its execution, or whether he continued to hold under the old lease until the new term began, was immaterial.

12. CANCELLATION OF INSTRUMENTS — CONDITIONS PRECEDENT.

Where a lessee has an option to purchase the premises at a fixed price during the term, and the right to make any use of the premises he sees fit, made improvements in reliance on the contract, the lessor, if he would rescind, must compensate the lessee for the improvements made.

13. PLEADING—EVIDENCE—ISSUES.

It is not error to exclude evidence relating to issues not made by the pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1237-1251.]

14. SPECIFIC PERFORMANCE — CONTRACTS ENFORCEABLE—CONSIDERATION.

A lease gave the lessee an option to purchase the premises for a fixed price at any time during the term. The lessee agreed to pay a higher rent than he considered the premises worth, because he was obtaining an option. The rent was paid for one year in advance, the rent under a prior lease accruing after the beginning of the new lease was canceled, and rent accruing under the prior lease, prior to the new term, was paid in advance. *Held*, that the option to purchase was supported by a sufficient consideration, and the lessee, on electing to purchase, could compel specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 140-152.]

On Rehearing.

15. SPECIFIC PERFORMANCE—RELIEF.

A lessee, having the right to purchase the premises during the term at a fixed price, elected to purchase, and tendered the price, but the lessor refused to convey. The lessee remained in possession of the premises, and sued for specific performance. *Held*, that since the lessee received the use of the premises after the tender, and was not liable for rent, it would be inequitable to compel the lessor to pay taxes and other incumbrances thereafter created, and not made or suffered by him or at his instance, or for his benefit.

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by Charles Swanston and another against Anna E. Clark. From a judgment

for plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Modified and affirmed.

William M. Sims, Albert M. Johnson, and Hiram W. Johnson, for appellant. L. T. Hatfield and A. L. Shinn, for respondents.

SHAW, J. The record presents appeals from the judgment, and from an order denying defendant's motion for a new trial. The action is to enforce specific performance of a written contract to sell real estate. The complaint was amended four times, and there were subsequently two specific amendments allowed to the fourth amended complaint. There is some contention by appellant that the court erred in allowing these amendments, and that there was error in overruling demurrers to the several complaints as they existed prior to the last amendment. The propriety of allowing amendments is a question for the trial court, and its ruling can be attacked on appeal only for an abuse of discretion. No abuse of discretion appears. The result is that the sufficiency of the several complaints, before it was finally perfected by the last amendment, is immaterial.

The complaint, as finally amended, states facts sufficient to constitute a cause of action. It alleges the execution of the contract, which is set out in full. The contract consists of a lease for five years, beginning October 1, 1902, and of an option allowing the lessees to purchase at any time during the term of the lease at a fixed price per acre. It further shows that the plaintiffs, being the lessees, had elected to buy the land in pursuance of the option, had made due tender of the price, and demanded the execution of a deed, which the defendant refused; that the contract was just, fair, and reasonable as to the defendant, and that the price agreed upon was in fair proportion to the value of the property; that two clauses, to which the parties had agreed, to the effect that the plaintiffs were to allow improvements made by them during their possession to remain on the premises, in case they failed to exercise the option and buy, and that plaintiffs should pay the rent for the five years, if they did not sooner exercise the option, were, by mutual mistake, omitted from the contract, and that by like mistake a clause was inserted, giving plaintiffs the right to remove such improvements if they did not purchase. The prayer was for the reformation of the contract, and the enforcement of the defendant's agreement to sell. The mistakes alleged related entirely to the rights of the parties in the event that the plaintiffs did not buy under the option, but chose to occupy for the five-year term under the lease. If material to the case at all, it was only for the purpose of showing that the real contract made was fair, just, and reasonable, and, so far as the option was concerned, supported by a valuable consideration. The facts alleged show the occurrence of a

mutual mistake. We do not think there is any ambiguity or uncertainty in the complaint as amended. The contract, as written, was sufficiently certain on its face to support a suit for performance. The ambiguity as to the two repugnant clauses, the one allowing the removal of the improvements, the other requiring that they remain if the option was not exercised, did not make the contract uncertain as an agreement to sell. Furthermore, if it was uncertain in the condition in which it stood as originally executed, the uncertainties were all removed by the reformation which the court directed. The defendant, in her answer, attempted to allege that the contract had been rescinded by her prior to the tender by the plaintiffs. The demurrer was properly sustained to this part of the answer. It did not aver an offer to repay the plaintiffs the moneys expended by them in improvements on the land, but only to repay the moneys "paid her by them" and "to restore everything received by her under that agreement." The complaint alleges the making of valuable improvements by the plaintiffs, on the faith of the option to purchase. This special answer did not deny the making of these improvements, and it cannot be said that the improvements had been "received" by the defendant. Hence the offer to restore, as alleged in the answer, did not include an offer to compensate the plaintiffs for the moneys expended by them in improving the property, and was insufficient to accomplish a rescission. Again, a party to a contract cannot rescind at his pleasure, but only for some one or more of the causes enumerated in section 1689 of the Civil Code. One seeking to rescind a contract, or to enforce a rescission, which he claims he has effected in the manner provided in section 1691 of the Civil Code, must allege facts showing that he had good right to rescind, and for what cause a rescission had taken place, or that a rescission had been made by consent. 18 Ency. Pl. & Pr. 802, 803, 804. The same rule controls where a rescission is averred as a defense. 18 Ency. Pl. & Pr. 844; *Bruck v. Tucker*, 42 Cal. 353; *Miller v. Fulton*, 47 Cal. 146; *Dorris v. Sullivan*, 90 Cal. 286, 27 Pac. 216; *Kentfield v. Hayes*, 57 Cal. 411; *Arguello v. Bours*, 67 Cal. 450, 8 Pac. 49; *Swasey v. Adair*, 88 Cal. 182, 25 Pac. 1119. The special defense does not aver any facts in regard to defendant's right to rescind, and does not show a rescission by consent. It is therefore insufficient.

The court did not err in adjudging that the defendant should convey the land free from all liens and incumbrances. The contract provided that she should convey it free from all liens and incumbrances, "except such as may be created by the terms of this instrument as a lease of said premises." The conveyance of the property to the plaintiffs in fee would effect a complete merger of the two estates, and the lease would not thereafter

be an incumbrance. The execution of the deed by the defendant would be a complete performance so far as the lease was concerned. The contract, as reformed, did not contemplate or provide that she should retain any right or interest under the lease after she had conveyed in pursuance of the option, even if it did not have that effect before reformation. The lease, therefore, did not constitute an incumbrance within the scope of the covenants in a grant deed. We cannot, upon these appeals, take notice of any liens for reclamation district taxes that may have accrued after the trial. The defendant. It may be observed, could have escaped that liability at any time by performing before the liens accrued. The statement in the record relating to the motion made by defendant to amend the judgment, so as to except such liens and the order denying the same, show that the judgment was entered before the motion and order were made. It was therefore an order made after final judgment, and it cannot be reviewed on appeal from the judgment itself. The defendant did not appeal from the order. As to the liens for ordinary taxes, which may be presumed to have accrued between the time of plaintiffs' tender in January, 1903, and the date of the entry of the judgment in January, 1905, it is sufficient to say that the defendant, having refused to accept the money and make the deed as the judgment declares she should have done, is in no position to complain of the consequence of her own breach of contract.

After the last amendment of the complaint defendant filed a cross-complaint to rescind and cancel the contract as signed, on the ground that it was executed under a mistake as to its contents, induced by fraudulent representations of the plaintiffs. The mistakes so alleged were not the same as those alleged in the amended complaint. Certain other conditions, it was alleged, were intended to have been inserted in the contract, but were omitted because of the fraudulent misrepresentations of the plaintiffs, and the mistake of the defendant caused thereby. The court found that these allegations of the cross-complaint as to fraud and mistake were untrue, and the finding is sustained by the evidence. As it thus appears that there was no just ground for the rescission asked for, it is immaterial whether the court was right or wrong in its rulings concerning the admission of evidence relating to the circumstances attending the service of the notice of rescission. The notice itself was introduced in evidence, and the time of its service was shown, without conflict. This also disposes of the objection that the plaintiffs' offer of performance was made after the notice of rescission was served. As the cause of rescission as alleged did not exist, the defendant had no right to rescind, and her attempt to do so did not affect the right of the plaintiffs to have specific performance.

Prior to the execution of the contract the

plaintiffs were occupying the lands under a previous lease which, by its terms, did not expire until January 1, 1903. Inasmuch as there was no cause shown for a rescission, the plaintiffs had the whole of the term in which to exercise their option, and the question whether they were technically in possession of the premises under the new lease immediately upon its execution, or whether they continued to hold under the old lease until October 1, 1902, when the new term was to begin, is entirely immaterial. The new lease provided that the plaintiffs should have immediate possession, and could make any use of the land they saw fit. The prior lease forbids any waste or alterations without the lessor's consent. The plaintiffs, immediately after the execution of the new lease, and because of their having procured the option to purchase, began certain improvements, which they would not have made under the old lease. They had the right to do this in reliance on the contract, and if the defendant desired to rescind the contract, and had the right to do so, she would have been required to compensate them for the improvements thus made.

In October, 1903, while the case was on trial, and before the last amendment to the complaint was proposed or filed, the court refused to allow the defendant to introduce evidence relating to a mistake in the terms of the agreement. This was not error. At that time, so far as the record shows, there was no issue upon the subject of mistake, and the evidence was irrelevant.

The claim that there was no sufficient consideration to support the option as a contract is not sustainable. There was evidence to the effect that the plaintiffs agreed to pay rent at a higher rate than they considered it worth, because of the fact that they were obtaining an option. This rent was paid for one year in advance, the rent for the last three months of the old lease was canceled, and the rent accruing under the old lease from July to October 1, 1902, although not due until January 1, 1903, was paid at the time of the execution of the new lease. All this constituted a sufficient consideration for the option.

Many other assignments of error are made by the appellant, which are included in and disposed of by the foregoing conclusions. Other errors are urged, but they are of so trivial a nature that we do not think it necessary to discuss them. They could not, under any circumstances, have been injurious to the defendant.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

On Rehearing.

PER CURIAM. Upon further consideration of this cause, pending an application

for rehearing, we are of the opinion that, inasmuch as the plaintiffs, ever since January 14, 1903, have been in possession of the land, receiving all income, use, and profit thereof, and being under no obligation to pay rent to the defendant after that date, it would not be equitable to compel the defendant to pay the taxes and other incumbrances created since that date, and not made or suffered by her, or at her instance, or for her benefit. See *Miller v. Corey*, 15 Iowa, 166; *Farber v. Purdy*, 69 Mo. 601; *Hall v. Denckla*, 28 Ark. 515; *Pomeroy v. Bell*, 118 Cal. 635, 50 Pac. 683; *Miller v. Waddingham*, 91 Cal. 381, 27 Pac. 750, 13 L. R. A. 680. The opinion hereinbefore rendered, so far as it is contrary to this conclusion, is, to that extent, modified.

The judgment of the court below is modified by altering the clause providing for the execution of a deed by the defendant so that said clause shall read as follows: "Within fifteen days after notice of the entry of this decree make, execute and deliver to the plaintiffs, or to the clerk of the superior court for the plaintiffs, a deed conveying to the plaintiffs, their heirs and assigns, the premises hereinafter described, free from all liens and incumbrances existing upon or against the same on January 14, 1903, or created thereafter by the defendant, or at her instance, or for her benefit." As thus modified, and in all other respects, the judgment is affirmed. The appellant shall not recover costs of appeal herein.

153 Cal. 507

DIEPENBROCK v. SUPERIOR COURT OF SACRAMENTO COUNTY. (S. F. 4,929.)

(Supreme Court of California. May 15, 1908.
Rehearing Denied June 11, 1908.)

1. HOLIDAYS—JUDICIAL PROCEEDINGS.

Const. art. 6, § 5, declaring that the superior courts shall always be open, legal holidays and nonjudicial days excepted, but that injunctions and writs of prohibition may be issued and served on such days, does not prohibit all business in the superior courts on a legal holiday or nonjudicial day except the issuance of injunctions and writs of prohibition, but leaves the Legislature at liberty to allow or disallow the transaction of all judicial business on such days.

2. CONSTITUTIONAL LAW—CLASS LEGISLATION.

Act Nov. 27, 1907 (Laws 1907, p. 561, c. 287), amends Code Civ. Proc. § 10, declaring what days shall be deemed holidays, by adding thereto that holidays besides those enumerated shall be such days as the Governor may declare such, and provides that the Governor may declare special holidays on which no public duty shall be suspended or prohibited except such as affects the administration of justice in the courts of the state, as prescribed by Code Civ. Proc. § 135, which section is amended by adding thereto that on all special holidays the courts shall be open for the transaction of all judicial business, except the trial of an action based on a contract for the direct payment of money. *Held*, that such exception is special legislation, in violation of the Constitution, and void, since such class does not owe its existence to any con-

stitutional, rational, legal distinctions, which alone justify such classification.

3. STATUTES—EFFECT OF PARTIAL INVALIDITY.

Act Nov. 27, 1907 (Laws 1907, p. 561, c. 287), amends Code Civ. Proc. § 10, declaring what days shall be deemed holidays, and providing that the Governor may declare special holidays on which the courts shall be open for the transaction of all judicial business, except the trial of an action based on a contract for the direct payment of money. *Held*, that the exception of the trial of an action based on such contracts was so integral a part of the act that, being void because special legislation, the whole act must fall.

In Bank. Application by M. H. Diepenbrock for a writ of prohibition against the superior court of the county of Sacramento and Hon. Peter J. Shields, judge thereof. Writ denied.

L. T. Hatfield, V. L. Hatfield, and W. H. Hatfield, amici curiæ. R. Platnauer (Grove L. Johnson, of counsel), for petitioner. C. E. McLaughlin, A. L. Shinn, C. B. Harris, and C. O. Busick, for respondent.

HENSHAW, J. This is an application for a writ of prohibition, the purpose of which is to have determined the validity of section 135 of the Code of Civil Procedure as amended on November 27, 1907. Laws 1907, p. 681, c. 358.

Article 6, § 5, of the Constitution, declares that the superior courts of this state "shall be always open (legal holidays and nonjudicial days excepted)," but "injunctions and writs of prohibition may be issued and served on legal holidays and nonjudicial days." Holidays were defined by the Codes, and were declared, besides certain enumerated days, to be "every day appointed by the President of the United States or by the Governor of this state for a public fast, thanksgiving or holiday." It was then declared by section 133, Code Civ. Proc., that courts of justice may be held and judicial business transacted on any day excepting as provided in the next section. Section 134, Code Civ. Proc., then provided as follows: "No court, other than the Supreme Court, must be open for the transaction of judicial business on any of the holidays mentioned in section ten, except for the following purposes: (1) To give, upon their request, instructions to jury when deliberating on their verdict; (2) to receive a verdict or discharge a jury; (3) for the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature. Injunctions and writs of prohibition may be issued and served on any day."

It will be noted that the language above quoted empowers the courts to transact business other than that designated by the Constitution. But, to the objection that the Constitution prohibited all business in the superior court on a legal holiday or nonjudicial day, except the issuance of injunctions and writs of prohibition, this court long since answered that the Constitution did not contemplate such a result, but "leaves the Legislature at liberty to allow or disallow the transaction

of all or any class of judicial business upon legal holidays." *People v. Soto*, 65 Cal. 621, 4 Pac. 664; *Ex parte Smith* (Cal. Sup.) 93 Pac. 191.

Such was the condition of the law when the Legislature was called together in extraordinary session in the autumn of 1907. The Legislature was convened principally for the purpose of devising some measure of relief from the effects of the financial panic which the state was then undergoing. A year and a half previously, in the spring of 1906, following the San Francisco disaster, it had seemed necessary to the Governor to declare holidays until such time as affairs again resumed something of their normal condition. Necessary and beneficial upon the whole, it was universally recognized that the state at large suffered no little inconvenience from the interruption to judicial business enforced under the law by the declaration of these holidays. Again, in the autumn of 1907, owing to the financial crisis through which the state was passing, it had been deemed necessary by the Governor to declare a series of holidays. And, again, as against the compensating good, it was recognized that hardship resulted from the general suspension of the judicial business of the superior courts. It was under these circumstances that the Legislature undertook the commendable task of preserving the benefits and advantages of such holidays, while minimizing their evils. To accomplish this result, it amended section 10 of the Code of Civil Procedure relating to holidays, adding to the language of section 10 above quoted that holidays, besides those enumerated in the section as it originally stood, should be "such days as the Governor may declare as special holidays." Then proceeding with the consideration of these special holidays, the section declared "that the Governor of the state may declare special holidays, and he may in one proclamation designate one or any number of consecutive days as special holidays, and during any such special holidays no public duty shall be suspended or prohibited except such as affect the administration of justice in the courts of this state as prescribed by section 135 of this Code for the control of such courts." Section 135 of the Code of Civil Procedure was then amended by adding to it this new matter: "On all special holidays the courts of this state shall be open for the transaction of any and all judicial business except the trial of an action or the rendition of a judgment based upon a contract, expressed or implied, for the direct payment of money."

In the briefs of counsel much consideration is paid to the question as to whether or not it is within the power of the Legislature, by calling a holiday a "special" holiday, to clothe it with characteristics, privileges, and immunities which do not pertain to a "general" holiday. It is argued that to permit this is to permit an evasion of the Constitution which speaks of holidays, and which, so speak-

ing, must mean all holidays, special as well as general; that the essential distinction, and the only essential distinction, which can exist between a special holiday and a general holiday, is found in the nature of their creation, but that when once created both stand upon the same plane with equal footing. A general holiday, it is thus said, is a day set apart and declared to be such by the Legislature itself, notice being carried to all the world by the statute that such particular day has been set apart for rest, recreation, fasting, thanksgiving, public rejoicing, public mourning, or any of the other legitimate purposes for which such a day may be decreed; upon the other hand, that a special holiday is special only in the sense that it is not a recurring anniversary, but is created from time to time by the declaration of the chief executive when occasion seems to call for it. But we need not here determine this question upon the broad lines of its presentation, for we think that, conceding that the Legislature has the power to make a distinction in some of their attributes and characteristics between a general holiday and that which they have designated a special holiday, nevertheless the particular difference, distinction, and limitation which they have here made affecting the courts of justice and the administration of justice is special legislation which cannot be upheld. When this court in *People v. Soto*, supra, declared that the Legislature was at liberty to allow or disallow the transaction of all or any class of judicial business upon legal holidays, it meant no more, and could have meant no more, than that the Legislature could authorize the transaction of any class of business which was not in itself obnoxious to the dictates of the Constitution. Up to that time the exceptions as to writs of prohibition and injunctions, while special in their nature, were classes designated by the Constitution itself, and therefore not to be questioned. In all other respects the purposes enumerated in section 134, Code Civ. Proc., for which judicial business could be transacted upon a holiday, were purposes which, while falling into classes, fell into classes carrying, from the very reading of their designation, the reason for their existence and the generality and uniformity of their operations. To give instructions to a jury when deliberating on their verdict meant instructions to any jury so deliberating to facilitate their deliberations and bring their labors to a close. To receive a verdict or discharge a jury was to receive the verdict of and discharge any jury that the members composing it might not be unnecessarily and unduly restrained and confined. To exercise the powers of a magistrate in a criminal action or proceeding of a criminal nature are general provisions tending to the speedy administration of the criminal laws in the interest of the commonwealth.

But for the first time by the amendment of section 135 is the effort made to designate one

class of litigants, and to say to them that, "While the courts of this state are open to all other suitors, its doors are closed to you." It matters not whether the Legislature should attempt to do this directly by virtue of its own statutory enactment, or indirectly by empowering the chief executive to accomplish the same result through the medium of special holidays. If the Legislature could not do this directly, it certainly could not accomplish the same result by indirection, and the proposition thus stated is: Can the Legislature say that the courts of justice, for 30 days or 60 days, or for any other period of time, while open to every other litigant in every kind and class of litigation, shall be closed to him who seeks the collection of money due upon a contract, or to him who seeks to recover damages for tort, or to him who seeks equitable as distinguished from legal relief, or, indeed, to any class as distinguished from another? Assuredly it will not be said that this may be done, unless there be some valid, legal reason for the class distinction and for the putting of the class so distinguished under this prohibitory ban. As to the exception under consideration it is of course apparent, recognized, and admitted that the law was designed to protect the debtor class in times of great financial stringency. But can such extraordinary privilege to a debtor be justified under our law? It is to be noted that in thus favoring the debtor from the legal enforcement of his creditor's demand, read from the other and equally important point of view, it is a denial to the creditor of the right to enforce such demand. It cannot be a favor to one class without inflicting a corresponding injury upon the rights of another. The creditor of one man is frequently the debtor of another. In the multiplicity of the transactions of modern business the creditor of a debtor residing in San Francisco may himself be the debtor of a resident of New York. Unable to enforce his collections from the local debtor, he stands liable to business disaster at the hands of his New York creditor. The class thus created by law is not a class owing its existence to any constitutional, rational, legal distinctions, which alone justify such classification, but the reason for its creation is personal as distinguished from governmental, and the plain object of the law is unduly to favor the debtor to the hardship of the creditor in times of financial stringency. Commendable as was the motive which prompted such legislation, it cannot be upheld.

We have stated that it is unnecessary to determine whether or not the Legislature has the power to make a distinction in characteristics between a legal holiday and a special holiday; but we are brought to the question as to whether this determination which forbids closing the courts to the trial of an action based on contract for the direct payment of money does or does not render the whole amendment void. In other words, is

the exception so integral a part of the statute as to lead to the conclusion that, if the Legislature had known it was void, it would not have enacted the amendment, or is it to be concluded that the exception may fall and the amendment stand, to the effect that the Legislature has declared that upon special holidays the courts of the state shall be open for the transaction of any and all judicial business? Clearly the first view must obtain. The purpose of the enactment was to allow the judicial business of the state to proceed in all matters saving one. In deciding that that one may not be excluded, if it should be held that the section may still stand, is to declare that the Legislature had enacted that on all special holidays the courts of this state shall be open for the transaction of any and all judicial business without exception, an interpretation of a statute which it did not enact, and which is in irreconcilable variance with the result which it attempted to accomplish. For which reasons it is held that the amendment to section 135 of the Code of Civil Procedure, approved November 23, 1907, is void.

In conclusion, then, we repeat that it is not decided that the Legislature may not make certain distinctions between general holidays and special holidays; but the distinction which here they sought to make being abortive and void, the law for the creation of special holidays itself falls. By this failure the days designated as special holidays were not transformed into general holidays, and were not holidays at all, with the result that they became judicial days, upon which the functions of the courts of the state were in no respect suspended. *Risser v. Superior Court* (Cal. Sup.) 93 Pac. 85.

It follows from the foregoing that petitioner is not entitled to his writ of prohibition, and his application therefor is denied.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

8 Cal. App. 7

ROUSSIN v. KIRKPATRICK et al.
(Civ. 393.)

(Court of Appeal, Third District, California.
March 27, 1908.)

1. APPEAL AND ERROR—BRIEFS—INCORPORATION OF PORTION OF RECORD INVOLVED—PHONOGRAPHIC REPORT OF PROCEEDINGS INSTEAD OF BILL OF EXCEPTIONS.

Under Code Civ. Proc. §§ 941a, 941b, 941c (St. 1907, p. 753, c. 410), providing an alternative method of taking appeals, and sections 953a, 953b, 953c (St. 1907, p. 750, c. 408), providing an alternative method of preparing records on appeals by making and filing in lieu of a bill of exceptions a transcript of the phonographic report of the proceedings, which need not be printed, but requiring in said section 953c that the parties print in their briefs or in a supplement thereto such portions of the record as they desire to call to the attention of the court, it is not sufficient to indicate in the briefs the portions of the record relied on by simply citing the page of the transcript where such portions

may be found, since such transcript was not intended as a substitute for the printed record previously required.

2. SAME—REVIEW—FINDINGS OF COURT ON CONFLICTING EVIDENCE.

In an action for services as a school teacher, plaintiff, who was discharged after the fall term of four months, contending that he had been employed to teach the school year of eight months, where there was evidence from which the court could have inferred that the engagement was for the fall term, and that plaintiff so understood it, although he testified otherwise, the court's finding that plaintiff was employed for the fall term only cannot be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983–3989.]

3. TRIAL—TRIAL BY COURT—FINDINGS.

Where the allegations set forth in certain paragraphs of a verified complaint were admitted by insufficient denials, no finding was necessary thereon.

4. SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—ACTION FOR COMPENSATION—TRIAL—FINDINGS.

In an action for services as a school teacher, the complaint alleged employment for the period of nine months. The allegation was denied by the answer, which alleged that plaintiff was employed to teach for only four months. The court found that plaintiff was employed to teach for four months only, and also that the contract for four months had been paid in full. *Held*, that this was a sufficient finding on that issue.

5. WITNESSES—IMPEACHMENT—CONTRADICTORY STATEMENTS.

In an action for services as a school teacher, plaintiff, who was discharged after the fall term of four months, contending that he was employed to teach the school year of nine months, testimony relating to certain declarations made by plaintiff in the presence of witness which tended to dispute plaintiff's testimony as to the period for which he had been employed was admissible for that purpose.

Appeal from Superior Court, Del Norte County; John L. Childs, Judge.

Action by A. C. Roussin against O. D. Kirkpatrick and others, as trustees of Redwood school district, Del Norte county. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. *Affirmed*.

Frank W. Taft, for appellant. G. W. Howe, for respondents.

CHIPMAN, P. J. Action for services alleged to have been performed by plaintiff for defendants as a school teacher. The cause was tried by the court without a jury, and defendants had judgment, from which and from the order denying his motion for a new trial plaintiff appeals.

The record purports to have been made up under new sections 953a, 953b, and 953c of the Code of Civil Procedure. St. 1907, p. 750, c. 408. The appeal is taken under new sections 941a, 941b, and 941c. St. 1907, p. 753, c. 410. Some interesting questions of practice arising under these sections are presented by respondents in their objections to the review of alleged errors, which we prefer not at this time to take up. We invite attention, however, to the closing paragraph of

section 953c, which reads: "In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Whatever motive of utility or economy suggested these new sections to the Codes, it is quite clear to our minds that the Legislature did not intend to require the reviewing court to grope through an unprinted transcription of the phonographic report of the trial to find the testimony and documents relied upon by the parties, or that it would be sufficient compliance with the statute for the parties to indicate in their briefs the portions of the record relied on by simply citing the page of this transcription where such portions may be found. If the Legislature had intended to substitute such a record for the printed record hitherto required, no such provision as we have quoted would have been placed in the section. Appellant has in a measure complied with the statute, but respondents not at all, and we might with propriety refuse to examine the transcript in aid of respondents. As the record is not of much length, and the issues are by no means complicated, we have in this instance undertaken to follow the directions of the briefs to find the evidence relied upon.

The court made the following findings:

(1) That in the month of July, 1906, defendants employed plaintiff to teach the grammar school in Redwood district for the period of four months of the school year ending December 21, 1906, at the agreed price of \$60 per month; (2) that plaintiff received \$240 "as payment for said teaching for said four months of school in said district"; (3) that plaintiff has not been damaged in any sum. As conclusion of law the court found that defendants are entitled to judgment.

Plaintiff claimed in his complaint that he was employed to teach "for the period of nine months, the school year ending June 30 1907," and his contention now is that the evidence "discloses a contract * * * whereby plaintiff was employed to teach Redwood school for a period of eight months." He further contends that the court failed to find upon all the material issues. The principal question is whether plaintiff was employed for a period of four months or of eight months. Plaintiff testified that in July, 1906, defendant trustee Kirkpatrick called upon him and stated that he was directed by the trustees to find some one to teach their school, and thought he would come and talk with plaintiff about it. Plaintiff was at the time temporarily disabled physically. He testified: "Well, he said, supposing you agree to teach our school, and if you can't take—open the school early enough you can get some one in your place to start it. * * * I asked him how long a term of school there would be in that district. He said 8½ months last year, and we had a little money left over, and we thought that we would put

it nine months this year. Well, I said, under these conditions I will undertake it, although I am pretty sure I will have to get a substitute for a while, but for a short time I will not accept it, for I might not be able to teach until after Christmas time, so if we can put in four months this fall and finish up in the spring all right. Then he said very well, if that suit you, it will suit me, or us rather. Try to get along as fast as you can do so, and in the meantime I will be down again or send some one to see you." It appeared that plaintiff hired a substitute to open the school and she taught for two months in his place, and following her plaintiff taught for two months, closing what was understood to be the fall term of the school on December 21, 1906, and was fully paid for this time. He testified that he was to take up the spring term in the February following. On February 9th plaintiff called upon trustee Watkins, "ready to open school on the 11th," and was informed that another teacher had been employed for the spring term. There was evidence that Kirkpatrick was not directed to employ a teacher for any definite time; that no records of the proceedings of the trustees were kept showing the employment of plaintiff; that the trustees other than Kirkpatrick understood plaintiff's employment to have been for the fall term; that plaintiff had made statements to the effect that he was hired to teach the fall term, to teach the school for four months; and that he had stated that he would not teach the spring term unless his wages were increased and the trustees and children of the school desired it. A witness testified: "He told me that he was only hired for four months, and that he should not teach unless the children and trustees wanted him." During the vacation plaintiff had taken a private class, and early in February returned to learn as to the spring term of the school. There had meantime been a change in the personnel of the board of trustees, one having died, and his successor having been appointed. Another witness met plaintiff just before the spring term of the school opened. She was asked what plaintiff said to her at that time, and answered: "I asked Mr. Roussin if he was going to take the school for the spring term for four months, and I thought he said he was not sure he would take it or not. They offered him a raise of wages to take the school, but he didn't know whether he would or not. He said he hated to refuse to take it, because Mr. Watkins and Mr. Kirkpatrick had been so good to him." There was some evidence tending to show that the teachers had previously been hired for the term, and that there were two terms, fall and spring terms. The evidence showed that there was a difference of understanding among the trustees as to the time for which plaintiff was engaged, Kirkpatrick holding that it was for the school year, and the others that it was

for a single term as they understood the meaning of a term. There was evidence from which the court could have inferred that the engagement was for the fall term, and that plaintiff so understood it though he testified that the fact was otherwise, and hence the finding of the court cannot be disturbed.

Appellant complains that the court failed to find upon the issues stated in paragraphs 1, 2, 4, and 5 of the verified complaint. The allegations set forth in paragraphs 1, 4, and 5 were admitted by insufficient denials, and no finding was necessary thereon. Paragraph 2 alleged employment for the period of nine months. This was denied by the answer, which alleged as the fact that plaintiff was employed to teach for the period of four months and no longer. The court not only found that plaintiff was employed to teach for the period only of four months ending December 21, 1906, but it found that the only contract entered into between plaintiff and defendants "has been paid in full, for teaching the Redwood school for the term of four months ending December 21, 1906." This was sufficient.

Appellant claims error "in overruling the objections of plaintiff to the introduction of the testimony of the witness Margaret Watkins as shown on page 30 of the transcript." The objection is not directed to any particular portion of the testimony, some of which was undoubtedly admissible, and was not objected to. The testimony objected to related to certain declarations made by plaintiff in the presence of witness which tended to dispute plaintiff's testimony as to the period for which he had been employed, and was admissible for that purpose. The same may be said of the testimony of the witness Alice Hussey.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

8 Cal. App. 41

WOODS v. POTTER, Auditor of City of San Diego. (Civ. 467.)

(Court of Appeal, Second District, California.
April 3, 1908. Rehearing Denied by
Supreme Court June 2, 1908.)

1. MUNICIPAL CORPORATIONS—CITY COUNCILS —DUTIES OF MEMBERS.

Members of city councils occupy a position of trust, and are bound to the same measure of good faith towards their constituents that a trustee is to his cestui que trust, and the mere fact that a member of such a body acts as such in connection with any matter in which he is interested vitiates the transaction.

2. OFFICERS—PUBLIC OFFICERS—RIGHT TO COMPENSATION.

No contractual relations arise between an officer and the state by reason of the election or appointment of the former. There is no implied obligation to pay him for his services, and to recover he must show a right by law to compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 132.]

3. MUNICIPAL CORPORATIONS—CHARTER OFFICERS—RIGHT TO COMPENSATION.

In order that a charter officer shall be entitled to compensation for his services, the burden is on him to show that either the charter which created the office, or the legislative or constitutional authority under which the charter was framed, attached to that office the right to receive pay for his services.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 357.]

4. SAME—MEMBERS OF COMMON COUNCIL.

The freeholders' charter under which the city of San Diego was organized (St. 1889, pp. 643-729, c. 22) took effect in May, 1889, and contains provisions relating to the compensation of all the charter officers of the city, except the members of the common council, as to whom it is silent. Article 2, c. 2, § 1, subd. 38, authorizes the council to make rules for the government of all employes, officers, etc., and to fix salaries and wages not otherwise provided by general laws or by the charter. Article 3, c. 9, § 1, reads: "The annual salaries of the officers and the compensation of the employes of the city shall be as follows: (Salary for mayor and other officers as to whom the amount to be received is fixed.) And all other officers and employes as may be fixed by the common council, and all salaries shall be payable monthly." In 1905 by an amendment of the charter the number of members of the council was changed from 27 to 9, but no change was made in the provisions of the charter relating to official salaries. *Held*, that the council had no power to create salaries for its members.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 369.]

Appeal from Superior Court, San Diego County; Benjamin F. Bledsoe, Judge.

Petition by Percival E. Woods for writ of mandate against Daniel Potter, as auditor of the city of San Diego. From a judgment denying the writ, petitioner appeals. Affirmed.

A. A. Haines and Haines & Haines, for appellant. George Puterbaugh, City Atty., for respondent.

TAGGART, J. Appeal from a judgment denying a writ of mandate to compel the issuance of a salary warrant.

Defendant is auditor of the city of San Diego, and plaintiff was elected a member of the common council of that city at an election held April 2, 1907, the term of his office to commence May 6, 1907. The claim of plaintiff to salary is based upon Ordinance No. 2,814 of the city of San Diego, passed and adopted by the common council by a two-thirds vote after its disapproval by the mayor of the city. The ordinance was originally passed February 25th, disapproved by the mayor March 7th, and adopted by a two-thirds vote of the council on April 3, 1907, one day after the election of plaintiff, and by its terms was to take effect and be in force from and after May 6, 1907.

The freeholders' charter under which the city of San Diego is organized took effect the first Monday in May, 1889 (St. 1889, pp. 643-729, c. 20). It contains provisions relating to the compensation of all the charter officers of the city, except the members of

the common council, as to whom the charter is silent. Ten officers are given fixed annual salaries, the salaries of two and the deputies of one are to be fixed by the common council, and the members of five boards are to serve without compensation. The right to create the salary in question is assumed to depend upon an exercise of a power vested in the common council by either one or both of two clauses of the charter, to wit: Subdivision 38 of section 1 of chapter 2 of article 2, which reads, "To make rules and regulations for the government of all servants, employes, officers, and departments, and to fix the fees and charges for all official services, and to fix salaries and wages not otherwise provided by general laws or by this charter"; or a clause in section 1, chapter 9 of article 3, which reads, "The annual salaries of the officers, and the compensation of the employes of the city shall be as follows: (Salary for mayor and other officers as to whom the amount to be received is fixed.) And all other officers and employes as may be fixed by the common council, and all salaries shall be payable monthly."

The petition alleges that prior to the passage of Ordinance No. 2,814 (from 1889 to 1907) "there has been no exercise of power by the common council of said city for or against providing, fixing, or establishing any salary or compensation for members of said common council." From this allegation it clearly appears that prior to the passage of Ordinance No. 2,814 there was not only no salary fixed which could be increased, but there was no salary or compensation attached to the office at all. The presumption arising from the absence of express authorization of compensation by the charter is strengthened by the rule of contemporaneous construction, and the presumption from 18 years acquiescence that it was not intended by the makers of the charter that the members of the common council should have any compensation for services. It further appears that in 1905 by an amendment of the charter the number of members of the council was changed from 27 to 9, but no change was made in the provisions of the charter relating to official salaries. This failure is significant, as this omission should have been supplied by an amendment to the charter. The propriety of this is apparent, when it is observed that the general clause under which the present ordinance is justified places the authority to create and fix such salaries in the hands of that body itself. The intention of the makers of the charter, as expressed by the original charter, cannot be affected by the mere reduction in the number of members of the council by the amendment of 1905.

To meet the effect of the clause in the charter requiring that "all official salaries provided for in this charter" shall be re-

adjusted and fixed anew in the month of January, 1891, and every four years thereafter, appellant contends that as this is the first and original fixing of his compensation, and not a readjustment, or fixing again or anew, this clause has no application. If we accept this argument as having any weight, then it logically follows that the common council would (the first time) have the power to fix their compensation at any amount they desired, and the members of the council so fixing such salary might thereby become the recipients of their own bounty bestowed without limitation from the public treasury. The same line of reasoning is used in meeting respondent's claim that the ordinance is in violation of section 9 of article 11 of the Constitution. None of the cases cited by appellant to support this view consider the question whether or not the power which creates the office should also determine the right of the officer to compensation. In none was it held or contended that a subordinate body was authorized to create a salary for an office which owed its existence to a superior authority, nor do we think such authority could be implied. The two clauses of the charter relied upon here as granting the power relate generally to servants and employes, as well as officers of the corporation. The salary of no other charter officer of the city is dependent upon the existence of this power. The use of the word "officer" in the sense in which it is used in these clauses or either of them does not necessarily imply that a charter officer is intended. *Patton v. Board of Health*, 127 Cal. 395, 59 Pac. 702, 78 Am. St. Rep. 66.

Members of city councils occupy a position of trust, and are bound to the same measure of good faith toward their constituents that a trustee is to his cestui que trust. *Andrews v. Pratt*, 44 Cal. 309. The mere fact that a member of such a body acts as such in connection with any matter in which he is interested vitiates the transaction. *Finch v. Riverside*, 87 Cal. 597, 25 Pac. 765. It will be presumed that under such circumstances self-interest prevents the individual member from protecting the rights of the public against his own. *Capital Gas Co. v. Young*, 109 Cal. 140, 41 Pac. 869, 29 L. R. A. 463. The charter here in question prohibits members of the common council from being directly or indirectly interested in contracts whereby they may receive any money or profit from their own action taken in behalf of the city.

No contractual relations arise between an officer and the state by reason of the election or appointment of the former. There is no implied obligation to pay him for his services rendered. To recover he must show a right by law to compensation. *Abbott on Municipal Corporations*, § 685; *Irwin v. Yuba Co.*, 119 Cal. 686, 52 Pac. 35. If the act authorizing the making of the city charter pro-

vides that the latter shall fix the compensation of the officers of a city, a provision in the charter fixing a maximum will not authorize the council to fix such a salary even within such maximum. *Taylor v. City of Tacoma*, 8 Wash. 174, 35 Pac. 584. If the officer is not satisfied with the compensation, he is not bound to hold the office or perform the duties thereof. *Coyne v. Rennie*, 97 Cal. 503, 32 Pac. 578.

In order, then, that a charter officer shall be entitled to compensation for his services, the burden is upon him to show that either the charter which created the office, or the legislative or constitutional authority under which the charter was framed, attached to that office the right to receive pay for his services. Such showing has not been made here. The power to "make rules and regulations for the government of all servants," etc., * * * "and to fix salaries and wages not otherwise provided by general law or by this charter," or the recital that "all other officers and employes as may be fixed by the common council," cannot be held to be a sufficient showing for this purpose. We have not overlooked the fact that in the section relating to official bonds there appears the clause "all salaried officers of this city, other than the mayor and members of the common council, must," etc. Conceding that in the interpretation of a charter containing an ambiguous statement as to the right of the members of the city council to a salary this clause might be considered in determining the intentions of the charter makers, it can have no application where the charter is devoid of any authorization whatever. Our conclusion in this regard rests upon the fact that it nowhere appears that the charter makers intended that the members of the common council should be compensated for their services.

While this view disposes of the case, there are other reasons which appear to us to justify the trial court in denying the writ asked for. The question of increase of compensation has been presented by both parties as if the time of the change or increase should be determined by the date of the passage of the ordinance. Our own Supreme Court has expressly said that the test of the time of increase is, "When did the law take effect?" *Harrison v. Colgan*, 148 Cal. 76, 82 Pac. 674. Those cases which construe constitutional prohibitions against an increase of salary similar to section 9 of article 11, upon the theory that its purpose is solely to prevent the possibility of an officer using his official position to obtain an increase of compensation after his election or his term begins, are distinguished by the opinion of the court in that case. The constitutional provision it is said was intended as well to avoid and prevent the abuses which may arise by reason of arrangements between candidates who are reasonably assured of

election or appointment and the legislative power, if such arrangements be made to take effect after the election of such candidates, regardless of the time of the enactment. The date of the increase in this case according to this rule was May 6, 1907, and the discussions as to when the ordinance was enacted become unimportant.

If we were to accept the view of petitioner that he was entitled receive a salary which was not fixed or expressly provided for by the charter, such a claim against the city would have to be presented to and allowed by the auditing committee of the city before a warrant for it could issue. Sections 1 and 2, chap. 2, art. 6. Only monthly salaries fixed by the charter are excepted from the rule provided in these sections. The complaint does not allege any such presentation and allowance or rejection, and therefore, upon that theory, does not state a cause of action.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

8 Cal. App. 35

PERRY v. J. NOONAN FURNITURE CO.
(Civ. 415.)

(Court of Appeal, First District, California.
April 3, 1908.)

1. APPEAL AND ERROR—RECORD—REQUISITES—INSTRUCTIONS.

Where it did not appear from the statement of case that a particular instruction which defendant assigned as error on appeal was not given at defendant's request, it would not be reviewed.

2. MASTER AND SERVANT—ORIGINAL HIRING—EXPIRATION OF TERM—CONTINUANCE OF EMPLOYMENT—PRESUMPTION.

Where an employé, hired at a fixed salary continues in the same employment after the expiration of the term of the original hiring without any new contract as to compensation, it is presumed that the parties intend the same compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 11.]

3. SAME—QUANTUM MERUIT.

Where an employé at a fixed salary continues in the same employment after the expiration of the term, the original contract controls as to the compensation the employé is entitled to receive, so that he cannot recover on a quantum meruit.

4. SAME—EVIDENCE.

Plaintiff for a considerable time had been employed by N. in his furniture business at a weekly salary of \$27.50 and \$32.50. N. having formed a corporation to continue the business, in which he owned nearly all the stock, plaintiff continued without a new contract to work as manager of the corporation, and drew from it \$32.50 per week until he was discharged. Plaintiff having been appointed manager by the board of directors for a year, and discharged before the year expired, sued for the value of his services, and testified that they were reasonably worth \$500 per month, and that the amount that he drew was only to cover living expenses. *Held*, that evidence that the services he performed as manager of the corporation were the same as those previously performed for N. was admissible to show that it was intended that he should be employed by the corporation

on the same terms as those prescribed by the original contract.

5. CONTRACTS—PROOF—CONDUCT.

Under Civ. Code, § 1621, the terms of a contract may be manifested by conduct when not stated in words.

6. CORPORATIONS—ACTION FOR SERVICES—EVIDENCE.

In an action on quantum meruit against a corporation by an officer, evidence of the situation of the parties at the time, the relations, if any, in which they stood, of a business character or otherwise, is admissible to establish the understanding and intention of the parties.

7. WITNESSES—CROSS-EXAMINATION.

Where, in an action against a corporation for breach of an employment contract, plaintiff testified that his services were worth \$500 per month, evidence that he had performed the same services for N. prior to the organization of a corporation for \$32.50 per week was proper cross-examination.

8. CORPORATIONS—OFFICER'S SERVICES—ACTIONS—EVIDENCE.

In an action against a corporation for breach of a general manager's contract of employment, a by-law of the corporation defining the duties of the general manager was admissible to show the nature of plaintiff's position.

9. EVIDENCE—VALUE OF SERVICES—EXPERTS—DISCRETION.

Determination of the qualification of a witness offered as an expert as to the value of services is largely within the discretion of the trial judge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2363.]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Donald E. Perry against the J. Noonan Furniture Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

See 1 Cal. App. 609, 82 Pac. 623.

R. M. Fitzgerald (Campbell, Fitzgerald, Abbott & Fowler, of counsel), for appellant. F. W. Sawyer and Curtis Hillyer, for respondent.

HALL, J. This is an appeal by defendant from a judgment entered against it upon the verdict of a jury and the order of the court denying its motion for a new trial. The complaint is in two counts. In the first count plaintiff sought to recover a balance of \$10,021.91 upon quantum meruit for services rendered by plaintiff to defendant, as its general manager, from November 18, 1898, to March 25, 1901. The second count alleges that plaintiff was duly elected general manager of defendant by its board of directors on the 18th day of February, 1901, for the term of one year from said day, and performed the duties of said position until the 25th day of March, 1901, from which last day defendant has refused to permit plaintiff to perform such duties. Upon this count plaintiff sought to recover the sum of \$5,385 as the reasonable value of the services that would have been performed but for the prevention by defendant. The jury rendered a general verdict in favor of plaintiff.

tiff for the sum of \$2,500, for which judgment was accordingly entered for plaintiff.

Appellant objects to certain instructions given to the jury as misleading. Respondent insists that we cannot review the action of the court in this regard, for the reason that it does not appear from the record that the instructions now complained of were not given at the request of the defendant, and we think that this contention must be sustained. The statement of the case recites that at the conclusion of the testimony, and after argument by the respective counsel for each party, it was stipulated "that all instructions given by the court on its own motion were excepted to by both parties; that all instructions requested by plaintiff and given by the court were excepted to by the defendant; that all instructions requested by defendant and given by the court were excepted to by plaintiff." The statement sets forth about 20 folios of instructions, but nowhere is it shown which were given at the request of the plaintiff, which were given at the request of defendant, or which were given upon the court's own motion. As was said in *Gray v. Eschen*, 125 Cal. 1, 57 Pac. 664: "It is presumed that the proceedings in the court below were regular, and where error is claimed it is incumbent upon appellant to show it affirmatively." For this reason we cannot say that the court erred in the giving of the instructions. *Gray v. Eschen*, supra.

We think the court, in excluding certain testimony, erred to the prejudice of defendant. It was the contention of defendant that plaintiff had been employed by defendant during the period he worked for defendant at a stated salary, to wit, at the weekly salary of \$27.50 per week, from November 18, 1898, to January 1, 1899, and at the weekly salary of \$32.50 per week during the balance of the time, which had been fully paid him up to the time of his discharge, which occurred shortly after the death of Mr. Noonan. Plaintiff testified that his compensation had never been agreed upon or fixed, but that each week he had drawn \$32.50 to cover his living expenses. He testified that the reasonable value of his services was \$500 per month, and he sought to recover for his services at that rate. The J. Noonan Furniture Company was incorporated November 18, 1898. In this connection plaintiff, upon cross-examination, testified: "It was Mr. Noonan's idea and my idea to incorporate the J. Noonan Furniture Company. Prior to the time of the incorporation of the J. Noonan Furniture Company I worked for Mr. Noonan I think 10 or 11 years. I was an employé there." Thereupon he was asked by defendant's attorney, "What were your duties as an employé there?" Whereupon the attorney for the plaintiff said: "To this line of questions we will object to all of them, and take a ruling of the court and exception." The court sus-

tained the objection, and defendant excepted. After plaintiff had testified that he had drawn \$32.50 each week from the time of the incorporation, he was asked by defendant, "Isn't that the amount you received before incorporation?" Plaintiff objected, and the objection was sustained. Defendant excepted. Plaintiff testified that the assets of the J. Noonan Furniture Company came from J. Noonan. After plaintiff had testified that his duties did not change in character during the period covered by the action, he was asked on cross-examination, "On the 17th day of November, 1898, were not your duties just the same as they were on the 18th day of November, 1898?" To this question the court sustained the objection of plaintiff. In these rulings the court erred. It is manifest from the record that defendant sought to prove by the questions ruled out that plaintiff had, before the incorporation of the business of J. Noonan into the J. Noonan Furniture Company, worked for J. Noonan in the same capacity that he worked for the corporation thereafter, and at the same wages that he drew, and was paid after the incorporation of the business. This was proper cross-examination of the plaintiff upon his testimony that his compensation had never been fixed, and that the sums that he drew weekly were not in payment of a fixed salary, but simply for his living expenses.

Where an employé, hired at a fixed salary, continues in the same employment after the expiration of the term of the original hiring, without any new contract as to compensation, it is presumed that the parties intend the same compensation. *Nicholson v. Patchin*, 5 Cal. 475; *Hermann v. Littlefield*, 109 Cal. 430, 42 Pac. 443; 20 Am. & Eng. Ency. of Law, 16, and cases cited under note 8 on said page. In such a case there can be no recovery on a quantum meruit, as the terms of the original contract control. *Nicholson v. Patchin*, supra; *Hermann v. Littlefield*, supra; *Grover & Baker Sewing Machine Co. v. Bulkley*, 48 Ill. 189; *Wallace v. Floyd*, 29 Pa. 184, 72 Am. Dec. 620; *Weise v. Milwaukee County*, 51 Wis. 564, 8 N. W. 295; *Ranck v. Albright*, 36 Pa. 367; *Ingalls v. Allen*, 132 Ill. 170, 23 N. E. 1028. True, in the case at bar, after the 18th of November, 1898, plaintiff worked for a corporation, while before that date he worked for J. Noonan; but the record shows that the business of J. Noonan was on said day incorporated, and out of 1,000 shares of the capital stock 996 were issued to and owned by Mr. Noonan, while the remaining 4 shares were issued, one to plaintiff, one to J. E. Skelley, another employé of Mr. Noonan, one to D. E. Doyle, another employé of Mr. Noonan, and one to Frances Noonan, the wife of Mr. Noonan. And this was the corporation for which he worked, a corporation evidently formed as a convenient instrument for conducting the business of J. Noon-

an. If he had continued to work in the same employment for Mr. Noonan without a new agreement, it would be presumed as a matter of law that he continued to work for the compensation previously agreed upon. If it be conceded that this presumption would not obtain in this case as a matter of law, because of the change of the employer from an individual to a corporation practically owned by that individual, yet the circumstances were such as to make it proper to lay before the jury the conditions of the previous employment of plaintiff by Mr. Noonan. For if, notwithstanding the incorporation of the business under the name of the J. Noonan Furniture Company, plaintiff continued to work for the corporation in the same capacity in which he had previously worked for Mr. Noonan, and to draw weekly for over two years the same amount without objection and without asking for an increase, it might fairly be inferred that this was because the parties understood and intended that the original contract was in force. It was therefore competent to show what the original contract of employment was. The terms of a contract may be manifested by conduct when not stated in words. Civ. Code, § 1621. In action upon quantum meruit against corporations by an officer thereof, "the situation of the parties at the time, the relations, if any, in which they stood, of a business character or otherwise, are important to be known and considered, in order to arrive at a correct solution of the ultimate question involved." *Barstow v. City R. R. Co.*, 42 Cal. 465; *McCarthy v. Mt. Tecarte L. & W. Co.*, 111 Cal. 328, 43 Pac. 956. Evidence as to the employment of plaintiff by Mr. Noonan, and the compensation paid, would have thrown light upon the conduct of plaintiff in taking a weekly payment of a fixed amount, and would have tended to make clear the understanding of the parties interested as to the compensation to be received by plaintiff for his services rendered to the corporation, which was the successor to the business of Mr. Noonan.

The questions ruled out were proper for another reason. Plaintiff had testified as an expert that the services performed by him were worth \$500 per month. Upon this phase of his direct examination it was proper to show upon cross-examination that he had performed the same services for practically the same concern for a much less compensation than \$500 per month.

The court did not err in admitting in evidence the by-law defining the duties of the general manager. Plaintiff had been appointed to the position of general manager, and it was proper to show what the duties of such position were, so that it could be determined from the evidence as to what he did do; whether he had properly and fully performed the duties of his position.

We cannot say that the court erred in overruling the objection to the testimony

of plaintiff and Bartlett as to the value of plaintiff's services. Plaintiff showed himself sufficiently qualified to give an opinion as to the value of his services. While the qualifications of Bartlett were so meager that the court might well have ruled out his opinion, and such we think would have been the better practice, yet we cannot say that there was an abuse of discretion in allowing the testimony to go to the jury. The determination of the qualification of a witness offered as an expert must be left largely to the discretion of the trial judge. *Howland v. Oakland C. St. Ry. Co.*, 110 Cal. 513, 42 Pac. 983.

For errors in ruling out testimony above noted the judgment and order must be reversed, and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

CHRISTISEN v. BARTLETT et al.

(Supreme Court of Kansas. May 9, 1908.)

1. PUBLIC LANDS — SETTLEMENT ON SCHOOL LAND—ELEMENTS OF.

A settlement upon school land to give a right of purchase, under the provisions of section 6341, Gen. St. 1901, involves, not only the outward, physical, and visible acts necessary to its accomplishment, but also an intention to permanently establish the dwelling and residence of the settler thereon, and to do all the things in good faith required by the statute.

2. TRIAL—TRIAL BY COURT—FAILURE TO FIND ON PARTICULAR QUESTIONS.

Where the findings of fact do not specifically state which one of several claimants first settled upon the tract of school land in controversy, the general finding included in the judgment against one of them necessarily determines the fact against him, where it is essential to support the judgment, and it is not in conflict with the special findings.

(Syllabus by the Court.)

Error from District Court, Hodgeman County; Charles E. Lobdell, Judge.

Ejectment by Edwin Bartlett against Mike Nall and George J. Christisen in separate actions, which were afterwards consolidated. Judgment for Bartlett and Nall as against Christisen, and Christisen brings error. Affirmed.

E. H. Madison and L. A. Madison, for plaintiff in error. F. Dumont Smith, and G. Polk Clue, for defendants in error.

BENSON, J. This action presents a controversy between three rival claimants for a tract of school land. Bartlett, claiming the land, sued Nall and Christisen, the other claimants, in ejectment, in separate actions, which were afterwards consolidated. The court found that the rights of Bartlett and Nall were equal, and that they, as tenants in common, were entitled to the land as against Christisen, and rendered judgment accordingly, which Christisen seeks to have reversed.

The case is presented upon the findings of the district court. From these findings it appears that a lease upon this tract expired December 31, 1903. Before the lease expired Bartlett, with the consent of the lessee, placed a house upon the land, and at 11:40 p. m. December 31st entered upon the land, took possession of the house, and at 12:20 a. m. January 1, 1904, began to dig a well. From the time of his entry to the day of trial he resided on the land. At 12:02 a. m. January 1, 1904, Nall entered upon the land, having with him a building, which he set up thereon, and continued to live in it as his only home for more than six months from such entry. The defendant, Christisen, was with Nall at the boundary of this land on December 31st, and immediately after midnight crossed the line, entered upon the land, and declared that he was the first person upon it. On January 5th following he hauled lumber to the land for the purpose of building a home there, and on January 10th erected a house, moved into it, and for more than six months after January 1st made it his only home. Each of the three parties within six months after their respective entries made improvements on the land of the value of more than \$100, and on January 1, 1904, each of them filed with the county clerk a declaration of settlement, which filings were in the following order: Christisen, Nall, Bartlett. In due time each made his proof of settlement, made the required payment, and received a certificate, as provided by law; and before the action was commenced Nall made full payment and received a patent for the land.

The statute under which the parties claim provides that "any person who has settled upon any portion of the school land and actually resided thereon continuously for a period of six months" (Gen. St. 1901, § 6341), and has complied with other requirements of the law, may purchase the same in the manner therein stated. The court did not, in the findings of fact, find who made the first settlement on this land. As it was, however, a fact essential to a determination of the priority of rights, it necessarily entered into the judgment, and was determined adversely to Christisen's claim. He asserted a prior right by reason of having made the first settlement. The court, having decided against this claim, necessarily found it to be untrue, although not stated in the special findings, for the general finding includes every fact necessary to support the judgment not in conflict with the special findings. *Winstead v. Standeford*, 21 Kan. 270; *Stratton v. Hawks*, 43 Kan. 538, 23 Pac. 591; *Else v. Freeman*, 72 Kan. 666, 83 Pac. 409. A settlement upon lands involves, not only the outward physical and visible acts necessary to its accomplishment, but also an intention to permanently establish the dwelling and residence of the settler thereon, and to do all the things in good faith required by the statute. Stepping upon the land and an-

nouncing his presence, his return there with lumber five days later, and building his house five days after that were acts on the part of Christisen proper to be considered with the acts of the other claimants in determining who made the first settlement; a settlement being so made up of acts and intention. The particular findings are not necessarily in conflict with the general conclusion in favor of Bartlett and Nall, and so do not overthrow it. What may be considered a settlement upon school land within the meaning of this statute was stated in *Bratton v. Cross*, 22 Kan. 673; but the conduct of the person, the nature of the improvements undertaken, his presence upon, and his absence from, the land, with the reasons therefor, and all the attendant circumstances of the particular case, must be considered in determining the ultimate fact of settlement and the time of its inception.

We must presume in favor of the judgment that the evidence supported, not only the special findings, but the general findings also; and, as the former do not necessarily conflict with the latter, the judgment must be affirmed.

BECK et al. v. LOWELL.

(Supreme Court of Kansas. May 9, 1908.)

ESTOPPEL—CLAIM TO PROPERTY—NOTICE.

One who, having previously claimed to have a mortgage on personal property, notifies the buyer of it at a public sale that he claims a right to it, is not estopped to assert full title thereto by the fact that in giving such notice he does not specify whether he claims as mortgagee or owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 155-164.]

(Syllabus by the Court.)

Error from District Court, Jackson County; Marshall Gephart, Judge.

Action by James H. Lowell against M. M. Beck and W. T. Beck. Judgment for plaintiff, and defendants bring error. Affirmed.

John D. Myers and Case Broderick, for plaintiffs in error. M. A. Bender and James H. Lowell, for defendant in error.

MASON, J. James H. Lowell brought replevin against M. M. Beck & Son and obtained judgment, which is sought to be reversed in this proceeding.

There was some conflicting testimony; but, as the jury must be deemed to have resolved all doubts in favor of the plaintiff, the evidence for the purposes of the case may be said to have established these facts: J. S. Orr owned a printing plant, including a gasoline engine, which he used in a building rented from Lowell. A clause of the written lease to secure the payment of the rent purported to mortgage all personal property which the lessee should have upon the premises at any time. Orr made a chattel mortgage to Mrs. Kline covering all the machinery then used

in his business, and specifically describing this engine. Beck & Son asked Lowell which of the mortgages had priority. Lowell answered that Mrs. Kline had a first lien upon the property described in her mortgage because it had been recorded before his, although executed later. The Becks then bought Mrs. Kline's mortgage, and took possession of the printing plant, including a gasoline engine then in use—not the one already referred to, but a new one procured by Orr after the mortgage had been given. Later they sold all this property at public sale, becoming themselves the purchasers. Before the sale Orr sold his interest in the property to Lowell. At the sale Lowell gave notice that he claimed the engine, not saying, however, whether he claimed it as mortgagee or as owner. This engine he sued for and recovered in the *replevin* action under a claim of general ownership.

The trial court allowed Lowell to introduce his lease in evidence. It is contended that this was error, because it permitted him, while suing as owner, to assert a title as mortgagee. The mortgage clause of the lease, however, was not relied upon as an independent ground of recovery. It was given in evidence incidentally as a part of the history of the transaction out of which the litigation grew. The plaintiff recovered upon the theory presented by his pleading, a theory to which he was confined by the instructions given.

Complaint is also made of a ruling admitting evidence of the usable value of the engine; but, as the jury allowed no damages on this account, the error, if any, was not material.

The defendants asked an instruction to the effect that, if the plaintiff stood by at the public sale and allowed them to purchase the engine without giving them notice of the title claimed in his bill of particulars, he could not recover. The court instructed that the plaintiff was precluded from recovery, if, being present at the sale, he allowed the defendants to purchase the engine without giving them any notice of a claim of title or ownership on his part. The evidence as to what took place at the sale was somewhat conflicting. Manifestly the plaintiff made some sort of a claim to the property, but whether as owner or lien holder, or as asserting an undefined right, was for the jury to determine. Therefore the court might properly have added that if, at the time of the sale, the plaintiff claimed specifically as a mortgagee, he could not thereafter assert that he held a title by purchase. But no such instruction was asked, and, in the absence of a request, the omission to give it cannot be said to have been reversible error. The purchasers at the sale were not justified in assuming that a general claim of right or title then made by Lowell was necessarily based solely upon the mortgage lien which he had previously asserted.

The only other assignment of error thought to require separate mention is based upon the refusal to give an instruction as to the effect it should have on the verdict if the jury should find that the engine in controversy was purchased to replace the one described in the Kline mortgage, and that the old one formed a part of the consideration for the new. Such refusal could not have been error, for there was no evidence that such an exchange had been made.

The judgment is affirmed.

ATCHISON, T. & S. F. RY. CO. v. WRIGHT.

(Supreme Court of Kansas. May 9, 1908.)

1. CARRIERS—SHIPMENT OF LIVE STOCK—DELAY—NOTICE OF DAMAGES.

Shrinkage in the weight of cattle, due to confinement in the cars for an unnecessary length of time while on the way to market, and for which the shipper seeks damages because of the negligent delay of the railway company, is within the stipulation of shipping contract making a written notice of the loss to the railway company, before the intermingling of the cattle with other stock, a condition precedent to a recovery for loss or injury to cattle during transportation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 947.]

2. SAME—NOTICE OF INJURY.

Where a car load of cattle, which were being transported to market, was in a railroad wreck and suffered injury, and the representatives of the railway company, in charge of the live stock business at the place of delivery, were present and inspected the injured cattle when they arrived, and then directed what disposition should be made of them, the purpose of the stipulated notice was fully accomplished, and no further notice was essential to a recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 947.]

(Syllabus by the Court.)

Error from District Court, Lyon County; F. A. Meckel, Judge.

Action by L. R. Wright against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Modified.

Wm. R. Smith, O. J. Wood, and A. A. Scott, for plaintiff in error. W. W. Brown, for defendant in error.

JOHNSTON, C. J. L. R. Wright recovered a judgment against the Atchison, Topeka & Santa Fé Railway Company of \$206.35 for losses arising from the negligent shipping of cattle over the defendant company's railroad. It was based on two causes of action, one for damage resulting from a negligent shipment in April, 1904, from Emporia to Kansas City, and another in February of the same year between the same places. As to the April shipment, it appears that a car load of plaintiff's cattle was in a wreck, which resulted in breaking the leg of one animal and in bruising the other cattle, as well as in the loss of market by reason of delay in transportation. The shipping con-

tract contained a provision that, before a recovery could be had for loss or injury to the cattle during transportation, the shipper should give a written notice to an officer of the company or the nearest agent before the removal of the stock from the place of destination, or before they should be intermingled with other stock. Formal notice was not given of the loss occasioned by the negligence of the company in the April shipment before the sale of the cattle, and it is contended that no recovery can be had. A formal written notice of the loss sustained was not required. The representatives of the company were at the stock yards when the injured cattle were received. They observed their condition and advised the consignees, who were looking for the arrival of the cattle, that they had been in a wreck. When the cattle did arrive, these representatives of the company inspected them, and advised that they be sold at once, which was done. Under recent decisions no notice was required as to some elements of the losses sustained, and, in any event, the purpose of the written notice was fully accomplished when the condition of the cattle was fully brought to the attention of the representatives of the company. After these representatives of the company, who were in charge of that branch of the business at Kansas City, had inspected the cattle, observed their condition, and then directed what disposition should be made of them, it is too late to insist that any other notice of loss would have afforded the company either information or protection. The railway company, having had a fair opportunity to examine the cattle and to ascertain the extent of the injury resulting from its negligence, has had the full benefit of the provision of the contract as to notice. *Cornelius v. Railway Co.*, 74 Kan. 599, 87 Pac. 751; *Railway Co. v. Fry*, 74 Kan. 546, 87 Pac. 754; *Railway Co. v. Frogley*, 75 Kan. 440, 89 Pac. 903; *Darling v. Railway Co.*, 93 Pac. 612.

As to the February shipment, written notice was not given as to the losses sustained; but, as to the one item of \$51.93 for loss of market, no notice was essential. Loss in weight because of extra confinement was the other item of loss, and was fixed by the jury at \$42.27. From the averment in the petition, as well as from the evidence, it seems that this loss was due, at least in part, to delay in transportation. Shrinkage in weight because of the unnecessary length of time the cattle were on the road to market would be an injury during transportation, and hence would come within the provision of the contract requiring notice. Shrinkage, or loss in weight, arising from delay after transportation has ended, is not within the contract (*Railway Co. v. Frogley*, supra); but it cannot be said that the loss in weight occasioned by the extra confinement in the cars was not, to some extent, the result of

the great length of time that the cattle were confined in the cars on the way to market. The objections to rulings on the admission of testimony are not deemed to be material, nor is it necessary to consider further the objections to the instructions.

The recovery on the first cause of action of \$113.15 will be affirmed, but the judgment so far as it is based on the second cause of action will be reversed, unless the defendant in error shall, within ——— days, remit \$42.27, the item of loss found by the jury to have been caused by the extra confinement of the cattle, and if that is done judgment for the remaining item of \$51.93, damages found to have resulted from the loss of market, will be affirmed.

MEMORANDUM DECISIONS.

DAVIS v. TERRITORY. (Supreme Court of Arizona. March 27, 1908.) Appeal from District Court, Gila County; before Justice Frederick S. Nave. Henry Davis was convicted of murder, and he appeals. Affirmed. George K. French, for appellant. E. S. Clark, Atty. Gen., for the Territory.

PER CURIAM. The appellant was convicted of murder in the first degree, and appeals. Although the appellant was sentenced to suffer death, his counsel has not seen fit to assist us in the examination of the merits of his case by assigning any errors or by filing a brief in his behalf. As required by the statute, we have carefully examined the record. We find no error, and the judgment of the district court is therefore affirmed.

NAVE, J., not sitting.

HANKINS et al. v. HELMS et al. (Supreme Court of Arizona. March 27, 1908.) Appeal from District Court, Cochise County; before Justice Fletcher M. Doan. Suit by Frank P. Helms and others against Daniel Hankins and another. Judgment for plaintiffs, and defendants appeal. Affirmed. Neale & Ross and O'Connell & McReynolds, for appellants. L. Kearney, for appellees.

PER CURIAM. This is a suit brought by Frank P. Helms and others against Daniel Hankins and E. G. Riley to quiet title to a mining claim to support an adverse filed in the land office against an application for patent. From a judgment in favor of plaintiffs, defendants have appealed. The only question which we may consider upon the record, as it is before us, is as to the necessity in an adverse suit of proof of citizenship of the successful party. Upon this point the members of the court sitting are equally divided in opinion. No useful purpose will be served by an expression of the reasons for the opinions entertained. The judgment of the district court is affirmed.

DOAN, J., not sitting.

STATEN v. TERRITORY. (Supreme Court of Arizona. March 27, 1908.) Appeal from District Court, Gila County; before Justice F. S. Nave. Lewis Staten was convicted of assault with a deadly weapon, and he appeals. Af-

firmed. George K. French, for appellant. The Attorney General, for the Territory.

PER CURIAM. The appellant was convicted of an assault with a deadly weapon, and sentenced to pay a fine. He has perfected an appeal to this court, but his counsel has failed to file any briefs or pursue his appeal further than by lodging it in this court. It being a criminal case, we have examined the record; and, finding no reversible error apparent, the judgment of the lower court is affirmed.

NAVE, J., not sitting.

ADDINGTON et al. v. KIMBALL et al. (Supreme Court of Kansas. April 11, 1908.) Error from District Court, Wilson County; L. Stillwell, Judge. Action by F. B. Kimball and others, trustees of the First Methodist Episcopal Church of Neodesha, against D. M. Addington and others. Judgment for plaintiffs, and defendants bring error. Affirmed. A. L. Billings, for plaintiffs in error. J. K. De Moss, for defendants in error.

PER CURIAM. Plaintiff in error in this case first asks to amend the case-made, and affidavits are presented pro and con upon this motion. The affidavit of the trial judge is to the effect that the record is correct as it stands. It is for the trial judge to certify the case-made to this court, and in no event could we allow an amendment thereto even with his consent. It may not be inappropriate to add, however, that nothing in the showing made in support of the motion leads this court to doubt the proceedings were as represented by the trial judge. Indeed, the controversy over the question of fact is more apparent than real. The other errors complained of are all, save one, trial errors alleged to have occurred, and to which no exception was taken at the time. They cannot be considered. The one assignment which we can consider is the finding of the court that there was a valid lien amounting to \$1,399.47, which sum the defendants below (plaintiffs in error) were by the terms of their contract bound to discharge. This finding is in accordance with the express provision of the bond given by the plaintiffs in error, as contractors, to the defendants in error. We find no error in the proceeding of the court. The judgment will therefore be affirmed.

CRAWFORD v. LININGER & METCALF CO. (Supreme Court of Kansas. May 9, 1908.) Error from District Court, Brown County; William I. Stuart, Judge. Action between William E. Crawford and the Lininger & Metcalf Company. From the judgment, Crawford brings error. Affirmed. B. R. Martin and F. M. Pearl, for plaintiff in error. James Falloon, for defendant in error.

PER CURIAM. The only question argued in this case is if the interpleader was a bona fide purchaser of the land in controversy. The question is one of fact, and has been determined by the trial court adversely to the interpleader upon oral evidence. The clear purpose of the vendors was to defraud their creditors. This fact being established, the burden rested upon the purchaser to show good faith on his part. It is not necessary that a purchaser should know of the fraudulent design of his grantors, or should knowingly participate in their scheme, in order to destroy the innocent character of the transaction as to him. It is enough that he have notice of facts sufficient to put a reasonably prudent person upon inquiry. In this case the facts and circumstances indicating there was something radically wrong about the sale were so numerous and peculiar the trial court could not have found the purchaser lacked information sufficient to put him upon inquiry.

It is not necessary to recapitulate the evidence. The rules of law stated are elementary. The judgment of the district court is affirmed.

CRAWFORD v. PARLIN, ORENDORFF & MARTIN CO. (Supreme Court of Kansas. May 9, 1908.) Error from District Court, Brown County; William I. Stuart, Judge. Action between William E. Crawford and the Parlin, Orendorff & Martin Company. From the judgment, Crawford brings error. Affirmed. B. R. Martin, and F. M. Pearl, for plaintiff in error. James Falloon, for defendant in error.

PER CURIAM. The same questions as above are involved in the case of Wm. E. Crawford v. Parlin, Orendorff & Martin Co. (No. 15,342) 95 Pac. 1134, and the judgment of the district court is affirmed.

EBEL v. EBEL. (Supreme Court of Kansas. April 11, 1908.) Error from District Court, Logan County; J. H. Reeder, Judge. Action by Mary Ebel against Frederick Ebel. Judgment for defendant, and plaintiff brings error. Affirmed. John B. Ennis, for plaintiff in error. Geo. W. Holland, for defendant in error.

PER CURIAM. The trial court might well have sustained the motion to strike out parts of the defendant's answer. The answer pleaded some of the evidence, but doubtless this was in explanation of certain allegations of the petition, which charged defendant with extreme cruelty. The denial of the motion, however, was not prejudicial error, and cannot furnish grounds for reversal. Inasmuch as the court denied any relief to the defendant under his cross-petition, it is apparent that the plaintiff was not prejudiced in the overruling of her demurrer to the cross-petition. The evidence was conflicting, and the judgment refusing to both parties a divorce must be accepted as final. We are unable to say from all the evidence that the court erred in refusing the plaintiff a divorce. Judgment affirmed.

KANSAS BUFF BRICK & MFG. CO. v. BENTLEY. (Supreme Court of Kansas. April 11, 1908. Rehearing Denied May 15, 1908.) Error to District Court, Wilson County; L. Stillwell, Judge. Action by John Bentley against the Kansas Buff Brick & Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed. Ziegler & Dana, for plaintiff in error. J. K. De Moss, for defendant in error.

PER CURIAM. This is another quarry case, in which workmen were sent to pick and shovel shale among hidden, unexploded charges of dynamite, of whose existence the men were ignorant; it being the duty of a foreman to locate and remove such charges. One man was killed, and the plaintiff was badly wounded. The defenses were those usually interposed after such catastrophes—assumption of risk and contributory negligence. The court rightfully took from the jury the question of assumption of risk. While that question is one of fact, there was no evidence in this case to take it to the jury. It did not arise upon the plaintiff's evidence, and the defendant's evidence brought the case clearly within the principle of *Harper v. Cement Co.* (Kan.) 83 Pac. 179. The fact that the plaintiff knew that dynamite placed in holes frequently did not explode did not make him assume the risk of injury from the negligence of the foreman in failing to perform his duty to locate and take out such unexploded charges. This court holds that for the protection of those workmen who have had nothing to do with the preparation and firing of a blast, but who must follow

the blasters in ignorance of the location of unexploded charges, the master must make an inspection to ascertain what holes failed to explode, and then mark or otherwise safeguard those which did not; and whoever may be entrusted with this work, whether foreman, driller, shooter, or other person, represents the master in a nonassignable duty. The court did not suggest the answer to question 18½, but inquired the answer, and saw to it that the answer of the jury correctly appeared. The answer to question 83 is entirely sufficient. The law itself answers the question the same way the jury did. The evidence of negligence on the part of the defendant was ample, and the finding that the plaintiff was not guilty of negligence accords with the proof. No other question of merit is presented, and the judgment of the district court is affirmed.

(77 Kan. 852)

LOW et al. v. WILSON et al. (Supreme Court of Kansas, Feb. 8, 1908. Rehearing Denied April 17, 1908.) Error from District Court, Allen County; Oscar Foust, Judge. Action by Rebecca Wilson and Scott Wilson against Clarence E. Low and Anna R. Low. Judgment for plaintiffs, and defendants bring error. Affirmed. F. J. Oyler, for plaintiffs in error. W. D. Cope and S. A. Gard, for defendants in error.

PER CURIAM. The demurrer to the second count of the answer should have been sustained. It stated no facts which constitute a defense, and as the petition stated a cause of action there is no force in the contention that the demurrer should have been carried back to the petition. However, as the answer was abandoned on the trial, and no evidence was given under it, the ruling on the demurrer was not prejudicial. Plaintiffs in error are not in a position to claim prejudice because the court permitted the answer to be amended on the trial and a new defense set up, for the reason that they made no request for a continuance over the term and the court postponed the hearing until a later day, in order to give plaintiffs an opportunity to procure evidence in rebuttal, at which time plaintiffs offered further testimony for that purpose. Complaint is made of the admission of certain testimony; but, as no objections were offered to the ruling of the court at the time, plaintiffs cannot avail themselves of any error in this respect. Plaintiffs' evidence, in our opinion, was sufficient to support a judgment in their favor; but there was a conflict in the evidence, and we are bound by the decision of the court thereon. The judgment will be affirmed.

(77 Kan. 862)

TULIP v. ANDREWS. (Supreme Court of Kansas, April 11, 1908.) Error from District Court, Cloud County; W. T. Dillon, Judge. Action by Frank Tulip against Adeline Andrews. Judgment for defendant, and plaintiff brings error. Affirmed. Geo. H. Bailey, for plaintiff in error. F. W. Sturges, for defendant in error.

PER CURIAM. Did the plaintiff convey the real estate involved in this controversy to defendant under an agreement, express or implied, that she would hold it in trust for plaintiff? Upon this, the controlling question in the case, the burden was upon plaintiff. The testimony of the parties was conflicting, and upon what appears to be sufficient evidence the trial court found in favor of the defendant. This finding is conclusive in this court, and is an end of the controversy. Judgment affirmed.

(77 Kan. 860)

TURNER v. LARABEE et al. (Supreme Court of Kansas, March 7, 1908. Rehearing Denied April 17, 1908.) Error from District Court, Stafford County; J. W. Brinckerhoff, Judge. Action by John M. Turner against F. S. Larabee and others. Judgment for defendants, and plaintiff brings error. Affirmed. J. Mack Love, C. W. Wright, and T. W. Moseley, for plaintiff in error. Prigg & Williams, for defendants in error.

PER CURIAM. The defendants are correct in stating that the proper solution of the questions involved depends upon the view which the trial court entertained respecting the facts. The first proposition stated in the plaintiff's brief is one of law, and is correct. But the question of fact underlying it is, did the defendant suffer damage? This question depends upon how the defendants made their prices. The plaintiff claimed prices were made without the defendant's knowing how the flour was to be packed. The defendants introduced abundant evidence to the contrary. The court believed the defendants, and that is an end of the question of fact. The plaintiff points out certain facts and circumstances which he claims conflict with the defendants' evidence. Very well. It was the province of the trier of facts to settle such disputes, and its finding is conclusive here. There is no merit in the contention that the defendants were negligent, or that they estopped themselves from holding the plaintiff responsible for the loss which he occasioned them. The facts are easily marshaled to demonstrate the soundness of the trial court's views upon these questions. The judgment of the district court is affirmed.

(78 Kan. 885)

WINSOR v. WINSOR. (Supreme Court of Kansas, May 9, 1908.) Error from District Court, Sumner County; C. L. Swarts, Judge. Action by George G. Winsor against A. D. Winsor. Judgment for defendant, and plaintiff brings error. Reversed. James Lawrence and Levi Ferguson, for plaintiff in error. W. T. McBride, for defendant in error.

PER CURIAM. There was testimony which tended quite strongly to show that the deed from George H. Winsor to his son Frank, although absolute in form, was a mortgage given to secure a debt of \$300, and that A. D. Winsor, another son, to whom Frank conveyed the farm after their father's death, knew the facts and circumstances when he took the conveyance. There was evidence that the last time the father left the place, which was less than three weeks prior to his death, he went to Frank and demanded that the farm be deeded back to him, and that Frank told him this would not be done until the \$300 which he owed was paid. In order to establish the plaintiff's claim that the farm belonged to the heirs, it was not necessary to prove that the debt which the mortgage was given to secure had been paid. Continued default would not make the conveyance absolute, if it were in fact a mortgage. The evidence also tended to establish that A. D. Winsor, the defendant, lived on the farm with his father for some time prior to the latter's death; that the personal property on the farm, or some of it, belonged to the father; that the defendant took or retained possession of it, and has never accounted to the plaintiff or to the other defendants in any manner for the share belonging to their father. We have no hesitation in saying that the court erred in sustaining the demurrer to the evidence. The judgment will be reversed, and the cause remanded for another trial.

